



Listening Log

HCBS Settings Final Rule – Stakeholder Comments

March 13, 2020 – June 9, 2020 **{WORKING DRAFT—IN PROGRESS}**

General

Date received	Individual/Organization	Comment	Department Response
3/13/20	Parker Personal Care Homes – Jodi Walters	<p>The language of these draft rules is not person-centered and could benefit from modification to make it more so. In addition, there is concern that these rules are being presented and discussed by individuals who are not familiar with current waivers, regulations, and statutes for services to individuals with intellectual and developmental disabilities. Much of this information is inconsistent with other portions of rule, as an example. While it is clear that HCPF is trying to write a general rule for all waivers, it is not that simple, particularly in areas where there is statute that addresses subjects, such as rights.</p>	<p>The Department intends to adopt a person-centered rule and has revised certain language throughout the draft rule to better serve this concept.</p> <p>The Department staff who drafted the rule and will be implementing it are familiar with all of the authorities governing all of the waivers serving all of the populations receiving long-term services and supports. The Department contractor, though tasked only with facilitating the workgroup meetings and not drafting the rule, was given information about these authorities, including as summarized in the Systemic Assessment Crosswalk. To ensure a diversity of viewpoints among workgroup participants, membership was not limited to those demonstrating such familiarity.</p> <p>The federal HCBS Settings Final Rule protects the same rights for all individuals, regardless</p>

			of the nature of their disability or the waiver under which they receive services. The state’s implementing rule, when adopted, will be consistent with all applicable state statutes. As previously indicated, existing regulations and waivers will be conformed as needed.
5/15/20	Association for Community Living (ACL) – Ailsa Wonnacott and Jan Rasmussen	<p>Unfortunately, there are no good solutions to the question of how to “protect” a person with an IDD from dangerous/harmful situations, or from making choices that potentially create dangerous/harmful situations for others. Providing interventions and potential protections are particularly difficult if the person does not want to participate in the intervention, and/or is unable/unwilling to give consent to potential right’s modifications aimed at increasing safety.</p> <p>However, there may be opportunities to prevent a person from evolving to the level of threat of harm that requires rights modifications or legal recourse. The intent of rule changes re rights modifications seems overall to be a positive effort to uphold a person’s rights. However, the impact and unintended consequence could be that a person’s rights are taken away (e.g. via guardianship or ILD) because they refuse to give informed consent. Guardianship/ILD does not offer a complete solution, is not available to most, and it is the last thing we would want to see happen. It should only be considered after every other option for support and protection has been exhausted.</p> <p>This being said it is imperative to focus on improving and enhancing the process for supporting a person with making safe choices, gaining consent where appropriate along the way, and knowing when consent has not been given in order to avoid the need for rights modifications</p>	

		<p>or right’s termination. To help think this through, it may be useful to separate the process of supported decision-making and consent, from the process of what happens at the point consent is not given and the person poses a potential risk to self or others.</p> <p>Some suggestions:</p> <ul style="list-style-type: none"> • Create a safety net – formalize best practice and develop a multi-agency crisis response systems in each CCB area. Do what we already do across agencies – but in a more organized way • Intervene before a crisis evolves crisis response teams consisting of person, family, case managers, advocates, providers • Complete person centered comprehensive life review with person and their team • Engage person in addressing the situation/plan intervention is necessary before an emergency arises • Identify potential high-risk situations and assess risk using a risk assessment tool - will need training for assessors. Likelihood and severity of the risk must both be assessed and mitigating interventions implemented/documented that fall short of rights modification • Have on-going conversation re informed consent and provide education regarding informed consent in non-emergent situations so that people with IDD are able to understand and engage in the process at all times, and particularly when there is a crisis situation • Provide education regarding informed consent to IDTs, family/guardian, so that the process is 	
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		<p>understood, developed and implemented in a person centered manner</p> <p>There should be a tiered approach to considering right's modification. The approach should match the level of danger and concern. Advancing to higher tiers should only occur once risk assessment has been completed. HRC review should inform the process.</p> <ol style="list-style-type: none"> 1. If person and IDT are unable to reach agreement as to a course of action to keep the person or others safe, involve an advocate to mediate 2. Develop interventions based on comprehensive life review and risk assessment data – review and revise this information to reflect changes and new information gathered. 3. Develop support plan and ask person for informed consent for interventions along the way 4. If person is unwilling/unable to give consent, and risk assessed level of danger/concern is high, contact APS. <p>If person is unwilling/unable to give informed consent, and the risk assessed level of danger/concern is high enough to warrant more extreme measures, consider temporary guardianship, or an ILD. This should only be used in the most extreme circumstances.</p>	
5/15/20	LeadingAge Colorado – Terry Zamell and Deborah Lively	<p>Thank you for the opportunity to comment on the draft state rule on behalf of LeadingAge Colorado members. First, however, it is important to raise our concern about proceeding with rulemaking during this pandemic. Our members' efforts have been focused on preventing and mitigating the spread of COVID-19</p>	<ul style="list-style-type: none"> • Regarding timing: The federal government has not extended the deadline for statewide compliance with the HCBS Settings Final Rule. Therefore, the state must continue implementing the rule on schedule. In

		<p>among residents, program participants and staff and keeping them safe. Our members will have more time to be engaged in this process once the COVID-19 situation stabilizes. It is also important to keep in mind that the way services look and how they are delivered may be different once the public health emergency ends.</p> <p>General Question Will HCPF be creating a crosswalk between this draft rule and the Alternative Care Facility (ACF) rules and as a result, will there be changes to the ACF rules?</p> <p>Questions Regarding Participant and Provider Rights Will providers have the right to ask participants to turn their cell phone off during activities if they are being disruptive? Does this require a rights modification? If a participant is accessing pornography using the adult day program’s technology devices, can the adult day program stop the participant from doing so? Does this require a rights modification?</p> <p>Training Topic Recommendation Training, guidance or best practices for obtaining informed consent when there is disagreement by the individual, however the rights modification is necessary for the individual’s safety. Best practices for how to respond if the individual refuses or withdraws their consent and best practices or tips for documenting the process. Include scenarios in which egress is restricted.</p>	<p>addition, delaying implementation would be detrimental to the individuals whose rights are protected by the rule. The Department is mindful of the challenges faced by workgroup participants and is grateful for their continued engagement, and it looks forward to seeing how recent, creative innovations can be extended beyond the end of the pandemic.</p> <ul style="list-style-type: none"> • Response to General Question: The Systemic Assessment Crosswalk illustrates the interplay between the draft rule and the existing ACF rules. At this time, although the Systemic Assessment Crosswalk will likely need to be updated, there is no plan to create another (separate) crosswalk from this rule to existing ACF rules. Many of the components in this new rule already exist in the ACF regulations. It is possible revisions to the ACF regulations will need to occur, likely referencing the new regulations, as indicated in the existing crosswalk. • Response to Questions Regarding Participant and Provider Rights: Asking people to turn off their phones during certain activities or to use them unobtrusively, as any activity host in the community would do, is not a rights modification. Going beyond a typical request, such as by requiring people to keep their phones off all day
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			<p>or to turn them in to staff, would be a rights modification. Prohibiting pornography on a day program's devices is advisable to prevent harm to other participants and is not a rights modification.</p> <ul style="list-style-type: none"> • Training topic recommendations: the Department appreciates these suggestions and will take them into account, with the rights modification workgroup, as part of the development of a training plan.
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Rule XXX - Statement of Purpose

Date received	Individual/Organization Name	Comment	Department Response
3/13/20	Parker Personal Care Homes – Jodi Walters	<p>A. This language states that the purpose of rules XXX through CCC is to implement the requirements of the federal HCBS Settings Final Rule. However, these draft rules far exceed the requirements in 42 CFR Section 441.301(c)(4).</p> <p>Additionally, this broadly states that the rules apply to all HCBS and other programs, which is overly broad.</p> <p>B. As discussed in the last stakeholder meeting, stating that the Department will not pay for Covered HCBS provided in any setting that does not comply with this body of rules does not allow for the provider to come into compliance if issues are identified. For example, should a CDPHE surveyor determine that a PASA has not</p>	<p>A. The impetus of this rulemaking, and its primary purpose, is the need to codify the federal requirements in state rule. The draft rule contains some additional detail, not found in the text of the federal rule but stemming from CMS and Department guidance, to clarify the meaning of the federal requirements (for example, to address questions that have frequently arisen over the past several years). The draft rule also contains elements that, while not strictly required by the federal rule, fit naturally within the subject of this rulemaking and help to conform requirements across waivers (for example,</p>

		<p>addressed a rights modification through the procedures identified in CCC, that would be an indicator of non-compliance, which could be addressed and corrected. Further, non-payment for services is currently delineated in regulation at 10 CCR 2505-10 8.000, 10 CCR 2505-10 8.500, and other locations.</p>	<p>as to how far in advance a provider must notify an individual of a potentially involuntary move). While nothing in the draft rule goes far beyond the federal requirements, CMS has been clear that its rule sets only a floor for HCBS settings and that states can impose additional requirements.</p> <p>The draft rule does not state that it applies to non-HCBS supports (“all HCBS and other programs”). Rather, it states that it applies to HCBS offered under waivers as well as under other kinds of authorities, such as the Medicaid State Plan (“all Medicaid-funded HCBS under all waivers and other programs, except where otherwise noted”). This language would be relevant if, for example, Community First Choice were implemented in Colorado. To clarify this point and allow for the settings criteria to apply to state-funded programs, the draft rule has been amended to state that “These rules apply to all HCBS under all authorities, except where otherwise noted,” and certain references to “Medicaid HCBS” have been changed to “HCBS” in general.</p> <p>B. As the Department stated during the referenced meeting, it agrees with this comment and does not anticipate enforcement, funding, or corrective action standards under the draft rule that are stricter than those applicable to other rules.</p>
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			The Department has deleted the provision and issue and will rely on the existing, general provisions already in rule.
5/17/20	The Arc Adams County – Kari Easterly	The language for these rules should reflect person centered language throughout the document. B. I like the language that the “Department will not pay for Covered HCBS provided at any setting that does not comply with Rules XXX through CCC.” Even if it appears in other Statute, this needs to be stated here. There should be some allowance for providers to correct the deficiency, but there needs to be parameters of correction to comply. And there should be consequences for providers to are systemically not following Rule.	The Department intends to adopt a person-centered rule and has revised certain language throughout the draft rule to better serve this concept. B. Although the Department appreciates the support for the quoted language, it notes that existing, general provisions already in rule create a process for correcting deficiencies and, if necessary, escalating to more serious consequences. As the Department does not anticipate enforcement, funding, or corrective action standards under the draft rule that are stricter than those applicable to other rules, it is deleting the quoted provision.

Rule YYY - Definitions

Date received	Individual/Organization Name	Comment	Department Response
3/13/20	Parker Personal Care Homes – Jodi Walters	Discussing exclusions for “Covered HCBS” does not seem consistent with the second bullet of the next definition of HCBS Settings. There is also no reasoning behind the exclusions that could potentially apply to other settings. “HCBS Setting” - the second bullet discusses that requirements in these draft rules through CCC apply to the setting a whole and protect the rights of all	The language is consistent. The intent of the exclusions from Covered HCBS for respite and respite-like services is to allow for these services to continue to be provided in currently allowable settings, even if these settings are institutional within the meaning of the federal rule; the exclusions are necessary to avoid depriving individuals and

		<p>individuals in the setting. While it is understood that a setting should meet the requirements of the HCBS Settings Final Rule, it is not clear why it would be required that those who are not HCBS funded would be required to have Rights Modifications addressed in the same manner as someone who is HCBS funded. As an example, an individual may participate in a day program after school, private pays for the activity, and the individual's parents request that the individual wear gloves to protect him/herself from self-injurious behavior. In these draft rules, the program would be required to go through the steps for obtaining informed consents. Or, what if that individual is attending a day program setting for respite after school? So excluded above, included here.</p> <p>As a note, it would be helpful to 'group' these definitions so that residential settings are together and non-residential settings are together, rather than listing them alphabetically. The current order is somewhat confusing.</p>	<p>families of access to settings that they have come to rely upon for critical respite services. The intent of the cited bullet-point is not to identify settings as exempt or not from the rule, but rather to clarify that <u>if</u> a setting is subject to the rule, it must follow the rule throughout the entire setting and not treat some individuals worse than others (as though they have fewer rights) because of their funding source or service(s) received. This language is important because the federal HCBS Settings Final Rule applies to each setting as a whole.</p> <p>In the commenter's example, the setting should comply with the federal settings requirements if it is a physical location where Covered HCBS are provided (for example, if it is a facility where Adult Day and/or Specialized Habilitation services are provided). In that case, everyone at the setting would have the same rights, including private-pay participants and those receiving respite. Again, this is because the respite exemption (which is set forth in the federal rule) simply allows for respite to be provided at institutional settings, if allowed by the applicable waiver; it does not deem respite participants to have fewer rights than others at HCBS settings.</p> <p>Although the Department appreciates the grouping suggestion, it generally defines</p>
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			terms in alphabetical order to make it easier for readers to find each term.
5/17/20	The Arc Adams County – Kari Easterly	<p>While these rules are written for all Home and Community based settings I do not think this should only be specific to Waiver funding. These should apply to all settings that serve individuals with I/DD receiving services. For example, a provider implementing a right modification for Joe who receives HCBS – DD services should not be different for Susie who needs a rights modification but receives State SLS services. They attend the same program and the provider receives payment. Rights are Rights. Individuals receiving services should receive the same informed consent and process regardless of funding stream.</p> <p>It would be helpful to group these definitions so that residential settings are together and non – residential settings are together. The definition of non-residential could include, “any location that services are being provided by a paid caregiver.” For example. The Family Caregiver setting is different than a provider controlled setting, and certain things may not need to be addressed, such as a lease or residential agreement. Is the FCG and PASA still responsible for rights modification processes?</p>	<p>The Department agrees that all individuals, including those receiving services under state-only programs, have the same rights. To clarify this point, the draft rule has been amended to state that “These rules apply to all HCBS under all authorities, except where otherwise noted,” and certain references to “Medicaid HCBS” have been changed to “HCBS” in general.</p> <p>Although the Department appreciates the grouping suggestion, it generally defines terms in alphabetical order to make it easier for readers to find each term.</p> <p>The Department does not believe it is necessary to add “any location that services are being provided by a paid caregiver” to the definitions, as “HCBS Setting” is already defined as “any physical location where Covered HCBS are provided.”</p> <p>Regarding family caregiver settings, ____.</p>

Rule AAA - Basic Criteria

Date received	Individual/Organization Name	Comment	Department Response
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<p>3/13/20</p>	<p>Parker Personal Care Homes – Jodi Walters</p>	<p>In the introduction paragraph to this section, and continuing through the document, the term person-directed service plan is used. The language that Colorado has been using to date is person-centered, consistent with the Settings Rule.</p> <p>A. The language in this section seems to address non-residential settings rather than residential, which is the basis of the Settings Rule. Understood this applies to all Colorado waivers, it just seems odd that the residential/home setting is not addressed first.</p> <ol style="list-style-type: none"> 1. It is not clear what this language references. Should this indicate that the individual should be given opportunity to engage in community activities but has the right to decline? 2. Why is transportation addressed here when this is a waiver service with expectations and rules to address the service already? 3. This language is very subjective and would benefit from quantifiers, without being too specific. CDPHE has addressed this with providers who are competing PTPs, and has also been addressed in FAQs. 4. The language under a-c does not relate to the right to privacy in communications. In addition, this right, for the IDD population, is addressed in statute and regulation (i.e. access to a telephone). a-c does not address privacy; it addresses access and should be modified to be more specific to the Settings Rule. 5. The language in this section should be consistent with existing regulatory language for assessment and access to personal funds. 	<p>The Department will use a single term (to be determined) for the person-centered/person-directed service plan throughout the rule.</p> <p>A. Rule AAA begins with a list of requirements for all HCBS Settings, which as defined in Rule YYY include both residential and nonresidential settings. This is consistent with, and follows the ordering of, the federal rule.</p> <p>{If needed: The following responses use the same numbering as cited by the commenter, although the numbering has since been changed in the draft rule.}</p> <p>Response to A.1: This language has been revised to clarify the distinction between the provider’s obligation to offer choices and the individual’s right to decline them.</p> <p>Response to A.2: Transportation is addressed in the rule because CMS has indicated, and the Department agrees, that all HCBS providers (even those that are not transportation providers) need to help people access ways of getting into the community. For example, CMS suggests asking, “Does the setting provide individuals with contact information, access to and training on the use of public transportation, such as buses, taxis, etc., and are these public transportation schedules and telephone numbers available in a convenient location? Alternatively where public transportation is limited, does</p>
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		<p>b. This language should be clarified to specify the scope of management. Additionally, it should be stated that informed consent would not be needed when SSA designates the Representative Payee.</p> <p>c. The provider must assure the individual has access to his/her personal funds at any time.</p> <p>C. This language on the right to privacy focuses on the use of camera, chimes, monitors, etc., which is not the first and foremost part of privacy in the Settings Rule, which is the ability to have privacy in the unit/room, with the ability to lock doors and have staff/providers knock before entering. This isn't addressed until page 7 under Additional Criteria.</p> <ol style="list-style-type: none"> 1. b. Discusses Section i., though it is not clear to what it refers (1.?) 2. The right to privacy here is already a requirement under rules for confidentiality and HIPAA and are redundant. <p>D-F address individual choice and autonomy in general terms and should suffice to be able to determine how choice is being offered to an individual. The language should be re-written in person-centered language - 'the individual is afforded the opportunity to make life choices, etc.'. Person-directed thinking and planning should not drive the setting's operations - the person-centered plan should drive the services afforded the individual.</p>	<p>the setting provide information about resources for the individual to access the broader community, including accessible transportation for individuals who use wheelchairs?" References to Medicaid-funded medical and nonmedical transportation (NMT) have been removed.</p> <p>Response to A.3: {In progress}</p> <p>Response to A.4: Although this provision was about both privacy and access, and items a through c appropriately detailed certain components of access, this provision has been broken out into two items.</p> <p>Response to A.5: This part of the draft rule aims at eliminating existing practices that have been too restrictive of individuals' rights to access their money. Existing regulatory language allowing or apparently allowing such practices will be conformed to the new rule.</p> <p>Response to A.5.b: The Department has added "scope of managing the funds" to the plan. The Department disagrees with stating that "informed consent would not be needed when SSA designates the Representative Payee," for three reasons. (1) That language would undermine the policy that providers may not insist on being individuals' representative payees. (2) The Department does not administer SSA's requirements regarding consent or lack thereof. (3) Just as a provider must work with the case manager via the rights</p>
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		<p>G. Again, the setting does not ensure that, it is the individual who is afforded the opportunity to. And, however, each item under this section is already addressed through requirements for person-centered planning, through the development of the service plan. In this section, the latest changes to the IDT should be incorporated: https://www.colorado.gov/pacific/sites/default/files/HCPF%20OM%2019-047%20Interdisciplinary%20Team%20Changes%20%20.pdf.</p> <p>2. As discussed during the last meeting, this is not measurable, and is also set forth in statute at 25.5-10- 222 C.R.S. - the right to religious belief, practice, and worship. This should also be addressed in the person-centered plan. Overly prescriptive.</p> <p>4. This needs to be written in person-centered language.</p> <p>5.-7. Already in existing statute and regulation.</p> <p>8. This should be incorporated in the concept of being afforded choices, etc. but this language is overly prescriptive and, in many cases, cannot be measured.</p> <p>11. Treatment - is this intended to mean services and supports? Individuals who receive services and supports through the IDD waivers are not provided treatment, in general.</p> <p>J. and K. Rights and dispute/grievance requirements are already spelled out in detail in regulations.</p>	<p>modification process to get an individual's informed consent for the ways in which it will help them comply with a court order, so it must follow the same process—if designated as the representative payee—for the ways in which it plans to restrict the individual from accessing their money, spending it how and when they prefer, and the like. {Confirm this is how CDPHE has been approaching rep payee issues}</p> <p>Response to A.5.c: The Department has added “access.”</p> <p>Response to C: All aspects of privacy are important under the federal and draft rule. The ordering in the draft rule is consistent with the ordering in the federal rule, in particular, with the listing of rights applicable at all settings (including nonresidential settings), followed by the additional rights applicable at specified subcategories of settings.</p> <p>Response to C. 1. b.: reference has been corrected.</p> <p>Response to C.2: this comment is noted and will be addressed when other sections of regulations are revised, to remove redundancies.</p> <p>Response to D-F: Thank you for the suggestions, the language has been revised to reflect person-centeredness.</p> <p>Response to G: This language has been revised to be more person-centered. However, the IDT process is only for certain waivers and, to be clear, this section of the</p>
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			<p>draft rule relates to provider (not case manager) obligations. We will review other sections of regulations to eliminate duplication elsewhere, if needed.</p> <p>Response to G.2: {In progress.}</p> <p>Response to G.4: language revised.</p> <p>Response to G.5-7: We will look to remove any redundancies in other parts of the regulations.</p> <p>Response to G.8: revised.</p> <p>Response to G.11: language revised.</p> <p>Response to J-K: They are spelled out for certain waivers, not all waivers. Any redundancies in regulations will be addressed.</p>
5/17/20	The Arc Adams County – Kari Easterly	<p>5. Individuals have control over their personal resources. I would like to keep the assessment and process for individuals with or without a representative payee. At times, individuals working with an agency do not understand they have a payee, the process of applying, or that they could manage their own funds. SSA may have deemed someone needing a payee 20 years ago; that may not be the case any longer. Assessment and informed consent should stay regardless of payee status.</p>	<p>The assessment and informed consent are remaining in the regulations, outside of rep payee provisions.</p>
5/15/20	LeadingAge Colorado – Terry Zamell and Deborah Lively	<p>“The provider must ensure that the individual can spend money at any time, including on weekends, holidays, and evenings, with assistance or supervision if necessary.”</p> <p>Comment: Clarification is needed on the intent expectations of this rule. Is the intent to prevent providers from establishing set and limited hours for individuals to have access to their money? Does this mean that the individual can go shopping at any time and staff is required to accompany them at any time day or night?</p>	<p>Language has been revised to state “access and spend money.” The intent is that an individual has access to their finances, when they want them. This does not necessarily mean at 1am, but within reason. Additionally, this does not require the provider to take the individual shopping at any time. The intent is for an individual to have access and an ability to spend their own money when they would</p>

		That is not practical. It is not clear if the intent is access to money, spending money or both.	like to, not only at set times outlined by the provider.
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Rule BBB - Additional Criteria

Date received	Individual/Organization Name	Comment	Department Response
3/13/20	Parker Personal Care Homes – Jodi Walters	<p>Placing the lease/residency agreements in the forefront obscures the rights that are to be protected from the HCBS Settings Final Rule, including privacy, access to food, visitors, etc. This section would benefit from being reorganized.</p> <p>While we understand that CMS has set out guidelines for the lease/residency agreements, requiring that they have the same considerations as the Tenant Landlord Acts, the HCBS Settings Final Rule addresses the freedom from eviction without due process, and the right to appeal. The language set forth in this rule draft is excessive for residential settings for individuals in services through the I/DD waivers. For the majority of individuals who receive services through the HCBS-DD waiver, those services are provided in a home, likely a host home, or in a staffed setting. These expectations do not seem applicable to the types of settings in which individuals live, unless they live in their own homes/apartments, and then likely will have a lease with the required state stipulations.</p>	<p>The ordering of the draft rule is consistent with, and follows the ordering of, the federal rule. As all the rights are important and protected, it is not clear what reordering them would accomplish.</p> <p>The draft rule contains some additional detail, not found in the text of the federal rule but stemming from CMS and Department guidance, to clarify the meaning of the federal requirements (for example, to address questions that have frequently arisen over the past several years). The draft rule also contains elements that, while not strictly required by the federal rule, fit naturally within the subject of this rulemaking and help to conform requirements across waivers (for example, as to how far in advance a provider must notify an individual of a potentially involuntary move).</p> <p>The requirements in this section of the rule are applicable to host homes. The Department has</p>

		<p>Additionally, residency agreements have been in place and approved through the PTP process for months now with some PASAs, and in rule since 1/1/2020, each would need to be changed to address this rule making and items that are in the rule that approved agreements through the PTP do not contain. We believe the rule should be consistent with the requirements that have been in place to date.</p> <p>Also of concern, continues to be the requirement for putting room and board charges in the residency agreement. The HCBS Settings Final Rule has stated that the amount available for room and board should be in the person- centered plan to assist with the selection of a provider. To add to the concern is the way host home providers in the I/DD system are paid, by way of a daily rate for all care, inclusive of room and board.</p> <p>This section does not use person-centered language.</p> <p>4. It has been discussed in the past that a provider does not need a substantial reason for a move - i.e. a contract with a host home provider has ended. This language needs to address the choice of the provider to no longer be a provider in the I/DD world. It should also acknowledge that sometimes people don't get along, and a move might be initiated to find a better fit.</p> <p>Additionally, HCPF has been discussing since the first conversations regarding informed consent that if a</p>	<p>changed “staff” to “staff/contractors” to clarify this point.</p> <p>FAQ Part III, Item 73, specified criteria for leases/residency agreements in November 2018. These criteria are being used as part of the PTP review process and form the basis of the list in the draft rule, which is the same except for two new items—expectations regarding maintenance and staff entry to the unit—prompted by recent CMS guidance (shared with the workgroup) with which the Department agrees, and which should not be difficult to include going forward.</p> <p>The amount of rent or room and board is a standard element found in all leases. For this reason, the Department required this item in FAQ Part III, Item 73 and will continue to require it in the draft rule. Furthermore, the recent CMS guidance (shared with the workgroup) confirms that “[t]he residency agreement must include at a minimum the same level of protections found in the jurisdiction’s landlord tenant laws which may include . . . [t]he amount of and when payment is due.”</p> <p>4. The Department has noted at least since November 2018, with the issuance of FAQ Part III, that “[t]he provider must have a good reason for seeking the move/termination (e.g., protection of someone’s health/safety), and minor personal conflicts do not meet</p>
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		<p>person refuses to give consent for a rights modification, the provider could terminate services. This language is not consistent with those conversations.</p> <p>5. Current requirement is 15-day notice in regulations for I/DD for moves. This timeline has worked well and should not be changed to 30 days. Additionally, the use of the word ‘discharge’ is inconsistent with I/DD services, in which services may be terminated, most services are community based, rather than facility based.</p> <p>6. The process for appeal for a termination is already defined in regulation. The current process allows for services to continue during an appeal process. Language should be consistent with existing regulation.</p> <p>7. In previous conversations, it has been discussed that the Case Management Agency is responsible to support the individual in finding a new placement. A provider cannot be forced to provide services after a termination date and once appeal processes have been completed.</p> <p>B. 1. Not all settings have staff. Most homes in the I/DD system are host homes, which contract with host home providers.</p> <p>B.3. This language needs to be consistent with lease/residency agreement under A.2.a.</p>	<p>this threshold.” (Table in Item 79.) The last item in the FAQ provides guidance for situations in which individuals and host home providers are not getting along. The end of a host home provider’s contract with a provider agency would be a substantial reason for planning a move, unless the host home provider and the individual elect to continue their arrangement through a different provider agency. A provider’s determination that it cannot safely serve an individual without a rights modification could (if true) be a substantial reason to begin the process for terminating services.</p> <p>5. The Department is making the policy decision to conform the timing requirements across waivers and give all individuals—without regard to disability—the benefit of 30 days’ notice, as most tenants have under typical leases. In the draft rule, the Department will change “discharge” to “notice to leave” in order to clarify the rule’s applicability to all populations and setting types.</p> <p>6. Although certain processes are already set out in the rules for certain setting types and waivers, the Department is clarifying in this section, for all setting types and waivers, the consequences of those processes’ still being in progress for an individuals’ right to stay in their home.</p>
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		<p>C. This is overly prescriptive and is subjective (for staff convenience). What if it is to help the individual who has a cognitive need for labeling? Entryways “filled” with postings is not regulatory language.</p> <p>E. and G. This language has just been set forth in the newest IRSS regulatory language and should be aligned.</p> <p>F. Writing regulation for romantic relationships is unnecessary, undignified, and not person-centered. The HCBS Settings Final Rule addresses having visitors at the time of choosing and should not go further than that.</p> <p>G. This language is institutional and should be written in person-centered terms: ‘Individuals shall have access to common areas... This language has also been set forth in the newest IRSS regulatory language and should be aligned. In addition, homes do not have facilities.</p> <p>Next section - Provider-Owned or Controlled Non-Residential Settings What does a changing area reference? Why doesn’t the individual have a means to lock/unlock the storage area, rather than only appropriate staff?</p> <p>Additionally, this section is overly complex - rules are to be written in a manner in which the individuals, their families, and others are able to understand them. And, as noted, should be person-centered.</p>	<p>7. Although the provider’s obligation to provide services to the individual may have concluded, its obligation to provide housing continues, as a matter of CMS and departmental policy, until the vulnerable individual has somewhere else to live. During this period, the individual may receive services from other providers (<i>e.g.</i>, day program, respite) as well as from family, friends, and other natural supports. The Department is changing various references within Section A from “discharge”/“termination” to “eviction”/“requiring an individual to leave” in order to (a) clarify this distinction between housing and services and (b) allow for the possibility of a provider’s continuing to serve the individual at other settings (in which case it would not pursue a termination).</p> <p>B.1. The Department has changed “staff” to “staff/contractors” to address this point.</p> <p>B.3. The Department has added a reference to the lease/residency agreement.</p> <p>C. Labels needed by an individual are not for staff convenience and not precluded by this rule. While “filled” is understandable, plain language, the Department has changed it.</p> <p>E and G. The draft rule is for all setting types. To the extent it renders language in the IRSS or other regulations redundant, those regulations will be revised.</p>
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			<p>F. Examples of inappropriate provider interference with relationships have demonstrated the need for this language.</p> <p>G. The Department has adjusted the wording. The draft rule is for all setting types. To the extent it renders language in the IRSS or other regulations redundant, those regulations will be revised.</p> <p>Next section. Changing areas may be needed in certain employment and day program settings to allow for changes of clothes (if an outfit is soiled or not suitable for an upcoming task or activity) and for diaper changes. The Department has added a reference to individuals having keys.</p> <p>Additionally. The Department appreciates this concern while noting that much of the complexity stems from the underlying federal requirements being implemented. In part because different people have different needs in this regard, the Department is requiring under Rule AAA that providers supply individuals with plain-language (including pictorial, if warranted) explanations of their rights.</p>
<p>5/17/20</p>	<p>The Arc Adams County – Kari Easterly</p>	<p>A residential agreement or a lease is needed for people living in HCBS settings. At times, people should have a witness, preferably a case manager or an advocate, when entering into a residential agreement or a lease. At times they may need to consult an</p>	

		<p>attorney. A residential agreement or lease should not be more excessive than a typical lease would be and be person centered. For example, individuals in services who have challenging behaviors including property destruction should be provided services and supports in conjunction with those behaviors, as opposed to having a residential agreement that states they are financially responsible for any property destruction when they haven't been provided behavioral supports and effective programming. This should be documented in the service plan and have IDT agreement.</p> <p>The terminology of provider vs PASA should be clarified in terms of getting evicted. If a host home provider gives 30 days notice as per a residential agreement or lease, this does not mean they will be evicted with no place to go. A PASA should be working with the individual and the HHP to make other arrangements. A PASA should be working with their local CMA to find another agency if needed. An individual cannot be evicted with no place to go. A lease or residential agreements should contain information about rights and appeal processes along with 30 days notice.</p> <p>Residential agreements and Leases should really be tailored to the individual and their needs. For example, the language in the lease or RA should be understood easily, contain plain language, with personal centered language. For example, if someone is very concerned about their belongings and people entering their space without their knowledge, then there should be information in the lease or RA that talks about when a provider will enter their private living quarters and when a key would be used,</p>	
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		<p>including time frames. This may be better addressed through a right modification process, but leases often specify when landlords may enter the establishment.</p> <p>G. According to the draft rules, accessibility to common areas of the home cannot be modified. Please consider wording this a bit differently. For example, a person has the right to enter the kitchen itself, but may have rights modifications regarding food access. Ex, a person who has Prader Willi Syndrome.</p>	
<p>5/15/20</p>	<p>LeadingAge Colorado – Terry Zamell and Deborah Lively</p>	<p>Rule BBB A.5. “A violation of a lease or residency agreement that leads to a discharge must include at least 30 days’ notice to the individual (or, if authorized their guardian or other legal representative).” Comment: In an ACF, circumstances may arise in which the individual has a medical emergency, or the individual may pose an immediate risk to him/herself or other residents and immediate discharge is necessary. There are provisions in the Chapter 7, Assisted Living Residence regulations for this type of situation. We want to be sure this rule does not prohibit discharge in such a case.</p> <p>Rule BBB C. “The residential setting does not have staff uniforms...” Comment: Some assisted living communities have their direct care staff wear the same color blouse or polo shirt, which is preferred by the residents because it helps them identify the staff. Is this considered a uniform? Flexibility should be provided that allows for this when it is beneficial/preferred by the residents.</p>	

		<p>Rule BBB E. “Individuals have access to food at all times, choose when and what to eat, have access to food preparation and storage areas...” Comment: The ACF rules (8.495.6.G.10.) provide options for ensuring food and snacks are accessible at all times without allowing access to a large commercial kitchen. It is important that this rule remain in place.</p>	
5/18/20	Adeo – Sarita Reddy	<p>Rule BBB, Section A treats the provider owned/controlled setting in which SLP services are provided as if the setting is separate from the services provided. Does this not conflict with the guidance cited below? We had an individual move in and then decide she wanted to stay in the apartment, but wanted her services delivered by another agency.</p> <p>8.515.85.C SUPPORTIVE LIVING PROGRAM INCLUSIONS (1 A. – I.) – These include protective oversight and supervision, transportation, community participation, ADLs etc.</p> <p>8.515.85.F HCBS PROGRAM CRITERIA 2. b. HCBS Program Criteria under 8.515.85.F.1.b and e:</p> <p>i. When a client chooses to receive HCBS in a provider-owned or controlled setting where the provider is paid a single rate to provide a bundle of services, the client cannot choose an alternative provider to deliver services that are included in the bundled rate.</p>	

RULE CCC

Date Received	Individual/Organization Name	Comment	Department Response
3/13/20	Parker Personal Care Homes – Jodi Walters	<p>B. In this section it discusses that all situations formerly covered by the processes for rights suspensions and restrictive procedures will be replaced by this rule. To reiterate a point that has been made in the past, this is not consistent with the HCBS Settings Final Rule (as indicated at the header of the draft rule). This change should not be made for the convenience of providers who find the different processes confusing. CMS did not intend that people should be placed in situations which could endanger themselves, others, the community, etc. The Settings Final Rule requires that any additional conditions (privacy including cameras, locks, visitors, food) that are to be modified, are to be addressed through a process of gathering information and obtaining consent. Changing allowable processes for the suspension of rights will have unintended consequences to individuals in services, providers, and the community. Please see previous information sent on this issue, which citations. In addition, see the November 2019 CMS information slides 18-20, with slide 20 being the most relevant.</p>	<p>While appreciating that this commenter and some others disagree with its approach, the Department does not plan to change course on this issue. As the Department understands the HCBS Settings Final Rule and subsequent guidance from CMS, the basic rights (set forth in draft rule AAA) can be modified, if at all, only if the individual is afforded at least as much due process—including the opportunity to grant or decline their informed consent—as would be afforded for modifications of the additional rights (set forth in draft rule BBB). The Department included some examples of CMS statements supporting its approach in the slide deck shared with the workgroup on May 19, 2020. These examples were just a small selection of the available evidence, to which could be added many other items, such as the following:</p> <p>Q3. How can modifications to the home and community-based settings</p>

			<p>requirements be appropriately used in the person-centered service planning process?</p> <p>A3. The modifications section of the rule is a tool allowing providers to serve individuals with the most complex needs in integrated community settings to ensure that the setting supports the health and well-being of the individual beneficiary and those of people around them. For example, providers in many states serve individuals with severe pica behavior (compulsive eating of non-food items), for whom the physical environment may need to be tightly controlled to prevent the occurrence of individual behavior that can cause severe injury or death. In addition, some community providers support individuals with a history of sexual predation where line-of-sight supervision and limits on interaction with certain members of the community may need to be imposed. Other community providers serve individuals with dementia for whom measures must be taken to account for safety needs in a person-centered manner, including concerns related to wandering. With the HCBS rule's emphasis on full community integration and control of personal resources and activities, the restrictions needed to provide individuals with these kinds of behaviors or other complex needs, alternatives to institutional placement could otherwise violate the HCBS</p>
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			<p>requirements. However, CMS emphasizes that it is essential that the modifications process be used with strict adherence to its very specific requirements. The modifications process must:</p> <ul style="list-style-type: none"> • be highly individualized • document that positive interventions had been used prior to the modifications • document that less-intrusive methods did not successfully meet the individual’s assessed needs. • describe how the modification is directly proportionate to the specific assessed need • include regular data collection • have established time limits for periodic reviews • include informed consent, and • be assured to not cause harm. <p style="text-align: center;">* * *</p> <p>In these and other instances, CMS has clearly indicated that restrictions on access to the community, to nonfood items, and to personal resources (basic/Rule AAA rights—not additional/Rule BBB rights), may make sense to protect the individual and/or others, but still need to go through the rights modification process. Stated differently, protection of health and safety are not reasons for bypassing the rights modification process, but reasons for pursuing it.</p> <p>The CMS slide deck cited by the commenter is not to the contrary. It simply paraphrases</p>
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			<p>the part of the federal rule requiring that modifications of the additional rights go through the rights modification process. While the exclusion of the basic rights from that process arguably precludes any modification of such rights, the Department intends to allow these modifications using the same overall process, as explained to the workgroup.</p> <p>The Department also notes that even if CMS were not requiring this approach, there are good policy reasons for adopting it. These include the Department’s core commitment to person-centeredness and honoring the dignity of risk and individuals’ right to decide which risks or restrictions are/are not acceptable to them. Every rights modification that is imposed without informed consent would come at the cost of those values. At the same time, the commenter’s concern that individuals might endanger themselves or others under the Department’s approach seems overstated, given that a number of providers in Colorado already use this approach successfully; many states have adopted the approach—or ones even more restrictive than the Department’s—successfully (examples were shared with the workgroup); and that even when the only formal requirement in Colorado was notice prior to a rights suspension, individuals in practice had the ability to</p>
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			<p>refuse to continue receiving services from the provider in question, effectively meaning they could always consent or not.</p> <p>With the adoption of a single process requiring the documentation of informed consent and other criteria for all rights modifications, it becomes apparent that the historic state processes for rights suspensions and restrictive procedures are no longer needed, as individuals’ rights and due process are fully protected, and at the same time everyone’s interests in health and safety are taken into account, under the single process. In this context, maintaining the older concepts would merely create extra layers of processes and paperwork, with concomitant confusion. For these reasons, the older concepts are being folded into the newer one, and all will be covered by the same process.</p>
3/13/20	Parker Personal Care Homes – Jodi Walters	<p>C. The use of the word valid in this section is subjective and needs to be quantified and measurable. In addition this information is not consistent with instructions from HCPF for the provider agency to document the requirements needed for the Case Manager to then obtain the consent and to document in the person centered plan.</p> <p>6. This language is overly formal, not clear, not person-centered, and not in line with being written in terms for the individuals to which they apply.</p>	<p>C. The Department has changed “valid” to “implemented” and has added language clarifying who does what in the rights modification process.</p> <p>6. The Department has revised this language to be less technical.</p> <p>7. The Department has changed references to collecting informed consent to obtaining informed consent.</p>

		<p>7. Collects informed consent should be changed to obtains informed consent.</p> <p>D. There is continued concern that rules are being created that will require obtaining consent when a Safety Control Procedure (SCP) or Emergency Control Procedure (ECP) is utilized to protect the individual, others, property, or the community safe from imminent harm. Current regulations provide for significant safeguards in the use of these types of restraints. It is felt that asking an individual to consent to being kept safe is like asking a person if they want to go to the hospital after they have been run over by a car. Additionally, information from F. below should be incorporated.</p> <p>The language following D. 4. is unclear.</p> <p>E. Portions of this section appear to be duplicative of information on pages 3-4.</p> <p>F. Please see D. above. While this has been addressed in the past in FAQs, how does this address a person’s imminent safety? What of an individual who requires the use of an SCP on an ongoing basis for health and safety? Is it expected that a meeting be called for every use? Current regulations require that an IDT be convened when an SCP is used three or more times in a 30-day period to review supports used to prevent the need for the use of the SCP. Regulations also require that an Incident Report is written and reviewed by the Human Rights Committee each time the SCP is use. What will happen if the individual denies consent? HCPF has suggested that the provider terminate the individual if the individual is unable to be kept safe. This needs to be</p>	<p>D. This concern is already addressed in Section F of the rule, which provides that F “[i]f there is a serious risk to anyone’s health or safety, a rights modification may be implemented or continued for a short time without meeting all the requirements of this Rule CCC, so long as the provider immediately (a) implements staffing and other measures to deescalate the situation and (b) reaches out to the case manager to set up a meeting as soon as possible. At the meeting, the individual can grant or deny their consent to the rights modification.” This provision reiterates guidance that has been in place since January 2018. See FAQ Part II, Item 53 (“the provider may use restraints or other measures to prevent an imminent emergency (if allowed under the relevant waiver and regulations, and while following applicable procedures for implementing and reporting such measures),” and “the provider may continue to implement the previously agreed-to rights modification (or implement a new one as needed for unanticipated situations) in order to mitigate serious health and safety concerns that do not rise to the level of an imminent emergency, so long as the provider (a) implements immediate staffing/other measures to deescalate the situation and make it as safe for everyone as possible, and (b) immediately reaches out to the case manager to set up a meeting to</p>
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		<p>addressed more thoroughly to ensure the health, safety, and welfare of individuals in HCBS waiver services, as well as the safety of others, and the community.</p>	<p>resolve the issue as soon as is feasible”). The Department presented to the workgroup evidence that CMS views the use of restraints as a rights modification that must be documented, with informed consent and the other federal criteria, in the individual’s person-centered plan. Finally, even if CMS were not requiring the Department’s approach, there are good policy reasons for adopting it. These include the Department’s core commitment to person-centeredness and honoring the dignity of risk and individuals’ right to decide which risks or restrictions are/are not acceptable to them. Every planned restraint that is used without informed consent would come at the cost of those values. At the same time, the commenter’s concern that individuals might endanger themselves or others under the Department’s approach seems overstated, given that a number of providers in Colorado already use this approach successfully (and specifically, a number of providers already obtain informed consent before the use of any Safety Control Procedure) and that many states have adopted the same approach— or ones even more restrictive of the use of planned restraints than the Department’s—successfully (examples were shared with the workgroup).</p>
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			<p>The Department has revised the language following D.4.</p> <p>E. The draft rule contains some internal cross-references to demonstrate how its parts work together. The Department would appreciate more details about the specific language that appears to be duplicative.</p> <p>F. In response to these questions:</p> <ul style="list-style-type: none"> • See the Department’s response above, in connection with Section D, regarding imminent risks to health and safety and the planned, ongoing use of Safety Control Procedures. The Department is reviewing existing rules for Safety and Emergency Control Procedures to determine which requirements (including as to meetings, reporting, and the like) should be maintained in the new rule. While a meeting would not necessarily be required every time a Safety Control Procedure is used, a meeting would be required if requested by the individual. • The draft rule and the Department’s suggestions are aimed not at termination of services, but rather at requiring providers, case managers, guardians, and others to be more
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			<p>creative about how to maintain services without automatically resorting to rights modifications, as some have done in the past. With that said, the Department understands that in some cases, a provider may come to the conclusion that without a certain rights modification, it cannot safely serve the individual, and in that case, if the individual does not consent, the provider may initiate the process for terminating services. As noted above, providers, case managers, and others in Colorado already have experience with this kind of situation. This is because individuals have always had the ability to refuse to continue receiving services from the provider in question, effectively meaning they could always consent or not to a given approach (whether or not their formal consent was required on paper).</p>
<p>5/17/20</p>	<p>The Arc Adams County – Kari Easterly</p>	<p>as discussed the involvement of an advocate to ensure individuals rights are protected. This should be offered.</p> <p>entation of the Final Settings Rule is a very good thing! With all of the advocacy issues that I have come into contact with in the last couple of decades, this is long overdue to require informed consent for modifications and protections. For far too long, some people have had unjust restrictions/suspensions. Teams should be</p>	

		<p>using supported decision making, teaching skills, and supporting people, not just modifying their rights. HOWEVER, I am concerned about the very small number of people or so who may need a modification because of significant health and safety issues and/or their refusal to sign an informed consent while they cannot understand the ramifications. People have the right to refuse and people have the right to risk. But there are a very few select individuals who may need a level of support that looks more like a rights suspension. Right now there is no allowance for this. There are rights modifications that can happen in an emergency as outlined in F, for some who may give consent but then retract resulting in a health and safety emergency. The teams should absolutely be working with individuals to explain, use supported decision making, teach, and review. This may not be enough. I have already heard mumblings from agencies that they may consider a search for a guardian given the lack of consent and significant safety issues. I find this to be a very extreme step for those who may need a little bit of help – not a full legal guardian.</p> <p>For example, I have worked with people who have diagnoses that can lead to life threatening consequences. One gentleman I worked with has a polydipsia and pica diagnoses. He has been hospitalized on more than one occasion from drinking fluids excessively and ingesting things he shouldn't. He has had to have rusty nails removed from his stomach due to his PICA. He requires line of sight supervision, a fluid restriction, and a search protocol. He has locked faucets and refrigerators. He will give consent but at any given time during the day, he will say that he needs the water and will not stop drinking; the urge is too strong. If informed consent can be removed at any time, this creates a problem. Even if the IDT meets and discusses this, this will be an ongoing problem that is life threatening for him. He may not need a guardian, removing all of his rights for decision</p>	
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		making. Thank you for the opportunity to submit comments. This is not an easy task and I sincerely appreciate the efforts from everyone.	
5/15/20	LeadingAge Colorado – Terry Zamell and Deborah Lively	<p>Rule CCC – Rights Modifications – Restricted Egress</p> <p>Comment: Rule CCC A. states, “Rights modifications may not be imposed across the board” and rule CCC E. states, “If restrictive or controlled egress measures are used they must: 1. be implemented on an individualized basis and 2. make accommodations for individuals in the same setting who are not at risk of safe wandering...”</p> <p>Please confirm our understanding that secured environment ACFs with locked egress doors can operate within the confines of these rules if each resident has an individualized rights modification in place for restricted egress and any resident that does not require restricted egress has access to the key code or other means of leaving the premises. Is HCPF going to make any changes to 8.495.6.J. Standards for Secured Environment ACFs?</p>	
3/16/20	Cheyenne Village – Regina DiPadova	<p>Under Rule CCC, C7 Informed consent,</p> <p>My only question, Does the informed consent need to be a separate form? Currently I have it as being a part of the modification letter. At the bottom the guardian or client would sign. This assures we are going over the document with them.</p> <p>thanks</p>	