



STATE OF MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

RICK SNYDER
GOVERNOR

NICK LYON
DIRECTOR

May 15, 2017

Dear Provider:

The Centers for Medicare and Medicaid Services issued a new rule for Medicaid waiver programs that offer home and community-based services (HCBS). The federal rule affects home and community-based service programs that are authorized under the 1115, 1915(b)(3), 1915(c), 1915(i), or 1915(k) sections of the Social Security Act. The HCBS Final Rule establishes new requirements for characteristics that home and community-based settings must have in order to receive Medicaid funding.

The Michigan Department of Health and Human Services (MDHHS) must assess settings under the following four waivers for compliance with the characteristics outlined in the HCBS Final Rule:

- MI Choice Waiver Program
- Habilitation Supports Waiver Program
- MI Health Link HCBS Waiver Program
- Managed Specialty Services and Supports Waiver - §1915(b)(3) services

As part of the assessment process, MDHHS has been working with the Bureau of Community and Health Systems and the Bureau of Fire Services within the Department of Licensing and Regulatory Affairs (LARA) to address issues related to licensing of Adult Foster Care (AFC) homes and Homes for the Aged (HFA). Stakeholders have raised questions about whether state licensing rules conflict with the characteristics outlined under the final rule. In particular, stakeholders have questioned whether the federal requirements conflict with state licensing requirements on the following issues:

- Lockable Doors
- Visiting Hours
- Residency Agreements and State Landlord-Tenant Law
- Choice of Providers
- Freedom of Movement
- Choice of Roommate
- Access to Earned Income

After reviewing the relevant laws and regulations, MDHHS and LARA have determined that the requirements under the final rule and state licensing rules are in alignment for the aforementioned issues. As part of this review, MDHHS and LARA are issuing the following guidance to stakeholders.

For additional questions regarding the home and community-based services rule or the setting compliance process, please email HCBSTransition@michigan.gov.

Thank you for your attention to this matter.



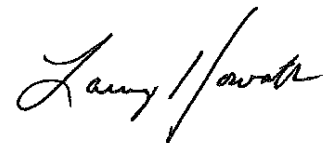
Richard C. Miles
Director, Bureau of Medicaid Policy and Health System Innovation
Department of Health and Human Services



Thomas J. Renwick
Director, Bureau of Community Based Services
Department of Health and Human Services



Kevin Sehlmeier
State Fire Marshal
Department of Licensing and Regulatory Affairs



Larry Horvath
Director, Bureau of Community & Health Systems
Department of Licensing and Regulatory Affairs

INTRODUCTION
KEY TERMS AND ASSOCIATED ACRONYMS

The following key terms and associated acronyms are used in this document:

Term	Acronym	Definition
Adult Foster Care Home	AFC	<p>“Adult foster care congregate facility” means an adult foster care facility with the approved capacity to receive more than 20 adults to be provided with foster care.</p> <p>“Adult foster care family home” means a private residence with the approved capacity to receive 6 or fewer adults to be provided with foster care for 5 or more days a week and for 2 or more consecutive weeks. The adult foster care family home licensee shall be a member of the household, and an occupant of the residence.</p> <p>“Adult foster care large group home” means an adult foster care facility with the approved capacity to receive at least 13 but not more than 20 adults to be provided with foster care.</p> <p>“Adult foster care small group home” means an adult foster care facility with the approved capacity to receive 12 or fewer adults to be provided with foster care.</p>
Bureau of Community and Health Systems	BCHS	BCHS is the bureau within LARA that is responsible for licensing and certifying facilities and agencies including licensing of Adult Foster Care and Home for the Aged facilities.
Bureau of Fire Services	BFS	BFS is the bureau within LARA that is responsible for ensuring facilities are constructed and maintained in accordance with the Life Safety Code.
Centers for Medicare and Medicaid Services	CMS	A federal agency within the United States Department of Health and Human Services that works in partnership with State governments to administer the Medicaid program.
Continuing Care Community Disclosure Act	CCFDA	An Act to regulate long-term leases in adult foster care facilities, independent living units, nursing homes, homes for the aged, home care service agencies and hospices. (MCL 554.901 et. seq.) This Act excludes adult foster care homes and homes for the aged from the state’s landlord tenant laws
Earned Income		Earned income is income received from another person or organization or from self-employment for duties that were performed for remuneration or profit. Some rental income is considered earned.
Foster Care		“Foster care” means the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation.

Home and Community Based-Services Final Rule	HCBS Final Rule	The HCBS Final Rule establishes new federal requirements for different Medicaid authorities that allow States to provide home and community-based long term services and supports to eligible persons. The rule requires Medicaid Home and Community-Based Services (HCBS) Waiver Programs to ensure that waiver participants have full access to benefits of community living and opportunity to receive services in the most integrated settings.
Home for the Aged	HFA	“Home for the aged” means a supervised personal care facility, other than a hotel, adult foster care facility, hospital, nursing home, or county medical care facility that provides room, board, and supervised personal care to 21 or more unrelated, non-transient, individuals 60 years of age or older. Home for the aged includes a supervised personal care facility for 20 or fewer individuals 60 years of age or older if the facility is operated in conjunction with and as a distinct part of a licensed nursing home.
Lockable Door		A lockable door is a side-hinged, permanently mounted door that is equipped with positive-latching, non-locking-against-egress hardware. The hardware must be able to be opened from the inside of a room with a single motion; such as a turn of a knob or push of a handle, even if the door is locked.
Medicaid-Funded Home and Community-Based Services		Services and supports that are offered through a Home and Community-Based Services Waiver program reimbursed by Medicaid.
Medicaid Home and Community-Based Services (HCBS) Waiver Program		Medicaid HCBS Waiver Program allows a State Medicaid Agency to meet the needs of people who prefer to get long-term care services and supports in their home or community, rather than in an institutional setting. The Program requires that HCB services follow an individualized and person-centered plan of care.
Michigan Compiled Laws Annotated	MCLA	Complete text of Michigan statutes, supplemented by succinct annotations.
Michigan Department of Health and Human Services	MDHHS	MDHHS is the Department within the State of Michigan that is responsible for administering the Michigan Medicaid Program. MDHHS is also responsible for implementing HCBS Final Rule.
Michigan Department of Licensing and Regulatory Affairs	LARA	LARA is responsible for safeguarding Michigan's citizens through a simple, fair, efficient and transparent regulatory structure.
Person Centered Planning	PCP	Person-Centered Planning (PCP) means a process for planning and supporting the person receiving services that builds upon his or her capacity to engage in activities that promote community life and that honors the person's preferences, choices, and abilities. The PCP process involves families, friends, and professionals as the person desires or requires. PCP is required by state law (Michigan Mental Health Code MCL 330.1712 and federal law (42 CFR 441.540) as the way that people plan for the services and supports that they receive from

		the community mental health system. PCP is used anytime an individual's goals, desires, circumstances, preferences, or needs change.
Provider-Owned and Controlled		A provider-owned and controlled setting is a setting that is owned and controlled by a Prepaid Inpatient Health Plan, Community Mental Health Service Provider, or contracted provider. A residential setting may be provider-owned and controlled if the waiver participant lives in a private residence that is owned or controlled by the Prepaid Inpatient Health Plan, Community Mental Health Service provider, or the contracted provider. "Controlled" means the person accepts the provider's staff as part of the living arrangement - provider controls the "choice" of who delivers the direct services in a package deal.
Residency Agreement		A residency agreement is a written, legally-enforceable agreement between a resident and owner that outlines the rights and protections when residing in a residential property. A residency agreement must be in compliance with state-landlord tenant law unless the residential setting is regulated under other statutes such as state licensing laws and the Continuing Care Community Disclosure Act. A residency agreement may also be known as a "Lease".
Resident Care Agreement		<p>A resident care agreement is the document which is established between the resident or the resident's designated representative, the responsible agency, if applicable, and the licensee and which specifies the responsibilities of each party. A resident care agreement shall include all of the following:</p> <ul style="list-style-type: none"> (a) An agreement to provide care, supervision, and protection, and to assure transportation services to the resident as indicated in the resident's written assessment plan and health care appraisal. (b) A description of services to be provided and the fee for the service. (c) A description of additional costs in addition to the basic fee that is charged. (d) A description of the transportation services that are provided for the basic fee that is charged and the transportation services that are provided at an extra cost. (e) An agreement by the resident or the resident's designated representative or responsible agency to provide necessary intake information to the licensee, including health-related information at the time of admission. (f) An agreement by the resident or the resident's designated representative to provide a current health care appraisal as required by subrule (10) of this rule. (g) An agreement by the resident to follow the house rules that are provided to him or her. (See HCBS house rule exception statement on page 9)

		<p>(h) An agreement by the licensee to respect and safeguard the resident's rights and to provide a written copy of these rights to the resident.</p> <p>(i) An agreement between the licensee and the resident or the resident's designated representative to follow the home's discharge policy and procedures.</p> <p>(j) A statement of the home's refund policy. The home's refund policy shall meet the requirements of R 400.14315.</p> <p>(k) A description of how a resident's funds and valuables will be handled and how the incidental needs of the resident will be met.</p> <p>(l) A statement by the licensee that the home is licensed by the department to provide foster care to adults.</p> <p>(7) A department resident care agreement form shall be used unless prior authorization for a substitute form has been granted, in writing, by the department. A resident shall be provided the care and services as stated in the written resident care agreement.</p>
Service Plan		<p>The individual Plan of Service (IPOS) is a written individual plan of services developed in partnership with the individual receiving services. The IPOS shall consist of a treatment plan, a support plan, or both. It must include the amount, scope and duration for each service and support. A treatment plan shall establish meaningful and measurable goals with the individual receiving services. The IPOS shall address, as either desired or required by the recipient, the recipient's need for food, shelter, clothing, health care, employment opportunities, educational opportunities, legal services, transportation, and recreation. The IPOS shall be kept current and shall be modified when indicated (reviewed and renewed at least annually). The individual in charge of implementing the IPOS shall be designated in the plan.</p> <p>The use of the Person Centered Planning process (PCP) is required by state law (Michigan Mental Health Code MCL 330.1712 and federal law (42 CFR 441.540) as the way that people plan for the services and supports that they receive from the community mental health system.</p>
State Landlord-Tenant Law		<p>State landlord-tenant law governs the rental of commercial and residential property. For the purposes of this document, the definition of state landlord-tenant law includes but is not exclusively limited to (1) MCL 554.631 to 554.641; and</p> <p>(2) MCL 600.5701 to 600.5759.</p>
State Licensing Administrative Rules		<p>Rules developed by LARA in accordance with the law in order to ensure the safety of residents in HFA and AFC facilities.</p>
Unearned Income		<p>Unearned income is all income that is not earned.</p>

LOCKABLE DOORS

The HCBS Final Rule requires residential settings to offer units that have bedroom and bathroom doors that are lockable by the individual, with only appropriate staff having keys to doors. Both the BFS and the BCHS allows AFC and HFA facilities to have bedroom and bathroom doors that are lockable from the inside of the room. In order to meet both the HCBS Final Rule and AFC/HFA licensing requirements, the bedroom door shall be equipped with a side-hinged, permanently mounted door that is equipped with positive-latching, non-locking-against-egress hardware (hardware that can be opened from the inside of a room with a single motion; such as a turn of a knob or push of a handle, even if the door is locked).

This requirement also applies to bathroom doors. In accordance with the AFC/HFA licensing requirements, appropriate staff must have a key to the bedroom or bathroom door if the individual has a lockable door, this key should be stored in an area not accessible to all staff and residents.

The associated licensing rules for bedroom and bathroom doors are as follows: R 400.1430 (2), R 400.1431 (3), R 400.14407 (3) and R 400.14408 (4) R 400.15407 (3) and R 400.15408 (4).

VISITING HOURS

The HCBS Final Rule requires residential settings to allow individuals to have visitors of their choosing at any time.

RESIDENCY AGREEMENT AND STATE LANDLORD-TENANT LAW

The HCBS Final Rule states that settings must have several “qualities” in order to be considered home and community-based. More specifically, a residential setting that is provider-owned or controlled must demonstrate the following qualities:

The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord tenant law.

The Continuing Care Community Disclosure Act specifically exempts certain facilities, such as AFCs and HFAs from the state’s landlord tenant laws. Consequently, these licensed settings, pursuant to HCBS Final Rule, must have a legally enforceable residential agreement that provides protections that address eviction processes and appeals comparable to the state’s landlord tenant laws.

MDHHS has determined that current state licensing rules offer comparable protections and rights as the state’s landlord-tenant laws on issues related to discharge processes and appeals. Specifically, both the state’s landlord tenant laws and state’s licensing rules require prior notice and an opportunity to appeal or contest the eviction or discharge to an impartial decision maker. However, unlike the landlord tenant laws, the licensing rules have built in protections to

accommodate the health, safety and wishes of the resident. MDHHS has determined that the variance between the licensing rules and landlord tenant laws, provide comparable protections as the state’s landlord tenant laws and additionally allow the setting to make person centered placement decisions in accordance with the resident’s wishes and for the resident’s health and safety that would not be permitted under the state’s landlord tenant laws.

MDHHS and LARA also agreed that both AFC and HFA licensed facilities must have a residential agreement that outlines these protections and rights. Because current state licensing rules offer comparable protections to state landlord-tenant laws, a residency agreement for a licensed setting that meet the requirements of state licensing rules may also meet the requirements of the HCBS Final Rule if the residency agreement includes information on discharge processes and complaints.

Based on these findings, MDHHS and LARA have determined that both AFC and HFA facilities may use residency agreements to meet the requirements of state licensing rules and the HCBS Final Rule under the following conditions:

- **AFC Homes:** State licensing rules require AFC homes to use the BCAL-3266 Resident Care Agreement form. MDHHS and LARA have agreed that the BCAL-3266 form meets the requirements of the HCBS Final Rule if the licensee also provides information on discharge processes and complaints to the resident. MDHHS and LARA have also created a supplemental document, known as the “Summary of Resident Rights: Discharges and Complaints”, which could be used by an AFC home in conjunction with BCAL-3266 form to meet the requirements of state licensing rules and the HCBS Final Rule. Licensees may still use their own residency agreements if the residency agreement outlines the relevant discharge and complaints processes and meets all applicable state and federal requirements.
- **HFA Homes:** State licensing rules do not require HFA homes to use a specific document as a residency agreement. MDHHS and LARA have agreed that licensees may design and use their own residency agreements to meet the federal requirement if the residency agreement outlines the relevant discharge and complaints processes and meets all applicable state and federal requirements. MDHHS and LARA have also agreed that licensees could use the Summary of Resident Rights: Discharges and Complaints document to fulfill the state and federal requirement to outline relevant discharge and complaint processes.

After also comparing this interpretation to existing state requirements, MDHHS and LARA have agreed that this interpretation complies with rules R 400.14301(6), 400.15301(6), and R 400.1407(5) as outlined by the BCHS.

The BCAL-3266 form and Summary of Resident Rights: Discharges and Complaints document can be found online at the following locations:

Name of the Document	Location
BCAL-3266	www.michigan.gov/lara >> Community and Health Systems >> Adult Foster Care >> Resident Care Agreement BCAL-3266
Summary of Resident Rights: Discharges and Complaints	www.michigan.gov/mdhhs >> Assistance Programs >> Health Care Coverage (Click on the tab) >> Home and Community-Based Services Program Transition

HOUSE RULES

Although house rules are optional under state licensing rules, for the purposes under HCBS Final Rule, house rules will not be permitted.

CHOICE OF PROVIDERS

In many AFC and HFA facilities, the provider of services is the same entity as the owner of the setting. Some stakeholders have contended that this arrangement conflicts with the requirements of the HCBS Final Rule.

The HCBS Final Rule does not expressly prohibit the provision of services in provider-owned and/or controlled settings. The HCBS Final Rule only requires that they be assessed for compliance with the home and community-based characteristics as outlined under the HCBS Final Rule. One of these characteristics is that participants must be offered a choice of providers within the waiver program. A participant could choose a setting that offers services from a specific provider under the following conditions:

1. The participant is offered an array of options in terms of where he or she will receive services by his or her supports coordinator.
2. If the participant chooses a setting where a specific provider offers services, the participant should also be informed by his or her service agency that he or she is choosing a specific provider by choosing that specific setting.
3. The participant should also be provided with information by his or her service agency about how to select a new provider and setting, and the array of available options when he or she desires.
4. The participant may also use private funds to reimburse other providers for additional services such as skilled therapies and other assistance.

MDHHS and LARA have determined that this approach complies with state licensing rules.

FREEDOM OF MOVEMENT

State licensing rules allow for settings to require supervision or place restrictions on the freedom of movement of residents or in accordance with the individual's service plan.

The HCBS Final Rule includes the requirement that individuals must not be unnecessarily restricted in their movement.

If an individual has a specific health or safety related need that requires supervision or restriction on the individual's freedom to move inside the setting or in the community this need must be

clearly documented in the individual's person centered plan and meet all the modification requirements outlined in the modification section of this document.

MDHHS and LARA have determined that this approach complies with state licensing rules.

Specific Licensing Rule Citations: Rule 408, MCLA 400.707(7), R 400.1707(2)(a), and R 400.14301(2)(a)

CHOICE OF ROOMMATE

Residents in many AFC homes and HFA facilities have an option of choosing to live with a roommate.

An individual's choice of roommate and room may be limited by the availability of open rooms within the individual's chosen residential setting. The licensee for the setting should discuss potential options for rooms and roommates with the participant prior to completing the residency agreement. Individuals must be aware of the process to request a different roommate or to change from a shared to a private room should their preferences change over time.

If an individual's preferences cannot be immediately met by a provider individuals must be informed of their right to pursue alternative settings where their preferences related to roommates or private room may be available.

Individuals must be aware of the process to request a different roommate or to change from a shared to a private room

Specific Licensing Rule Citations: R 400.1407(2)(c), R 400.14301(2)(c)

ACCESS TO EARNED AND UNEARNED INCOME

The HCBS Final Rule requires that individuals be able to control their own resources including personal funds.

State licensing rules do not permit a licensee to restrict access to earned income. A provider may offer a safe location for a participant to store earned income, but the provider must make provisions for individuals to access their earned income when desired as part of this arrangement. This arrangement does not conflict with the requirement under the HCBS Final Rule for individuals to be able to control their own resources.

Specific Licensing Rules Citation: R. 400.1407(5), R 400.14301(6)(k), R 400.14315(3), and R 400.1421

MODIFICATIONS

Any modifications to the HCBS settings requirements needed by an individual must be supported by a specific assessed health and/or safety need and justified in the person-centered plan.

The following must be documented in the plan:

- Identify a specific and individualized assessed safety or health related need
- Positive interventions and supports used prior to modification
- Less intrusive methods tried
- Describe the condition that is directly proportionate to the specified need
- Regular collection and review of data to review effectiveness
- Established time limits for periodic review to determine if modification is still needed
- Informed consent of the individual
- Assure interventions and supports will cause no harm

Federal Regulation 42 CFR §441.530