



COLORADO

Department of Health Care
Policy & Financing

Community Living Office
1570 Grant Street
Denver, CO 80203

TO: All Stakeholders

FROM: The Department of Health Care Policy & Financing

DATE: November 8, 2017

SUBJECT: COMMUNICATION BRIEF – Compliance requirement for new settings under the Home and Community Based Services (HCBS) Settings Final Rule

Purpose: To notify providers and other stakeholders of the requirement that new settings comply with the Home and Community Based Services (HCBS) Settings Final Rule.

Background: In January 2014, the Centers for Medicare & Medicaid Services (CMS) published a rule to ensure that HCBS are provided in settings that meet certain criteria. CMS, *Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers*, 79 Fed. Reg. 2948 (2014) (final rule). The rule requires new waivers to assure compliance with the federal criteria “as of the effective date of the waiver,” but it allows a transition period for bringing existing waivers into compliance. *Id.* at 3031. The transition period was initially five years from the March 2014 effective date of the rule (until March 2019), *id.* at 2979; it was later extended by CMS by up to an additional three years (to March 2022), of which Colorado is currently taking one year (to March 2020). See CMS, CMCS Informational Bulletin, *Extension of Transition Period for Compliance with Home and Community-Based Settings Criteria* (May 9, 2017); HCPF, Communication Brief, *Notification that the Department Plans to Adjust Timelines in the Statewide Transition Plan (STP)* (June 1, 2017).

Although the rule explicitly requires new waivers to be compliant from the outset, CMS later clarified that new settings—even under existing waivers—must also be compliant from the outset:

Q3. Can a new setting that was not providing Medicaid-funded HCBS on March 17, 2014 under an approved state plan, waiver or demonstration, avail itself of the time remaining in the transition period through March 17, 2019 to come into compliance with the settings requirements?

A3. No. As indicated in the HCBS final regulations, any setting in which services were not being provided under an approved state plan, waiver or demonstration as of March 17, 2014 must be in compliance with the regulations for HCBS settings by the effective date of the program (the time the state submits a claim for Federal HCBS reimbursement).

CMS, HCBS Final Regulations: Questions and Answers Regarding Home and Community-Based Settings, Planned Construction of Presumed Institutional Settings (April 12, 2016); see also CMCS Informational Bulletin (“we will extend the transition period for states to demonstrate compliance with the [HCBS] criteria until March 17, 2022 for settings in which a transition period applies”) (emphasis added). In other words, the transition period does not apply to settings that began operating after the March 2014 effective date of the Final Rule.

Department staff have highlighted this point at various provider and other stakeholder meetings. This Communication Brief formalizes and adds details to the guidance already provided.

Information: Settings where people live or receive HCBS that were in operation on March 17, 2014 may come into compliance with the requirements of the Final Rule as stated in the [Statewide Transition Plan \(STP\)](#) and their [Provider Transition Plans \(PTPs\)](#). Providers are expected to work diligently toward compliance at these settings. The Department and the Colorado Department of Public Health and Environment (CDPHE) maintain a registry of such settings and are working with affected providers to complete PTPs for such settings. When the updated, web-based PTP system is rolled out, providers will be able to see all of their affected settings that are included in the registry. The system allows providers to complete abbreviated PTPs for identically operated settings.

Settings where people live or receive HCBS that began or will begin operation after March 17, 2014 must comply with the requirements of the Final Rule from the outset. This category has two subsets:

- Settings that opened after March 17, 2014 but before tomorrow. The Department and CDPHE have reached out to new providers to discuss the need to comply with the Final Rule. They have also worked with existing providers to collect up-to-date information about their settings, including settings that are new or have added services affected by the Final Rule. Affected settings have been or will be added to the registry and will provide proof of compliance through the PTP system. Providers are expected to demonstrate compliance through this system as soon as possible (once the web-based system rolls out), but are not expected to provide retroactive proof of compliance back to March 2014.
- Settings opening tomorrow or thereafter. The Department and CDPHE have been discussing with affected providers the need to comply with the Final Rule, and they are preparing to include this requirement in the standard materials given to all new providers (and providers expanding their HCBS offerings) as part of the provider enrollment and/or certification process. In addition, CDPHE will soon incorporate Final Rule criteria to its initial and follow-up surveys for new providers. New providers that do not demonstrate compliance with the Final Rule for all settings will not receive certification or program approval and certification (PASA status). Existing providers adding services or opening setting types for which CDPHE does not automatically conduct a formal survey may request a voluntary survey in order to confirm compliance with the Final Rule. The departments do not expect to track new settings in their registry or to track their compliance status in the web-based PTP system, as this system is specific to the transition period; nevertheless, providers may find the [PTP](#) to be a useful tool in assessing and compiling proof of compliance at new settings.

In addition, all providers should be aware that if a setting is not covered by the transition period but is subject to heightened scrutiny, CMS must approve the setting under heightened scrutiny before

the setting can receive reimbursement for HCBS provided to Medicaid participants, and this approval is not guaranteed, meaning that the provider is at risk of delayed or denied Medicaid funding.

Under the Final Rule,

Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution unless [CMS] determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings.

42 C.F.R. § 441.301(c)(5)(v). CMS guidance regarding the application of heightened scrutiny to particular settings includes:

- [Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community](#)
- [Frequently Asked Questions Regarding the Heightened Scrutiny Review Process and Other Home and Community-Based Settings Information](#)
- [Frequently Asked Questions on Planned Construction and Person-Centered Planning Requirements](#)

Action: All providers should continue to watch for the roll-out of the web-based PTP system and be prepared to promptly complete their PTPs once the system rolls out. To help providers prepare to fill out their PTPs, a [pdf](#) showing approximately what the new PTP for adult residential settings will look like is available on the Department's [website](#). The PTPs for nonresidential and children's residential settings will be similarly structured, albeit with some different elements.

Providers with settings that were in operation as of March 17, 2014 will need to complete a PTP for each such setting (except settings that have since closed) and continue taking diligent steps toward compliance.

Providers with settings that opened after March 17, 2014 but before tomorrow will also need to complete a PTP for each such setting, with an expectation that they will demonstrate compliance as soon as possible.

Providers with settings that will open tomorrow or thereafter will need to ensure their settings' compliance from the outset. New providers will make this demonstration to CDPHE, where a new certification or program approval and certification (PASA status) is required. Existing providers adding new services or setting types must also ensure compliance, even where a CDPHE site survey is not required, and may request a voluntary survey by CDPHE. The PTP may be used as a model for demonstrating compliance, but do not seek to add these settings to the registry or the web-based PTP system.

Providers that plan to open new settings that may be subject to heightened scrutiny should contact the Department as soon as possible to discuss ways to mitigate the risk of Medicaid HCBS funding being delayed or denied pending CMS review.

Providers that have not yet received a CDPHE site visit for any of their settings may find it useful to request a voluntary site visit in order to receive in-person technical assistance. To do so, contact Barbara Rydell at CDPHE.

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