

**DQA IMPLEMENTATION OF
HOME AND COMMUNITY-BASED SERVICES
SETTINGS RULE
IN RESIDENTIAL ASSISTED LIVING FACILITIES**



WISCONSIN DEPARTMENT OF HEALTH SERVICES

Division of Quality Assurance
Bureau of Assisted Living

Division of Medicaid Services
Bureau of Adult Long-Term Care Services

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INTRODUCTION

The Department of Health Services (DHS), Division of Medicaid Services (DMS), has agreed that, effective March 1, 2019, the Division of Quality Assurance (DQA), Bureau of Assisted Living (BAL), will begin inspecting DQA-regulated assisted living facilities to ensure compliance with the [Home and Community-Based Services \(HCBS\) settings rule](#).

The Centers for Medicare & Medicaid Services (CMS) requires all states that operate Medicaid HCBS waivers to comply with the settings rule by March 17, 2022. The settings rule is intended to ensure that people who receive services through Medicaid HCBS waiver programs will have access to the benefits of community living and will be able to receive services in the most integrated settings. Since Wisconsin serves approximately 65,000 people through 1915(c) Medicaid HCBS waivers, DHS is required to implement the settings rule.

The ability of DHS to continue providing home and community-based services requires compliance with the settings rule. States have until March 17, 2022, to comply with the rule, but settings are required to comply in advance of that date. Wisconsin's plan for meeting the rule's requirements is described in the [Statewide Transition Plan, P-01839](#).

This publication provides important information on the following:

- Background
- Implementation
- Notice of Compliance Review Determination
- Training Information
- Resources

BACKGROUND

CMS published regulations, effective March 17, 2014, in the Federal Register that changed the definition of HCBS settings for the 1915(c) and 1915(i) Medicaid HCBS programs. In Wisconsin, DMS is the state Medicaid agency responsible for direct oversight of the new HCBS settings rule.

The settings rule addresses several sections of Medicaid law under which states may use federal Medicaid funds to pay for HCBS. The rule supports enhanced quality in HCBS programs and adds protections for individuals receiving services. The new rules require all HCBS settings to:

- Be integrated in and facilitate full access to the greater community.
- Promote autonomy and independence in making life choices.
- Be chosen by the individual from among residential and nonresidential options, including non-disability specific settings.
- Ensure the right to privacy, dignity, respect, and freedom from coercion and restraint.
- Provide individuals an option to choose a roommate.
- Facilitate choice regarding services and providers.

The rules reiterate long-standing federal law that institutions (e.g., nursing homes, psychiatric hospitals, or intermediate care facilities for individuals with intellectual disabilities [ICF/IIDs]) cannot be funded as HCBS settings.

KEY PROVISIONS OF THE SETTINGS RULE

1915(c) Home and Community-Based Waivers

The settings rule is designed to improve the quality of services for individuals by amending the federal regulations for home and community-based compliant settings in Medicaid HCBS programs operated under sections 1915(c), 1915(i), and 1915(k) of the Social Security Act (the Act). It establishes requirements for home and community-based compliant settings in Medicaid HCBS programs; defines person-centered planning requirements; provides states with the option to combine multiple target populations into one waiver to facilitate streamlined administration of HCBS waivers; clarifies the timing of amendments and public input requirements when states propose modifications to HCBS waiver programs and service rates. For more detail, refer to the 1915(c) fact sheet at the [Medicaid HCBS webpages](#).

Home and Community-Based Settings Requirements

The settings rule establishes requirements for home and community-based settings in Medicaid HCBS programs operated under sections 1915(c), 1915(i), and 1915(k) of the Act. The rule creates a more outcome-oriented definition of home and community-based settings, rather than one based solely on a setting's location, geography, or physical characteristics. The regulatory changes will maximize opportunities for HCBS program participants to have access to the benefits of community living and to receive services in the most integrated setting and will effectuate the law's intention for Medicaid home and community-based services to provide alternatives to services provided in institutions. For more detail, refer to the fact sheet on the [Medicaid HCBS webpages](#).

The settings rule includes a provision requiring states offering HCBS under existing state plans or waivers to develop transition plans to ensure that HCBS settings will meet the settings rule requirements. New 1915(c) waivers or 1915(i) state plans must meet the new requirements to be approved.

DMS developed a [Statewide Transition Plan, P-01839](#), to address how DHS will ensure compliance with the new HCBS settings rule. The statewide transition plan states, "For residential settings, the service standards in Wisconsin's waivers are based upon and reference applicable state statutes and regulations." The state Medicaid agency (SMA) conducted an analysis of the current regulatory requirements for the residential settings that serve adults and identified those that align with and meet specific requirements of the HCBS regulations and guidelines for these residential settings. The analysis found that most of the requirements included in the federal rule are already covered by Wisconsin's statutes and regulations that govern certain licensed or certified residential settings. The SMA determined that Wisconsin's state statutes, state regulations, and DHS standards related to residential settings do not conflict with any requirements of the HCBS regulations; that is, none of the state certification or licensure criteria risk putting the setting out of compliance with the settings rule. The results of the analysis conducted by the SMA are detailed in the crosswalk in Appendix 3 in the Wisconsin Statewide Transition Plan. The crosswalk identifies areas of compliance and areas where the statutes, regulations, and standards are silent. It also specifies the remediation actions necessary to ensure that settings are compliant.

CONCLUSION OF ANALYSIS

Wisconsin laws, regulations, standards, and other policies address most of the requirements of the rule, including provider agreements, participant choice, participant rights, and accessibility. In some cases, however, the policies do not address all of the criteria that CMS has published in its toolkits and other sub-regulatory guidance. In addition, Wisconsin regulations are silent on some aspects of the rule. Therefore, provider assessments will be performed to determine whether requirements of the federal rule that are not addressed in detail through state regulations are met by individual providers.

Based on CMS guidance, the SMA has determined additional information is needed in a number of areas, including:

- Access to personal funds
- Locks on living units
- Visitors
- Decorate living units
- Choice of roommates
- No exceptions to resident rights training

Pursuant to the transition plan described below, additional requirements will be incorporated into waivers, SMA policies, contracts, and other documents to articulate program requirements.

Wisconsin's statewide transition plan states, "licensed and certified settings are subject to periodic compliance site visits by the state licensing authority, or by the entity that certified the provider if not regulated by the state." Settings found to have deficiencies in licensing or certification requirements are required to implement corrective actions and may lose their license or certification when noncompliance continues or is egregious. Any provider that loses its license or certification cannot continue to be a qualified waiver service provider. As part of these periodic licensing or certification reviews, the credentialing entity will also review the setting for continued HCBS compliance. Providers will be required to address any HCBS rule deficiencies. Failure to remediate will result in the cessation of reimbursement to the provider for Medicaid adult long-term care waiver-funded services.

Per [CMS Informational Bulletin of May 9, 2017](#), CMS has extended the transition period for states to demonstrate compliance with the HCBS criteria until March 17, 2022. This extension will allow more time for settings to come into compliance with the provisions of the rule and give time for CMS to clarify some of the policies and procedures of the rule. At this point, DHS will continue to move forward with determining compliance of residential and nonresidential settings so that providers that comply can be assured that they meet the requirements, providers that do not comply will have time to remediate any deficiency, and residents can choose to be transitioned to compliant settings.

IMPLEMENTATION

Effective March 1, 2019, DQA/BAL will begin inspecting DQA-regulated settings for ongoing compliance with the HCBS settings rule. Ongoing compliance will include the three situations described below.

1. **Assisted living facilities requesting a Medicaid HCBS compliance determination on their initial license or certification application starting March 1, 2019, or later.**

If an applicant chooses to include HCBS compliance on their license or certification, the applicant will be required to complete the section of the application that references HCBS.

Central office licensing staff and the on-site surveyor will confirm compliance with the new HCBS setting rule. Failure to be identified as HCBS compliant during the initial on-site licensing or certification visit will significantly delay the facility's ability to admit individuals receiving Medicaid HCBS funding; however, there will be no delay in licensing/and certification activities.

The decision on facility HCBS compliance will be sent to the facility mailing contact. All Wisconsin waiver agencies will receive a copy of the decision.

2. **Assisted living facilities licensed prior to March 1, 2019, that have not received an initial HCBS compliance decision by DMS and would like to serve residents receiving Medicaid HCBS funding.**

DQA has developed form [F-02138, HCBS Compliance Review Request](#), to assist the provider in submitting a request for HCBS compliance to be included on the license or certification. The form

will include an attestation of compliance with applicable HCBS setting rules. The provider will submit completed form F-02138 to the appropriate BAL regional office email address. [Regional office contact information](#) is available online.

A desk review will be completed by BAL regional office staff. If the review determines that the form is incomplete, the form will be returned. Only one update request will be made prior to making a final HCBS compliance decision.

A provider can submit two HCBS compliance review requests within one calendar year. If a second, unsuccessful submission is received by the department, no further compliance determination request will be accepted from the facility for a period of one year.

The decision on facility HCBS compliance will be sent to the facility mailing contact. All Wisconsin waiver agencies will receive a copy of the decision.

3. Assisted living facilities licensed prior to March 1, 2019, that currently serve residents receiving Medicaid HCBS funding and have received the initial HCBS compliant determination from DMS.

BAL has incorporated the HCBS settings rule into its current assisted living survey process and activities. During a survey, BAL will ensure the provider continues to meet the HCBS setting rule requirements. Surveyors will ensure HCBS compliance with the following:

- Residents must be able to access their personal funds and resources to the extent of their functional capability, in a manner of their choosing, and at times agreed upon between the provider and the resident and his or her legal representative, as applicable.
- The facility has locks placed on all resident or consumer living unit doors and residents have means of unlocking their unit.
- The facility has policies to ensure why, how, and when a staff member will enter a resident's living unit.
- Staff who provide direct care for the resident, including nurses, have completed initial and annual resident rights training and it is documented in the personnel file.
- Residents and consumers have the choice of roommate when applicable.
- Residents and consumers have the opportunity to fully decorate their bedroom or apartment within the bounds of the lease or agreement.
- Residents and consumers have the right to have visitors of their choosing at any time.

DHS's review of the HCBS regulations conclude that most of the HCBS settings rule requirements already exist in Wisconsin licensing and certification laws, regulations, and standards. The areas listed above are not addressed in Wisconsin's assisted living licensing laws.

Because of a completed DQA/BAL survey, a notice of remediation may be issued. The provider is required to submit a plan of remediation via the HCBS compliance report. Compliance must be achieved 45 days after receipt of the HCBS compliance report.

A desk review of the plan of remediation will be completed by BAL regional office staff. If the documentation submitted reflects that revisions are required to meet HCBS criteria as defined by DHS, BAL staff will contact the provider. Only one update request will be made prior to making an HCBS compliance decision. If the review determines that the plan of remediation is incomplete and/or supporting documentation has not been submitted, the provider will receive a notice of rescinded compliance.

Following approval of the plan of remediation, the provider will be sent a notice of compliance. All Wisconsin waiver agencies will receive a copy of the decision.

HEIGHTENED SCRUTINY REVIEW PROCESS

The HCBS settings rule assumes that certain settings are not home and community-based. These include:

- Settings in a publicly or privately owned facility providing inpatient treatment (including hospitals and skilled nursing facilities)
- Settings on the grounds of, or adjacent to, a public institution (A public institution is owned and operated by a county, state, municipality, or other unit of government.)
- Settings with the effect of isolating individuals from the broader community (e.g., an ICF/IID)

If a setting meets one of the above criteria, it will require additional review to overcome the assumption that it is not home and community-based.

If it is determined the facility meets the definition of heightened scrutiny and the DMS heightened scrutiny process has not occurred, DMS will be notified following the survey. DMS will work with CMS to complete the heightened scrutiny process. While the heightened scrutiny process is occurring, BAL will not issue a finding on its compliance review.

NOTICE OF HCBS COMPLIANCE REVIEW DETERMINATION

In accordance with federal requirements, all compliance results will be made public by DHS. The decision will appear on the subsequent upload of facility information to DHS websites, including the [DQA Provider Search webpage](#) and the provider directories available at the [Consumer Guide to Health Care – Finding and Choosing an Assisted Living Facility webpage](#).

Notice of HCBS compliance review determination only applies to compliance with the federal HCBS settings rule. The setting still remains subject to all requirements of its licensure or certification, as applicable.

An "HCBS Compliant" decision does not guarantee a contract with Wisconsin waiver agencies to provide services under any Wisconsin Medicaid waiver program, including Family Care, Family Care Partnership, IRIS (Include, Respect, I Self-Direct), or Children's Long-Term Support Waiver.

A notice of noncompliance is not an order for the setting to close. Noncompliance means that the setting will not be reimbursed for services to Medicaid waiver participants. The waiver agencies responsible for any affected member(s) or participant(s) will be informed of the action(s) required and will contact the setting to address the next steps.

You may choose to resubmit your request for a compliance determination. If you choose to do so, review the requirements on the [HCBS webpages](#) and ensure all compliance requirements are met prior to resubmission of your request.

A HCBS noncompliance decision may be contested. To do so, you or your legal representative may submit a letter requesting an administrative review of this decision. Your request must be submitted within 15 days of the date on the notice of noncompliance letter.

The administrator of DMS or designee will make a decision based on the information presented in your request. A written decision concerning your setting will be sent within 45 days after DHS receipt of your request for administrative review. The decision by DHS will be final.

TRAINING INFORMATION

DHS will offer training to assisted living providers through a series of in-person meetings. Training may be provided at Assisted Living Forums.

Training dates and locations will be announced through the Assisted Living Forum email subscription service (the listserv). Register for the listserv at www.dhs.wisconsin.gov/regulations/listserv-signup.htm.

RESOURCES

- [HCBS Compliance Review Request, F-02138](#)
- [Benchmark Guide for Adult Residential Settings: Home and Community-Based Services \(HCBS\) Settings Rule, P-02207](#)
- [Statewide Transition Plan, P-01839](#)
- [CMS HCBS Regulatory Requirements Summary](#)