



March 7, 2018

FAQ on CMS Final Rule

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1. What is the Final Rule?

The Final Rule refers to a change in Medicaid regulation for Home and Community Based Services (HCBS) that was adopted March 17th, 2014. The regulations now define Home and Community Based settings based on the nature and quality of individual experience and outcomes with the purpose of maximizing the opportunity to receive services in settings that are integrated in and support full access to the greater community. Generally, the Final Rule means that there will be greater oversight to ensure that settings where clients receive services are promoting person centered planning and inclusion in the community, as well as maximizing opportunity, choice, independence, rights, and individualized services for their participants. Regional Center service providers will be assessed in the near future to determine compliance with the new requirements. Some providers may have to make updates to service delivery.

2. What does the Final Rule say?

The text of the Final Rule can be found here: <https://www.law.cornell.edu/cfr/text/42/441.301> .

See section § 441.301.c.4 for relevant requirements:

(4) Home and Community-Based Settings. Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:

(i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.

(ii) The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.

(iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.

(iv) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

(v) Facilitates individual choice regarding services and supports, and who provides them.

(vi) In a provider-owned or controlled residential setting, in addition to the qualities at [§ 441.301\(c\)\(4\)\(i\)](#) through (v), the following additional conditions must be met:

(A) 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.

- (B)** Each individual has privacy in their sleeping or living unit:
- (1)** Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.
 - (2)** Individuals sharing units have a choice of roommates in that setting.
 - (3)** Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.
- (C)** Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.
- (D)** Individuals are able to have visitors of their choosing at any time.
- (E)** The setting is physically accessible to the individual.
- (F)** Any modification of the additional conditions, under [§ 441.301\(c\)\(4\)\(vi\)\(A\)](#) through (D), must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:
- (1)** Identify a specific and individualized assessed need.
 - (2)** Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
 - (3)** Document less intrusive methods of meeting the need that have been tried but did not work.
 - (4)** Include a clear description of the condition that is directly proportionate to the specific assessed need.
 - (5)** Include regular collection and review of data to measure the ongoing effectiveness of the modification.
 - (6)** Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
 - (7)** Include the informed consent of the individual.
 - (8)** Include an assurance that interventions and supports will cause no harm to the individual.

3. Does the Final Rule apply to me?

The Final Rule applies to services being provided in a congregate setting (that is, to more than one person at a time). The following settings / services have been identified in the California Statewide Transition Plan as subject to assessment for compliance by the Department of Developmental Services (DDS):

Activity Center
Adult Day Care Center
Adult Day Care Facility
Adult Day Program
Adult Day Support Center
Adult Development Center
Adult Family Home
Adult Residential Facility

Adult Residential Facility for Persons with Special Health Care Needs
Behavior Management Program
Certified Family Home
Child Day Care Center
Child Day Care Facility
Community Activities Support Service
Community Integration Training Program
Community-Based Training Provider
Family Child Care Home
Family Teaching Home
Foster Family Home
Group Home
Residential Care Facility for the Elderly
Small Family Home
Socialization Training Program
Work Activity Program

4. When does the Final Rule take effect?

The Final Rule took effect March 17th, 2014.

Service providers vendedored after the adoption of the Final Rule on March 17th, 2014 are expected to be in compliance at this time.

Service providers vendedored before March 17th, 2014 (if not in compliance at this time) must have an approved transition plan in place by March 17th, 2019, and complete all updates by March 17th, 2022.

5. When and how will settings be assessed for compliance?

All Regional Center vendors will be required to complete a self-assessment survey provided via e-mail by DDS. Some vendors will also be selected for an on-site visit by an assessment team. Additionally, feedback will be obtained from clients, advocates, and other stakeholders. This assessment activity had not begun as of February 2018, but should be completed by the end of 2018. Assessments will be used to determine compliance with the Final Rule. Any vendor not currently in compliance must develop and implement a transition plan. The plan must be developed by March 17th, 2019.

6. How will the Final Rule be enforced?

Following the initial assessment for compliance, ongoing monitoring and oversight for DDS programs will take place through visits by monitoring teams every two years. The team will include a Nurse and Program Analyst, who will assess for HCBS Setting Compliance as well as a Provider Self-Survey Validation. Monitoring activities will include a review of records, as well as client and staff interviews.

7. What is the California Statewide Transition Plan?

All states are required to develop a transition plan, approved by CMS, to demonstrate how they will bring HCBS settings into compliance with the CMS Final Rule. In California, the Department of Health Care Services (DHCS) has been working with partner agencies and stakeholders to develop the Statewide Transition Plan.

8. What is the current status of California's Statewide Transition Plan?

California has received initial approval from CMS on the draft Transition Plan submitted on February 14, 2018. In order to receive final approval, California will have to additionally provide:

- A summary of completed assessments of HCBS settings
- Draft remediation strategies and timeline for resolving issues identified during the assessment process
- A plan for identifying, reviewing, and submitting to CMS for heightened scrutiny those settings presumed to have institutional characteristics
- A process for communicating with clients receiving services in settings that are not anticipated to come into compliance
- A description of the process for ongoing monitoring and quality assurance

9. How does the Final Rule intersect with client choice? What if a client chooses a segregated service?

A setting that has the effect of isolating individuals receiving services is presumed to be institutional in quality. A client's services must not be segregated by nature of the setting. The client's individual needs and goals should drive the method of service delivery. Settings that are initially presumed to be institutional in nature may have an opportunity through the Heightened Scrutiny process to demonstrate if they do in fact meet the CMS Final Rule criteria. If a setting is unable to achieve compliance by March 17, 2022, participants will be relocated to a compliant setting.

10. Can a client choose not to participate in community activities?

Yes, clients have the right to make choices about how they spend their time. However, settings are responsible to support full access to the greater community. Therefore, settings should be supporting clients to identify locations and activities of interest, and be working to address potential barriers such as anxiety.

11. What if Final Rule requirements conflict with state regulations?

Conflicts between regulatory requirements are under review at this time. If you have a specific question or concern, please reach out to HCBS Specialist at ACRC, Katherine Weston, at kweston@altaregional.org.

12. What is the definition of community?

As described in the California State Transition Plan, the California Department of Health Care Services (DHCS) describes community as not just the mere physical presence of other buildings and people:

It includes a safe and purposeful environment where individuals have needed support and safety, and the greatest freedom to live productive, connected lives according to their own desires.

13. What about individuals who live in rural settings? Does this automatically mean that rural facilities are isolating?

Not necessarily. Individuals who receive services in a rural area must have the same opportunities for community integration as other people in that same community.

14. According to the CMS Final Rule, are all clients are expected to work?

According to CMS Final Rule requirements, which align with *Employment First* legislation and policies, HCBS providers shall support clients' opportunities to seek employment and work in competitive integrated settings. Clients have the right to decline these opportunities and pursue other goals if they wish. However, HCBS settings are expected to be supportive of clients' efforts towards employment.

15. How does the Final Rule impact clients who live independently or in the family home?

California has determined that private residences are presumed to be in compliance. If it is discovered through the course of normal reviews that a person-centered service plan does not address an individual's unique needs and a setting is non-compliant, the individual will have access to a choice of compliant settings.

16. Are there exceptions?

Some elements of the Final Rule may be modified for the health and safety of an individual client. For example, a doctor may prescribe a limited calorie diet for a client diagnosed with Prader-Willi. That client's residential service provider would not be required to provide access to food at any time for that particular client. However, other clients residing in the same home should not have their own access to food restricted, unless so prescribed by their own physicians. The following is required for a modification to take place:

- Assessment of the specific need by the planning team.
- The need is described and addressed in the Person Centered Plan, to include:
 - Documentation of positive interventions and supports used prior to any modification.
 - Description of less intrusive methods of meeting the need that have been tried and did not work.
 - A clear description of the condition that is directly proportionate to the specific assessed need.
 - Documentation of data review to measure the ongoing effectiveness of the modification.
 - Informed consent of the individual
 - Assurance that interventions and supports will cause no harm to the individual.
 - Re-assessment on an ongoing basis, at least annually.

17. Do all day programs have to "sell the building"?

The CMS Final Rule does not prohibit facility based day programs. However, services taking place on site should not take the place of training that can occur in an integrated community setting.

18. What will be the impact on clients and families?

The CMS Final Rule ensures that clients are provided full access to the benefits of community living, including receiving regional center services and supports in integrated settings that meet their needs and goals. Due to the greater focus on individual experience at various settings, planning teams may invest more attention to evaluating clients' specific needs and goals, exploring various service options, and assessing if desired outcomes are being achieved through services at a particular setting. As a result, services should be more individualized and outcome oriented. In a small number of cases, it is possible that clients receiving services at a setting unable to achieve compliance may be relocated.

19. How do providers for children implement the Final Rule?

Just like adults, children have rights to receive individualized services in settings that are not isolating. All providers should work with their planning teams to develop service plans that align with the individual's specific needs and goals. Because settings are obligated to provide the same degree of access as individuals not receiving Medicaid funded services, planning teams for children should consider what is typical for their clients' non-disabled peers.

20. What are the considerations regarding installing a lockable door in a residential facility?

The CMS Final Rule provides for clients to have a lockable entrance door on their living unit, with only appropriate staff having keys to doors. For shared bedrooms, all residents of that room must have access to keys. For clients who desire to secure their door but cannot use a traditional key, the planning team can explore other mechanisms such as a card key or electronic keypad.

21. Are there specific questions that should be discussed during an Individual Program Plan / Planning Team Meeting?

Planning Team Meetings should include a discussion of a client's needs and goals (short and long term), so that the Individual Program Plan can clearly outline the role of a setting in providing individualized support and training.

22. What changes are vendors making already?

Activity varies greatly by service type and needs/goals of clients served, but updates reported by Alta California Regional Center vendors have included the following:

- Increased collaboration with ID teams
- Installing lockable doors (residential)
- Offering private rather than shared bedrooms (residential)
- Hiring additional staff to facilitate client choice
- Encouraging greater levels of client input regarding planning for meals and activities
- Improved documentation of client input / client choice
- Exploring resources to improve accessibility
- Installing front loading washing machines for non-ambulatory clients
- Providing greater opportunities for community integration and employment
- Providing greater opportunities and training in regards to independence, such as using public transportation and managing one's own money
- Increased training to staff, clients, and families

23. What are some additional resources?

You are welcome to reach out to HCBS Specialist Katherine Weston at Alta California Regional Center for training and consultation. You may reach Katherine at kweston@altaregional.org.

You may also keep up to date with information at these various websites:

Department of Health Care Services (California Statewide Transition Plan):

<http://www.dhcs.ca.gov/services/ltc/Pages/HCBSStatewideTransitionPlan.aspx>

Department of Developmental Services:

<http://www.dds.ca.gov/HCBS/>

HCBS Advocacy:

<https://hcbsadvocacy.org/>

Medicaid Toolkit:

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

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