



## OPERATIONAL MEMO

---

|  |   |
|--|---|
| <b>Title:</b> Protected Rights and Rights Modifications in the Home and Community-Based Services Program   | <b>Topic:</b> HCBS Settings Final Rule and Rights Modifications |
| <b>Audience:</b> Case Management Agencies and Provider Agencies  | <b>Sub-Topic:</b> HCBS Settings Final Rule                      |
| <b>Supersedes Number:</b> N/A  | <b>Division:</b> Case Management and Quality Performance        |
| <b>Effective Date:</b> Dec. 17, 2024   | <b>Office:</b> Office of Community Living                       |
| <b>Expiration Date:</b> Dec. 17, 2026  | <b>Program Area:</b> N/A  |
| <b>Key Words:</b> HCBS, Home and Community-Based Services, HRC, Human Rights Committee, CCM, Information Management System, Informed Consent, Monitoring Contacts, Rights Modification, HCBS Settings Final Rule, Waiver |   |
| <b>Legal Authority:</b> 42 C.F.R. § 441.301(c)(4) and 10 CCR 2505-10 §8.7001.B, §8.7202.K and §8.7202.P  |   |
| <b>Memo Author:</b> Aubre Frost  |   |
| <b>Operational Memo Number:</b> HCPF OM 24-062   |   |
| <b>Issue Date:</b> Dec. 17, 2024   |   |
| <b>Approved By:</b> Amanda Lofgren   |   |

---

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

### **Purpose and Audience:**

The purpose of this Operational Memo is to provide information to Case Management Agencies (CMAs) on the requirements of the Home and Community-Based Services (HCBS) Settings Final Rule for Rights Modifications. In addition, this Operational Memo introduces a guide to support ongoing statewide compliance with the HCBS Settings Final Rule and announces an upcoming training on Rights Modifications that will include the implementation of the Rights Modification section within the Care and Case Management (CCM) system.

## Definition(s):

Rights Modification-Any situation in which an individual is limited in the full exercise of their rights.

Dignity of Risk-The concept that individuals have the right to take reasonable risks to promote self-determination.

Member Identified Team-People, agencies, or representatives a Member selects to participate in supporting them with HCBS processes and procedures.

## Information:

In 2014, the federal Centers for Medicare and Medicaid Services published the HCBS Settings Final Rule (42 C.F.R. §441.301(c)(4)) requiring HCBS to be provided in settings that meet certain standards. These standards ensure that settings protect individual rights and that any modifications to individual rights meet several criteria, such as being based on individualized need and Member consent. The Department of Health Care Policy and Financing (HCPF) codified the federal standards in rule, 10 CCR 2505-10 section 8.7001.B (formerly §8.484), that went into effect in January 2022.

HCPF has previously provided CMAs with guidance and resources regarding the HCBS Settings Final Rule, including the Case Manager's role in the Rights Modification process. These resources can be found on HCPF's [HCBS Settings Final Rule website](#) as well as the Colorado Learns Learning Management System (LMS). HCPF has developed a new [HCBS Settings Final Rule Ongoing Monitoring Guide](#); this guide is intended to help Case Managers, HCBS Provider Agencies, contractors, Direct Support Professionals, and other paid or unpaid caregivers make observations and ask questions relevant to a setting's HCBS Settings Final Rule compliance.

## Action To Be Taken:

### Case Manager Responsibilities

Case Managers are responsible for ensuring Members' individual rights are respected, and Rights Modifications are appropriately discussed, consented to, and documented. Case Managers should familiarize themselves with the HCBS Settings Final Rule (§8.7001.B) and individual rights (§8.7001.C) in order to ensure the rights of all HCBS Members are safeguarded.

### Informed Consent

- The Case Manager ensures that the Informed Consent agreement for a Rights Modification is informed, freely given, and in writing by confirming that the Member (or, if authorized, their Guardian or Legally Authorized Representative) understands all of the information required to be documented in §8.7001.B.4 and has signed the HCPF-prescribed form to that effect.

### Rights Modifications

- Rights Modifications, which are developed by the Member's Provider Agency and consented to by the individual (or, if authorized, their Guardian or Legally Authorized Representative), shall be documented in the Person-Centered Support Plan.
- CMA Monitoring Contacts shall include a review of the Member's services to ensure there are no violations of HCBS Settings Final Rule (§8.7202.K).
- If the Case Manager learns of a violation and if the right(s) in question may be modified consistent with the HCBS Settings Final Rule, the Case Manager shall request that the Provider Agency immediately document the required information on HCPF's prescribed [Informed Consent Template](#) and ensure Informed Consent is obtained.
- Not all rights are appropriately subject to modification.
  - Case Managers shall report a violation of the HCBS Settings Final Rule as a Critical Incident Report and labeled as "Other High-Risk Issue".
  - Case Managers shall report a violation of the HCBS Settings Final Rule that presents imminent danger to a Member and when a Provider Agency does not have actions outlined to protect the health, welfare, or safety of a Member to CDPHE.
    - [CDPHE Health Facilities Complaint Form](#)
  - Case Managers shall report a violation of the HCBS Settings Final Rule that meets the definition of mandatory reporting to Law Enforcement and Child or Adult Protective Services per mandatory reporting laws (§18-6.5-108 (wrongs to at-risk adults), §19-3-304 (persons required to report child abuse), and §26-3.1-102 (reporting requirements), C.R.S.).

### Critical Incident Reporting

- CMAs shall ensure all employees receive Critical Incident Reporting training.
- Case Managers shall follow all applicable timelines set forth in regulation and contract for Critical Incident Reporting.
- Case Managers shall conduct all required follow-up within assigned timelines.

- Case Managers shall follow all mandatory reporting law requirements for allegation of mistreatment, abuse, neglect, and exploitation.
- CMAs shall report all MANE allegations that fall within the scope of an Administrative Review (formally known as investigations) as a complaint to CDPHE.

#### Administrative Review

- CMAs shall conduct requested activities upon HCPF's request necessary to complete an Administrative Review of a Critical Incident.

#### Policies and Procedures

- CMAs shall ensure they have written policies and procedures meeting applicable State statutes, rules, and contract for:
  - Complaint Process (§8.7201.D),
  - Preservation of Member Rights (§8.7201.J.1),
  - Incident Reporting (§8.7201.L.1),
    - This includes Critical Incidents and Mandatory Reporting.
  - MANE (§8.7201.M), and
  - HRC (§8.7202.Q.8).

#### Rights Modification Basics and Processes

Below outlines the basics of Rights Modifications as well as the process for their implementation.

Provider Agencies are prohibited from implementing or requesting a Rights Modification for any Member in HCBS or a State General Fund program that conflicts with HCBS Final Settings Rule or other regulations, including but not limited to:

- Modifications to the rights of dignity and respect, person-centeredness, civil rights, freedom from abuse, and physical accessibility.
- Modifications inconsistent with the concept of dignity of risk.
- Implementation across-the-board for all Members in a setting or that imposes upon the rights of Members not subject to the modification.
- Implementation for provider convenience.
- Implementation without documentation of all required criteria; this includes the written informed consent of the Member or their Guardian or Legally

Authorized Representative, if applicable (unless otherwise outlined in regulation).

- Modifications that include the use of prone restraints.
- Modifications that restrict or control egress to the extent that the safety of the Member is at risk should there be a need for immediate evacuation.

#### Modification Requirements

- Specific to the Member's assessed need.
- Implemented following the processes outlined in regulations.
- Implemented only *after* the Member or Guardian or Legally Authorized Representative, if applicable, consents (unless otherwise outlined in regulation).
- Valid for no more than one (1) year from the date of consent.
- Reviewed by the Member Identified Team at least every six (6) months.
- Reviewed initially and annually thereafter by the CMA's Human Rights Committee (HRC) for Members served through the HCBS-DD, HCBS-SLS, HCBS-CES, HCBS-CHRP, and State General Fund programs.

#### Reminders About Informed Consent

- Informed Consents must always be reviewed with the Member.
- Colorado is a limited guardianship state; Case Managers shall review official, legal guardianship or Legally Authorized Representative documents to determine the scope of legal decision-making authority. If a Guardian or Legally Authorized Representative does not have full legal decision-making authority, they are not legally able to consent on the Member's behalf.
- Providers may not obtain the Member or their Guardian or Legally Authorized Representative's signature(s).
- When Case Managers are obtaining the signature from a Guardian or Legally Authorized Representative, best practice, though not a requirement, is to also obtain the Member's signature.
- Members or their Guardian or Legally Authorized Representative, if applicable, *always* have the right to deny or remove their consent to a modification at any time.

#### Standard Rights Modification Process

**Prior** to the implementation of a Rights Modification, the below process must be followed:

1. Any Provider serving the Member or anyone on the Member Identified Team identifies a need for a Rights Modification.
2. The Provider completes the [Informed Consent Template](#), filling out all fields, but leaving the signature lines blank. The Provider sends the completed, unsigned, Informed Consent, to the Member's Case Manager.
  - Case Managers shall complete the Informed Consent Template in cases where a Provider is not implementing the Rights Modification (i.e. Home Modifications or single items funded through HCBS or State General Funds).
3. Once the Case Manager receives the completed, unsigned, Informed Consent, they review it to ensure it addresses all required criteria. If the document provided does not meet requirements, the Case Manager will discuss missing criteria with the party proposing the Rights Modification and request a corrected Informed Consent be provided.
4. The Case Manager shall schedule an Informed Consent Review Meeting with the Member and their Guardian or Legally Authorized Representative, if applicable, to be held within ten (10) business days of receiving the complete (corrected, if applicable) Informed Consent. When scheduling, the Case Manager shall offer the Member the option to have a support person or Advocate present when reviewing the Informed Consent, or, if they do not have one, the opportunity to obtain one. This meeting may be in-person or virtual, depending on the Member or Guardian or Legally Authorized Representative's preference.
5. The Case Manager shall hold the meeting as scheduled above with the Member and their Guardian or Legally Authorized Representative, if applicable, to review all information documented in the Informed Consent. Other members of the Member Identified Team, may be included in this meeting based on the Member's or their Guardian or Legally Authorized Representative's, preference, if applicable. This review of the Informed Consent shall exclude Providers proposing to implement the Rights Modification(s), and Providers with similar proposals to be implemented at different settings.
  - If consented to, the Case Manager will collect the signature of the Member or their Guardian or Legally Authorized Representative, if applicable, on the Informed Consent.
6. With the implementation of the Rights Modification section in the CCM, the Case Manager shall no longer complete the Rights Modification Form, once trained. The Case Manager shall complete the Rights Modification section within the *Assessments/Support Plans* tab in the CCM. The Case Manager must upload the signed Informed Consent directly to the completed assessment and using the *Print* or *Download* function, send a copy to the Member, Guardian or Legally Authorized Representative (if applicable), and Provider(s).

- Case Managers should refer to the Rights Modifications Job Aid for detailed steps.
7. For Members on an IDD waiver or in a State General Fund Program, Case Managers shall follow the CMA's internal procedure for referring the Member to HRC for review and recommendations.
    - The Provider may not implement the Rights Modification prior to HRC review.

### Emergency Rights Modification Process

When there is an incident that occurs that presents a serious risk to anyone's health or safety, a Rights Modification may *temporarily* be immediately implemented or continued by a Provider when the below process is followed.

1. The Provider immediately implements staffing and other measures to deescalate the situation.
2. The Provider immediately reaches out to the Case Manager to schedule an Informed Consent Review Meeting to be held within three (3) business days of the incident.
3. The Provider completes the [Informed Consent Template](#), leaving the signature lines blank, to be reviewed at the Informed Consent Review Meeting by the Case Manager with the Member and their Guardian or Legally Authorized Representative, if applicable.
4. The Case Manager meets with the Member and their Guardian or Legally Authorized Representative, if applicable, in person, by phone, or virtual meeting platform to review all information documented in the completed, unsigned, Informed Consent. Other members of the Member Identified Team, excluding Providers temporarily implementing the Rights Modification(s), may be included in this meeting based on the Member's or their Guardian or Legally Authorized Representative's preference, if applicable. This meeting must occur as soon as possible and no later than the end of the third business day following the date on which the serious risk arose.
  - If consented to, the Case Manager will collect the signature of the Member and their Guardian or Legally Authorized Representative, if applicable, on the Informed Consent.
5. With the implementation of the Rights Modification section in the CCM, the Case Manager shall no longer complete the Rights Modification Form, once trained. The Case Manager shall complete the Rights Modification section within the **Assessments/Support Plans** tab in the CCM. The Case Manager must upload the signed Informed Consent directly to the completed assessment and

using the **Print or Download** function, send a copy to the Member, Guardian or Legally Authorized Representative (if applicable), and Provider(s).

- Case Managers should refer to the Rights Modifications Job Aid for detailed steps.
6. For Members on an IDD waiver or in a State General Fund Program, Case Managers shall follow the CMA's internal procedure for referring the Member to HRC for review and recommendations.
- Providers may not continue to implement the Emergency Rights Modification past the conclusion of the Informed Consent Review Meeting or the end of the third business day following the date on which the serious risk arose, whichever comes first, unless **all the above steps for a standard, non-emergency** Rights Modification are complete. Providers may continue to implement the Rights Modification prior to HRC review.

### Monitoring and Safeguarding Rights

As outlined in §8.7202.K, CMAs are responsible for monitoring the provision of services and supports to ensure the rights, health, safety, and welfare of Members while also promoting Members' ability to engage in self-determination, self-representation, and self-advocacy. In connection with this requirement, Case Managers perform quarterly monitoring contacts with Members to evaluate the Member's health, safety, and welfare, including respect for individual rights.

Case Managers are encouraged to refer to the new HCBS Settings Final Rule Ongoing Monitoring Guide during their quarterly monitoring contacts with Members as part of completing their existing task of evaluating whether Member rights are being respected in HCBS settings. Case Managers should follow the instructions in the guide if they suspect any compliance issues.

- Case Managers are required to have general familiarity with the guide so they can identify possible compliance concerns as they arise. They are not required to use the guide as a script or checklist, or to discuss each item during each Monitoring Contact conversation(s). The guide is intended to be used as a tool that can help prompt Case Managers to:
  - pursue questions and conversation as time and the individual's interests and needs allow, and
  - know when a situation may need to be escalated.
- The guide is only a summary and not a complete statement of all requirements of the HCBS Settings Final Rule.



- These are outlined in detail in §8.7001.B.
- The guide is relevant to residential facilities as well as settings, such as family homes, that are and are not routinely surveyed by the Colorado Department of Public Health and Environment (CDPHE) and/or the Colorado Department of Human Services (CDHS).
- The guide is not limited to the Rights Modification context. Rather, it helps confirm that all rights protected by the HCBS Settings Final Rule are honored even where Members do not have any documented Rights Modifications.
- As Case Managers refer to the guide and speak with Members, they may identify possible violations of the HCBS Settings Final Rule. The guide explains how to escalate concerns for inquiry and enforcement actions, as needed.

Providers may also find the guide useful as an overview of key rights protected by the HCBS Settings Final Rule; as a ready-reference or refresher that can be shared with their contractors, direct support professionals (DSPs), and other paid or unpaid caregivers; as a tool that can be used in monitoring host homes, family caregiver homes, and other settings over which they have oversight obligations; and as a source of transparency into what Case Managers may be discussing with Members during quarterly monitoring contacts.

Members may use the guide as a way of understanding their rights, but please note that this guide was not specifically designed for Members. It is not written in first-person or plain language and is not available in languages other than English. Members may find the Health First Colorado-produced short, animated [videos](#) about Rights and Rights Modifications on YouTube more beneficial.

#### Upcoming Training Opportunity

HCPF has provided mandatory training for Case Managers on Rights Modifications, including the implementation of the Rights Modification section in the CCM system and an overview of the [HCBS Settings Final Rule Ongoing Monitoring Guide](#). The training slides and the recording are posted on the [Long-Term Services and Supports \(LTSS\) Training website](#) for Case Managers to access. Case Managers should access the following Web Based Training (WBT) modules within the Colorado Learns LMS to learn more about Rights Modifications. Navigate to the CMA Playlist - CIRS Curriculum for Rights Mods courses:

- [HCBS Settings Rule Part 1](#)
- [HCBS Settings Rule 2: Rights Modification](#)

**Attachment(s):**

None

**Links:**

[HCBS by Health First Colorado](#) (Rights and Rights Modifications videos)

[HCBS Setting Final Rule](#) (website)

[HCBS Settings Final Rule Ongoing Monitoring Guide](#)

[HRC Memo 24-036](#)

[Informed Consent Template](#)

[LTSS Training](#) (website)

**HCPF Contact:**

[HCPF\\_HCBS\\_Questions@state.co.us](mailto:HCPF_HCBS_Questions@state.co.us)