

Medicaid Home and Community Based Services Final Settings Rule

Frequently Asked Questions for Developmental Disabilities

This fact sheet is intended to give an overview of the Medicaid Home and Community Based Services Final Settings Rule and State Transition Plan, to address frequently asked questions (Q & A) about the rule and plan, as well as provide information (I) on its relevance to Developmental Disabilities participants, families, guardians, stakeholders, and the general public.

General Information:

Q: What is the Medicaid Home and Community Based Services Final settings rule?

A: The Medicaid Home and Community Based Services (HCBS) Final Settings Rule is a federal regulation that was published by the Centers for Medicare and Medicaid Services (CMS) in March 2014. The rule enhances the quality of HCBS, provides additional protections to HCBS program participants, and ensures that individuals receiving services through HCBS programs have full access to the benefits of community living. The Final Settings Rule applies to all Medicaid 1915(c) HCBS Waivers, Medicaid 1915(i) HCBS State Plan Options, and Medicaid 1915(k) Community First Choice Programs.

I: *The Nebraska Department of Health and Human Services (DHHS) has four Medicaid 1915(c) HCBS waivers. The Division of Medicaid and Long-Term Care (MLTC) administers two of these: the Aged & Disabled waiver (A&D waiver) and the Traumatic Brain Injury waiver (TBI waiver). The Division of Developmental Disabilities (DD) administers the other two waivers: the Adult Day Services waiver (AD waiver) and the Comprehensive waiver (Comp waiver). Nebraska does not administer any Medicaid 1915(i) or 1915(k) waivers at this time. The final rule in its entirety can be found [:https://www.federalregister.gov/documents/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider](https://www.federalregister.gov/documents/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider)*

Q: How is the Final Rule different from the “Medicaid waivers”?

A: The Medicaid HCBS waiver program is a mechanism for states to utilize matching federal money to provide services to participants in a community setting instead of an institutional setting. States have to apply for and be granted a waiver(s) in order to receive matching federal money to provide these services. States must contribute money to the cost of providing services, and CMS will match this money at a specific percentage, which may vary from year to year. States must assure that services provided in the waiver(s) are carried out within the parameters of all applicable federal and state laws and regulations in order to receive the federal match.

The Final Rule is one of the regulations that governs how services in the Medicaid HCBS waiver program are provided.

I: *The Final Rule and the Medicaid waivers intersect at many points, however the most important difference is the Medicaid waivers define what services are available, the rates of payment, the safeguards for the services, etc., whereas the Final Rule is one set of rules that must be followed while delivering Medicaid waiver services in provider owned, operated, or controlled settings.*

Q: How does the Final Rule affect DD services?

A: The final rule was designed to improve the quality of services for participants receiving HCBS waiver services. It reinforces person-centered planning requirements, access to the benefits of community living, and receipt of services in the most integrated settings possible.

I: *The Final Rule will affect some providers and service types more than others. The Division of Developmental Disabilities (DHHS-DD) has worked toward taking a person-centered planning approach for nearly two decades. , The rule serves to reinforce good practices that are already occurring and continue to guide Nebraska toward true person-centered planning.*

The Final Rule primarily affects those services that are being delivered by providers in settings that the provider owns, operates, or controls (namely Group Homes, Centers for the Developmentally Disabled [CDDs], Extended Family Homes/Shared Living Homes, Habilitative Workshops, and other day sites). The Final Rule has minimal effect on services provided in a private home (not owned/operated/controlled by a provider) or in the community. There is more information on this later in this document.

Q: What does the state have to do in order to follow the Final Rule?

A: Each state has been tasked with assuring that all (provider owned, operated, or controlled) settings in which HCBS waiver services are provided are compliant with all aspects of the final rule by March 2022. In order to do that, each state is required to draft and submit a Statewide Transition Plan (STP) to CMS for approval.

I: *Nebraska received initial approval of the submitted STP from CMS in March, 2017. Since that time modifications have been made to the plan with the intent to submit to CMS for final approval in August 2019. Prior to submission, the plan went through a public comment period in June, 2019. A copy of the submitted plan and other information about Nebraska's STP can be found [here](http://dhhs.ne.gov/Pages/HCBS-Statewide-Transition-Plan.aspx): <http://dhhs.ne.gov/Pages/HCBS-Statewide-Transition-Plan.aspx>*

Q: What do providers have to do in order to follow the Final Rule?

A: Each provider must assure that all sites that are owned, controlled, or operated by the agency are compliant with the Final Rule before the end of the transition period (March 2022). Providers are also responsible for assuring that any new sites opened after the implementation of the Final Rule in March 2014 are immediately compliant with the Final Rule.

I: *DHHS-DD has completed multiple rounds of site assessments for all providers and those results have been given to the providers. For those sites that are out of compliance, DHHS-DD has provided technical assistance to providers in creating remediation plan strategies in order to bring their sites into compliance with the Final Rule. As of July 2019, there are no indications that any site will not be able to remediate the identified issues before the transition period ends. There is more information on this later in this document.*

Q: What does “initial approval” and “final approval” mean?

A: Initial approval of the STP is given once the state submits a plan to CMS, and CMS determines the plan to have the proper public comment input and summary requirements. If the STP is sufficient, but systemic and/or site-specific assessments are not yet completed, initial approval is granted.

Final approval of the STP is given when CMS has determined that public comment, input and summary requirements are met, and the STP provides all necessary information including but not limited to: systemic assessment, site specific assessment, information regarding heightened scrutiny, and clear remedial steps with milestones.

I: *CMS is looking to make sure that each state has done the following: assessed all laws, regulations, and policies that apply to HCBS settings (“systemic assessment”); assessed all of the applicable HCBS sites and made a determination of compliance (“site specific assessment”); have a plan to identify settings that could be seen as institutional and how those are going to be reviewed (“information regarding heightened scrutiny”); and how the state is going to assist providers in becoming compliant with the rule including a timeline to bring all sites into compliance (“clear remedial steps with milestones”).*

Q: Wasn’t the transition period supposed to end in March 2019?

A: Yes, in the original Final Rule regulation, the transition period for the settings to become compliant ended in March 2019. However, in May 2017, CMS issued an informational bulletin outlining an extension of the transition period for compliance with the Final Rule. The transition period is to end on March 17, 2022 and all settings must be compliant by that date.

I: *This extension allowed for extra time for each setting to make the necessary changes to their physical locations as well as their policies, procedures, and practices in order to come into compliance with the Final Rule. DHHS-DD is currently working with providers to bring all settings into compliance.*

Habilitative Workshops and Day Site Information:

Q: Are the “workshops” being forced to close because of the Final Rule?

A: No, there is no requirement that the habilitative workshops in Nebraska must close due to the Final Rule. However, all habilitative workshops must meet the Final Rule requirements including integration with the community in order to continue to receive Medicaid funds.

I: *The intent of the Final Rule is to improve services, not shut down sites. DHHS-DD has assessed all habilitative workshops in-person, on-site and has assisted providers in developing remediation plans to come into compliance with the Final Rule. An assessment of integration is currently being completed with agency providers and once DHHS-DD has gathered this information, a plan on how to assure all workshops are integrated will be developed. Comments from participants, stakeholders, providers, and the public has been and will continue to be sought prior to any changes in integration requirements for workshops.*

Q: Do the integration requirements of the Final Rule mean my family member is required to ride around in a van all day?

A: No, this practice is not tolerated or encouraged by the State of Nebraska or the Final Rule.

I: *Participants riding in vans all day long with no purpose is not an acceptable practice; it is not habilitative, and it does not meet the definition of any current Medicaid HCBS DD waiver service. Riding around in a van for the sake of “community inclusion” is not true community inclusion as there is no meaningful interaction with the community.*

Q: What will integration of the workshops look like in the future?

A: CMS has tasked each state with determining how they will define integration. This offers the states a unique opportunity to reimagine their systems to fit the populations of participants they serve. There is no one-size-fits-all answer, but rather it is up to the states to be creative in their service structure.

I: *Participants, families, providers, and stakeholders have been and will continue to be given an opportunity to provide input into how the future of day services will look. At this time the end result is unknown, but be assured that there will continue to be many options from which participants may choose when it comes to day services.*

Q: Will sub-minimum wage work still be available under the Final Rule?

A: Sub-minimum wage work is primarily regulated by the US Department of Labor. At this time, sub-minimum wage work is still allowed under specific circumstances, which are outlined [here: https://www.dol.gov/whd/specialemployment/](https://www.dol.gov/whd/specialemployment/). The Final Rule does not prohibit sites from offering sub-minimum wage work at this time as a part of their service array, however the site still must meet the requirements of the Final Rule (including integration).

I: *Sub-minimum wage work is still allowed by law, therefore can be offered by providers. It is important to know that while sub-minimum wage work is allowed, in order to be compliant with the Final Rule there must be other options available outside of sub-minimum wage work.*

Q: How does Vocational Rehabilitation (VR) fit in to the Final Rule?

A: DHHS-DD has partnered with Nebraska Vocational Rehabilitation (VR) in order to assist interested DD waiver participants in gaining competitive, integrated employment. Competitive, integrated employment is considered by many as the ideal outcome for day/employment services for waiver participants younger than retirement age. More information about Nebraska VR can be found [here: http://www.vr.nebraska.gov/](http://www.vr.nebraska.gov/)

I: *Not every participant will qualify for VR services. VR assesses the participant's skills, abilities, and desires regarding competitive employment and makes a determination if the participant is currently at a place where they have the proper skills, abilities, and desires to obtain and maintain competitive integrated employment.*

Q: Based on the assessments that were done, what types of things needed remediated in Nebraska's day service sites?

A: Nebraska's day sites were assessed primarily in 2018. Twenty-nine percent of the day sites were already fully compliant with the rule. The primary items that required remediation included having a secure place to store belongings, assuring that all personal cares were provided in a private area, assuring that all participants had access to information about public transportation (where available), and assuring that all participants had a choice in activities and their daily schedule. Integration was not assessed at that time as explained above.

I: *There were other areas in which some day sites were out of compliance, however those listed above occurred the most. All sites with deficiencies are currently working on correcting these with some having already been completed. All sites have indicated they will be in compliance by the deadline in 2022.*

Residential Site Information:

Q: Are any types of residential sites being closed because of the final rule?

A: No, there is no requirement that any of the residential site types in Nebraska must close due to the Final Rule. However, all types of residential sites must meet the Final Rule requirements including integration with the community in order to continue to receive Medicaid HCBS waiver funds.

I: *The intent of the Final Rule is to improve services, not shut down sites. DHHS-DD has assessed a majority of the residential sites either in-person and on-site or via Agency self-assessment and has assisted providers in developing remediation plans to come into compliance with the Final Rule. An assessment of integration is currently being completed and once DHHS-DD has received this information, a plan on how to assure all residential sites are integrated will be developed. Comments from participants, stakeholders, providers, and the public will be sought prior to any changes in integration requirements for residential sites.*

Q: What does integration of residential sites look like?

A: Much like workshops, CMS has tasked each state with determining how they will define integration. This offers the states a unique opportunity to reimagine their systems to fit the populations of participants in which they serve. There is no one-size-fits-all answer, but rather it is up to the states to be creative in their service structure.

I: *Participants, families, providers, and stakeholders will be given an opportunity to provide input into how the future of residential services will look. At this time the end result is unknown, but be assured that there will continue to be many options from which participants may choose when it comes to residential services. Some current services, such as Shared Living may already be considered integrated, due to the nature of the service (a participant living with a family and fully participating in family life).*

Q: Is my family member going to be forced to move because of the Final Rule?

A: As long as the setting is compliant with the Final Rule within the set timeframes, there will be no reason that the participant must move due to the Final Rule. At this time, no sites have indicated that they cannot or will not be able to remediate prior to the end of the transition period (March 2022).

I: *If a setting chooses not to or cannot become compliant, then no Medicaid HCBS waiver funds can be paid to support that person in that setting after March 2022. If there are any settings that have indicated they cannot or will not comply with the Final Rule, the participants residing in that setting (and their guardians if applicable) will be notified no later than September 2021 in order to assist in developing a transition plan and locating a new residence.*

Q: Based on the assessments that were done, what types of things needed remediated in Nebraska's residential service sites?

A: Nebraska's residential sites were assessed primarily in 2017 and 2018. More than half of the residential sites (64%) were already fully compliant with the rule. The primary items that required remediation included the ability to file an anonymous complaint, not having a lease/residency agreement, a lack of locks on bedroom and bathroom doors for privacy, and a lack of accessibility to the entire home. Integration was not assessed at that time as explained above.

I: *There were other areas in which some residential sites were out of compliance, however those listed above occurred the most. All sites with deficiencies are currently working on correcting these with some having already been completed. All sites have indicated they will be in compliance by the deadline in 2022.*

Heightened Scrutiny Information:

Q: What is "Heightened Scrutiny"?

A: Heightened Scrutiny is the name CMS has given to the process of the required extra reviews for settings that are presumed to be institutional.

There are three types of settings that could be presumed institutional:

1. Settings that are located in a building that is also a publically or privately operated facility that provides inpatient institutional treatment;
2. Settings that are in a building located on the grounds of or adjacent to a public institution; or
3. Settings that have the effect of isolating individuals from the broader community.

If a setting is identified by the State to fall into one of these three categories, the setting will be required to produce documentation to show that they overcome the institutional presumption. If the State agrees that they've overcome the presumption, the site will be submitted to CMS for further review. These settings will also be posted on the DHHS website (in a HIPAA-compliant fashion so as to protect the participants).

More information about Heightened Scrutiny can be found [here](#):

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

I: *The only settings DHHS-DD has preliminarily identified as heightened scrutiny (less than 10 total) fall into category three. At this time, Nebraska has not yet begun the Heightened Scrutiny process to assess if these sites have overcome the presumption. The settings that were preliminarily identified as heightened scrutiny will be contacted soon to begin the process.*