



HCBS Settings Final Rule Proposed Corrective Action Plan (CAP)

Pursuant to [CMS's May 24, 2022 announcement](#), the Department requests a one-year corrective action plan (CAP). The purpose of the proposed CAP is to minimize unnecessary disruption to waiver members whose settings would be fully compliant with the HCBS Settings Final Rule but for the direct support professional (DSP) workforce crisis exacerbated by the public health emergency (PHE). The Department acknowledges the fundamental rights and values protected by the HCBS Settings Final Rule and notes that delay is detrimental to these rights. Balancing these interests, the proposed CAP is extremely limited in scope and will affect the timeline for very few active settings.

HCBS Settings Final Rule criteria for which additional time is needed

CMS's announcement indicates that "CMS will authorize CAPs to continue federal reimbursement of HCBS beyond the end of the transition period, if states need additional time to ensure full provider compliance with the regulatory criteria NOT included on slide 7. These include for example: – Access to the broader community; [and] – Opportunities for employment"

The Department identified the following compliance issues within the [Adult Residential Provider Transition Plan \(PTP\) template](#) as aligning with the examples given by CMS:

- RA-6: The setting does not offer individualized supports that enable individuals to choose activities of their own interests (with a group or individually);
- CI-1: Individuals interact only with people with disabilities and paid staff, not counting incidental contact;
- CI-3: Setting does not ensure that residents have the opportunity to be engaged in community activities outside the setting with individuals without disabilities; and
- CI-4: Individuals' community activities offer only incidental contact with non-disabled, non-staff members of the community due to the type of activities or the number of individuals participating.

The Department identified similar compliance issues within the [Children's Residential PTP template](#). However, with verification of compliance now complete at 100% of Children's Residential settings, additional time is not needed for such settings.

The Department identified the following compliance issues within the [Nonresidential PTP template](#) as aligning with the examples given by CMS:



- RA-6: The setting does not offer individualized supports that enable individuals to choose activities of their own interests (with a group or individually);
- IC-6: Setting does not seek input from individuals regarding age-appropriate activities, including in the community;
- IC-7: Setting does not offer choices of age-appropriate activities, including in the community;
- CI-1: Group Supported Employment services are provided in a facility-based or sheltered work setting (such as a site owned or operated by an agency whose primary focus is service provision to persons with disabilities), as distinct from a typical business or industry setting in the community;
- CI-2: Group Supported Employment services do not include and provide the opportunity for integration into the workplace and regular interaction between participants and people without disabilities in those workplaces (other than staff);
- CI-3: Group Supported Employment services do not support career development leading to individual integrated community-based employment at or above the minimum wage;
- CI-4: Group Supported Employment settings do not provide individuals with the opportunity to participate in negotiating their work schedule, break/lunch times, and leave and medical benefits with their employer to the same extent as individuals not receiving Medicaid-funded HCBS;
- CI-6: Prevocational services do not help the individual develop general, non-job-task-specific strengths and skills leading to integrated community-based employment at or above the minimum wage;
- CI-7: Prevocational services are provided for more than five years to a single individual;
- CI-8: Prevocational services do not promote regular interaction between participants and people without disabilities (other than staff), beyond incidental contact;
- CI-9: A designated individual or group of individuals rarely or never has the opportunity to interact with people in the community who are not disabled and not paid staff, even if others have such opportunities;
- CI-10: Individuals' community activities offer only incidental contact with non-disabled, non-staff members of the community due to the type of activities or the number of individuals participating; and
- CI-12: Setting does not ensure that individuals have the opportunity to be engaged in community activities outside the setting with individuals without disabilities.

The PTP templates contain several catchall compliance issues, e.g., "Setting is otherwise noncompliant with the federal requirements above relating to community integration." Because of the variation in whether and how these compliance issues arose, they did not lend themselves to statewide categorization as either qualifying or disqualifying for additional time. Rather, state staff considered such open compliance issues on an individualized, setting-specific basis to determine whether they fit within the CMS guidance.

All other compliance issues in the PTP templates, if still open (not marked as Resolved), are disqualifying for additional time. Most of these compliance issues relate to CMS's "non-negotiable" criteria and/or require fixes to provider policies/procedures, which should have been implemented already.

For a setting to potentially qualify for additional time, it must (i) have at least one qualifying open compliance issue as discussed above; (ii) have no disqualifying open compliance issues; and (iii) not be a host home, unless it can overcome the presumption that such settings did not have the types of staffing issues faced by congregate settings. In addition, as detailed below, the provider must request extra time for such a setting.

The Department's efforts to date to ensure compliance with these criteria to the fullest extent possible

As set out in the Department's [Final Statewide Transition Plan \(STP\)](#) and quarterly updates to CMS, the Department has worked steadfastly over the years to ensure that all covered settings are fully compliant with the HCBS Settings Final Rule, including with the broad criteria and specific compliance issues listed above. As of today, the state has verified complete compliance at 94.1% of settings statewide, including 96.2% of Adult Residential settings, 100% of Children's Residential settings, and 80.8% of Nonresidential settings.

To ensure compliance to the fullest extent possible at the remaining settings, the Department has:

- Issued guidance to clarify its expectations, including most recently a [MythBusters FAQ](#);
- Supported providers/DSPs with a [community integration tip sheet/brainstorming tool](#);
- Conducted extensive outreach to providers with noncompliant settings, including automated reminder emails sent by the PTP platform, manually generated emails, phone calls, and hard copy letters, most recently including "pre-provisional notices," provisional notices of noncompliance determinations, and Requests for Written Responses;
- Continued to offer 1:1 technical assistance to providers, including through the Colorado Department of Public Health & Environment (CDPHE); and
- Designated as disqualifying for extra time all PTP compliance issues that, even if relating to broad criteria like community integration, (a) were framed in terms of deficiencies in a provider's policies and procedures and/or (b) were generally remedied

by way of changes to a provider's policies and procedures, according to CDPHE's experience in verifying thousands of PTPs. A provider that is supporting community integration to the fullest extent possible should have fixed these problems "on paper" by now, even if it needs more staff to fully implement its plans; therefore, such compliance issues are disqualifying for additional time.

Delay in implementing these criteria because of the PHE and workforce crisis

To ensure that extra time is provided only where the setting would be compliant with all HCBS Settings Final Rule criteria but for the DSP workforce crisis exacerbated by the PHE, the Department:

- Employed a rebuttable presumption that host homes would not qualify for additional time. Whereas congregate settings faced short- and long-term closures because of staff and participant needs to quarantine/isolate, and are still encountering staff shortages in some cases, host homes have an inbuilt staffing capacity (the provider(s) living in the home) that should always be available to support members. While host home residents may have been unable to go out into the community at times because of the pandemic, most have been able to work out routines by now to access the community as desired.
- Required settings to have at least one qualifying open compliance issue, and no disqualifying open compliance issues, to potentially qualify for additional time. Broadly speaking, if a setting has not resolved disqualifying compliance issues by now, its delays are probably due to some factor other than the PHE/workforce crisis (e.g., inability or unwillingness to conform its policies and procedures to federal and state expectations).
- Required providers to affirmatively request extensions, rather than automatically providing extensions to all settings that potentially qualified for additional time based on their open compliance issues. Pre-provisional notices to providers stated:

To request additional time for a setting marked with an asterisk [based on open compliance issues]:

- Send an email to your CDPHE staff lead requesting additional time . . . , and including the following information:
 - An explanation of how the pandemic and/or workforce crisis has affected your implementation of the HCBS Settings Final Rule at this site; and
 - Your plan to finish coming into compliance within the next several months. Your plan must include the date by which you will submit your final updates demonstrating complete compliance, and this date may be no later than **December 30, 2022**.

If you do not submit a timely and complete request, you will not receive additional time.

- Worked with CDPHE staff leads to review and approve provider extension requests, based on satisfactory explanations by the provider of the reason for the delay in fully implementing the HCBS Settings Final Rule. As an example, one provider detailed many months of high community transmission levels in the county, which limited members' ability to go out safely, as well as "a full blown staffing crisis" during which many staff "either chose to leave or were terminated for noncompliance [with] the vaccination mandate," and which is continuing "as staff members continue to leave due to other COVID related factors (staffing issues and mandatory [overtime])."

If a provider demonstrates that it has winnowed down its open compliance issues to only those that qualify for more time, as verified by CDPHE, it may request additional time even if its setting(s) did not initially receive an asterisk.

As of today, a total of 72 settings (50 Adult Residential and 22 Nonresidential) are receiving extra time based on extension requests and/or, in the case of three settings, pending requests for informal reconsideration relating to community integration requirements. These settings represent 2.9% of total active settings and 48.7% of noncompliant settings.

Noncompliant residential settings that are not receiving extra time were just subject to final notices of noncompliance on November 17, 2022, and noncompliant nonresidential settings that are not receiving extra time will be subject to final notices on December 16, 2022. Pursuant to these notices and departmental guidance ([Operational Memo 22-052](#); [Individual Transition Plan \(ITP\) tool](#)), individuals will be supported to transition to other settings/funding sources by March 17, 2023.

Plan to completely implement these criteria within one year


The Department has been taking a multi-pronged approach to supporting providers in addressing their challenges related to the pandemic and DSP workforce crisis while coming into full compliance with the HCBS Settings Final Rule. This includes tackling the DSP workforce shortage by implementing a number of rate increase and wage pass-through measures for certain provider/service/worker types, culminating in obtaining a historic, guaranteed base wage for DSPs of at least \$15/hour (during the last state legislative session). The Department is continuing these efforts in the current session, requesting new measures along these lines to ensure ground is not lost. The Department is also facilitating the [Direct Care Workforce Collaborative](#) and a number of [ongoing projects to bolster the workforce using funds from the American Rescue Plan Act \(ARPA\)](#).

The Department hopes that in light of these measures, as well as the guidance, resources, and technical assistance mentioned above, providers will be able to finish implementing all HCBS Settings Final Rule criteria by the end of this calendar year. To that end, the Department instructed providers requesting an extension to specify, as part of their extension request, their plan for finishing their demonstrations of compliance by December 30, 2022. If providers finish submitting their evidence by that date, then the Department would be in a position to verify the evidence and confirm compliance in early 2023. However, the Department is aware that many of its past scheduling goals were over-optimistic, and it proposes to allow for some

slippage, such that its final milestones for site-specific compliance would be the following (shown as redlines to the existing deadlines in the Final STP):

✓	Action Item	Start Date	End Date
13.	Complete site-specific remediation pursuant to PTPs. This step includes submitting PTP updates with evidence showing that compliance issues have been resolved.	4/8/2016	<p>Updated PTPs demonstrating remediation were/will be completed for all affected settings by:</p> <ul style="list-style-type: none"> • Adult Residential <ul style="list-style-type: none"> ○ 25% - completed 9/30/19 ○ 50% - completed 12/31/19 ○ 75% - 7/1/22 <u>completed 7/26/22</u> ○ 100% - 8/1/22 <u>completed 9/21/22 with sending of provisional notices</u> ○ <u>Settings receiving extra time under CAP - 12/30/22</u> • Children’s Residential <ul style="list-style-type: none"> ○ 25% - completed 4/29/21 ○ 50% - completed 7/2/21 ○ 75% - 7/1/22 <u>completed 7/26/22</u> ○ 100% - 8/1/22 <u>completed 9/21/22 with sending of provisional notices</u> • Nonresidential <ul style="list-style-type: none"> ○ 25% - completed 4/29/21 ○ 50% - completed 7/2/21 ○ 75% - 7/1/22 <u>completed 7/26/22</u> ○ 100% - 8/1/22 <u>completed 10/21/22 with sending of provisional notices</u> ○ <u>Settings receiving extra time under CAP - 12/30/22</u>
14.	Validate site-specific remediation via desk reviews and/or site visits. This step includes desk reviews of updated PTPs and supporting materials and/or site visits to confirm that all compliance issues have been resolved.	4/8/2016	<p>Verification of updated PTPs demonstrating remediation will be completed by CDPHE by 9/14/2022 (Adult Residential and Children’s Residential - <u>completed 9/21/2022 with sending of provisional notices</u>) and 10/14/2022 (Nonresidential - <u>completed 10/21/22 with sending of provisional notices</u>)</p> <p><u>Settings receiving extra time under CAP - 9/14/23 (Adult Residential) and 10/13/23 (Nonresidential)</u></p>
15.	Provisionally notify providers that have settings (a) determined to be noncompliant or (b) put forward for heightened scrutiny and not yet approved as required, as well as individuals receiving services at these settings (as well as guardians and any other legally responsible parties) via case managers.	9/1/2022	<p>Completed on a rolling basis through 9/21/2022 (Adult Residential and Children’s Residential - <u>emails sent 9/21/22; hard copies sent 9/29/22 via certified mail</u>) and 10/21/2022 (Nonresidential - <u>emails sent 10/21/22; hard copies sent 10/25/22 via certified mail</u>)</p> <p><u>Settings receiving extra time under CAP - 9/21/23 (Adult Residential) and 10/20/23 (Nonresidential)</u></p>
16.	<p>Providers that disagree with the Department’s determination that their setting is (a) noncompliant or (b) still awaiting required heightened scrutiny approval may submit an informal request for reconsideration with the Department.</p> <p>Individuals receiving services at such settings, as well as other interested parties, may submit evidence relevant to a</p>	9/14/2022	<p>10/5/2022 (Adult Residential and Children’s Residential) and 11/4/2022 (Nonresidential)</p> <p><u>Settings receiving extra time under CAP - 10/5/23 (Adult Residential) and 11/3/23 (Nonresidential)</u></p>

☑	Action Item	Start Date	End Date
	provider's informal request for reconsideration.		
17.	The Department will complete its reconsideration of any settings as to which providers have submitted timely and complete requests for reconsideration.	9/28/2022	11/17/2022 (Adult Residential and Children's Residential) and 12/16/2022 (Nonresidential) Settings receiving extra time under CAP - 11/15/23 (Adult Residential) and 12/15/23 (Nonresidential)
The Department expects the individual transition process to include the following steps:			
18.	Reach out to individuals and their case managers (as well as guardians and any other identified responsible parties) to confirm they need to begin the process of transitioning from the affected setting to another setting or funding source.	10/1/2022	Percentage of outreach completed: <ul style="list-style-type: none"> • Adult Residential and Children's Residential <ul style="list-style-type: none"> ○ 25% - 10/27/22 ○ 50% - 11/3/22 ○ 75% - 11/10/22 ○ 100% - 11/17/22 ○ Settings receiving extra time under CAP - 11/15/23 • Nonresidential <ul style="list-style-type: none"> ○ 25% - 11/25/22 ○ 50% - 2/2/23 ○ 75% - 12/9/22 ○ 100% - 12/16/22 ○ Settings receiving extra time under CAP - 12/15/23
19.	Case managers will prepare an Individual Transition Plan (ITP) with each individual that resides in or receives services at a setting that has been finally determined noncompliant/not able to timely comply/not approved if CMS's approval under heightened scrutiny is required.	11/1/2022	Percentage of ITPs prepared: <ul style="list-style-type: none"> • Adult Residential and Children's Residential <ul style="list-style-type: none"> ○ 25% - 11/28/22 ○ 50% - 12/5/22 ○ 75% - 12/12/22 ○ 100% - 12/19/22 ○ Settings receiving extra time under CAP - 12/15/23 • Nonresidential <ul style="list-style-type: none"> ○ 25% - 12/27/22 ○ 50% - 1/3/23 ○ 75% - 1/10/23 ○ 100% - 1/17/23 ○ Settings receiving extra time under CAP - 1/15/24
20.	ITPs will be implemented, such that individuals no longer receive Medicaid-funded services at settings that are (a) noncompliant or (b) still awaiting required heightened scrutiny approval.	12/1/2022	Percentage of ITPs that have been implemented: <ul style="list-style-type: none"> • Adult Residential and Children's Residential <ul style="list-style-type: none"> ○ 25% - 2/1/23 ○ 50% - 2/17/23 ○ 75% - 3/1/23 ○ 100% - 3/17/23 ○ Settings receiving extra time under CAP - 3/15/24 • Nonresidential <ul style="list-style-type: none"> ○ 25% - 2/1/23 ○ 50% - 2/17/23 ○ 75% - 3/1/23 ○ 100% - 3/17/23 ○ Settings receiving extra time under CAP - 3/15/24

	Action Item	Start Date	End Date
21.	Transition assistance and weekly check-ins by case manager continue for 30 days after individual’s transition to ensure a stable relocation.	12/1/2022	4/17/2023 <u>Settings receiving extra time under CAP - 4/17/2024</u>

Transparency

As noted in its [quarterly update to CMS for the quarter ending September 30, 2022](#), the Department previewed its planned CAP approach with stakeholders as follows:

- During stakeholder webinars for providers, case management agencies (CMAs), advocates, and other stakeholders held on August 18, 2022;
- In an August 29, 2022 [Informational Memo](#); and
- During stakeholder webinars for providers, CMAs, advocates, and other stakeholders held on September 15, 2022.

The Department plans to post this submission on its website under the header “Correspondence with CMS,” where it also posts its quarterly updates to CMS.

Settings subject to heightened scrutiny

The Department submitted 51 heightened scrutiny determinations to CMS on August 20, 2021. On July 5, 2022, CMS requested the evidentiary packages for a sample of 17 of these settings. On August 11, 2022, the Department invited CMS and various federal partners identified by CMS to a SharePoint site containing these evidentiary packages as they existed in August 2021. On October 14, 2022, the Department notified CMS that it had uploaded to the SharePoint site updated summary sheets, as well as updated evidentiary packages, for five settings in the sample that had finished demonstrating compliance, with CDPHE verification, by August 2022. Additional settings within the original group of 51, both included and not included in CMS’s sample, have finished demonstrating compliance after August 2022.

The Department has identified a few additional settings that were not included in the original group of 51, are subject to the institutional presumption, and are able to demonstrate full compliance with the HCBS Settings Final Rule. It plans to put these determinations out for public comment and submit them to CMS as soon as possible.

Insofar as the Department has determined that a given setting complies with all HCBS Settings Final Rule criteria (subject to the proposed CAP if applicable), we propose to continue reimbursing the provider for HCBS at that setting after the end of the transition period in March 2023, unless notified otherwise by CMS.

Additional information

As required by [CMS's May 24, 2022 announcement](#), the Department will submit the following information regarding the "non-negotiable" HCBS Settings Final Rule criteria (those not subject to a CAP) by January 1, 2023:

- A description of how Colorado's oversight systems have been modified to embed these criteria into ongoing operations;
- A description of how Colorado assesses providers for initial compliance and conducts ongoing monitoring for continued compliance with these criteria; and
- A description of members' recourse to notify the state of provider noncompliance and how the state will address member feedback.

The Department will also complete the attestations on CMS's milestones website. For now, it may be helpful to note in connection with the numbered attestations (to the effect that HCBS members in all settings have the full enjoyment of the "non-negotiable" criteria) that these and other criteria are set forth in [Colorado's codification of the federal rule](#), which went into effect on January 10, 2022; final determinations of compliance/noncompliance are being made now; and transitions from noncompliant settings will be completed by March 17, 2023. The Department will add relevant dates, as well as narrative information responsive to the unnumbered attestation, by January 1, 2023.