



COLORADO

Department of Health Care
Policy & Financing

Home- and Community-Based Services (HCBS) Statewide Transition Plan (STP)

Released for public comment in March 2022

Department responses to public comments received in May 2022

June 8, 2022



Acknowledgement

The Colorado Department of Health Care Policy & Financing (HCPF or “the Department”) thanks everyone who took the time to provide feedback regarding the final Home- and Community-Based Services (HCBS) Statewide Transition Plan (STP). Stakeholder input throughout the STP implementation process, and now on the final STP itself, has been critical to ensuring that Colorado is on the right track to helping people with disabilities and older adults remain in their homes and communities.

Background

In January 2014, the federal Centers for Medicare & Medicaid Services (CMS) published a [rule](#) requiring HCBS to be provided in settings that meet certain criteria. The criteria ensure that HCBS participants have access to the benefits of community living and live and receive services in integrated, noninstitutional settings. They also ensure that residential settings are truly homelike.

The HCBS Settings Final Rule went into effect in March 2014, and states originally had five years—until March 2019—to ensure that their HCBS settings were compliant with the rule. In May 2017, CMS issued an [Informational Bulletin](#) extending the transition period for compliance with the rule by three years, to March 2022. In July 2020, because of the COVID-19 pandemic, CMS issued a [State Medicaid Director Letter](#) extending the transition period by an additional year, to March 2023. Colorado has continued to work toward statewide compliance by that deadline.

As part of this work, the Department developed a Statewide Transition Plan (STP) for bringing HCBS throughout Colorado into compliance with the HCBS Settings Final Rule. The [STP was last published and submitted to CMS](#) on December 16, 2016. CMS granted [initial approval](#) of that version of the STP on November 21, 2017. In the years that followed, the Department completed a number of major tasks and identified a timeline for completing all remaining tasks, as described in the updated, [final STP](#) released for public comment in March 2022.

Approach to public comment

The materials released for public comment included:

- [Fact sheet](#)—explaining the materials available for public comment;
- [Informational Memo](#)—alerting stakeholders to the public comment opportunity;
- [Final STP](#)—describing the process by which the Department has been working with stakeholders to achieve statewide compliance with the HCBS Settings Final Rule;

- [STP redline](#)—showing changes made to the STP since it received CMS’s initial approval; and
- [Stakeholder communication strategy](#)—summarizing the Department’s approach to engaging with stakeholders as it implements the HCBS Settings Final Rule.

The final STP and related materials were officially open for public comment for 45 days, running from March 25 through May 9, 2022. The Department chose a 45-day period rather than the federally required 30-day period in order to allow stakeholders enough time to review and compile feedback on all the materials, which were voluminous. In addition, the Department advised two stakeholders that inquired about the timeline that it would treat May 9 as a “soft close,” such that comments submitted within the following several days would be considered for purposes of this summary. Finally, to encourage the sharing of all relevant feedback, the Department advised a stakeholder that it would value and take into account comments received after or outside of this process, even if time would not permit the comments to be included in this summary.

The Department provided public notice of the public comment opportunity—including methods of accessing/reviewing the full STP, methods of commenting, and the deadline for commenting—through the following means:

- Emailing the [Informational Memo](#) to the Intellectual and Developmental Disability Stakeholders and Long-Term Services & Supports Stakeholders Constant Contact subscriber lists, as well as the list of stakeholders who participated in the Rights Modification Stakeholder Workgroup and/or the Open Meeting Series;
- Publishing a notice on the Department’s website ([HCBS Settings Final Rule page](#) and [HCBS Public Comment Opportunities page](#));
- Emailing a notice to Tribal Consultation recipients;
- Emailing the Fact Sheet to the Medicaid Advisory Committee (“Night MAC”);
- Publishing notices in the newspapers of widest circulation in each city in Colorado with a population of 50,000 or more (with these notices being re-run after two weeks); and
- Publishing a notice in the [Colorado Register](#).

The Department received two requests for a copy of the final STP to be emailed. It responded to each request on the day it was received.

In the few days before and after May 9, 2022, the Department received two substantive comments and one note expressing thanks for the work done by state staff (without other substantive feedback).

Summary of Public Comment and Department's Responses

This document summarizes and responds to the two substantive public comments received in May 2022, breaking the comments down by theme as determined by the Department. The Department also appreciates the note of thanks.

Theme #1: Purpose of the HCBS Settings Final Rule

One commenter quoted the final STP's opening statement: "In January 2014, the federal Centers for Medicare & Medicaid Services (CMS) published a [rule](#) requiring home- and community-based services (HCBS) to be provided in settings that meet certain criteria. The criteria ensure that HCBS participants have access to the benefits of community living and live and receive services in integrated, noninstitutional settings. They also ensure that residential settings are truly homelike." The commenter stated:

I believe that it would be more accurate to say that the Settings Rule is concerned with ensuring that HCBS participants have access to the benefits of community living, and the Rule supports HCBS participants in choosing services that best meet their desires and needs as documented in their person-centered plan. Both CMS (Settings Rule, Guidance, letters) and the State have indicated this. In July 2021, I received the following response to comments I made on the Heightened Scrutiny issue:

The purpose of the Settings Final Rule is to support a more person-centered approach where individuals have a say in services they receive or would like to receive. It does not mean that individuals will be forced to participate in community activities that they do not choose to attend or have an interest in. It also does not mean that current programming that is in place must be done away with or greatly altered. It simply means that current programming needs to be expanded to include additional opportunities for members to access the greater community if they so choose.

I appreciate this considered position, and encourage the State of Colorado to more clearly describe the Settings Rule and the importance of allowing HCBS participants to choose the settings and services that best suit their needs and desires.

Response: Both of the Department's quoted statements, from the introductory Background section of the STP and the note sent to the commenter during the heightened scrutiny process, are accurate.

Broadly speaking, the federal rule sets out criteria that differentiate home- and community-based services from services provided in institutions. The criteria for qualifying as a home- and community-based setting include those listed in the STP,

which have been incorporated (with additional clarifying details) into [Colorado's codification of the federal rule](#).

These criteria include requirements that “[t]he setting is selected by the individual from among setting options, including non-disability specific settings,” and that “[t]he setting facilitates individual choice regarding services and supports, and who provides them.” *Id.* Colorado’s codification of the rule further provides that “[i]ndividuals are not required to leave the setting or engage in community activities. Individuals must be offered and have the opportunity to select from Age Appropriate Activities and Materials both within and outside of the setting.” *Id.* The codification also requires that “[t]he Person-Centered Support Plan drives the services afforded to the individual, and the setting staff/contractors are trained on this concept and person-centered practices, as well as the concept of dignity of risk.” *Id.* The federal rule also sets out a number of additional criteria that are also codified in the state’s version of the rule.

In the context of this commenter’s earlier submissions relating to a setting that is subject to heightened scrutiny, the Department alluded to the standards quoted in the preceding paragraph, because they were directly relevant to the commenter’s apparent concern that site-based day program activities would be eliminated. That said, no single criterion encapsulates the entire purpose of the HCBS Settings Final Rule. Additionally, it would not be accurate to strike important concepts such as integration, being noninstitutional, and being homelike (for residential settings) from any attempt to summarize the rule. All of the many criteria are important, and all will be enforced as stated in the rule codification.

Theme #2: Intentional communities

One commenter submitted a description of a planned intentional community for people with intellectual and developmental disabilities (IDD). The commenter noted that “for an organization like [this one, which] is aggressively working on acquiring land, creating a design and then filing for a [low-income housing tax credit (LIHTC)], it is important that we know that the State of Colorado will see [the community] as compliant with the Settings Rule, and that HCBS funding can also [be] used by residents, if needed.” The commenter then asked: “Does the [State] of Colorado agree that we are compliant with the [rule] . . . , and that, as described, [the planned intentional community] does not have the characteristics of an institution? Is there anything that can be done to remove any potential conflict or disagreements regarding the State’s intent in the [rule] . . . and [the group’s] plan to develop an intentional community for people with IDD?”

Response: We appreciate this commenter’s continued cooperation with the State—which has been ongoing for several years—and commitment to meet the expectations of the HCBS Settings Final Rule. As previously shared with this commenter:

- The rule does not prohibit intentional communities.

- The rule also does not necessarily subject such communities to heightened scrutiny, although that is a possibility depending on the characteristics of the setting, including whether it is potentially isolating for the residents with IDD.
- Like all settings where people live or receive HCBS, an intentional community must ensure that individuals are supported in being fully integrated with the broader community.
- In addition, the intentional community should ensure that individuals have a choice of providers for any HCBS they may need. (Restricting choice of providers is permissible in limited circumstances—for example, in a group home, the provider may be the only one to offer services included within the Group Residential Services and Supports bundle, though it may not restrict choice of providers for other services. In this case, and in others where the provider restricts choice of providers, the setting is a provider-owned or -controlled residential setting, making it subject to additional criteria under the rule.)
- Whether this particular proposed community requires licensure as a group home (or other provider type) and meets other legal requirements depends on the input of a number of agencies/authorities, not just the Department.

We understand the commenter’s desire for more certainty that its proposal complies with the HCBS Settings Final Rule. As previously shared with the commenter, nothing about the planned community strikes us as conflicting with the rule. However, under CMS guidance, we will not be in a position to determine whether the setting (a) is subject to heightened scrutiny and (b) complies with the rule, until it is operating and can show how people actually experience the setting.

- In a 2016 document, CMS asked and answered the following question:

Q1. Can a state’s request for heightened scrutiny of a setting under development or new construction be approved before the setting is operational and occupied by beneficiaries receiving Medicaid-funded [HCBS]?

A1. No, a setting presumed to have the qualities of an institution cannot be determined to be compliant with the home and community-based setting regulatory requirements until it is operational and occupied by beneficiaries receiving services there. To comply with the HCBS settings regulations, requirements beyond the physical structure of the setting itself must be met. These requirements ensure that the individuals residing or receiving services in the setting actually experience the setting in a manner that promotes independence and community integration. For example, individuals have the right to privacy, the ability to choose their

own schedules for meals and other activities, and have access to the broader community.

CMS, [Planned Construction of Presumed Institutional Settings](#) (April 12, 2016).

CMS went on to state:

Some . . . states have asked if CMS can review the physical and programmatic designs of . . . proposed new settings and pre-approve them under heightened scrutiny to mitigate any downstream financial risk to the state or a developer. Such “pre-approval” is not possible. A heightened scrutiny review cannot rely on program plans and proposed physical design descriptions alone. . . . CMS will not be able . . . to provide any final determination that the proposed setting complies with regulatory requirements and that [federal funding] will be available to match the facility’s eventual operational costs. For that reason, states, providers or developers assume financial risk regarding new and planned construction.

Id.

- In 2019, CMS adjusted this approach somewhat, so that while evidence of individuals’ lived experiences at the setting is still required, the individuals need not be Medicaid members:

At this time, CMS is revising the 2016 guidance to allow the state to submit a setting to CMS for a heightened scrutiny review while only non-Medicaid beneficiaries are receiving services in the new setting. CMS encourages states, providers, builders and other stakeholders to thoughtfully consider alternatives to new development of presumptively institutional settings. However, in the event the new construction is considered presumptively institutional, CMS believes that an accurate analysis of a setting’s adherence to the regulatory criteria can be performed at the state and federal levels based on the experiences of non-Medicaid beneficiaries.

CMS, [CMCS Informational Bulletin: Heightened Scrutiny Review of Newly Constructed Presumptively Institutional Settings](#) (August 2019).

In citing this guidance, we are not necessarily determining that the commenter’s proposed intentional community will be subject to heightened scrutiny. Rather, pursuant to CMS’s guidance, we are emphasizing that the answer to that question, and to the overall compliance of the setting with the HCBS Settings Final Rule, will depend on how actual residents experience the setting, once it is operational.

Theme #3: Public comment process

One commenter stated, “I learned very recently about the public comment period for the STP. I have spoken to families and professionals working with people with IDD (including the director of an agency providing community and residential services) to see if they were aware of this comment period. None of them were. That is astounding! . . . Given how important this is, great effort should go into making sure that all who are, or will be, affected by the State’s implementation of the Settings Rule are made aware that the STP exists, and is open for comment.” The commenter stated, “I did not learn about the comment period from [the [Informational Memo](#)], nor was I contacted directly by the State, even though I was involved in the Heightened Scrutiny process and made comment in June/July of 2021. I was not informed by the local [Community Centered Board (CCB)]. My [relative participating in a waiver] was not informed by the State or [their] case manager. As far as I can tell almost nobody in the IDD community knows about this.”

The commenter suggested that the State extend or reopen the comment period, with the following additional changes:

- Add “‘guardians’ and ‘family members of waiver participants’” to the target audiences of the [Informational Memo](#);
- “attempt to contact everyone who might be affected by this, and solicit their input”;
- “consider holding educational sessions for the public with Q&A, and public comments sessions, at times that the public can attend” (noting that “[o]nline forums make this easier”); and
- ask CMS to “accommodate . . . a request” for additional time.

Response: The Department is disappointed to hear that a director of a provider agency was unaware of the public comment period. This lack of awareness indicates that the director either is not subscribing to the Constant Contact emails by which the Department circulates Memo Series issuances, or is not reading such emails and issuances. The Department strongly encourages all providers and case management agencies to subscribe, as Constant Contact messages and the Memo Series are the primary means by which Department communication is disseminated. This method is broadly effective: In just the last two years, the Department held fourteen large stakeholder meetings and other events to address implementation of the HCBS Settings Final Rule, which were well-attended thanks largely to Constant Contact/Memo Series announcements. (See STP, Rows 3, 10, 28-29, 34-35 65, 67).

Reaching those who are not obliged to know about an issuance or public comment period—such as waiver participants, guardians, and family members—requires a

balancing of two different interests: (1) the goal of informing everyone who may be interested and (2) the need to avoid sending undesired or excessive communications to those who prefer not to get involved. The Department generally balances these interests by supporting stakeholders to “opt in” to email lists, rather than requiring people to “opt out” of unsolicited email. This process, administered via Constant Contact, allows people to get the communications that they feel are right for them. Information about this process has been available on the Department’s [HCBS Settings Final Rule website](#), under the header “Stakeholder Engagement,” for some time:

To view departmental issuances regarding the HCBS Settings Final Rule and other matters, please visit the Department’s [Memo Series page](#). This page includes links to Policy Memos, Operational Memos, and Informational Memos, as well as attachments to such memos.

To receive communications regarding the implementation of the HCBS Settings Final Rule, including notices of Memo Series issuances as well as notices of upcoming trainings and meetings and other information, please visit the Department’s [distribution lists sign-up page](#).

- Check the box for the Long-Term Services & Supports Stakeholders list.
- Add your contact information and click Sign-Up.

To join meetings and other events, please visit the [Office of Community Living’s stakeholder engagement page](#). You can subscribe to the calendar by following the instructions on that page.

We are aware that stakeholders who might be affected by a particular development may not always know about or read the relevant issuances distributed and meetings announced via this process. Because of this concern, we have implemented additional outreach methods. These include:

- Maintaining some separate, subject-matter-specific email lists. As relevant to this public comment period, the Department has a list of the email addresses of everyone who participated in the Rights Modification Stakeholder Workgroup and/or the Open Meeting Series, through which the Department’s codification of the HCBS Settings Final Rule was developed. These stakeholders have a variety of backgrounds and roles, including parents and advocates involved with waivers serving people with IDD. The Department alerted everyone on this email list of the public comment period. Because comments on settings subject to heightened scrutiny were for the limited purpose of discussing specific providers/settings, we have not assumed that everyone who participated in that process would want to receive further emails about other HCBS Settings Final Rule-related issues. However, we have now added this commenter to the email list.

- Requesting that providers and/or case managers alert the individuals they serve (along with parents, other family members, guardians, and others as appropriate) of a given development. In implementing the HCBS Settings Final Rule, the Department has used this method to ensure, for example, that people were (and are) aware of the opportunity to respond to the Individual/Family/Advocate (IFA) Survey, and of the opportunity to provide input on settings subject to heightened scrutiny. It is not our practice to use this method to alert all waiver participants of public comment periods in general, as that approach would rapidly lead to information overload. (Public comment periods for waiver amendments/renewals happen twice per year; public comment periods for rule changes happen often, on an as-needed basis.)

Given the extensive stakeholder input already received (through prior public comment periods for earlier versions of the STP, the Rights Modification Stakeholder Workgroup, the Open Meeting Series, the Medical Services Board (MSB) process, heightened scrutiny town halls/public comment period, and more—see STP, Row 3), we believe that (1) many stakeholders are learning about opportunities to comment by way of our Memo Series issuances/Constant Contact emails; and (2) most stakeholders have already provided the feedback they wished for us to hear. Further, given the requests for a copy of the STP and the comments received in this comment period, it seems apparent that our recent outreach efforts succeeded in reaching additional people.

Our understanding from CMS is that it is critical to submit our final STP by the agreed-upon deadline. CMS needs time to review and respond to voluminous material such as this from many states. Therefore, we are proceeding on our original schedule. However, as we told this commenter (among others), comments received after or outside the official public comment period will still be valued and taken into account.

Conclusion and Next Steps

The Department has determined that the public comments received do not warrant changes to the final STP or public comment period, as explained above. The Department has made some updates to the final STP, relating to other matters, as shown in the updated redline (showing changes between the version released for public comment and the version being submitted to CMS). The Department is submitting these updated materials to CMS for final approval. Please monitor our [website](#) and [subscribe to our Constant Contact list\(s\)](#) for updates, and/or let us know at HCPF_STP.PublicComment@state.co.us if you would like to be added to our HCBS Settings Final Rule-specific email list.