



## OPERATIONAL MEMO

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**OPERATIONAL MEMO NUMBER: HCPF OM 19-029**

**TITLE: HCBS SETTINGS FINAL RULE—RIGHTS MODIFICATION DEADLINE**

**SUPERSEDES NUMBER: HCPF OM 19-006 ONLY AS TO DEADLINE**

**ISSUE DATE: JULY 8, 2019**

**EFFECTIVE DATE: JULY 8, 2019**

**DIVISION AND OFFICE: POLICY, INNOVATION, AND ENGAGEMENT DIVISION,  
OFFICE OF COMMUNITY LIVING**

**PROGRAM AREA: HCBS WAIVERS**

**APPROVED BY: BONNIE SILVA**

**KEY WORDS: HOME AND COMMUNITY-BASED SERVICES, HCBS, HCBS  
SETTINGS FINAL RULE, RIGHTS MODIFICATION**

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*HCPF Memo Series can be accessed online: <https://www.colorado.gov/hcpf/memo-series>*

### **Purpose and Audience:**

The purposes of this Operational Memo are (1) to inform case management agencies and providers serving the home- and community-based services (HCBS) waivers that there will be an extension of the previously announced deadline for the rights modification process under the HCBS Settings Final Rule and (2) to clarify this process.

### **Background:**

In 2014, the federal Centers for Medicare & Medicaid Services (CMS) published a [rule](#) requiring HCBS to be provided in settings that meet certain criteria. The rule identifies rights that individuals have in HCBS settings and sets out a process for modifying those rights where appropriate in an individual case. The process includes documenting several criteria, including the individualized assessed need for the modification and the informed consent of the individual.

The Department provided guidance for implementation of the rights modification process in several issuances, including its responses to frequently asked questions (FAQs) [Part I](#) (January 2018) and [Part II](#) (June 2018), a [training series](#) (January 2019), and two Operational Memos ([February 2019](#) and [June 2019](#)).

The current deadline for rights modifications, announced in the trainings and the February 2019 Operational Memo, is as follows: “by **July 31, 2019**, each provider must have a copy of the appropriate documentation for each rights modification or stop implementing the rights modification. The provider must be able to show this

documentation to the Department, [the Colorado Department of Public Health & Environment (CDPHE)], and (in some cases) CMS.”

As the Department has shared at various in-person and telephonic meetings, an extension to this deadline is being finalized and will be published as part of an updated set of HCBS Settings Final Rule implementation milestones. The milestones will be submitted to CMS and published on the Department’s [HCBS Settings Final Rule website](#).

### **Information/Procedure:**

Providers and case management agencies should continue to implement the HCBS Settings Final Rule requirements relating to rights modifications, including by:

- Modifying policies, procedures, and practices that restrict individuals’ rights on a broad (not individualized) basis. The Department and CDPHE have been providing technical assistance regarding the changes needed and the dates by which they should be implemented.
- Identifying all rights modifications that are currently in place. Providers and case management agencies should have identified existing modifications as part of their efforts to comply with previously announced deadlines. The Department has heard from providers and case management agencies that they are encountering challenges regarding obtaining informed consent for some of these modifications. The Department has also heard from advocates that individuals’ informed consent may not always be fully informed and freely given. The Department is considering these concerns and possible ways to address them. Without committing to specific measures, and without “pausing” any ongoing work, the Department does seek to minimize undue disruption and will allow documentation of compliance with the federal criteria for rights modifications to be completed on the schedule that will be included in the new milestones, in lieu of the July 31, 2019 deadline.

Some providers and case management agencies have asked how to employ both a notice of rights suspension, as required by current Department regulations for the Developmental Disabilities (DD), Supported Living Services (SLS), and Children’s Extensive Supports (CES) waivers, and a request for the individual’s signed, informed consent, as required by the HCBS Settings Final Rule. The Department has explained what information should be collected under the federal rule, most recently in the January trainings, but has not prescribed a specific template. Separate forms for the notice of rights suspension and the federally required informed consent may be used. Using separate forms creates an opportunity for providers and case managers to discuss with individuals their rights under both existing state authorities and the federal rule. Regardless of who initiates the paperwork, the case manager discusses the rights modification and alternatives with the individual and, if they agree to the rights modification, collects their signature.

**Attachment(s):**

None

**Department Contact:**

Inquiries may be sent to the following shared inbox: [hcpf\\_ptp@state.co.us](mailto:hcpf_ptp@state.co.us).