

January 28, 2022 **AMENDED 01/28/2022 to add missing row from page A.15 on 6.07 (ENFORCEMENT)**

*Re: Testimony **Neither For Nor Against LD 1773**, “An Act To Make MaineCare Rules Pertaining to Global Home and Community-based Services Waiver Programs and Person-centered Planning and Settings Major Substantive Rules”.*

Chairwoman Claxton, Chairwoman Meyer, Distinguished Members of the Joint Standing Committee on Health and Human Services:

My name is Alan Cobo-Lewis. I live in Orono. I am director of the Center for Community Inclusion and Disability Studies at the University of Maine (CCIDS).

1 University Center for Excellence in Developmental Disabilities

CCIDS is Maine’s federally funded University Center for Excellence in Developmental Disabilities (UCEDD, pronounced “YOU-said”, authorized by the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000 (“DD Act”). The purpose of the national network of UCEDDs is to provide leadership in, advise federal state and community policy leaders about, and promote opportunities for individuals with developmental disabilities to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life. Part of the federal mandate of CCIDS is to educate and advise policymakers, including members of the state legislature. Consistent with CCIDS responsibilities under the DD Act and consistent with University of Maine Board of Trustees policies [212](#) and [214](#), I am testifying on the bill for myself and for CCIDS, not for the University of Maine or the University of Maine System as a whole.

2 Goal of Federal Home and Community Based Services (HCBS) Settings Rule

Home and Community Based Services (HCBS), funded through Medicaid waivers (MaineCare Benefits Manual Chapters II and III Sections 18, 19, 20, 21, and 29) offer an alternative to institutional care, in accordance with the US Supreme Court’s *Olmstead* decision (*Olmstead v. L.C.*, 527 U.S. 581 (1999)), which held that, under the Americans with Disabilities Act, people with intellectual disabilities have the right to live in the community rather than an institution if community placement is appropriate, transfer from institutional care to a less restrictive setting is not opposed by the person with a disability, and the placement can be reasonably accommodated. Maine has provided services to citizens with intellectual disabilities primarily through HCBS waivers since closing the state institution at Pineland in 1996.

The goal of the federal HCBS settings rule is to ensure that services and supports funded through federal HCBS Medicaid waivers are genuinely home- and community-based so that people receiving such services and supports can be truly included in their community and enjoy all the benefits of community living.

3 Association of Settings Rule Indicators with Health and Safety

Higher scores on those subscales of the Personal Outcome Measures instrument that align with HCBS Setting rule (e.g., living in integrated environments, participating in community life, exercising rights, choosing where and with whom to live and work) are associated with fewer emergency room visits, fewer abuse and neglect incidents, and fewer injuries, even when controlling for level of intellectual disability and presence of dual diagnosis¹.

4 Compliance with Federal HCBS Settings Rule

The federal HCBS Settings rule was adopted in 2014. After several delays (including a delay in response to the covid pandemic), the federal rule will finally go into effect March 17, 2023. Maine is required to come into compliance with the federal rule lest we forfeit the roughly two-thirds federal contribution to the cost of operating MaineCare Sections 18, 19, 20, 21, and 29.

Complying with the federal HCBS Settings Rule will also ensure that Mainers with disabilities have access to the community.

5 Routine Technical vs Major Substantive

Maine DHHS has proposed a routine technical rule (MaineCare Benefits Manual Chapter I Section 6) to implement the federal HCBS Settings Rule.

Rules pertaining to HCBS are important, and it is vital that stakeholders, including people who receive services and support from HCBS waivers, have meaningful direct impact on the rules that affect their lives so deeply. Major substantive rules are an important way to give that input power. It is unfortunate that the only major substantive rules pertaining to the HCBS waivers are MaineCare Benefits Manual Chapter III Section 21 and Chapter III Section 29—just the chapter that pertains to reimbursement rates, not the chapter that refers to vital policy and that defines the services and support available (see [22 MRS §3195](#)).

It is written into the CCIDS federal mission that we encourage self-determination by people with developmental disabilities. I have previously testified in favor of making the HCBS policy rules (MaineCare Benefits Manual Chapter II Sections 18, 19, 20, 21, and 29) major substantive, and I still encourage the Committee to do so. For this reason, I do not object in principle to making Chapter I Section 6 major substantive.

6 The State Rule Essentially *Is* the Federal Rule

However, please understand that the state rule in Chapter I Section 6 is ***extremely similar*** (frequently word-for-word the same) as the federal HCBS Settings Rule. If Chapter I Section 6 were to become major substantive then I believe that the Department may have to enact emergency major substantive rules under [5 MRS §8073](#) in order to come into compliance with the federal HCBS Settings rule.

¹ Friedman, C. (2020). The impact of Home and Community Based Settings (HCBS) final setting rule outcomes on health and safety. *Intellectual and Developmental Disabilities*, 58(6), 486-498 <https://doi.org/10.1352/1934-9556-58.6.486>

Please see the chart on pages A.1-A.15 of my testimony, showing a side-by-side comparison of the state and federal rule. You will see ***very few differences between the rules.***

I attended the Department’s public hearing on the proposed rule, and most of the concerns I heard raised were either outside the scope of the rule itself (pertaining mostly to findings from site visits of individual providers) or were actually challenging language that was identical to the required federal language. Indeed, I pared back my own public comment on the proposed rule upon realizing that some of the changes I might have suggested would have actually been changes to state language that mirrored the federal language.

7 Possible Timeframe for Broad Adoption of Major Substantive Framework

LD 1773 would make the state settings rule major substantive until January 1, 2023, after which it would revert to routine technical. I suggest that the Committee consider amending the bill to make ***all*** of the key HCBS waiver policy rules (***MaineCare Benefits Manual Chapter II Sections 18, 19, 20, 21, 29; Chapter I Section 6; and any other HCBS waiver rules in Chapter II***) as well as the rule governing behavioral support, modification, and management for Mainers with intellectual disabilities or autism (***14-197 Code of Maine Regulations Chapter 5***) ***major substantive effective July 1, 2023***. This would allow Maine to come into compliance with the federal HCBS settings rule by the federal deadline but still put Mainers with disabilities and their supporters in a position to participate meaningfully in any major HCBS changes, as the Office of Aging and Disability Services has indicated it intends to undertake.

Respectfully

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Proposed State Rule	Correspondence in Federal Rule or Guidance
<p>6.01 INTRODUCTION</p> <p>This rule implements the federal requirements for Maine’s Section 1915(c) home and community based waiver programs set forth in 42 C.F.R. § 441.301(c), and includes requirements for person-centered service planning and for settings in which home and community-based waiver services (“HCBS”) are provided, including requirements for provider-owned or controlled residential settings.</p> <p>This rule implements additional requirements or changes to HCBS waiver programs under the following sections of the MaineCare Benefits Manual:</p> <p>Section 18: Home and Community-Based Services for Adults with Brain Injury;</p> <p>Section 19: Home and Community Benefits for the Elderly and Adults with Disabilities;</p> <p>Section 20: Home and Community-Based Services for Adults with Other Related Conditions;</p> <p>Section 21: Home and Community Benefits for Members with Intellectual Disabilities or Autism Spectrum Disorder; and</p> <p>Section 29: Support Services for Adults with Intellectual Disabilities or Autism Spectrum Disorder.</p> <p>In the event of conflict between the requirements of this rule and any rule listed above, the terms of this rule supersede and shall apply.</p>	<p>§ 441.301(b)(6) on pp 3030 in Federal Register notice</p> <p>§ 441.301 Contents of request for a waiver. * * * * *</p> <p>(b) * * * * * * * *</p> <p>(6) Be limited to one or more of the following target groups or any subgroup thereof that the State may define: [some repeated out of order below to show correspondence with state rule]</p> <p>(i) Aged or disabled, or both. (ii) Individuals with Intellectual or Developmental Disabilities, or both. (iii) Mentally ill.</p> <p>(i) Aged or disabled, or both.</p> <p>(i) Aged or disabled, or both. (ii) Individuals with Intellectual or Developmental Disabilities, or both. (iii) Mentally ill.</p> <p>(ii) Individuals with Intellectual or Developmental Disabilities, or both.</p> <p>(ii) Individuals with Intellectual or Developmental Disabilities, or both.</p>

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<p>6.02 DEFINITIONS</p> <p>A. “Coercion” means the use of force or threats, including the threat of diminishment of any right or privilege, to cause a person to do something against the person’s will.</p> <p>B. “Department” means the State of Maine Department of Health and Human Services.</p> <p>C. “Informed Consent” means consent voluntarily given with sufficient knowledge and comprehension of the subject matter involved so as to enable the person giving consent to make an informed and enlightened decision, without any element of force, fraud, deceit, duress, or other form of constraint or coercion.</p> <p>D. “Member” means a person determined to be eligible for and subsequently enrolled in MaineCare benefits coverage by the Office of Family Independence (OFI) in accordance with the eligibility standards published by the OFI in the MaineCare Eligibility Manual. Some Members may have restrictions on the type and amount of services they are eligible to receive.</p> <p>E. “Provider” means any individual, partnership, group, association, corporation, institution, or entity, and the officers, directors, owners, managing employees, or agents of any partnership, group association, corporation, institution, or entity that is enrolled in the MaineCare program to provide covered services to Members.</p> <p>F. “Provider-Owned or Controlled Residential Setting” means a specific, physical place in which a Member resides that is owned, co-owned, and/or operated by a provider of home and community-based services. The Department shall determine whether a setting is a Provider-Owned or Controlled Residential Setting when authorizing services for a Member at the setting.</p> <p>G. “Restraint” means a mechanism or action – whether physical or chemical – that limits or controls a person’s voluntary movement or deprives a person of the use of all or part of the person’s body. “Restraint” does not include a prescribed therapeutic device or intervention, or a safety device or practice.</p>	

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<p>6.03 PERSON-CENTERED PLANNING</p> <p>A Person-Centered Service Plan is required for a Member to receive HCBS waiver services. The following requirements shall apply to person-centered planning.</p>	<p>§ 441.301(b)(1)(i) and 441.301(c) on pp 3030 in Federal Register notice</p> <p>§ 441.301 Contents of request for a waiver. * * * * *</p> <p>(b) * * *</p> <p>(1) * * *</p> <p>(i) Under a written person-centered service plan (also called plan of care) that is based on a person-centered approach and is subject to approval by the Medicaid agency. * * * * *</p> <p>(c) A waiver request under this subpart must include the following—</p>
<p>A. Person-Centered Planning Process. The Member will lead the person-centered planning process where possible. The Member’s representative should have a participatory role, as needed and as defined by the Member, unless state law confers decision-making authority to a legal representative. All references to a Member or individual in this Section are intended to include the role of the Member’s representative. In addition to being led by the Member, the person-centered planning process must:</p> <ol style="list-style-type: none"> (1) Include people chosen by the Member; (2) Provide necessary information and support to ensure that the Member directs the process to the maximum extent possible, and is enabled to make informed choices and decisions; (3) Be timely and occur at times and locations of convenience to the Member; 	<p>§ 441.301(c)(1) on pp 3030-1 in Federal Register notice</p> <p>(1) <i>Person-Centered Planning Process.</i> The individual will lead the person centered planning process where possible. The individual’s representative should have a participatory role, as needed and as defined by the individual, unless State law confers decision-making authority to the legal representative. All references to individuals include the role of the individual’s representative. In addition to being led by the individual receiving services and supports, the person-centered planning process:</p> <ol style="list-style-type: none"> (i) Includes people chosen by the individual. (ii) Provides necessary information and support to ensure that the individual directs the process to the maximum extent possible, and is enabled to make informed choices and decisions. (iii) Is timely and occurs at times and locations of convenience to the individual.

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<p>(4) Reflect cultural considerations of the Member and be conducted by providing information in plain language and in a manner that is accessible to individuals with disabilities and persons who have limited proficiency in English, consistent with 42 C.F.R. § 435.905(b);</p> <p>(5) Offer informed choices to the Member regarding the services and supports they receive and from whom;</p> <p>(6) Include a method for the Member to request updates to the plan as needed;</p> <p>(7) Record the alternative home and community-based settings that were considered and accepted or rejected by the Member; and</p> <p>(8) Include a discussion of strategies for resolving disputes or disagreements within the planning process, including clear conflict of interest guidelines for all planning participants.</p> <p>Providers of HCBS services for the Member, or those who have an interest in or are employed by a provider of HCBS services for the Member, must not provide case management or develop the Person-Centered Service Plan (PCSP), except when the Department determines that the only willing and qualified entity to provide case management and/or develop PCSPs in a geographic area also provides HCBS services.</p>	<p>(iv) Reflects cultural considerations of the individual and is conducted by providing information in plain language and in a manner that is accessible to individuals with disabilities and persons who are limited English proficient, consistent with § 435.905(b) of this chapter.</p> <p>(vii) Offers informed choices to the individual regarding the services and supports they receive and from whom.</p> <p>(viii) Includes a method for the individual to request updates to the plan as needed.</p> <p>(ix) Records the alternative home and community-based settings that were considered by the individual.</p> <p>(v) Includes strategies for solving conflict or disagreement within the process, including clear conflict-of-interest guidelines for all planning participants.</p> <p>(vi) Providers of HCBS for the individual, or those who have an interest in or are employed by a provider of HCBS for the individual must not provide case management or develop the person-centered service plan, except when the State demonstrates that the only willing and qualified entity to provide case management and/or develop person centered service plans in a geographic area also provides HCBS. In these cases, the State must devise conflict of interest protections including separation of entity and provider functions within provider entities, which must be</p>

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	<p>approved by CMS. Individuals must be provided with a clear and accessible alternative dispute resolution process.</p>
<p>B. The Person-Centered Service Plan. The Person-Centered Service Plan must reflect the services and supports that are important for the Member to meet the needs identified through an assessment of functional need, as well as what is important to the Member with regard to preferences for the delivery of such services and supports.</p> <p>Commensurate with the level of need of the Member, and limited to the scope of services and supports available under the applicable HCBS waiver, the Person-Centered Service Plan must:</p> <p>(1) Reflect that the setting in which the Member is to reside is chosen by the Member. The HCBS Setting chosen by the Member must be integrated in, and support full access by the Member receiving HCBS services 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 HCBS waiver services;</p> <p>(2) Reflect the Member’s strengths and preferences;</p>	<p>§ 441.301(c)(2) on pp 3031 in Federal Register notice</p> <p>(2) <i>The Person-Centered Service Plan.</i> The person-centered service plan must reflect the services and supports that are important for the individual to meet the needs identified through an assessment of functional need, as well as what is important to the individual with regard to preferences for the delivery of such services and supports.</p> <p>[2 continues] Commensurate with the level of need of the individual, and the scope of services and supports available under the State’s 1915(c) HCBS waiver, the written plan must:</p> <p>(i) Reflect that the setting in which the individual resides is chosen by the individual. The State must ensure that the setting chosen by the individual 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.</p> <p>(ii) Reflect the individual’s strengths and preferences.</p>

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(3) Reflect clinical and support needs as identified through an assessment of functional need;	(iii) Reflect clinical and support needs as identified through an assessment of functional need.
(4) Include individually identified goals and desired outcomes;	(iv) Include individually identified goals and desired outcomes.
(5) Reflect the services and supports (paid and unpaid) that will assist the Member in achieving identified goals, and the Providers of those services and supports, including natural supports. Natural supports are unpaid supports that are provided voluntarily to the Member in lieu of or in addition to HCBS waiver services and supports;	(v) Reflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals, and the providers of those services and supports, including natural supports. Natural supports are unpaid supports that are provided voluntarily to the individual in lieu of 1915(c) HCBS waiver services and supports.
(6) Reflect risk factors and measures in place to minimize them, including individualized back-up plans and strategies when needed;	(vi) Reflect risk factors and measures in place to minimize them, including individualized back-up plans and strategies when needed.
(7) Be understandable by the Member and by the individuals important in supporting the Member. At a minimum, the Person-Centered Service Plan must be written in plain language and in a manner that is accessible to individuals with disabilities and persons who have limited proficiency in English, consistent with 42 C.F.R. § 435.905(b);	(vii) Be understandable to the individual receiving services and supports, and the individuals important in supporting him or her. At a minimum, for the written plan to be understandable, it must be written in plain language and in a manner that is accessible to individuals with disabilities and persons who are limited English proficient, consistent with § 435.905(b) of this chapter.
(8) Identify the individual and/or entity responsible for monitoring the plan;	(viii) Identify the individual and/or entity responsible for monitoring the plan.
(9) Be finalized and agreed to, with the informed consent of the Member in writing, and	(ix) Be finalized and agreed to, with the informed consent of the individual in writing, and signed by all individuals and providers responsible for its

Proposed State Rule	Correspondence in Federal Rule or Guidance
<p>signed by all individuals and Providers responsible for its implementation;</p> <p>(10) Be distributed to the Member and other people involved in the Person-Centered Service Plan;</p> <p>(11) Include those services the purpose or control of which the Member elects to self-direct where available;</p> <p>(12) Prevent the provision of unnecessary or inappropriate services and supports; and</p> <p>(13) Document that any modification of the requirements in Section 6.04(B) (Additional Requirements for Provider-Owned or Controlled Residential Settings) must be supported by a specific assessed need and justified in the Person-Centered Service Plan. The following requirements related to the modification must also be documented in the Person-Centered Service Plan:</p> <p>(a) Identify the specific and individualized assessed need that creates the need for the modification;</p> <p>(b) Document the positive interventions and supports used prior to any modifications to the Person-Centered Service Plan;</p> <p>(c) Document less intrusive methods of meeting the need that</p>	<p>implementation.</p> <p>(x) Be distributed to the individual and other people involved in the plan.</p> <p>(xi) Include those services, the purpose or control of which the individual elects to self-direct.</p> <p>(xii) Prevent the provision of unnecessary or inappropriate services and supports.</p> <p>(xiii) Document that any modification of the additional conditions, under paragraph (c)(4)(vi)(A) through (D) of this section, 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:</p> <p>(A) Identify a specific and individualized assessed need.</p> <p>(B) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.</p> <p>(C) Document less intrusive methods of meeting the need that have been tried but did not work.</p>

Proposed State Rule	Correspondence in Federal Rule or Guidance
<p>have been tried but did not work;</p> <p>(d) Include a clear description of the modification that demonstrates that it is directly proportionate to the specific assessed need;</p> <p>(e) Include a regular collection and review of data to measure the ongoing effectiveness of the modification;</p> <p>(f) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;</p> <p>(g) Include informed consent of the Member; and</p> <p>(h) Include an assurance that interventions and supports will cause no harm to the individual.</p>	<p>(D) Include a clear description of the condition that is directly proportionate to the specific assessed need.</p> <p>(E) Include a regular collection and review of data to measure the ongoing effectiveness of the modification.</p> <p>(F) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.</p> <p>(G) Include informed consent of the individual.</p> <p>(H) Include an assurance that interventions and supports will cause no harm to the individual.</p>
<p>C. Review of the Person-Centered Service Plan. The Person-Centered Service Plan must be reviewed, and revised upon reassessment of functional need as required by 42 C.F.R. § 441.365(e), at least every 12 months, when the Member’s circumstances or needs change significantly, or at the request of the Member.</p>	<p>§ 441.301(c)(3) on pp 3031 in Federal Register notice</p> <p>(3) <i>Review of the Person-Centered Service Plan.</i> The person-centered service plan must be reviewed, and revised upon reassessment of functional need as required by § 441.365(e), at least every 12 months, when the individual’s circumstances or needs change significantly, or at the request of the individual.</p>
<p>6.04 HOME AND COMMUNITY-BASED SETTINGS</p>	<p>§ 441.301(c)(4)(i)-(v) on pp 3031-2 in Federal Register notice</p> <p>(4) <i>Home and Community-Based Settings.</i> Home and community-based settings must have all of the following</p>

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<p>A. General Requirements. Each home and community-based setting must have all of the following qualities, based on the needs of the Member as indicated in the Member’s Person-Centered Service Plan:</p> <p>This 6.04(A) provision will become legally effective on September 30, 2022, EXCEPT that, for those HCBS Settings that were approved as new settings on or after March 17, 2014, this provision is legally effective on the effective date of this rule.</p> <ul style="list-style-type: none"> (1) Is integrated in and supports full access of the Member receiving HCBS waiver services 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 HCBS waiver services; (2) Is selected by the Member 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 Member’s needs, preferences, and, for residential settings, resources available for room and board; (3) Ensures the Member’s rights of privacy, dignity and respect, and freedom from coercion and restraint, except 	<p>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:</p> <ul style="list-style-type: none"> (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.

Proposed State Rule	Correspondence in Federal Rule or Guidance
<p>restraints deployed in accordance with 34-B M.R.S. § 5605(14-A) to protect the Member or others from imminent injury or in conformance with an approved behavior management program under 34-B M.R.S. § 5605(13).</p> <p>(4) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to daily activities, physical environment, and deciding with whom to interact;</p> <p>(5) Facilitates individual choice regarding HCBS waiver services and supports, and from among qualified and willing MaineCare Providers who provide them; and</p> <p>(6) Complies with any and all licensing requirements.</p>	<p>(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.</p> <p>(v) Facilitates individual choice regarding services and supports, and who provides them.</p>
<p>B. Additional Requirements for Provider-Owned or Controlled Residential Settings</p> <p>This 6.04(B) provision will become legally effective on September 30, 2022, EXCEPT that, for those Provider-owned or Controlled Residential Settings that were approved as new settings on or after March 17, 2014, this provision is legally effective on the effective date of this rule.</p> <p>In a Provider-Owned or Controlled Residential Setting, in addition to the qualities set forth in Section 6.04(A), the following additional conditions must be met:</p>	<p>§ 441.301(c)(4)(vi) on pp 3032 in Federal Register notice</p> <p>(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:</p>

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<p>(1) The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the Member receiving services, and the Member has, at a minimum, the same responsibilities and protections from eviction that tenants have under landlord/tenant law of Maine and/or the county and/or municipality in which the unit or dwelling is located.</p> <p>For settings in which landlord/tenant laws do not apply, a lease, rental, or residency agreement or other form of written agreement must be executed for each HCBS participant that provides protections that address eviction processes and appeals comparable to those provided pursuant to 14 M.R.S. §§ 6000 – 6017.</p>	<p>(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.</p> <p>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.</p>
<p>(2) Each Member has privacy in their sleeping or living unit:</p> <p>(a) Units have entrance doors lockable by the Member, with only appropriate staff having keys to doors;</p> <p>(b) Members sharing units have a choice of roommates in that setting; and</p> <p>(c) Members have the freedom to furnish and decorate their sleeping</p>	<p>(B) Each individual has privacy in their sleeping or living unit:</p> <p>(1) Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.</p> <p>(2) Individuals sharing units have a choice of roommates in that setting.</p> <p>(3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.</p>

Proposed State Rule	Correspondence in Federal Rule or Guidance
<p style="text-align: center;">or living units within the lease or other agreement;</p> <p>(3) Members have the freedom and support to control their own schedules and activities, and have access to food at any time;</p> <p>(4) Members are able to have visitors of their choosing at any time; and</p> <p>(5) The setting is physically accessible to the Member.</p>	<p>(C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.</p> <p>(D) Individuals are able to have visitors of their choosing at any time.</p> <p>(E) The setting is physically accessible to the individual.</p> <p>[There is additional federal language in (F) about any modification of the additional conditions in (A) through (D) above requiring support by specific assessed need and justified in person-centered service plan. This is also stated in § 441.301(c)(2) on pp 3031 in Federal Register notice and mirrored in the state rule at 6.03(B)(13)]</p>
<p>C. Additional Requirements for Certain Disability-Specific Settings</p> <p>For the purposes of this provision, “disability-specific setting” means a non-residential HCBS setting that exclusively or primarily serves persons with a disability and that is not open to the general public. This provision applies to the following disability-specific service settings: MCBM, Ch. II, Sec. 18 (Work Ordered Day Club House Services) MCBM, Ch. II, Sec. 20 (Work Support Services) MCBM, Ch. II, Sec. 21 (Community Support Services and Work Support-Group Services) MCBM, Ch. II, Sec. 29 (Community Support Services and Work Support-Group Services)</p>	<p>§ 441.301(c)(5)(v) on pp 3031 in Federal Register notice indicates in part that “any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings.” Response to comments asking whether the rule applies to non-residential community settings such as adult day settings or day habilitation settings stated that services “(for example, residential, day or other) must be delivered in a setting that meets the HCB setting requirements as set forth in this rule. We will provide further guidance regarding applying the regulations to non-residential HCBS settings.” (p 2060 in</p>

Proposed State Rule	Correspondence in Federal Rule or Guidance
<p>In addition to the qualities set forth in Subsection 6.04(A), the Department may require, in Ch. II, Sections 18, 20, 21 and 29, that Disability-Specific Settings have the following qualities:</p> <p>(1) the setting is physically accessible to the Member;</p> <p>(2) the Member may have visitors at the setting;</p> <p>(3) the Member is supported to determine the Member’s activities and schedule; and</p> <p>(4) the Member has the freedom to have access to food at any time.</p>	<p>Federal Register notice). See below for example of such guidance.</p> <p>This appears to follow the “Exploratory Questions” that CMS suggested states might use in non-residential settings. See https://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/exploratory-questions-non-residential.pdf</p> <ul style="list-style-type: none"> • “Is the setting physically accessible” (p 4) • “Does the setting encourage visitors or other people from the greater community (aside from paid staff) to be present, and is there evidence that visitors have been present at regular frequency? For example, do visitors greet/acknowledge individuals receiving service with familiarity when they encounter them, are visiting hours unrestricted, or does the setting otherwise encourage interaction with the public (for example, as customers in a pre-vocatioal setting)?” (p 3) • “Does the setting afford opportunities for individual schedules that focus on the needs and desires of an individual and an opportunity for individual growth?” (p 3) “Do employment settings provide individuals with the opportunity to participate in negotiating his/her work schedule...to the same extent as individuals not receiving Medicaid funded HCBS?” (p 3) <p>“Does the setting allow for individuals to have a meal/ snacks at the time and place of their choosing? For instance, does the setting afford individuals full access to a dining area with comfortable seating and opportunity to converse with others during break or meal times afford dignity to the diners (i.e., individuals are treated age-appropriately and not required to wear bibs)? Does the setting provide for an alternative meal and/or private dining if requested by the</p>

Proposed State Rule	Correspondence in Federal Rule or Guidance
	individual? Do individuals’ have access to food at any time consistent with individuals in similar and/or the same setting who are not receiving Medicaid-funded services and supports?” (p 5)
<p>HCBS waiver services may not be offered in the following settings:</p> <ul style="list-style-type: none"> A. A nursing facility; B. An institution for mental diseases; C. An intermediate care facility for individuals with an intellectual disability (“ICF-IID”); D. A hospital; or E. Any other locations that have qualities of an institutional setting. Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating Members from the broader community of individuals not receiving HCBS waiver services, will be presumed to be a setting that has the qualities of an institution, unless CMS has determined that the setting does not have the qualities of an institution and that the setting does have the qualities of HCBS settings. 	<p>§ 441.301(c)(5) on pp 3032 in Federal Register notice</p> <p>(5) <i>Settings that are not Home and Community-Based.</i> Home and community-based settings do not include the following:</p> <ul style="list-style-type: none"> (i) A nursing facility; (ii) An institution for mental diseases; (iii) An intermediate care facility for individuals with intellectual disabilities; (iv) A hospital; or (v) Any other locations that have qualities of an institutional setting, as determined by the Secretary. Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings.
<p>6.06 PROVIDER QUALIFICATIONS</p> <p>To provide home and community-based waiver services, a provider must be</p>	

Proposed State Rule	Correspondence in Federal Rule or Guidance
<p>enrolled in MaineCare as a provider by the Office of MaineCare Services, be in compliance with the Provider’s MaineCare Provider Agreement, and satisfy all provider qualification requirements set forth in the applicable HCBS waiver regulations.</p>	
<p>6.07 ENFORCEMENT</p> <p>The Office of Aging and Disability Services (OADS) and/or the Department shall assure compliance with this rule as provided by the MaineCare Benefits Manual, Ch. I, Sec. I, including the Department’s right to full access to inspect, review, or audit medical, financial and other relevant documents, and including the duty of MaineCare providers and rendering providers to make their premises available for announced or unannounced visits for all purposes related to the administration of the MaineCare program.</p> <p>OADS’ and/or the Department’s failure to take any particular action to enforce compliance with the MaineCare Benefits Manual may not be deemed to waive the Department’s authority to act regarding prior or future violations by any Provider of HCBS waiver services.</p>	