

Rights Modification Training

Office of Community Living

June 2018



COLORADO
Department of Health Care
Policy & Financing

Our Mission

Improving health care access and outcomes for the people we serve while demonstrating sound stewardship of financial resources



Right to Humane Treatment

"Every person has the right to humane treatment. It is the responsibility of all service agencies and community centered boards to prohibit mistreatment, exploitation, neglect or abuse in any form."

C.R.S. 25.5-10-221



**“To deny people their human rights is
to challenge their very humanity.”**

- Nelson Mandela



Purpose

To provide training for Case Management Agencies (CMA) and Program Approved Services Agencies (PASA) on the use of Rights Modifications *when all options for less restrictive interventions have been tried without success to support an individual's health and safety needs and/or the health and safety needs of the community.*

Training is specific to the Home and Community Based Services- for Persons with Developmental Disabilities (HCBS-DD), Supported Living Services (HCBS-SLS), and Children's Extensive Supports (HCBS-CES) waivers.



Topics

- Overview of HCBS Settings Final Rule, HCBS-DD, SLS, and CES waiver, statutory, regulatory, and references
- Requirements for Rights Modifications:
 - Suspension of Rights
 - Restrictive Procedures
 - Restraints
 - Safety Control Procedures (SCP)
 - Emergency Control Procedures (ECP)
 - Links to references



REFERENCES



HCBS Settings Final Rule

In 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, non-institutional settings. The Department's website contains information about implementation of the federal settings criteria, including the Statewide Transition Plan (STP); the Systemic Assessment Crosswalk setting out planned changes to Colorado's statutes, regulations, and waivers; training materials; and additional guidance.



HCBS Settings Final Rule

On January 30, 2018, the Department published responses to frequently asked questions (FAQs) regarding general requirements of the rule and miscellaneous aspects of its implementation (FAQ Part I). As announced via Communication Brief, the Department hosted a public conference call on April 5, 2018 to answer questions regarding FAQ Part I. A transcript and recording of that call are available online.



HCBS DD, SLS, and CES Waiver

Appendix G of each waiver:

- Section G-2-a: Use of Restraints
- Section G-2-b: Use of Restrictive Interventions
- Section G-2-c: Seclusion (*The State does not permit and prohibits the use of seclusion*)



HCBS-DD, SLS, and CES Wavier

Performance Measures (Appendix C):

- Number and percent of providers surveyed during the performance period that met requirements for use of physical or mechanical restraints.
- Number and percent of providers surveyed in the performance period that met due process requirements for implementing a suspension of rights.
- Number and percent of providers surveyed that met the requirements for the use of training and support plans with restrictive procedures.



Colorado Revised Statutes

Title 25.5 Health Care Policy and Financing

- Article 10. Community Living
 - Part 2. Intellectual and Developmental Disabilities
 - Definitions
 - Rights



Colorado Code of Regulation

10 CCR 2505-10 8.600

- 8.600.4 Definitions
- 8.608 Service and Support Planning, Supporting People with Challenging Behavior, and Protections



REQUIREMENTS



HCBS Settings Final Rule - Rights Modification Requirements

Rights modifications are based on the specific assessed needs of the individual, not the convenience of the provider.

The case manager, not the provider, should obtain the individual's informed consent and other documentation relating to rights modifications and should maintain these materials in their file as part of the person-centered planning process.



HCBS Settings Final Rule - Rights Modification Requirements

Any rights modification must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:

- Identify a specific and individualized assessed need.
- Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
- Document less intrusive methods of meeting the need that have been tried but did not work.

42 C.F.R. 441.301(c)(4)(vi)(F)(1)-(3)



HCBS Settings Final Rule - Rights Modification Requirements

- Include a clear description of the condition that is directly proportionate to the specific assessed need.
- Include regular collection and review of data to measure the ongoing effectiveness of the modification.
- Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
- Include the informed consent of the individual.
- Include an assurance that interventions and supports will cause no harm to the individual.

42 C.F.R. 441.301(c)(4)(vi)(F)(4)-(8)



HCBS Settings Final Rule - Rights Modification Requirements

- The person-centered service plan must be reviewed, and revised upon reassessment of functional need . . . at least every 12 months, when the individual's circumstances or needs change significantly, or at the request of the individual." In the interim, the provider should support the individual in learning skills so that the modification becomes unnecessary; the plan for doing so should also be documented.

- Informed consent must be in writing. Consent must be limited to a specific modification applicable to particular circumstances; it may not be a general consent to whatever modifications a provider sees fit to impose.

HCPF FAQ Part 1 January 30, 2018



HCBS Settings Final Rule - Rights Modification Requirements

- In assuring that a rights modification will not cause the individual harm, document any ways in which the modification is paired with additional supports to prevent harm.

- The individual's person-centered plan is maintained by the case manager, with a copy of the plan or its relevant sections also being maintained by the provider.

HCPF FAQ Part 1 January 30, 2018



Rights Modification

Unless a person's rights are modified by court order, a person with an intellectual and developmental disability has the same legal rights and responsibilities guaranteed to all other persons under the federal and state constitutions and federal and state laws. No otherwise qualified person, by reason of having an intellectual and developmental disability, may be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity which receives public funds.

C.R.S. 25.5-10-218 (1)



Informed Consent

“Consent” means an informed assent, which is expressed in writing and is freely given. Consent shall always be preceded by the following:

- A fair explanation of the procedures to be followed, including an identification of those which are experimental;
- A description of the attendant discomforts and risks;
- A description of the benefits to be expected;

10 CCR 2505-10 8.600.4



Informed Consent

- A disclosure of appropriate alternative procedures together with an explanation of the respective benefits, discomforts and risks;
- An offer to answer any inquiries regarding the procedure;
- An instruction that the person giving consent is free to withdraw such consent and discontinue participation in the project or activity at any time; and,
- A statement that withholding or withdrawal of consent shall not prejudice future provision of appropriate services and supports to individuals.

10 CCR 2505-10 8.600.4



Rights Modification

An individual's rights may be suspended only to protect the individual from endangering such person, others, or property. Rights of an adult person receiving services may be suspended only by a developmental disabilities professional in a manner which will promote the least restriction on the person's rights and in accordance with rules and regulations herein or by a court order. Additionally, in the case of a minor, the parent(s) or guardian must approve suspension of any rights which may pertain to the minor.

10 CCR 2505-10 8.604.3.A



Rights Modification - Suspension of Rights

When suspension of an individual's rights is under consideration, the rights to be affected shall be specifically explained to the individual with notice as defined in section 8.600.4 of these rules of such proposed activity given to the appropriate parties.

When a right is proposed to be suspended, it is reviewed by the individual's interdisciplinary team and, if suspended, is documented in the Individualized Plan. The person's Individualized Plan must include a statement of what services and supports are required and plans for implementing such services and supports in order to assist the person to the point that suspension of rights is no longer needed. This plan shall meet the requirements of Sections 8.607 and 8.608.

10 CCR 2505-10 8.604.3.A.1.&2.



Rights Modification - Suspension of Rights

When a right has been suspended, the continuing need for such suspension shall be reviewed by the individual's interdisciplinary team at a frequency decided by the team, but not less than every six months.

Such review shall include the original reason for suspension, current circumstances, success or failure of programmatic intervention, and the need for continued suspension or modification.

Restoration of affected rights shall occur as soon as circumstances justify.

10 CCR 2505-10 8.604.3.A.3.a.&b.



Rights Modification - Suspension of Rights

At the time a right is suspended, such action shall be referred to the Human Rights Committee for review and recommendation. Such review shall include an opportunity for the person who is affected, parent of a minor, guardian or authorized representative, after being given reasonable notice of the meeting, to present relevant information to the Human Rights Committee.

10 CCR 2505-10 8.604.3.A.4



Rights Modification - Suspension of Rights

Emergency action may be taken by a developmental disabilities professional, specifically designated for this purpose, by the director of the community centered board, program approved service agency or regional center to suspend the right(s) of a person receiving services if such action is imminently necessary to protect the health and safety of the person, others, or property. When such emergency action is necessary, the least intrusive means of right(s) suspension shall be utilized in order to protect the health and safety of the person or others, or property, and the following requirements must be adhered to:

10 CCR 2505-10 8.604.3.A.5.



Rights Modification- Suspension of Rights

- The person assigned case management responsibility pursuant to section 8.607.1.E, must be notified of the right(s) suspension within 24 hours;
- The suspended right(s) shall be specifically explained to the individual and notice as defined in section 8.600.4, sent to the appropriate parties within 24 hours of the suspension of the right(s); and,
- Immediately initiate the provisions of section 8.604.3.A.2 through 4.

10 CCR 2505-10 8.604.3.A.5.a.,b.,& c.



Rights Modification - Restrictive Procedure

“Restrictive Procedure” means any of the following when the intent or plan is to *[modify behavior]*:

- Limitations of an individual's movement or activity against his or her wishes; or,
- Interference with an individual's ability to acquire and/or retain rewarding items or engage in valued experiences.

10 CCR 2505-10 8.600



Rights Modification - Restrictive Procedure

When restrictive procedures, as defined in section 8.600.4, are recommended or used to change a person's challenging behavior, the following steps must be completed:

- The program approved service agency in conjunction with other members of the person's interdisciplinary team shall complete a comprehensive review of the person's life situation;
- The program approved service agency shall complete a functional analysis of the person's challenging behavior for review by the interdisciplinary team; and,

10 CCR 2505-10 8.608.2.A.1.& 2.



Rights Modification - Restrictive Procedure

- In conjunction with the interdisciplinary team, the program approved service agency shall prepare an Individual Service and Support Plan that explains the use of any restrictive procedure and includes, at a minimum:
- A description of the behavior to be changed or improved, described when possible, in observable and measurable terms;
- Baseline data which demonstrates why the behavior has been targeted for change;
- A description of the specific methodology and procedures that will be used to implement the Individual Service and Support Plan;



Rights Modification - Restrictive Procedure

- A description of the specific methodology and procedures that will be used to implement the Individual Service and Support Plan;
- Identification of the person(s) who will monitor the implementation of the Individual Service and Support Plan;
- A description of the behavior to be developed, if necessary and appropriate;
- Identification of the person(s) who will implement the Individual Service and Support Plan and assurance that they have demonstrated competency in its implementation;

10 CCR 2505-10 8.608.2.A.3.c.,d.,e.,&f



Rights Modification - Restrictive Procedure

- Criteria which will measure the effectiveness of the Individual Service and Support Plan;
- Data to be collected; and,
- Specific timelines for review.
- The person receiving services, parents of a minor, or legal guardian shall grant informed consent for the use of the Individual Service and Support Plan with a restrictive procedure prior to its implementation.

10 CCR 2505-10 8.608.2.A.3.g.,h.,i.,& 4



Rights Modification - Restraints

- Corporal punishment of persons with an intellectual and developmental disability is not permitted.
- Seclusion, defined as the placement of a person receiving services alone in a closed room for the purpose of punishment, is prohibited.
- Behavior development programs involving the use of the procedure in a "time out room" are prohibited.
- Behavior development programs involving the use of aversive or noxious stimuli are prohibited.

C.R.S. 25.5-10-221-(1)(5)(6) & (7)



Rights Modification - Restraints

- Physical restraint, defined as the use of manual methods intended to restrict the movement or normal functioning of a portion of a person's body through direct contact by staff, may be employed only when necessary to protect the person receiving services from injury to self or others.
- Physical restraint may not be employed as punishment, for the convenience of staff, or as a substitute for a program of services and supports.
- Physical restraint may be applied only if alternative techniques have failed and only if such restraint imposed the least possible restriction consistent with its purpose.

C.R.S. 25.5-10-221-(8)



Rights Modification - Restraints

- The use of a mechanical restraint, defined as the use of mechanical devices intended to restrict the movement or normal functioning of a portion of a person's body, is subject to special review and oversight, as defined in rules.
- Use of mechanical restraints may be applied only in an emergency if alternative techniques have failed and in conjunction with a behavior development program.
- Mechanical restraints must be designed and used so as not to cause physical injury to the person receiving services and so as to cause the least possible discomfort.
- The use of posey vests, straight jackets, ankle and wrist restraints, and other devices defined in rules is prohibited.

C.R.S. 25.5-10-221-(9)



Rights Modification - Restraints

- Physical or mechanical restraint can only be used by employees or contractors trained in its use, in an emergency situation, when alternatives have failed, and when necessary to protect the person from injury to self or others.
- The individual shall be released from physical or mechanical restraint as soon as the emergency condition no longer exists.
- Physical or mechanical restraint cannot be a part of an Individual Service and Support Plan and can only be used as an emergency or safety control procedure in accordance with these rules and regulations.

10 CCR 2505-10-8.608.3.A.1.,& 2.



Rights Modification - Restraints

- No physical or mechanical restraint of a person receiving services shall place excess pressure on the chest or back of that person or inhibit or impede the person's ability to breathe.

- During physical restraint, the person's breathing and circulation shall be checked to ensure that these are not compromised.

10 CCR 2505-10-8.608.3.A.3.& 4.



Rights Modification - Restraints

- Relief periods of, at a minimum, ten (10) minutes every one (1) hour shall be provided to an individual in mechanical restraint, except when the individual is sleeping. A record of relief periods shall be maintained.

- An individual placed in a mechanical restraint shall be monitored at least every fifteen (15) minutes by employees or contractors trained in the use of mechanical restraint to ensure that the individual's physical needs are met and the individual's circulation is not restricted or airway obstructed. A record of such monitoring shall be maintained.

10 CCR 2505-10 8.608.3.A.6.& 7.



Rights Modification - Restraints

- Mechanical restraints used for medical purposes following a medical procedure or injury shall be authorized by a physician's order which shall be renewed every twenty-four (24) hours.

- Mechanical or physical restraints used for a diagnostic or other medical procedure conducted under the control of the agency (e.g., drawing blood by an agency nurse) shall be dually authorized by a licensed medical professional and agency administrator, and its use documented in the person's record.

10 CCR 2505-10 8.608.3.B.& C.



Rights Modification - Safety Control Procedures

Safety control procedures must be developed when it can be anticipated that there will be a need to use restrictive procedures or restraints to control a previously exhibited behavior which is likely to occur again. The use of safety control procedures shall comply with the following:

- Each community centered board, program approved service agency, and regional center shall have written policies on the use of safety control procedures, the types of procedures which may be used, and requirements for staff training;

10 CCR 2505-10 8.608.4.B.1.



Rights Modification - Safety Control Procedures

- When a safety control procedure is used, the service agency shall file an incident report within three (3) days with the community centered board or regional center which meets all requirements of section 8.608.6.B and the conditions associated with each use of a safety control procedure; and,
- If the safety control procedure is used more than three times within the previous thirty (30) days, the person's interdisciplinary team shall meet to review the situation and to endorse the current plans or to prepare other strategies.

10 CCR 2505-10 8.608.4.B.2.,&.3



Rights Modification - Emergency Control Procedures

An Emergency Control Procedure is the unanticipated use of a restrictive procedure or restraint in order to keep the person receiving services and others safe.

- Each community centered board, program approved service agency, and regional center shall have written policies on the use of emergency control procedures, the types of procedures which may be used, and requirements for staff training.
- Behaviors requiring emergency control procedures are those which are infrequent and unpredictable.

10 CCR 2505-10 8.608.4.A.1.& 2.



Rights Modification - Emergency Control Procedures

Emergency control procedures shall not be employed as punishment, for the convenience of staff, or as a substitute for services, supports or instruction.

Within twenty-four (24) hours after the use of an emergency control procedure, the responsible staff person shall file an incident report. The incident report shall meet all requirements of section 8.608.6.B and shall also include:

10 CCR 2505-10 8.608.A.4.



Rights Modifications - Emergency Control Procedure

- A description of the emergency control procedure employed, including beginning and ending times;
- An explanation of why the procedure was judged necessary; and,
- An assessment of the likelihood that the behavior that prompted the use of the emergency control procedure will recur.

10 CCR 2505-10 8.608.4.A.a.,b.,& c.



Rights Modification - Emergency Control Procedure

Within three (3) days after use of an emergency control procedure, the community centered board or regional center, parent of a minor, guardian, and authorized representative if within the scope of his or her duties, shall be notified.

10 CCR 2505-10 8.6084.A.5.



Rights Modification - Human Rights Committee Review

- Informed consent is obtained when required from the person receiving services, the parent of a minor, or the guardian as appropriate.
- Suspension of rights of persons receiving services occurs only within procedural safeguards as stipulated in section 8.604.3 and that continued suspension of such rights is reviewed by the interdisciplinary team at a frequency decided by the team, but not less than every six months.
- Emergency control procedures, safety control procedures and Individual Service and Support Plans with restrictive procedures are used in accordance with the requirements of these rules.

10 CCR 2505-10 8.608.5.I.1.2.& 3.



TRENDS - SURVEY FINDINGS



Survey Trends

Absence of a satisfactory plan:

- Notice not in place/action not identified as a Rights Modification.
- ISSP (for use of Restrictive Procedures).
- Criteria for plan to fade/remove rights modification.
- Lack of Comprehensive Life Review.
- Lack of training for direct providers.
- Rights Modification not documented in Service Plan.



Survey Trends

Is this considered a Rights Modification?

- A person who has difficulty with their gait and would fall when not accompanied having movement sensors around bed or other areas to alert staff they are getting up.
- A person who does not watch the environment for danger and requires someone to be with them within line of sight or for direct support at all times.
- A person who never has privacy in the bathroom due to the need for staff assistance because of physical or cognitive disability.



Survey Trends

Is this considered a Rights Modification?

- A person is searched when returning from day program because they have stolen things in the past.
- Limiting phone access because a person's family only wants to receive a call once a week.
- All food in the home is locked due to one housemate's safety needs.



Links to References

HCBS Settings Final Rule:

- Text of rule:

www.federalregister.gov/documents/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider

Department's website on rules (contains trainings, FAQs, and other guidance):

- www.colorado.gov/hcpf/home-and-community-based-services-settings-final-rule
- www.colorado.gov/hcpf/department-program-rules-and-regulations



Questions or Concerns?



Contact Information

For Case Management questions:

- Victor.Robertson@state.co.us or 303-866-6463

For HCBS Settings Final Rule questions:

- Leah.Pogoriler@state.co.us or 303-866-6470
- Lori.Thompson@state.co.us or 303-866-5142
- Kyra.Acuna@state.co.us or 303-866-5666

For Critical Incident Reporting questions:

- Andrea.Behnke@state.co.us or 303-866-6138



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to challenge their very humanity.”**

- Nelson Mandela



Thank You!

