



The HCBS Modifications Process Explained

According to federal regulation, the following basic elements are expected of ALL DD waiver providers and settings that fall under the HCBS Settings Regulation Final Rule:

- Is integrated in and supports access to the greater community
- Provides opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources
- Ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid HCBS
- Is selected by the individual from among setting options including non-disability specific settings
- Ensures an individual's rights of privacy, respect, and freedom from coercion and restraint
- Optimizes individual initiative, autonomy, and independence in making life choices
- Facilitates individual choice regarding services and supports and who provides them

Provider "owned and controlled settings" (i.e., group homes, sponsored residential homes, supported living apartments/homes) have additional criteria to follow:

- Specific unit/dwelling is owned, rented, or occupied under legally enforceable agreement
- Same responsibilities/protections from eviction as all tenants under landlord tenant law of state, county, city or other designated entity
- If tenant laws do not apply, state ensures lease, residency agreement or other written agreement is in place providing protections to address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law
- Each individual has privacy in their sleeping or living unit
- Units have lockable entrance doors, with appropriate staff having keys to doors as needed
- Individuals sharing units have a choice of roommates
- Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement
- Individuals have freedom and support to control their schedules and activities and have access to food any time
- Individuals may have visitors at any time
- Setting is physically accessible to the individual

As a provider, you must ensure that an individual's HCBS rights are implemented in the least restrictive manner necessary to protect the person.

What is a "modification?"

An HCBS modification is an agreed upon restriction, implemented by the provider, in the setting to limit an individual's rights in order to address an identified need or risk to health and safety.

The HCBS settings requirements are inherent rights that all individuals have.

Further, unless a legal guardian has been appointed, all individuals receiving services in settings that fall under the settings requirements are presumed competent to experience all of the benefits of community living that each of us enjoy, including the capacity to express their preferences and choice in the setting, AND expect that their choices will be honored. Even those with legal guardians should have their preferences considered to the extent possible. Section 64.2-2019 E. of the Code of Virginia states:

"A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in

making decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship."

If an individual has a plenary guardian, the guardian is empowered to make decisions on behalf of the individual consistent with the citation language above. The individual's perspective, wishes, and goals must be addressed during Person Centered Planning meetings and be considered as services and supports are identified. A guardian with less than plenary authority will have the extent of their authority identified in the guardianship documents. Providers should ensure they have an understanding of the guardian's power specific to each individual. An individual's support team (particularly Support Coordinator and providers) should advocate for the individual's expressed desires and work to educate guardians about the person's rights. Any restrictions on the freedoms specified by CMS must be supported by the modification process (due to health and safety concerns) outlined in the Final Rule.

Only if there is a health and safety, behavioral, or other risk to that individual in relation to one or more of the HCBS residential specific rights that is justified AND documented in the individual's plan, can ANY of these rights be restricted. This restriction is called a MODIFICATION.

Modifications are ONLY for provider owned and controlled settings and ONLY for the "additional criteria" (i.e., no modifications are allowed for the basic HCBS expectations). These are typically necessary for some health or safety reason. **An individual's physical access to the setting (last of the "additional criteria") cannot be modified at any time.** An individual's right to an accessible setting means: access to **all common areas** in the home (any area where life takes place- living room, kitchen, washer/dryer, patio, etc.), access to the main entrance/exit door of the home, and fully access to their bedroom and bathroom.

Modifications of the additional criteria must be:

- Supported by specific assessed need/risk
- Justified in the person-centered service plan
- Documented in the Safety Restriction section of Part V of the Individual Support Plan (ISP)

How do I do a modification?

Documentation of modifications of the additional criteria in the person-centered ISP MUST include the following elements.

1. Specific individualized assessed need

Some individuals come to waiver services with a history of certain needs or medical/behavioral risks. This information should be documented in the record along with the source of the information (e.g., licensed professional, family member, former provider, etc.). In other situations, a new need or risk arises while in waiver services. Again, this should be thoroughly documented in the record. This can include the PCISP, provider ISP, person-centered reviews, notes, behavioral plans, and doctor's notes.

2. Prior interventions and supports including less intrusive methods

All means of addressing the need or risk, either historical or ongoing, must be documented. This includes documenting less intrusive steps to support the individual in having access to the "additional criteria" *before*

restricting them in any way. Providers should document the following in progress notes, data collection in support of behavior plans, etc.:

- The positive interventions that have been attempted to help reduce any challenging issues and/or help support and reinforce the learning of new, more appropriate skills. This could have been accomplished by specific paid supports and desired outcomes, natural supports, additional waiver services or general community support.
- Any analyses completed to determine the cause of the issue/behavior and why it is being manifested, as well as alternative positive measures, activities, and/or supports.

3. Description of condition proportionate to assessed need

This means that the modification must be reasonable for the individual's need for limits in an area of the HCBS additional criteria. The support team should discuss what this means for the individual and come to agreement on a modification that supports the individual but is not overly restrictive.

4. Ongoing data measuring effectiveness of modification

Once a modification is written and included in the individual's Plan for Supports, ongoing data must be collected and reviewed periodically to demonstrate that it is having the desired, beneficial effect. The data should indicate that the modification is actually reducing the health and safety or medical/behavioral risk, while not unnecessarily infringing on the individual's rights. A provider is responsible for developing a system to collect data within their setting.

5. Established time limits for periodic review of modifications

At the time of the initiation of the modification, the provider must establish a regular schedule (no longer than annually, but perhaps more regularly) for reviewing the ongoing need for the modification. State this schedule along with the modification.

At the time of the review, use the data to determine if the modification is still required. This should be discussed with the individual's support team. It is possible that, with time and the building of skills or maturation of younger individuals, the modification is no longer needed or that a less restrictive modification may be tried. In no circumstance is it a given that a modification once implemented is required for the rest of the individual's life.

6. Individual's informed consent

Prior to implementing a modification of a person's rights, the support coordinator and provider must fully inform the person and legally appointed decision maker, as applicable, of the assessed need for the modification and how the modification will be implemented. The individual and/or legally appointed decision maker, as applicable, must agree to the modification, as evidenced by their signature on the plan that includes the details of the modification. It is best-practice for the individual to be fully involved in this discussion. Then the modification and continued reason for its inclusion in the plan (as appropriate) should be discussed with the person at least annually (more frequently as necessary).

7. Assurance that interventions and supports will not cause harm

The modification must not be something that interferes with the individual's basic human rights, particularly as outlined in DBHDS Human Rights regulations. Any modification which could endanger the individual's health or safety is strictly prohibited.

Note: The provider must work with the individual, the Support Coordinator, and the person-centered planning team to address all requirements and steps necessary to implement a modification to a person's rights.

HCBS Remediation Required Regarding Modifications

A modification can be added to an individual's Plan for Supports or removed because it is no longer needed at any time during the plan year. It is not necessary to wait until the beginning of a new ISP year to add a new or remove an existing modification that is no longer needed. New modifications should be discussed with the Support Coordinator and must have the agreement of the individual or guardian before implementation (see #6 above).

For those providers that have had their HCBS settings review and the summary report included a lack of full compliance around modifications, proof that the required modification is in place must be presented to the HCBS reviewers before the setting will be deemed fully compliant.

Additional Questions and Resources

If you have questions about any of the above elements, please reach out to your DBHDS Community Resource Consultant.

In addition, please find the contacts for the DBHDS Office of Human Rights [here](#). **The HCBS modification process DOES NOT NEGATE THE REQUIRED HUMAN RIGHTS REGULATIONS! For any restriction or restraint that required Human Rights review, contact your advocate!**