

Title of Rule: Revision to the Medical Assistance Rule concerning the Home and Community Based Services Final Settings Rule, Section 8.484
Rule Number: MSB 21-02-09-A
Division / Contact / Phone: COB Section / Cassandra Keller / 303-866-5181

STATEMENT OF BASIS AND PURPOSE

1. Summary of the basis and purpose for the rule or rule change. (State what the rule says or does and explain why the rule or rule change is necessary).

In 2014, the federal Centers for Medicare & Medicaid Services (CMS) published a rule requiring Home- and Community-Based Services (HCBS) to be provided in settings that meet certain criteria. The criteria ensure that HCBS participants have access to the benefits of community living and live and receive services in integrated, non-institutional settings. These rules codify in regulation the federal requirements for all HCBS Waivers.

2. An emergency rule-making is imperatively necessary

- to comply with state or federal law or federal regulation and/or
 for the preservation of public health, safety and welfare.

Explain:

3. Federal authority for the Rule, if any:

§ 441.301(C)(4))

4. State Authority for the Rule:

Sections 25.5-1-301 through 25.5-1-303, C.R.S. (2021);

Initial Review
Proposed Effective Date

10/08/21
01/10/22

Final Adoption
Emergency Adoption

11/12/21

DOCUMENT #04

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REGULATORY ANALYSIS

1. Describe the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The proposed regulations will impact all HCBS members, approximately 55,000 individuals. All providers who accept Medicaid funding are required to comply with these rules. Member's will greatly benefit from the implementation of these rules by ensuring everyone gets the most out of community living, all services are provided in integrated settings, and the provision of services are person-centered. There may be costs incurred by providers in order to come into compliance with these regulations. For example, a provider may need to invest in locks for bedroom doors. The Department has engaged stakeholders throughout the process to understand the potential costs incurred from the implementation of this rule.

2. To the extent practicable, describe the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.

The codification of the federal Final Settings Rule will have a significant, positive impact for our members. As noted, these regulations ensure services are delivered in an integrated, person-centered manner. A members' rights are outlined and protected within these regulations. If a right needs to be modified for some reason, informed consent must be given by the member or the guardian. These rules will ensure all providers follow these requirements and allows the oversight agency to survey on these requirements.

3. Discuss the probable costs to the Department and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Department has partnered with the Department of Public Health and Environment on this project. There are no additional costs to CDPHE from these regulations. The work to conduct the surveys has already been incorporated into their existing workload.

4. Compare the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.

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The Department must implement these regulations otherwise we will be out of compliance with the federal regulations. By being out of compliance, there is a risk of losing the federal match on all HCBS services.

5. Determine whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

There are no other methods to achieve our purpose. These regulations must be promulgated in order to remain in compliance with federal regulations.

6. Describe any alternative methods for achieving the purpose for the proposed rule that were seriously considered by the Department and the reasons why they were rejected in favor of the proposed rule.

No alternative methods were considered.

1 **8.483 ADULT FOSTER CARE - REPEALED**

2 [Repealed effective April 2, 2007]

3 **8.484 HOME- AND COMMUNITY-BASED SERVICES SETTINGS FINAL RULE HOME CARE**
4 **ALLOWANCE - REPEALED**

5 [~~Repealed effective April 2, 2007~~]

6 **8.484.1 STATEMENT OF PURPOSE, SCOPE, AND ENFORCEMENT**

7 8.484.1.A The purpose of this Section 8.484 is to implement the requirements of the federal Home-
8 and Community-Based Services (HCBS) Settings Final Rule, 79 Fed. Reg. 2947 (2014), codified
9 at 42 C.F.R. § 441.301(c)(4). These rules identify individual rights that are protected at settings
10 where people live or receive HCBS. They also set out a process for modifying these rights as
11 warranted in individual cases. These rules apply to all HCBS under all authorities, except where
12 otherwise noted.

13 8.484.1.B This Section 8.484 is enforced pursuant to existing procedures, subject to the following
14 transition period exceptions:

- 15
- 16 1. The following settings were presumed compliant during the transition period and remain
17 covered by this presumption until March 17, 2023:
- 18
- 19 a. Residential settings owned or leased by individuals receiving HCBS or their
20 families (personal homes);
- 21
- 22 b. Professional provider offices and clinics;
- 23
- 24 c. Settings where children receive Community Connector services under the
25 Children's Extensive Supports (CES) Waiver; and
- 26
- 27 d. Settings where people receive individual Supported Employment services.
- 28
- 29 2. Any setting for which a Provider Transition Plan (PTP) has been submitted by December
30 30, 2021 may continue to transition toward compliance according to the schedule set
31 forth in the PTP. This exception is to be narrowly construed and does not apply to other
32 situations, such as, by way of illustration only, non-compliance:
- 33
- 34 a. At case management agencies;
- 35
- 36 b. At a setting for which a PTP was not submitted by December 30, 2021 for any
37 reason;
- 38
- 39 c. At a setting after the applicable deadline in the setting's PTP, with the deadline
40 being (i) three months after the PTP was submitted unless adjusted with
41 departmental approval and (ii) in no event after March 17, 2023; or
- 42
- 43 d. Involving compliance issues that have been verified as resolved through the PTP
44 process and therefore no longer subject to transition.

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8.484.2 DEFINITIONS

8.484.2.A Age Appropriate Activities and Materials means activities and materials that foster social, intellectual, communicative, and emotional development and that challenge the individual to use their skills in these areas while considering their chronological age, developmental level, and physical skills.

8.484.2.B Covered HCBS means any Home- and Community-Based Service(s) provided under the Colorado State Medicaid Plan, a Colorado Medicaid waiver program, or a State-funded program administered by the Department. This category excludes Respite Services, Palliative/Supportive Care services provided outside the child's home under the Children with Life-Limiting Illness Waiver, and Youth Day Services under the CES Waiver.

8.484.2.C HCBS Setting means any physical location where Covered HCBS are provided.

1. HCBS Settings include, but are not limited to, Provider-Owned or -Controlled Non-residential Settings, Other Non-residential Settings, Provider-Owned or -Controlled Residential Settings, and Other Residential Settings.

2. If Covered HCBS are provided at a physical location to one or more individuals, the setting is considered an HCBS Setting, regardless of whether some individuals at the setting do not receive Covered HCBS. The requirements of this Section 8.484 apply to the setting as a whole and protect the rights of all individuals receiving services at the setting regardless of payer source.

8.484.2.D Informed Consent means the informed, freely given, written agreement of the individual (or, if authorized, their guardian or other legally authorized representative) to a Rights Modification. The case manager ensures that the agreement is informed, freely given, and in writing by confirming that the individual (or, if authorized, their guardian or other legally authorized representative) understands all of the information required to be documented in Section 8.484.5 and has signed the Department-prescribed form to that effect.

8.484.2.E Intensive Supervision means one-on-one (1:1), line-of-sight, or 24-hour supervision. Intensive Supervision is a Rights Modification if the individual verbally or non-verbally expresses that they do not want the supervision or if the supervision would be covered by the Department's processes for rights suspensions or restrictive procedures pursuant to the version of Sections 8.600.4, 8.604.3, and 8.608.1-2 in effect on December 30, 2021.

8.484.2.F Other Non-residential Setting means a physical location that is non-residential and that is not owned, leased, operated, or managed by an HCBS provider or by an independent contractor providing non-residential services.

1. Other Non-residential Settings include, but are not limited to, locations in the community where Covered HCBS are provided.

8.484.2.G Other Residential Setting means a physical location that is residential and that is not owned, leased, operated, or managed by an HCBS provider or by an independent contractor providing residential services.

1. Other Residential Settings include, but are not limited to, Residential Settings owned or leased by individuals receiving HCBS; or their families (personal homes) and those

1 owned or leased by relatives paid to provide HCBS unless such relatives are
 2 independent contractors of HCBS providers.

3 8.484.2.H Person-Centered Support Plan means a service and support plan that is directed by the
 4 individual whenever possible, with the individual's representative acting in a participatory role, as
 5 needed, is prepared by the case manager under Sections 8.393.2.E or 8.519.11, identifies the
 6 supports needed for the individual to achieve personally identified goals, and is based on
 7 respecting and valuing individual preferences, strengths, and contributions.

8 8.484.2.I Plain Language means language that is understandable to the individual and in their
 9 native language, and it may include pictorial methods, if warranted;

10 8.484.2.J Provider-Owned or -Controlled Non-residential Setting means a physical location that is
 11 non-residential and that is owned, leased, operated, or managed by an HCBS provider or by an
 12 independent contractor providing non-residential services.

13 1. Provider-Owned or -Controlled Non-residential Settings include, but are not limited to,
 14 provider-owned facilities where Adult Day, Day Treatment, Specialized Habilitation,
 15 Supported Community Connections, Prevocational Services, and Supported Employment
 16 Services are provided.

17 8.484.2.K Provider-Owned or -Controlled Residential Setting means a physical location that is
 18 residential and that is owned, leased, operated, or managed by an HCBS provider or by an
 19 independent contractor providing residential services.

20 1. Provider-Owned or -Controlled Residential Settings include, but are not limited to,
 21 Alternative Care Facilities (ACFs); Supported Living Program (SLP) and Transitional
 22 Living Program (TLP) facilities; group homes for adults with intellectual or developmental
 23 disabilities (IDD); Host Homes for adults with IDD; any Individual Residential Services
 24 and Supports (IRSS) setting that is owned or leased by a service provider or independent
 25 contractor of such a provider; and foster care homes, Host Homes, group homes,
 26 residential child care facilities, and Qualified Residential Treatment Programs (QRTPs) in
 27 which Children's Habilitation Residential Program (CHRP) services are provided.

28 8.484.2.L Restraint means any manual method or direct bodily contact or force, physical or
 29 mechanical device, material, or equipment that restricts normal functioning or movement of all or
 30 any portion of a person's body, or any drug, medication, or other chemical that restricts a
 31 person's behavior or restricts normal functioning or movement of all or any portion of their body.
 32 Physical or hand-over-hand assistance is a Restraint if the individual verbally or non-verbally
 33 expresses that they do not want the assistance or if the assistance is a safety or emergency
 34 control procedure or would be covered by the Department's processes for rights suspensions or
 35 restrictive procedures pursuant to the version of Sections 8.600.4, 8.604.3, and 8.608.1-2 in
 36 effect on December 30, 2021.

37 8.484.2.M Restrictive or Controlled Egress Measures means devices, technologies, or approaches
 38 that have the effect of restricting or controlling egress or monitoring the coming and going of
 39 individuals. The following measures are deemed to have such an effect and are Restrictive or
 40 Controlled Egress Measures: locks preventing egress; audio monitors, chimes, motion-activated
 41 bells, silent or auditory alarms, and alerts on entrances/exits at residential settings; and wearable
 42 devices that indicate to anyone other than the wearer their location or their presence/absence
 43 within a building. Other measures that have the effect of restricting or controlling egress or
 44 monitoring the coming and going of individuals are also Restrictive or Controlled Egress
 45 Measures.

1 8.484.2.N Rights Modification means any situation in which an individual is limited in the full
 2 exercise of their rights.

3 1. Rights Modifications include, but are not limited to:

4 a. the use of Intensive Supervision if deemed a Rights Modification under the
 5 definition in Section 8.484.2.E above;

6 b. the use of Restraints;

7 c. the use of Restrictive or Controlled Egress Measures;

8 d. modifications to the other rights in Section 8.484.3 (basic criteria applicable to all
 9 HCBS Settings) and Section 8.484.4 (additional criteria for HCBS Settings);

10 e. any provider actions to implement a court order limiting any of the foregoing
 11 individual rights;

12 f. rights suspensions under Section 25.5-10-218(3), C.R.S.; and

13 g. all situations formerly covered by the Department's processes for rights
 14 suspensions or restrictive procedures pursuant to the version of Sections
 15 8.600.4, 8.604.3, and 8.608.1-2 in effect on December 30, 2021.

16 2. Modifications to the rights to dignity and respect, the rights in Sections 8.484.3.A.6-11
 17 (covering such matters as person-centeredness; civil rights; freedom from abuse; and
 18 Plain-Language explanations of rights, dispute resolution policies, and
 19 grievance/complaint procedures), and the right to physical accessibility are not permitted.

20 3. For children under age 18, a limitation or restriction to any of the rights in Sections
 21 8.484.3 and 8.484.4 that is typical for children of that age, including children not receiving
 22 HCBS, is not a Rights Modification. Consider age-appropriate behavior when assessing
 23 what is typical for children of that age. If the child is not able to fully exercise the right
 24 because of their age, then there is no need to pursue the Rights Modification process
 25 under Section 8.484.5. However, if the proposed limitation or restriction is above and
 26 beyond what a typically developing peer would require, then it must be handled as a
 27 Rights Modification under Section 8.484.5.

28 **8.484.3 BASIC CRITERIA APPLICABLE TO ALL HCBS SETTINGS**

29 8.484.3.A All HCBS Settings must have all of the following qualities and protect all of the following
 30 individual rights, based on the needs of the individual as indicated in their Person-Centered
 31 Support Plan, subject to the Rights Modification process in Section 8.484.5:

32 1. The setting is integrated in and supports full access of individuals to the greater
 33 community, including opportunities to seek employment and work in competitive
 34 integrated settings, control personal resources, receive services in the community, and
 35 engage in community life, including with individuals who are not paid staff/contractors and
 36 do not have disabilities, to the same degree of access as individuals not receiving HCBS.

- 1 a. Individuals are not required to leave the setting or engage in community
2 activities. Individuals must be offered and have the opportunity to select from Age
3 Appropriate Activities and Materials both within and outside of the setting.
- 4 b. Integration and engagement in community life includes supporting individuals in
5 accessing public transportation and other available transportation resources.
- 6 c. Individuals receiving HCBS are not singled out from other community members
7 through requirements of individual identifiers, signage, or other means.
- 8 d. Individuals may communicate privately with anyone of their choosing.
- 9 e. Methods of communication are not limited by the provider.
- 10 i. The setting must always provide access to shared telephones if it is a
11 Provider-Owned or -Controlled Residential Setting and during business
12 hours if it is a Provider-Owned or -Controlled Non-residential Setting.
- 13 ii. Individuals are allowed to maintain and use their own cell phones,
14 tablets, computers, and other personal communications devices, at their
15 own expense.
- 16 iii. Individuals are allowed to access telephone, cable, and Ethernet jacks,
17 as well as wireless networks, in their rooms/units, at their own expense.
- 18 f. Individuals have control over their personal resources. If an individual is not able
19 to control their resources, an assessment of their skills must be completed and
20 documented in their Person-Centered Support Plan. The assessment and
21 Person-Centered Support Plan must identify what individualized assistance the
22 provider or other person will provide and any training for the individual to become
23 more independent, based on the outcome of the assessment.
- 24 i. Providers may not insist on controlling an individual's funds as a
25 condition of providing services and **may not** require individuals to sign
26 over their Social Security checks or paychecks.
- 27 ii. A provider may control an individual's funds if the individual so desires,
28 or if it has been designated as their representative payee under the
29 Social Security Administration's (SSA's) policies. If a provider holds or
30 manages an individual's funds, their signed Person-Centered Support
31 Plan must:
- 32 a) Document the request or representative payee designation;
- 33 b) Document the reasons for the request or designation; and
- 34 c) Include the parties' agreement on the scope of managing the
35 funds, how the provider should handle the funds, and what they
36 define as "reasonable amounts" under Section 25.5-10-227,
37 C.R.S.

- 1 iii. The provider must ensure that the individual can access and spend
2 money at any time, including on weekends, holidays, and evenings,
3 including with assistance or supervision if necessary.
- 4 2. The setting is selected by the individual from among setting options, including non-
5 disability specific settings and an option for a private unit in a residential setting. The
6 setting options are identified and documented in the Person-Centered Support Plan and
7 are based on the individual's needs, preferences, and, for residential settings, resources
8 available for room and board.
- 9 3. The setting ensures an individual's rights of privacy, dignity, and respect, and freedom
10 from coercion and restraint.
- 11 a. The right of privacy includes the right to be free of cameras, audio monitors, and
12 devices that chime or otherwise alert others, including silently, when a person
13 stands up or passes through a doorway.
- 14 i. The use of cameras, audio monitors, chimes, and alerts in (a) interior
15 areas of residential settings, including common areas as well as
16 bathrooms and bedrooms, and in (b) typically private areas of non-
17 residential settings, including bathrooms and changing rooms, is
18 acceptable only under the standards for modifying rights on an
19 individualized basis pursuant to Section 8.484.5.
- 20 ii. If an individualized assessment indicates that the use of a camera, audio
21 monitor, chime, or alert in the areas identified in the preceding paragraph
22 is necessary for an individual, this modification must be reflected in their
23 Person-Centered Support Plan. The Person-Centered Support Plans of
24 other individuals at that setting must reflect that they have been informed
25 in Plain Language of the camera(s)/monitor(s)/chime(s)/alert(s) and any
26 methods in place to mitigate the impact on their privacy. The provider
27 must ensure that only appropriate staff/contractors have access to the
28 camera(s)/monitor(s)/chime(s)/alert(s) and any recordings and files they
29 generate, and it must have a method for secure disposal or destruction
30 of any recordings and files after a reasonable period.
- 31 iii. Cameras, audio monitors, chimes, and alerts on staff-only desks and
32 exterior areas, cameras on the exterior sides of entrances/exits, and
33 cameras typically found in integrated employment settings, generally do
34 not raise privacy concerns, so long as their use is similar to that
35 practiced at non-HCBS Settings. In provider-owned or -controlled
36 settings, notice must be provided to all individuals that they may be on
37 camera and specify where the cameras are located. If such devices have
38 the effect of restricting or controlling egress or monitoring the coming and
39 going of individuals, they are subject to the Rights Modification
40 requirements of Section 8.484.5.
- 41 iv. Audio monitors, chimes, motion-activated bells, silent or auditory alarms,
42 and alerts on entrances/exits at residential settings have the effect of
43 restricting or controlling egress and are subject to the Rights Modification
44 requirements of Section 8.484.5. If such devices on entrances/exits at
45 non-residential settings have the effect of restricting or controlling egress
46 or monitoring the coming and going of individuals, they are subject to the
47 Rights Modification requirements of Section 8.484.5.

- 1 b. The right of privacy includes the right not to have one's name or other
2 confidential items of information posted in common areas of the setting.

- 3 4. The setting fosters individual initiative and autonomy, and the individual is afforded the
4 opportunity to make independent life choices. This includes, but is not limited to, daily
5 activities, physical environment, and with whom to interact.

- 6 5. The setting facilitates individual choice regarding services and supports, and who
7 provides them.

- 8 6. The Person-Centered Support Plan drives the services afforded to the individual, and the
9 setting staff/contractors are trained on this concept and person-centered practices, as
10 well as the concept of dignity of risk.

- 11 7. Each individual is afforded the opportunity to:
12 a. Lead the development of, and grant Informed Consent to, any provider-specific
13 treatment, care, or support plan;
14 b. Have freedom of religion and the ability to participate in religious or spiritual
15 activities, ceremonies, and communities;
16 c. Live and receive services in a clean, safe environment;
17 d. Be free to express their opinions and have those included when any decisions
18 are being made affecting their life;
19 e. Be free from physical abuse and inhumane treatment;
20 f. Be protected from all forms of sexual exploitation;
21 g. Access necessary medical care which is adequate and appropriate to their
22 condition;
23 h. Exercise personal choice in areas including personal style;
24 i. Receive the same consideration and treatment as anyone else regardless of
25 race, color, ethnic or national origin, ancestry, age, sex, gender, sexual
26 orientation, gender identity and expression, religion, creed, political beliefs, or
27 disability; and
28 j. Accept or decline services and supports of their own free will and on the basis of
29 informed choice.

- 30 8. Nothing in this rule shall be construed to prohibit necessary assistance as appropriate to
31 those individuals who may require such assistance to exercise their rights.

- 32 9. Nothing in this rule shall be construed to interfere with the ability of a guardian or other
33 legally authorized representative to make decisions within the scope of their guardianship
34 order or other authorizing document.

- 35 10. Providers shall supply all individuals at the setting with a Plain Language explanation of
36 their rights under [this Section 8.484](#).

11. Providers shall supply all individuals at the setting with a Plain Language explanation of available dispute resolution and grievance/complaint procedures, along with outside agency contact information, including phone numbers, for assistance. Providers must allow grievances/complaints to be submitted anonymously and at any time (not subject to a deadline).

8.484.4 ADDITIONAL CRITERIA FOR HCBS SETTINGS

8.484.4.A Provider-Owned or -Controlled Residential Settings must have all of the following qualities and protect all of the following individual rights, based on the needs of the individual as indicated in their Person-Centered Support Plan, subject to the Rights Modification process in Section 8.484.5:

1. The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity. For settings in which landlord/tenant laws do not apply, a lease, residency agreement, or other form of written agreement must be in place for each individual, and the document must provide protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord/tenant law.

a. The lease, residency agreement, or other written agreement must:

i. Provide substantially the same terms for all individuals;

ii. Be in Plain Language, or if the provider/its independent contractor cannot adjust the language, at least be explained to the individual in Plain Language;

iii. Provide the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of their State, county, city, or other designated entity (or comparable responsibilities and protections, as the case may be), and indicate the authorities that govern these responsibilities, protections, and related disputes;

iv. Specify that the individual will occupy a particular room or unit;

v. Explain the conditions under which people may be asked to move or leave;

vi. Provide a process for individuals to dispute/appeal and seek review by a neutral decisionmaker of any notice that they must move or leave, or tell individuals where they can easily find an explanation of such a process, and state this information in any notice to move or leave;

vii. Specify the duration of the agreement;

viii. Specify rent or room-and-board charges;

ix. Specify expectations for maintenance;

- 1 x. Specify that staff/contractors will not enter a unit without providing
2 advance notice and agreeing upon a time with the individual(s) in the
3 unit;
- 4 xi. Specify refund policies in the event of a resident's absence,
5 hospitalization, voluntary or involuntary move to another setting, or
6 death; and
- 7 xii. Be signed by all parties, including the individual or, if within the scope of
8 their authority, their guardian or other legally authorized representative.
- 9 b. The lease, residency agreement, or other written agreement may:
- 10 i. Include generally applicable limits on furnishing/decorating of the kind
11 that typical landlords might impose; and
- 12 ii. Provide for a security deposit or other provisions outlining how property
13 damage will be addressed.
- 14 c. The lease, residency agreement, or other written agreement may not modify the
15 individual rights protected under Sections 8.484.3 and 8.484.4, such as (a) by
16 imposing individualized terms that modify these conditions or (b) by requiring
17 individuals to comply with house rules or resident handbooks that modify
18 everyone's rights.
- 19 d. Providers and their independent contractors must engage in documented efforts
20 to resolve problems and meet residents' care needs before seeking to move
21 individuals or asking them to leave. Providers and their independent contractors
22 must have a substantial reason for seeking any move/eviction (e.g., protection of
23 someone's health/safety), and minor personal conflicts do not meet this
24 threshold.
- 25 e. A violation of a lease or residency agreement, a change in the resident's medical
26 condition, or any other development that leads to a notice to leave must include
27 at least 30 days' notice to the individual (or, if authorized, their guardian or other
28 legally authorized representative).
- 29 f. If an individual has not moved out after the end of a 30-day (or longer) notice
30 period, the provider/its independent contractor may not act on its own to evict the
31 individual until the individual has had the opportunity to pursue and complete any
32 applicable grievance, complaint, dispute resolution, and/or court processes,
33 including obtaining a final decision on any appeal, request for reconsideration, or
34 further review that may be available.
- 35 g. A provider/its independent contractor may not require an individual who has
36 nowhere else to live to leave the setting.
- 37 h. This Section 1 does not apply to children under age 18.
- 38 2. Individuals have the right to dignity and privacy, including in their living/sleeping units.
39 This right to privacy includes the following criteria:

1 a. Individuals must have a key or key code to their home, a bedroom door with a
 2 lock and key, lockable bathroom doors, privacy in changing areas, and a lockable
 3 place for belongings, with only appropriate staff/contractors having keys to such
 4 doors and storage areas. Staff/contractors must knock and obtain permission
 5 before entering individual units, bedrooms, bathrooms, and changing areas.
 6 Staff/contractors may use keys to enter these areas and to open private storage
 7 spaces only under limited circumstances agreed upon with the individual.

8 b. Individuals shall have choice in a roommate/housemate. Providers must have a
 9 process in place to document expectations and outline the process to
 10 accommodate choice.

11 c. Individuals have the right to furnish and decorate their sleeping and/or living units
 12 in the way that suits them, while maintaining a safe and sanitary environment
 13 and, for individuals age 18 and older, complying with the applicable lease,
 14 residency agreement, or other written agreement.

15 3. The Residential Setting does not have **institutional features not found in a typical home,**
 16 **such as** staff uniforms; entryways containing numerous staff postings or messages; or
 17 labels on drawers, cupboards, or bedrooms for staff convenience.

18 4. Individuals have the freedom and support to determine their own schedules and
 19 activities, including methods of accessing the greater community;

20 5. Individuals have access to food at all times, choose when and what to eat, have input in
 21 menu planning (if the setting provides food), have access to food preparation and storage
 22 areas, can store and eat food in their room/unit, and have access to a dining area for
 23 meals/snacks with comfortable seating where they can choose their own seat, choose
 24 their company (or lack thereof), and choose to converse (or not);

25 6. Individuals are able to have visitors of their choosing at any time and are able to socialize
 26 with whomever they choose (including romantic relationships);

27 7. The setting is physically accessible to the individual, and the individual has unrestricted
 28 access to all common areas, including areas such as the bathroom, kitchen, dining area,
 29 and comfortable seating in shared areas. If the individual wishes to do laundry and their
 30 home has laundry machines, the individual has physical access to those machines; and

31 8. Individuals are able to smoke and vape nicotine products in a safe, designated outdoor
 32 area, unless prohibited by the restrictions on smoking near entryways set forth in the
 33 Colorado Clean Indoor Air Act, Section 25-14-204(1)(ff), C.R.S., or any law of the county,
 34 city, or other local government entity.

35 8.484.4.B Other Residential Settings in which one or more individuals receiving 24-hour residential
 36 services and supports reside must have all of the qualities of and protect all of the same
 37 individual rights as Provider-Owned or -Controlled Residential Settings, as listed above, other
 38 than Section 8.484.4.A relating to a lease or other written agreement providing protections
 39 against eviction, subject to the Rights Modification process in Section 8.484.5.

40 8.484.4.C Other Residential Settings in which no individuals receiving 24-hour residential services
 41 and supports reside are excluded from **this** Section 8.484.4.

1. This group of settings includes, but is not limited to, homes in which no individual receives IRSS and one or more individuals receive Consumer-Directed Attendant Support Services (CDASS), Health Maintenance Services, Homemaker Services, In-Home Support Services (IHSS), and/or Personal Care Services.

8.484.4.D Provider-Owned or -Controlled Non-residential Settings must have all of the qualities of and protect all of the same individual rights as Provider-Owned or -Controlled Residential Settings, as listed above, other than Section 8.484.4.A relating to a lease or other written agreement providing protections against eviction and Section 8.484.4.B relating to privacy in one's living/sleeping unit, subject to the Rights Modification process in Section 8.484.5.

1. Provider-Owned or -Controlled Non-residential Settings must afford individuals privacy in bathrooms and changing areas and a lockable place for belongings, with only the individuals and appropriate staff/contractors having keys to such doors and storage areas.

2. This Section 8.484.4 does not require Non-residential Settings to provide food if they are not already required to do so under other authorities. This Section 8.484.4 does require Non-residential Settings to ensure that individuals have access to their own food at any time.

8.484.4.E Other Non-residential Settings must have all of the qualities of and protect the same individual rights as Provider-Owned or -Controlled Non-residential Settings, as stated immediately above, to the same extent for HCBS participants as they do for other individuals, subject to the Rights Modification process in Section 8.484.5.

8.484.5 RIGHTS MODIFICATIONS

8.484.5.A Any modification of an individual's rights must be supported by a specific assessed need and justified in the Person-Centered Support Plan, pursuant to the process set out in Sections 8.484.5.C and 8.484.5.D below. Rights Modifications may not be imposed across-the-board and may not be based on the convenience of the provider. The provider must ensure that a Rights Modification does not infringe on the rights of individuals not subject to the modification. Wherever possible, Rights Modifications should be avoided or minimized, consistent with the concept of dignity of risk.

8.484.5.B The process set out in Sections 8.484.5.C-D below applies to all Rights Modifications.

8.484.5.C For a Rights Modification to be implemented, the following information must be documented in the individual's Person-Centered Support Plan, and any provider implementing the Rights Modification must maintain a copy of the documentation:

1. The right to be modified.
2. The specific and individualized assessed need for the Rights Modification.
3. The positive interventions and supports used prior to any Rights Modification, as well as the plan going forward for the provider to support the individual in learning skills so that the modification becomes unnecessary.
4. The less intrusive methods of meeting the need that were tried but did not work.

- 1 5. A clear description of the Rights Modification that is directly proportionate to the
2 specific assessed need.
- 3 6. A plan for regular collection of data to measure the ongoing effectiveness of and
4 need for the Rights Modification, including specification of the positive behaviors
5 and objective results that the individual can achieve to demonstrate that the
6 Rights Modification is no longer needed.
- 7 7. An established timeline for periodic reviews of the data collected **under** the
8 preceding paragraph. The Rights Modification must be reviewed and revised
9 upon reassessment of functional need at least every 12 months, and sooner if
10 the individual's circumstances or needs change significantly, the individual
11 requests a review/revision, or another authority requires a review/revision.
- 12 8. The Informed Consent of the individual (or, if authorized, their guardian or other
13 legally authorized representative) agreeing to the Rights Modification.
- 14 9. An assurance that interventions and supports will cause no harm to the
15 individual, including documentation of the implications of the modification for the
16 individual's everyday life and the ways the modification is paired with additional
17 supports to prevent harm or discomfort and to mitigate any undesired effects of
18 the modification.
- 19 10. Alternatives to consenting to the Rights Modification, along with their most
20 significant likely consequences.
- 21 11. An assurance that the individual will not be subject to retaliation or prejudice in
22 their receipt of appropriate services and supports for declining to consent or
23 withdrawing their consent to the Rights Modification.

24 8.484.5.D Additional Rights Modification process requirements:

- 25 1. Prior to obtaining Informed Consent, the case manager must offer the individual
26 the opportunity to have an advocate, who is identified and selected by the
27 individual, present at the time that Informed Consent is obtained. The case
28 manager must offer to assist the individual, if desired, in identifying an
29 independent advocate who is not involved with providing services or supports to
30 the individual. These offers and the individual's response must be documented
31 by the case manager.
- 32 2. Any providers that desire or expect to be involved in implementing a Rights
33 Modification may supply to the case manager information required to be
34 documented under **this** Section 8.484.5, except for documentation of Informed
35 Consent and the offers and response relating to an advocate, which may be
36 obtained and documented only by the case manager. The individual determines
37 whether any information supplied by the provider is satisfactory before the case
38 manager enters it into their Person-Centered Support Plan.

39 8.484.5.E Use of Restraints

- 40 1. If **R**estraints are used with an individual at an HCBS Setting, their use must:
41

- a. Be based on an assessed need after all less restrictive interventions have been exhausted;
- b. Be documented in the individual's Person-Centered Support Plan as a modification of the generally applicable rights protected under Section 8.484.3, consistent with the Rights Modification process in this Section 8.484.5; and
- c. Be compliant with any applicable waiver.

2. Prone Restraints are prohibited in all circumstances. Nothing in this Section E permits the use of any Restraint that is precluded by other authorities.

8.484.5.F If Restrictive or Controlled Egress Measures are used at an HCBS Setting, they must:

1. Be implemented on an individualized (not setting-wide) basis;
2. Make accommodations for individuals in the same setting who are not at risk of unsafe wandering or exit-seeking behaviors;
3. Be documented in the individual's Person-Centered Support Plan as a modification of the generally applicable rights protected under Section 8.484.3, consistent with the Rights Modification process in this Section 8.484.5, with the documentation including:
 - a. An assessment of the individual's unsafe wandering or exit-seeking behaviors (and the underlying conditions, diseases, or disorders relating to such behaviors) and the need for safety measures;
 - b. Options that were explored before any modifications occurred to the Person-Centered Support Plan;
 - c. The individual's understanding of the setting's safety features, including any Restrictive or Controlled Egress Measures;
 - d. The individual's choices regarding measures to prevent unsafe wandering or exit-seeking;
 - e. The individual's (or, if authorized, their guardian's or other legally authorized representative's) consent to restrictive- or controlled-egress goals for care;
 - f. The individual's preferences for engagement within the setting's community and within the broader community; and
 - g. The opportunities, services, supports, and environmental design that will enable the individual to participate in desired activities and support their mobility; and
4. Not be developed or used for non-person-centered purposes, such as punishment or staff/contractor convenience.

1 8.484.5.G If there is a serious risk to anyone's health or safety, a Rights Modification may be
2 implemented or continued for a short time without meeting all the requirements of this Section
3 8.484.5, so long as the provider immediately (a) implements staffing and other measures to
4 deescalate the situation and (b) reaches out to the case manager to set up a meeting as soon as
5 possible, and in no event past the end of the third business day following the date on which the
6 risk arises. At the meeting, the individual can grant or deny their Informed Consent to the Rights
7 Modification. The Rights Modification may not be continued past the conclusion of this meeting or
8 the end of the third business day, whichever comes first, unless all the requirements of this
9 Section 8.484.5 have been met.

10 8.484.5.H When a provider proposes a Rights Modification and supplies to the case manager all of
11 the information required to be documented under this Section 8.484.5, except for documentation
12 that may be obtained only by the case manager, the case manager shall arrange for a meeting
13 with the individual to discuss the proposal and facilitate the individual's decision regarding
14 whether to grant or deny their Informed Consent. Except when the timeline in Section 8.484.5.G
15 applies, the case manager shall arrange for this meeting to occur by the end of the tenth business
16 day following the date on which they received from the provider of all the required information.
17 The individual may elect to make a final decision during or after this meeting. If the individual
18 does not inform their case manager of their decision by the end of the fifth business day following
19 the date of the meeting, they are deemed not to have consented.

21 **8.485 HOME AND COMMUNITY BASED SERVICES FOR THE ELDERLY, BLIND AND DISABLED** 22 **(HCBS-EBD) GENERAL PROVISIONS**

23 **8.485.10 LEGAL BASIS**

24 The Home and Community Based Services for the Elderly, Blind and Disabled (HCBS-EBD) program in
25 Colorado is authorized by a waiver of the amount, duration and scope of services requirements contained
26 in Section 1902(a)(10)(B) of the Social Security Act. The waiver was granted by the United States
27 Department of Health and Human Services, under Section 1915(c) of the Social Security Act. The HCBS-
28 EBD program is also authorized under state law at C.R.S. section 25.5-6-301 et seq. – as amended.