

MDHHS BHDDA HCBS GUARDIANSHIP FAQ's

General guidance:

The existence of a diagnosis does not negate an individual's right to make decisions about their lives. Only when an identified health or safety risk has been identified can others consider the restrictions of these rights. Restrictions must be as narrow as possible and must be reviewed on a regular basis. Those who support the individual must work with that person to learn new skills or take additional steps to continue to decrease or eliminate the need for restrictions. All restrictions must be justified and follow the requirements of the rule. Similarly, the existence of a guardian does not mean that the individual loses all decision making authority.

If an individual has a plenary guardian the guardian is empowered to make decisions on behalf of the individual consistent with language below (330.1602. Sec. 602.) The individual's perspective, wishes, and goals must be addressed during Person Centered Planning meetings and be considered as plans for living arrangements, services and supports are identified. Any restrictions on the freedoms specified by CMS must be supported by the modification process outlined in the Final Rule and the MDHHS Medicaid Provider Manual and outlined under question two below.

A guardian with less than plenary authority will have the extent of their authority identified in the guardianship documents. Providers should ensure they have an understanding of the guardian's power specific to each individual. The individual's perspective, wishes and goals must be addressed during the Person Centered Planning meeting and be taken into account as plans for living arrangements, services and supports are identified. Any restrictions on the freedoms specified by CMS must be supported by the modification process outlined in the Final Rule and the MDHHS Medicaid Provider Manual and outlined under question two below.

Frequently Asked Questions:

1. Does the HCBS rule affect the role of guardians/guardianship?

The role of the guardian does not change. The HCBS rule requires that in order for certain services to be Medicaid funded specific requirements of the HCBS rule must be met. It is possible to be both an HCBS participant and an individual with a guardian.

If an individual has a plenary guardian the guardian has the authority to make decisions in the place of the individual. Guardian decisions that impair or prevent full compliance with the HCBS requirements will result in an inability to use Medicaid funds to pay for the individual's home and community based services. As noted above any infringement on the individuals rights whether by a guardian or service provider at the guardian's direction must be consistent with the modifications requirement outlined in response to question 2 below.

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2. Can a guardian require a provider to take action that restricts the freedoms of an individual?

No. Modification or restrictions of an individual's rights must be based upon health or safety risks to the individual. Restrictions cannot be placed upon an individual based on the preferences, values or convenience of the guardian or the provider. As noted any modifications to an individual's freedoms as outlined by the Rule must be consistent with the required modification process and be clearly documented in the individual's Person Centered Plan of Service.

Any 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.*
- 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.*

3. If an individual and their guardian disagree on things such as access to food or voting who gets to decide?

Individuals are empowered to make their own decisions. CMS requires that any modifications of an individual's rights must follow a specific process. This process is outlined in the Michigan Medicaid Provider Manual and above (Q2). In the event that there is disagreement on access of an individual to certain freedoms these issues should be discussed in a person centered planning meeting with the goal of coming to a compromise that all parties are comfortable with. Any modifications must be paired with efforts to provide support to an individual to decrease the need for the modification and increase their freedom. If agreement cannot be reached and the guardian is requesting

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restrictions that cannot be justified as required by the rule the individual will lose their status as an HCBS Medicaid recipient.

MENTAL HEALTH CODE (EXCERPT)

330.1602 Guardianship; use; design; limitation; partial guardianship.

Sec. 602.

(1) Guardianship for individuals with developmental disability shall be utilized only as is necessary to promote and protect the well-being of the individual, including protection from neglect, exploitation, and abuse; shall take into account the individual's abilities; shall be designed to encourage the development of maximum self-reliance and independence in the individual; and shall be ordered only to the extent necessitated by the individual's actual mental and adaptive limitations.

(2) If the court determines that some form of guardianship is necessary, partial guardianship is the preferred form of guardianship for an individual with a developmental disability.

History: 1974, Act 258, Eff. Aug. 6, 1975;-- Am. 1978, Act 527, Imd. Eff. Dec. 21, 1978;-- Am. 1995, Act 290, Eff. Mar. 28, 1996

330.1618 Hearing; powers and duties of court.

Sec. 618.

(1) The court, at a hearing convened under this chapter for the appointment of a guardian, shall do all of the following:

(a) Inquire into the nature and extent of the general intellectual functioning of the respondent asserted to need a guardian.

(b) Determine the extent of the impairment in the respondent's adaptive behavior.

(c) Determine the respondent's capacity to care for himself or herself by making and communicating responsible decisions concerning his or her person.

(d) Determine the capacity of the respondent to manage his or her estate and financial affairs.

(e) Determine the appropriateness of the proposed living arrangements of the respondent and determine whether or not it is the least restrictive setting suited to the respondent's condition.

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(f) If the respondent is residing in a facility, the court shall specifically determine the appropriateness of the living arrangement and determine whether or not it is the least restrictive suited to the respondent's condition.

(2) The court shall make findings of fact on the record regarding the matters specified in subsection (1).

(3) If it is determined that the respondent possesses the capacity to care for himself or herself and the respondent's estate, the court shall dismiss the petition.

(4) If it is found by clear and convincing evidence that the respondent is developmentally disabled and lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or the respondent's estate, the court may appoint a partial guardian to provide guardianship services to the respondent, but the court shall not appoint a plenary guardian.

(5) If it is found by clear and convincing evidence that the respondent is developmentally disabled and is totally without capacity to care for himself or herself or the respondent's estate, the court shall specify that finding of fact in any order and may appoint a plenary guardian of the person or of the estate or both for the respondent.

History: 1974, Act 258, Eff. Aug. 6, 1975;-- Am. 1978, Act 527, Imd. Eff. Dec. 21, 1978

[http://www.legislature.mi.gov/\(S\(nrvfijpc0j5r0wb4ljfszpuj\)\)/mileg.aspx?page=getobject&objectname=mcl-330-1618](http://www.legislature.mi.gov/(S(nrvfijpc0j5r0wb4ljfszpuj))/mileg.aspx?page=getobject&objectname=mcl-330-1618)

Resources:

State of Michigan Medicaid Provider Manual:

<http://www.mdch.state.mi.us/dch-medicaid/manuals/MedicaidProviderManual.pdf>

MDHHS Home and Community Based Services Webpage

https://www.michigan.gov/mdhhs/0,5885,7-339-71547_2943-334724--,00.html

State of Michigan Mental Health Code

https://www.michigan.gov/mdhhs/0,5885,7-339-71550_2941_4868-23755--,00.html

Centers for Medicare and Medicaid HCBS webpage

<https://www.medicare.gov/medicaid/hcbs/index.html>