



**STATE OF HAWAII
DEPARTMENT OF HEALTH**

P.O. Box 3378
Honolulu, HI 96801-3378

DEVELOPMENTAL DISABILITIES DIVISION

TITLE: Home and Community Based Services
Rights Modifications

Policy #: 02.06

BACKGROUND:

The Developmental Disabilities Division (DDD) is the operating agency for the State of Hawaii's Medicaid 1915(c) Home and Community Based Services (HCBS) Waiver for Individuals with Intellectual and Developmental Disabilities (Medicaid I/DD Waiver). Hawaii's Medicaid I/DD Waiver operates under the authority of section 1915(c) of the Social Security Act and all waiver services must align with the federal Medicaid regulatory waiver requirements in 42 CFR 441.301(c) (HCBS final rule). Each participant of the Medicaid I/DD Waiver retains the human and civil rights afforded to any person living in Hawaii, except as restricted by a court of law. When a participant may have health and safety needs that require consideration of the modification of certain rights or freedoms in HCBS settings, the Individualized Service Plan (ISP) team shall ensure that such modifications are designed, implemented, and documented in a manner that minimizes the restrictions to rights and freedoms and seeks to maximize the development of alternatives.

PURPOSE:

The purpose of this policy is to ensure that participants of the Developmental Disabilities Division (DDD) receiving services and supports in HCBS settings are supported in a caring and responsive manner that promotes and protects their rights to dignity, respect, trust, autonomy, independence, choice, and freedom from unnecessary restrictions.

DEFINITIONS:

"HCBS Settings" means provider-owned, operated, or controlled residential and non-residential settings that receive Medicaid funding to provide HCBS.

- Provider-owned, operated, or controlled residential settings include:
 - Adult residential care homes/expanded adult residential care homes;
 - Developmental disabilities adult foster homes;
 - Developmental disabilities domiciliary homes; and
 - Special treatment facilities/therapeutic living programs.
- Provider-owned, operated, or controlled non-residential settings include:
 - Adult day health settings.

“HCBS Rights Modification Plan” is an attachment to the ISP for a participant who has health and/or safety needs that require a modification of certain rights or freedoms in HCBS settings (Residential or Non-Residential). HCBS rights modification plans must:

- Be individualized for the participant and not be applied to all participants in the HCBS setting;
- Be for a specific assessed health and safety need; and
- Include documentation of the positive and less restrictive interventions that have been implemented previously that did not work.

“Specific Assessed Need” is a health and safety need identified in a formal assessment for the individual. Formal assessments may include but are not limited to:

- Functional Behavior Assessment (FBA)/Behavior Support Plan (BSP);
- Court documentation;
- Supports Intensity Scale (SIS);
- Medical reports or diagnoses supported by a physician’s evaluation or order specific to an individual’s health and safety risk;
- Psychological or psychiatric evaluations;
- DDD Clinical Interdisciplinary Team (CIT) consultation reports; and
- Nursing assessments.

ACRONYMS:

Behavior Support Plan (BSP)
Case Manager (CM)
Code of Federal Regulation (CFR)
Clinical Interdisciplinary Team (CIT)
Developmental Disabilities Division (DDD)
Functional Behavior Assessment (FBA)
Hawaii State Department of Health (DOH)
Home and Community-Based Services (HCBS)
Individualized Service Plan (ISP)
Intellectual and Developmental Disabilities (I/DD)
Supports Intensity Scale (SIS)

POLICY:

This policy requires that any modification to the rights and freedoms of a participant in a setting where HCBS are delivered must comply with federal Medicaid regulatory waiver requirements in 42 CFR 441.301(c) and, as applicable, DOH DDD Policy 2.02 on Restrictive Interventions.

Any modification to the rights and freedoms of a participant in an HCBS setting must be supported by a specific assessed need and must be explained in the ISP. The modification should rely upon the least restrictive approach to address the participant's needs, should be reviewed periodically for effectiveness, and should be terminated when there is no longer a demonstrated need or when a less restrictive approach would achieve the same result. This policy also describes which rights and freedoms may be modified and which may not, the circumstances under which modifications may be incorporated into participants' ISPs, and the requirements that must be met, including documentation requirements.

Generally, participants have all the same rights and personal freedoms granted to other people. Certain participant rights and freedoms in HCBS settings, as articulated in the federal Medicaid regulatory requirements in 42 CFR 441.301(c) and Hawaii Administrative Rules Chapter 11-148.1, that may be subject to a modification as necessary, to address a participant's specific assessed need(s), include:

- The right to a legally enforceable tenancy agreement that offers eviction protections consistent with those required under the landlord tenant laws in that jurisdiction, when living in a provider-owned or -controlled residential setting;
- The following aspects of the right to privacy in residential settings:
 - Entrance doors lockable by the participant, with only appropriate staff having keys to doors;
 - Choice of roommates; and
 - Freedom to furnish and decorate sleeping or living units within the lease or other agreement.
- Freedom and support for participants to control their own schedules and activities;
- Access to food at any time; and
- Access to visitors of the participant's choosing at any time.

Certain participant rights and freedoms in HCBS settings that **may not** be modified by anyone including legal representatives, unless otherwise required by a court order include but are not limited to:

- The right to access and participate in the greater community and engage in community life;
- The right to dignity, respect, and autonomy;
- The right to freedom from coercion, abuse, neglect, or exploitation;
- The right to seek employment and work in competitive, integrated settings;

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- The right to receive services and supports in settings that are physically accessible to the participant;
 - The right to make informed choices about services and supports and who provides them;
 - The right to freedom from seclusion, aversive procedures, and restraints and interventions prohibited by DOH DDD Policy 2.02 on Restrictive Interventions; and
 - The right to freedom from restrictions or interventions imposed for the purpose of discipline, retaliation, and/or staff convenience.

The fundamental features of this policy specify that any modification to a participant's rights and freedoms:

- Are only meant to address individual specific assessed needs;
- Must be highly individualized and may not be established for groups of participants receiving services in a particular setting;
- Should be considered a last option, only after positive interventions and supports and other less intrusive methods have been attempted and documented; and
- May not cause any harm to the participant.

Members of the ISP team are responsible for developing any necessary modification and related documentation as part of the person-centered planning process.

When any member of the ISP team, which includes the participant, family member, CM, caregiver, and provider of services to the participant (Waiver Provider), identifies a health and/or safety need that may require a modification to a participant right or freedom, the ISP team may incorporate a modification into the participant's ISP, if the following requirements are met and documented in the Attachment to ISP, HCBS Rights Modification Plan, to include:

- The specific and individualized health and safety assessed need must be identified and described;
- A clear description of the condition, situation, and necessary modification that is directly proportionate to the specific health and safety assessed need, including how the modification balances health and safety needs with the participant's rights to privacy, dignity, respect, autonomy, independence, choice, and community integration and participation;
- Positive interventions and supports, as well as less intrusive methods of meeting the need, have been implemented, assessed for effectiveness, and determined to be ineffective in fully meeting the specific assessed need;
- Strategies that have been identified and implemented to reduce or eliminate the need for the modification, including development of participant skills and knowledge, additional accommodations, changes in supports, environmental adaptations, assistive technologies, or other approaches;
- The plan and timeframe to regularly collect and review data to measure the ongoing effectiveness of the modification, and to determine if the modification is still necessary or

can be terminated. Periodic review must occur at least annually, but more frequent review and assessment may be determined as necessary by the ISP team;

- The participant and, as applicable, the participant's legal representative, have provided informed consent regarding the modification and related documentation in the ISP; and
- The person or entity responsible for implementation of the modification offers a written assurance that any interventions and supports utilized will cause no harm to the participant.

PROCEDURES:

I. Duties and Responsibilities of the DDD Case Manager

- A. Receive any information of a participant's health or safety concern, that may require a modification to the participant's rights and freedoms, by a member of the participant's ISP team.
1. The CM shall determine if the request is for a participant's rights and freedoms that can be modified and is not identified as a participant rights and freedom that **may not** be modified.
 2. If the CM determines that the participant's rights and freedoms may not be *considered* for a modification, the CM shall explain the policy to the ISP team member and work with the ISP team to address the team member(s)' concern(s).
- B. Facilitate a person-centered discussion with the ISP team on the health and safety concerns and needs. Discussion shall include, but is not limited to:
1. The situation, condition, or behavior that creates the health and safety need;
 2. The specific assessed need, including verification that the health and safety need is identified in a formal assessment specific to the participant;
 3. If a formal assessment is needed, the CM shall work with the ISP team to ensure an appropriate, formal assessment is completed or attained.
 4. Attempts made to modify the environment prior to requesting a modification;

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5. Other positive interventions, supports, and less intrusive methods that the setting may implement to meet the participant's needs; and
 6. Determination if a modification is warranted and if so, how the modification would balance health and safety needs with participant rights to privacy, dignity, respect, autonomy, independence, choice, and community integration and participation.
- C. If the ISP team agrees that a modification is not warranted, document the details of the person-centered discussion with the ISP team in the Contact Notes of the participant's record including the ISP team's decision on the request for a modification.
- D. If the ISP team agrees that a modification is warranted, complete the following within fourteen (14) calendar days:
1. Attachment to ISP, HCBS Rights Modification Plan (Residential or Non-Residential Setting), Part 1;
 2. Submit the Attachment to ISP, HCBS Rights Modification Plan, to the Waiver Provider to complete Part 2: Implementation of Modifications; and
 3. Document the details of the person-centered discussion with the ISP team, including the ISP team's decision on the request for a modification, in the Contact Notes of the participant's record.
- E. Upon receipt of the Attachment to ISP, HCBS Rights Modification Plan, from the Waiver Provider, the CM shall review the documentation in Part 2 and approve, deny, or request more information from the Provider within seven (7) calendar days.
- F. After reviewing and determining approval, sign the Attachment to ISP, HCBS Rights Modification Plan, Part 3: Approval. Approval by the CM means the proposed modification does not reduce the participant's likelihood of goal attainment and is in alignment with:

1. The specific assessed need(s) of the participant;
 2. Other applicable DDD policies (e.g., restrictive intervention policy);
 3. HCBS rule; and
 4. Other state rules and expectations.
- G. Coordinate a meeting with the participant and applicable ISP team members to review, discuss, and seek informed consent from the participant and, as applicable, their legal representative, regarding the Attachment to ISP, HCBS Rights Modification Plan, within seven (7) calendar days of determining approval.
1. If consent is granted, the CM shall:
 - a) Ask the participant and their legal representative, if applicable, to check off the appropriate box on the Attachment to ISP, HCBS Rights Modification Plan, Part 4, sign, and date, to indicate acknowledgement of informed consent; and
 - b) Update the ISP Risk and Safety section to indicate that there is a modification and an approved Attachment to ISP, HCBS Rights Modification Plan.
 2. If consent is not granted, the CM shall:
 - a) Have the participant and their legal representative, if applicable, check off the appropriate box on the Attachment to ISP, HCBS Rights Modification Plan, Part 4, sign, and date, to indicate refusal;
 - b) Coordinate and facilitate a person-centered discussion with the ISP team to determine if the participant's health, safety and well-being can be supported without the modifications described in the Attachment to ISP, HCBS Rights Modification Plan; or if other options must be explored and considered; and
 - c) Update the ISP Risk and Safety section to indicate the need for a modification and the status of the Attachment to ISP, HCBS Rights Modification Plan and/or other options that will be explored.

3. Ensure the completed and signed Attachment to ISP, HCBS Rights Modification Plan, is filed with the ISP and copies distributed to the ISP team members.
 4. Submit a copy of the Attachment to ISP, HCBS Rights Modification Plan to the DDD Behavior Supports Review Committee (BSRC).
- H. Facilitate person-centered meetings with the ISP team to ensure the modification(s) are reviewed, discussed, and considered for termination, consistent with the approved Attachment to ISP, HCBS Rights Modification Plan, at the frequency the ISP team agreed upon, as indicated in Part 1, Section A. At a minimum, the modification(s) must be reviewed at the end of the modification period, as indicated in Part 1, Section A, and at the annual ISP meeting. A review may also be requested by any member of the ISP team at any time.
1. CM shall secure informed consent from the participant and their legal representative, if applicable, as reflected in an updated and signed Attachment to ISP, HCBS Rights Modification Plan, upon any amendment to a modification within the modification period.
- II. Duties and Responsibilities of the Waive Provider
- A. The Waiver Provider shall complete Part 2 of the Attachment to ISP, HCBS Rights Modification Plan, upon transmittal from the CM within thirty (30) calendar days of receipt.
1. Part 2 of the Attachment to ISP, HCBS Rights Modification Plan includes:
 - a) A clear description of the modification;
 - b) The positive interventions and supports, and any less intrusive methods of meeting the health or safety need, that have been attempted or implemented but were not effective;
 - c) The strategies to reduce or eliminate the need for the modification;
 - d) Description of how the effectiveness of the modification will be measured, including the plan and timeframe to collect and review data to measure the ongoing effectiveness of the modification and to determine if the modification is still necessary or can be terminated; and

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- e) Written assurance that any interventions or supports utilized as part of the modification will cause no harm to the participant.

AUTHORITATIVE & OTHER REFERENCES:

DOH DDD Policy 2.02 on Restrictive Interventions
Hawaii Administrative Rules Chapter 11-148.1
ISP Attachment – HCBS Rights Modification Plan (Residential or Non-Residential Setting)
Contents of Request for Waiver 42 CFR 441.301(c) (HCBS final rule)

Approved: *Mary Brogan*
Administrator
Developmental Disabilities Division

Date: Apr 5, 2022