

# Behavioral Health Joint Guidance Document

## INTRODUCTION

### KEY TERMS AND ASSOCIATED ACRONYMS

The following key terms and associated acronyms are used in this document:

Term	Acronym	Definition
Adult Foster Care Home	AFC	<p>“Adult foster care congregate facility” means an adult foster care facility with the approved capacity to receive more than twenty adults to be provided with foster care.</p> <p>“Adult foster care family home” means a private residence with the approved capacity to receive six or fewer adults to be provided with foster care for 5 or more days a week and for two or more consecutive weeks. The adult foster care family home licensee shall be a member of the household, and an occupant of the residence.</p> <p>“Adult foster care large group home” means an adult foster care facility with the approved capacity to receive at least thirteen but not more than twenty adults to be provided with foster care.</p> <p>“Adult foster care small group home” means an adult foster care facility with the approved capacity to receive twelve or fewer adults to be provided with foster care.</p>
Bureau of Community and Health Systems	BCHS	BCHS is the bureau within LARA that is responsible for licensing and certifying facilities and agencies including licensing of Adult Foster Care and Home for the Aged facilities.
Bureau of Fire Services	BFS	BFS is the bureau within LARA that is responsible for ensuring facilities are constructed and maintained in accordance with the Life Safety Code.
Centers for Medicare and Medicaid Services	CMS	A federal agency within the United States Department of Health and Human Services that works in partnership with State governments to administer the Medicaid program.
Continuing Care Community Disclosure Act	CCFDA	An Act to regulate long-term leases in adult foster care facilities, independent living units, nursing homes, homes for the aged, home care service agencies and hospices. (MCL 554.901 et. seq.) This Act excludes adult foster care homes and homes for the aged from the state’s landlord tenant laws

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Earned Income		Earned income is income received from another person or organization or from self-employment for duties that were performed for remuneration or profit. Some rental income is considered earned.
Foster Care		“Foster care” means the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for two or more consecutive weeks for compensation.
Home and Community Based-Services Final Rule	HCBS Final Rule	The HCBS Final Rule establishes new federal requirements for different Medicaid authorities that allow States to provide home and community-based long-term services and supports to eligible persons. The rule requires Medicaid Home and Community-Based Services (HCBS) Waiver Programs to ensure that waiver participants have full access to benefits of community living and opportunity to receive services in the most integrated settings.
Home for the Aged	HFA	“Home for the aged” means a supervised personal care facility, other than a hotel, adult foster care facility, hospital, nursing home, or county medical care facility that provides room, board, and supervised personal care to twenty-one or more unrelated, non-transient, individuals 60 years of age or older. Home for the aged includes a supervised personal care facility for twenty or fewer individuals 60 years of age or older if the facility is operated in conjunction with and as a distinct part of a licensed nursing home.
Lockable Door		A lockable door is a side-hinged, permanently mounted door that is equipped with positive-latching, nonlocking-against-egress hardware. The hardware must be able to be opened from the inside of a room with a single motion, such as a turn of a knob or push of a handle, even if the door is locked.
Medicaid-Funded Home and Community-Based Services		Services and supports that are offered through a Home and Community-Based Services Waiver program reimbursed by Medicaid.
Medicaid Home and Community-Based Services (HCBS) Waiver Program		Medicaid HCBS Waiver Program allows a State Medicaid Agency to meet the needs of people who prefer to get long-term care services and supports in their home or community, rather than in an institutional setting. The Program requires that HCB services follow an individualized and person-centered plan of care.
Michigan Compiled Laws Annotated	MCLA	Complete text of Michigan statutes, supplemented by succinct annotations.

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Michigan Department of Health and Human Services	MDHHS	MDHHS is the Department within the State of Michigan that is responsible for administering the Michigan Medicaid Program. MDHHS is also responsible for implementing HCBS Final Rule.
Michigan Department of Licensing and Regulatory Affairs	LARA	LARA is responsible for safeguarding Michigan's citizens through a simple, fair, efficient, and transparent regulatory structure.
Person Centered Planning	PCP	Person-Centered Planning (PCP) means a process for planning and supporting the person receiving services that builds upon his or her capacity to engage in activities that promote community life and that honors the person's preferences, choices, and abilities. The PCP process involves families, friends, and professionals as the person desires or requires. PCP is required by state law (Michigan Mental Health Code MCL 330.1712 and federal law (42 CFR 441.540) as the way that people plan for the services and supports that they receive from the community mental health system. PCP is used anytime an individual's goals, desires, circumstances, preferences, or needs change.

### LOCKED DOORS

**The HCBS Final rule requires that individuals have freedom of movement within a setting and the freedom to enter and exit a setting as they chose. This prohibits the use of locking mechanisms that can be used to restrict movement. This includes locks on entry or exit doors and locking mechanisms on gates unless non locking against egress with positive-latching, nonlocking-against-egress hardware. The gate must be able to be opened from the inside with a single motion, even if the gate is locked.**

Individuals must not be restricted in their movement within a setting through use of barriers including locked doors. Settings may not incorporate separate units or sections of a building such as a specific floor of a building that is restrictive or portions of a building that are locked against egress.

Settings may restrict access to unlicensed areas of settings such as a basements utility area. Settings may also restrict access to business office and areas where medications are stored. If laundry facilities are in an unlicensed area and therefore locked the setting must have a means to accommodate individuals access to the laundry as desired.

### LOCKABLE DOORS

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The HCBS Final Rule requires that residential settings provide units that have bedroom and bathroom doors that are lockable by the individual, with only appropriate staff having keys to doors. When a setting has multiple bedrooms, each must have a unique key. If there are private bedrooms that include private bathrooms, only the door to the bedroom must be lockable, though MDHHS encourages that both the bedroom door and bathroom door to be lockable. Both the BFS and the BCHS allows AFC and HFA facilities to have bedroom and bathroom doors that are lockable from the inside of the room. In order to meet both the HCBS Final Rule and AFC/HFA licensing requirements, the bedroom door shall be equipped with a side-hinged, permanently mounted door that is equipped with positive-latching, non-locking-against-egress hardware (hardware that can be opened from the inside of a room with a single motion, such as a turn of a knob or push of a handle, even if the door is locked). Settings may utilize keypads as a means of securing an individual bedroom, however the individual must be able to utilize the keypad easily for this is to be an acceptable option, and all keypads must have unique codes.

This requirement also applies to bathroom doors. In accordance with the AFC/HFA licensing requirements, appropriate staff must have a key to the bedroom or bathroom door if the individual has a lockable door, this key should be stored in an area not accessible to all staff and residents.

Waiver participants cannot authorize a waiver of this requirement. The requirement is with the State of Michigan not the person.

The associated licensing rules for bedroom and bathroom doors are as follows: R 400.1430 (2), R 400.1431 (3), R 400.14407 (3) and R 400.14408 (4) R 400.15407 (3) and R 400.15408 (4).

### **LEGALLY MANDATED RIGHTS**

A person's rights resulting from the age of majority (18 or 21 years of age) may not be infringed upon unless a restriction that meets modification requirements is present in the persons IPOS. Examples of age-related rights are:

- Voting
- Access to alcohol or cigarettes
- Attainment of a driver's license or car

### **VISITING HOURS**

The HCBS Final Rule requires residential settings to allow individuals to have visitors of their choosing at any time.

Settings may not impose specific times of day when visitors are / are not allowed, or require searches of persons who would visit, or require specific permissions to have visitors. Settings may not impose rules that have the effect of making it difficult for families and friends to visit residents in their homes setting wide including in their bedrooms. A health and/or safety-based

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modification that meets CMS and MDHHS criteria are the exception and must be documented in the individuals IPOS if restrictions are required based upon *the individual's* health or safety needs.

## **RESIDENCY AGREEMENT AND STATE LANDLORD-TENANT LAW**

The HCBS Final Rule states that settings must have several “qualities” to be considered home and community based. More specifically, a residential setting that is provider-owned or controlled must demonstrate the following qualities:

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.

The Continuing Care Community Disclosure Act specifically exempts certain facilities, such as AFCs and HFAs from the state’s landlord tenant laws. Consequently, these licensed settings, pursuant to HCBS Final Rule, must have a legally enforceable residential agreement that provides protections that address eviction processes and appeals comparable to the state’s landlord tenant laws.

MDHHS has determined that current state licensing rules offer comparable protections and rights as the state’s landlord-tenant laws on issues related to discharge processes and appeals. Specifically, both the state’s landlord tenant laws and state’s licensing rules require prior notice and an opportunity to appeal or contest the eviction or discharge to an impartial decision maker.

However, unlike the landlord tenant laws, the licensing rules have built in protections to accommodate the health, safety and wishes of the resident. MDHHS has determined the variance between the licensing rules and landlord tenant laws, provide comparable protections as the state’s landlord tenant laws and additionally allow the setting to make person centered placement decisions in accordance with the resident’s wishes and for the resident’s health and safety that would not be permitted under the state’s landlord tenant laws.

MDHHS and LARA also agreed that both AFC and HFA licensed facilities must have a residential agreement that outlines these protections and rights. Because current state licensing rules offer comparable protections to state landlord-tenant laws, a residency agreement for a licensed setting that meet the requirements of state licensing rules may also meet the requirements of the HCBS Final Rule if the residency agreement includes information on discharge processes and complaints.

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Based on these findings, MDHHS and LARA have determined that both AFC and HFA facilities may use residency agreements to meet the requirements of state licensing rules and the HCBS Final Rule under the following conditions:

- AFC Homes: State licensing rules require AFC homes to use the BCAL-3266 Resident Care Agreement form. MDHHS and LARA have agreed that the BCAL-3266 form meets the requirements of the HCBS Final Rule if the licensee also provides information on discharge processes and complaints to the resident. MDHHS and LARA have also created a supplemental document, known as the “Summary of Resident Rights: Discharges and Complaints,” which could be used by an AFC home in conjunction with BCAL-3266 form to meet the requirements of state licensing rules and the HCBS Final Rule. Licensees may still use their own residency agreements if the residency agreement outlines the relevant discharge and complaints processes and meets all applicable state and federal requirements.
- HFA Homes: State licensing rules do not require HFA homes to use a specific document as a residency agreement. MDHHS and LARA have agreed that licensees may design and use their own residency agreements to meet the federal requirement if the residency agreement outlines the relevant discharge and complaints processes and meets all applicable state and federal requirements. MDHHS and LARA have also agreed that licensees could use the Summary of Resident Rights: Discharges and Complaints document to fulfill the state and federal requirement to outline relevant discharge and complaint processes.

After also comparing this interpretation to existing state requirements, MDHHS and LARA have agreed that this interpretation complies with rules R 400.14301(6), 400.15301(6), and R 400.1407(5) as outlined by the BCHS.

The BCAL-3266 form and Summary of Resident Rights: Discharges and Complaints document can be found online at the following locations:

Name of the Document	Location
BCAL-3266	<a href="http://www.michigan.gov/lara">www.michigan.gov/lara</a> >> Community and Health Systems >> Adult Foster Care >> Resident Care Agreement BCAL-3266
Summary of Resident Rights: Discharges and Complaints	<a href="http://www.michigan.gov/mdhhs">www.michigan.gov/mdhhs</a> >> Assistance Programs >> Health Care Coverage (Click on the tab) >> Home and Community-Based Services Program Transition

### HOUSE RULES

Although house rules are optional under state licensing rules, under HCBS Final Rule house rules will not be permitted.

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Settings may not substitute alternative language for the purpose of instituting house rules. Individuals may not be required to comply or sign in agreement with specific “agreements” or resident policy documents that restricts their freedoms as a condition of living within the home. This includes:

- Specific “quiet hours” when individuals are asked to be quiet in their rooms,
- Clothing mandates such as length of skirts, shorts, or what individuals will wear within the setting, identification of specific clothing that is not allowed.

**Any setting wide denial of rights is not allowed.** This may include:

- Use of alcohol,
- Smoking tobacco,
- Driving, and owning a vehicle,
- Owning or using a cell phone,
- Participation in community activities as desired,
- Access to or owning tv,
- Seeing visitors in private bedroom,
- Settings may not restrict items that do not have a foundation in fire safety or licensing requirements and will be required to provide specific evidence of regulation upon request of the PIHP or MDHHS.

Individuals must be afforded the same rights as non-Medicaid recipients and these rights do not have to be identified in this document to exist.

## **USE OF VIDEO CAMERAS**

The use of video cameras for surveillance is prohibited in HCBS settings. Video cameras maybe utilized in areas where waiver participants do not enter (such as the business office, or medication distribution rooms, if the camera is **fixed** in its position and is facing in such a way that it cannot inadvertently record waiver participants. The responsibility to ensure a camera meets the requirements identified is upon the setting. Settings should work with their PIHP leads to confirm that any intended use of cameras is acceptable.

Cameras that are part of an external security system are allowed.

## **MARIJUANA**

Recreational and/or medicinal use of marijuana is legal in the state of Michigan. However, marijuana use is not legal federally. For this reason, settings cannot be required to allow waiver participants to store or use marijuana on the premises of the setting. Settings may not, however, seek to restrict an individual’s marijuana use off premises unless there is a restriction in the individuals IPOS that is consistent with MDHHS and CMS modification requirements.

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## **CHOICE OF PROVIDERS**

In many AFC and HFA facilities, the provider of services is the same entity as the owner of the setting. Some stakeholders have contended that this arrangement conflicts with the requirements of the HCBS Final Rule.

The HCBS Final Rule does not expressly prohibit the provision of services in provider-owned and/or controlled settings. The HCBS Final Rule only requires that they be assessed for compliance with the home and community-based characteristics as outlined under the HCBS Final Rule. One of these characteristics is that participants must be offered a choice of providers within the waiver program. A participant could choose a setting that offers services from a specific provider under the following conditions and when documented in the individuals IPOS:

1. The participant is offered an array of options in terms of where he or she will receive services by his or her supports coordinator.
2. If the participant chooses a setting where a specific provider offers services, the participant should also be informed by his or her service agency that he or she is choosing a specific provider by choosing that specific setting.
3. The participant must be provided with information by his or her service agency about how to select a new provider and setting, and the array of available options when he or she desires.
4. The participant may also use private funds to reimburse other providers for additional services such as skilled therapies and other assistance.

MDHHS and LARA have determined that this approach complies with state licensing rules.

## **FREEDOM OF MOVEMENT**

State licensing rules allow for settings to require supervision or place restrictions on the freedom of movement of residents or in accordance with the individual's service plan.

The HCBS Final Rule includes the requirement that individuals must not be unnecessarily restricted in their movement.

This includes the following examples:

- Individuals must have full access to all licensed areas of the home except as specifically identified in the individuals IPOS with modifications as required by CMS and MDHHS

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- Individuals must be free to move around inside and outside the home without restriction and must be able to access the greater community as they desire with or without support from others.

If an individual has a specific health or safety related need that requires supervision or restriction on the individual's freedom to move inside the setting or in the community, this need must be clearly documented in the individual's person-centered plan and meet all the modification requirements outlined in the modification section of this document.

MDHHS and LARA have determined that this approach complies with state licensing rules. Specific Licensing Rule Citations: Rule 408, MCLA 400.707(7), R 400.1707(2)(a), and R 400.14301(2)(a).

### **CHOICE OF ROOMMATE**

Residents in many AFC homes and HFA facilities have an option of choosing to live with a roommate.

An individual's choice of roommate and room may be limited by the availability of open rooms within the individual's chosen residential setting. The licensee for the setting should discuss potential options for rooms and roommates with the participant prior to completing the residency agreement. Individuals must be aware of the process to request a different roommate or to change from a shared to a private room should their preferences change over time.

If an individual's preferences cannot be immediately met by a provider individuals must be informed of their right to pursue alternative settings where their preferences related to roommates or private room may be available. This conversation related to choice should be documented in the individual's record.

Individuals must be aware of the process to request a different roommate or to change from a shared to a private room.

Specific Licensing Rule Citations: R 400.1407(2)(c), R 400.14301(2)(c)

### **ACCESS TO EARNED AND UNEARNED INCOME**

The HCBS Final Rule requires that individuals be able to control their own resources including personal funds.

State licensing rules do not permit a licensee to restrict access to earned income. A provider may offer a safe location for a participant to store earned income, but the provider must make provisions for individuals to access their earned income when desired as part of this

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arrangement. This arrangement does not conflict with the requirement under the HCBS Final Rule for individuals to be able to control their own resources.

Specific Licensing Rules Citation: R. 400.1407(5), R 400.14301(6)(k), R 400.14315(3), and R 400.1421

## ACCESS TO FOOD

Waiver participants must always have access to food. This does not require the setting to prepare meals at any time, however, participants must have access to snacks they enjoy at any time. These snacks should be accessible to the individual unless a modification is present in the individual's IPOS.

## MODIFICATIONS

Any modifications to the HCBS settings requirements needed by an individual must be supported by a specific assessed health and/or safety need and justified in the person-centered plan. There must be evidence in the record that the modification is required *prior* to the institution of the restriction. *Settings may not request that restrictions be documented in the persons IPOS based upon the convenience or preferences of the setting.*

Settings may not institute setting wide restrictions for the benefit of one individual. For example, a setting may not restrict access to the kitchen or the kitchen cupboards for all residents because one person requires a modification in this area. *The agreement of residents to any such restriction may not be requested by the setting in order to live within the setting and will not be considered justification of the restriction by MDHHS.*

The following must be documented in the plan:

- Identify a specific and individualized assessed safety or health related need,
- Positive interventions and supports used prior to modification,
- Less intrusive methods tried,
- Describe the condition that is directly proportionate to the specified need,
- The plan to ameliorate or eliminate the behavior must be reviewed and approved by the CMHSP or PIHP behavior review committee,
- The plan must be reviewed regularly and no less than quarterly to determine if the modification is still needed,
- Informed consent of the individual and
- Assure interventions and supports will cause no harm.

Federal Regulation 42 CFR §441.530