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In reply, please refer to:  
File:

Medicaid I/DD Waiver  
Memo No.: FY2023-01  
Date: September 20, 2022

TO: Medicaid I/DD Waiver Providers

FROM: Mary Brogan, Administrator  
Developmental Disabilities Division

SUBJECT: Home and Community Based Services Rights Modifications

The Home and Community Based Services (HCBS) final rule on community integration (79 FR 2947) (HCBS final rule) federal deadline for states to achieve compliance is March 17, 2023. The HCBS final rule requires that each participant of Hawaii's Medicaid 1915(c) HCBS Waiver for Individuals with Intellectual and Developmental Disabilities (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. The HCBS final rule includes requirements when a participant may have health and safety needs that require consideration of the modification of certain rights and freedoms in HCBS settings to 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. Modifications may only be considered when all other less restrictive alternatives have been tried, assessed to determine effectiveness, and determined to be ineffective in fully meeting the participant's specific assessed need.

The Department of Health, Developmental Disabilities Division (DDD), promulgated Policy and Procedures (P&P) #2.06 to implement the HCBS final rule requirements. The purpose of P&P #2.06 is to ensure that participants 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. The policy establishes the process for the Individualized Service Plan (ISP) team to identify, discuss, and implement HCBS modifications for participants who may have health and safety needs. The policy also specifies the participant rights that may be modified through the ISP process and those rights that cannot be modified.

Providers have an important role as part of the ISP team in identifying the need for modifications to the participant's rights, documenting other approaches that have been tried and what the results were, suggesting modifications for the ISP team to consider, implementing the modifications as designed and approved by the ISP team, documenting the results of the modifications for periodic review, and identifying when modifications should be changed or should end.

### **Participant Rights:**

Participants have the same rights and personal freedoms granted to other people. 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.

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;
- 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.

### **HCBS Rights Modifications:**

Modifications to a participant's rights and freedoms must be highly individualized to address the individual's specific assessed needs and may not be established for groups of participants receiving services in a particular setting. It 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.

When a health and/or safety need is identified that may require a modification to a participant's rights 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.

The case manager (CM) will receive 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 and facilitate a person-centered discussion with the ISP team on the health and safety concerns and needs. If the ISP team agrees that a modification is warranted, the CM will complete the Attachment to ISP, HCBS Rights Modification Plan (Residential or Non-Residential Setting), Part 1, and submit the Attachment to the Waiver Provider within fourteen (14) calendar days.

The Waiver Provider shall complete Part 2 of the Attachment to ISP, HCBS Rights Modification Plan, and submit to the CM within thirty (30) calendar days of receipt. Part 2 shall include the following:

- A clear description of the modifications;
- The positive interventions and supports, and any less intrusive methods of meeting health or safety need that have been attempted or implemented but were not effective;
- The strategies to reduce or eliminate the need for the modification;
- 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
- Written assurances that any interventions or supports utilized as part of the modification will cause no harm to the participant.

The CM may approve, deny, or request more information from the Waiver Provider within seven (7) calendar days. If the CM approves Part 2, the CM shall sign agreeing that the proposed modification does not reduce the participant's likelihood of goal attainment and is in alignment with the specific assessed need(s) of the participant; state rules, expectations, and policies; and federal rules. The CM shall coordinate a meeting with the participant and the ISP team to review, discuss, and seek informed consent within seven (7) calendar days of determining approval. If consent is granted, the CM shall have the participant and their legal representative, if applicable, complete Part 4 of the Attachment to the ISP, HCBS Rights Modification Plan, and sign and date. The CM shall update the ISP Risk and Safety section to indicate that there is a modification and an approved Attachment to the ISP, HCBS Rights Modification Plan and file a copy of the Attachment with the ISP and distribute copies to the ISP team. A copy of the Attachment to ISP, HCBS Rights Modifications Plan will be submitted to the DDD Behavior Supports Review Committee (BSRC).

**Implementation and Review of the HCBS Rights Modification Plan:**

The CM shall facilitate person-centered meetings with the ISP team to ensure the modification(s) are reviewed, discussed, and considered for termination consistent with 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. The waiver provider must implement the modifications as specified on the Attachment to ISP, HCBS Rights

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Modification Plan, document the effectiveness of the modification and submit to the CM for review. The 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.

This transmittal memo updates the Waiver Provider Standards Version A, effective April 1, 2022. Please refer to the attached P&P #2.06 and the “Attachment to ISP, HCBS Rights Modification Plan” (sample PDF version) for additional information.

If you have any questions, please contact the Community Resources Branch at (808) 733-2135 or at [doh.dddcrb@doh.hawaii.gov](mailto:doh.dddcrb@doh.hawaii.gov).

Thank you for your continued commitment to providing quality services for individuals with intellectual and developmental disabilities.

Attachments