



HCBS Settings Final Rule Quarterly Update for Quarter Ending 9/30/22

Since its last quarterly update, the Department has taken the following steps to promote systemic compliance with the HCBS Settings Final Rule:

- On July 15, 2022, published a [Policy Memo](#) and attached [FAQ Part V](#). In this FAQ issuance, the Department took a “MythBusters” approach to addressing questions received by the Department. The Department outlined a number of continued misunderstandings of or myths about the federal rule or the state codification of the rule, and then “busted” each myth.
- On August 8 and August 11, 2022, held public stakeholder meetings to take informal public comment on [proposed critical rule updates](#), as announced in an [Informational Memo](#) published in June. As previously described, these updates will eliminate or revise regulatory provisions that are in tension with the HCBS Settings Final Rule. The Department addressed questions and comments during the meetings and will be summarizing its responses in writing as it proceeds to the formal rulemaking stage.
- On August 24, 2022, released resources for members regarding their rights under the rule and the rights modification process. As announced in an [Informational Memo](#), on social media, and in member and provider newsletters, the materials include short, animated videos, as well as resource sheets with links to helpful websites. The memo instructs case managers to show the videos to members and families as part of discussions regarding whether to consent to a proposed rights modification.

| English videos and resource sheet | Spanish videos and resource sheet |
|----------------------------------------------------|--------------------------------------------------------------|
| Part I: My Rights | Part I: My Rights (Spanish) |
| Part II: Rights Modifications | Part II: Rights Modifications (Spanish) |
| Resource Sheet to Accompany Videos | Resource Sheet to Accompany Videos (Spanish) |

- On September 2, 2022, published a [Community Integration Tip Sheet](#). This document contains tips to help provider agencies and direct support professionals brainstorm with individuals. Many of the examples given come from Colorado’s own providers.
- On September 16, 2022, submitted critical waiver amendments to CMS (summarized in this [Fact Sheet](#) as “Removal of Non-integrated Settings Language”). Like the critical rule



updates mentioned above, these amendments will eliminate or revise waiver provisions that are in tension with the HCBS Settings Final Rule.

Since its last quarterly update, the Department has taken the following steps to complete site-specific assessment, remediation, and verification:

- On August 18, 2022, during stakeholder webinars for providers, case management agencies (CMAs), advocates, and other stakeholders, provided reminders of the deadlines in the final Statewide Transition Plan (STP) and the associated upcoming steps the Department would be taking.
- On August 23-24, 2022, emailed “pre-provisional notices” (final warnings) to providers regarding 590 **residential** settings that had not yet been verified as compliant. These warnings attached templates of the provisional notices that would soon be sent to providers and individuals (via their CMAs) unless the providers either promptly submitted all remaining evidence of compliance or requested and received additional time under the corrective action plan (CAP) that the Department plans to request from CMS. The planned CAP is discussed in more detail at the end of this quarterly update.
- On August 29, 2022, published an [Informational Memo](#) reminding providers, CMAs, and other stakeholders of the deadlines in the final STP and explaining the planned CAP.
- On September 15, 2022, reiterated the reminders and schedule from this Informational Memo during stakeholder webinars for providers, CMAs, and other stakeholders.
- On September 16, 2022, emailed “pre-provisional notices” (final warnings) to providers regarding 112 **nonresidential** settings that had not yet been verified as compliant.
- On September 21, 2022, emailed provisional notices to providers and CMAs regarding 231 **residential** settings that had not yet been verified as compliant and had not received additional time under the planned CAP. These notices noted the determination of noncompliance and explained how both providers and individuals could request informal reconsideration. The notices require providers to notify the members they serve, with a copy to the relevant case manager, and they require CMAs to also notify members through case managers. The Department sent hard copies of these notices via certified mail on September 29, 2022.
 - Informal reconsideration is currently underway for residential settings. So far, most reconsideration requests have been readily resolvable by CDPHE based on the submission of overdue evidence of compliance as required within the PTP platform, as distinct from policy/interpretive questions requiring more discussion.
- On September 23, 2022, issued an [Informational Memo](#) drawing CMAs’ attention to the provisional notices just sent.

- As of September 30, 2022, site-specific status could be summarized as follows:
 - Consolidating the three Provider Transition Plan (PTP) categories, about 87.5% of all covered settings in Colorado have been verified as compliant.
 - Details are in the following table.

| | Adult Residential PTPs | Children’s Residential PTPs | Nonresidential PTPs |
|-----------------------------------------------------|-------------------------------|------------------------------------|----------------------------|
| Number of providers | 359 | 10 | 207 |
| Number of settings = number of PTPs to be completed | 2151 | 14 | 357 |
| Compliance status of settings | | | |

Compliance status options

- (1) Setting is NOT subject to heightened scrutiny and IS compliant with rule; no further action needed
- (2) Setting is NOT subject to heightened scrutiny and NOT YET compliant with rule; file updated PTP in three months with evidence showing progress
- Other
 - (3) Setting is NOT subject to heightened scrutiny and NOT timely able to comply with rule; prepare now to transition clients
 - (4) Setting IS subject to heightened scrutiny and IS able to overcome institutional presumption; evidence should be put forward to the public and/or CMS
 - (5) Setting IS subject to heightened scrutiny and NOT YET able to overcome institutional presumption; file updated PTP in three months with evidence showing progress
 - (6) Setting IS subject to heightened scrutiny and NOT timely able to overcome institutional presumption; prepare now to transition clients
 - (7) Not yet known (default) or blank
 - (8) Setting has closed because of rule
 - (9) Setting has closed for another reason

All data in table is as of October 4, 2022. Providers and settings may appear in more than one column. The table excludes data relating to PTPs in Retired status.

Heightened scrutiny updates

- The Department has prepared updated summary sheets and evidentiary materials for the five settings that were included in CMS’s sample of 17 settings (per CMS’s July 5,

2022 email) and that finished demonstrating full compliance, as verified by CDPHE, by approximately August 2022. The Department will soon be uploading these materials to the SharePoint site shared with CMS and other federal partners in August 2022. Unless requested by CMS, the Department does not plan to prepare updated summary sheets and evidentiary materials for additional heightened scrutiny settings that (a) finished demonstrating compliance but were not in CMS's sample of 17, and/or (b) finished demonstrating compliance after August 2022.

Other

- The Department was honored to join CMS in giving presentations at the August 2022 HCBS Conference regarding implementation of the HCBS Settings Final Rule.
- In recognition of the pandemic and workforce-related difficulties that providers have faced, the Department plans to request a one-year CAP pursuant to [CMS's May 24, 2022 announcement](#). The purpose of doing so is to minimize unnecessary disruption to waiver members whose settings would be compliant but for the pandemic/workforce crisis. At the same time, 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 requested CAP will be extremely limited in scope and will affect the timeline for very few active settings.
- In the interest of transparency, the Department previewed its planned CAP approach with stakeholders as follows:
 - On the August 18, 2022 webinars mentioned above for providers, CMAs, advocates, and other stakeholders.
 - In the August 29, 2022 [Informational Memo](#) mentioned above.
 - On the September 15, 2022 webinars mentioned above for providers, CMAs, advocates, and other stakeholders.
- Summarizing these materials and the latest site-specific numbers:
 - The Department and CDPHE worked together to identify a small set of compliance issues in each PTP category that could qualify for additional time under CMS's guidance. The departments determined that the majority of compliance issues were disqualifying for additional time (for example, because they related to CMS's "non-negotiable" criteria or because they turned on fixes to provider policies/procedures, which should have been implemented already). A few catchall compliance issues are not automatically qualifying or disqualifying, but are assessed by the CDPHE staff lead on a provider/setting-specific basis.
 - The Department determined that host homes rarely faced the types of staffing issues faced by congregate settings, so they should be presumed ineligible for additional time, subject to rebuttal on a case-by-case basis.

- For a setting to potentially qualify for additional time, it must have at least one open compliance issue that qualifies for more time, and it may have no open compliance issues that are disqualifying. The Department used this approach to designate with an asterisk each non-host-home setting that could potentially qualify for additional time. In the “pre-provisional notices” (final warnings) sent to providers, the Department included asterisks, where applicable, to indicate that providers could request more time for these settings. A total of 63 residential settings and 44 nonresidential settings received an asterisk in these messages.
 - Providers do not receive extra time for an eligible setting unless/until they request it from their CDPHE staff lead. The request must include an explanation of how the direct-service workforce crisis exacerbated by the COVID-19 PHE led to a delay in their implementation of the relevant settings criteria.
 - 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.
 - Currently, about 48 residential settings and 16 nonresidential settings have requested and received extra time under the planned CAP, accounting for a total of about 2.5% of all active settings in the PTP platform, or 20% of all active settings not yet verified as compliant. There are more settings, not included in this tally, that could qualify for additional time but have not requested it.
- The Department will be submitting more information to CMS as required in the May 24, 2022 announcement.