

Information Memorandum Transmittal Aging and People with Disabilities



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Topic: Long Term Care

Due date:

Subject: Home and Community-Based Services (HCBS) time extension and Frequently Asked Questions (FAQ's)

Applies to (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> All DHS employees | <input type="checkbox"/> County Mental Health Directors |
| <input checked="" type="checkbox"/> Area Agencies on Aging: Type B | <input type="checkbox"/> Health Services |
| <input checked="" type="checkbox"/> Aging and People with Disabilities | <input type="checkbox"/> Office of Developmental Disabilities Services (ODDS) |
| <input type="checkbox"/> Self Sufficiency Programs | <input type="checkbox"/> ODDS Children's Intensive In Home Services |
| <input type="checkbox"/> County DD program managers | <input type="checkbox"/> Stabilization and Crisis Unit (SACU) |
| <input type="checkbox"/> Support Service Brokerage Directors | <input type="checkbox"/> Other (<i>please specify</i>): |
| <input type="checkbox"/> ODDS Children's Residential Services | |
| <input type="checkbox"/> Child Welfare Programs | |

Message:

In 2014, the Center for Medicare & Medicaid Services (CMS) issued new rules regarding requirements for Home and Community-Based Settings. All states were required to submit transition plans on how and when they would come into compliance with the regulations.

APD enters the final phase of the CMS approved Home and Community-Based Services (HCBS) Transition Plan which runs July 1, 2020 through March 17, 2022. During this final phase of the transition period, compliance with all aspects of HCBS is moved under the regular SOQ oversight as are all other rules. This means that corrective action is now possible for violations to HCBS rules. We have appreciated the energy and effort we have seen providers and APD staff make over the transition period. In order to continue to support providers, APD has created a list of Frequently Asked Questions (FAQs) which will be posted on both the HCBS Website and the SOQ provider Websites. Also attached are decision charts to assist in guiding the actions needed to implement Individually-Based Limitations (IBL).

HCBS website: <https://www.oregon.gov/DHS/SENIORS-DISABILITIES/HCBS/Pages/APD.aspx>

SOQ AFH website: <https://www.oregon.gov/DHS/PROVIDERS-PARTNERS/LICENSING/APD-AFH/Pages/Alerts.aspx>

SOQ ALF/RCF website: <https://www.oregon.gov/DHS/PROVIDERS-PARTNERS/LICENSING/Pages/admin-alerts.aspx>

These FAQs will be periodically updated as new questions arise or if revision or clarification is needed to any answers.

Please submit questions to:

For Adult Foster Home questions, please contact:
APD.AFHteam@state.or.us.

For Community-Based Care questions, please contact:
CBC.team@state.or.us.

For other HCBS-related questions, please contact:
HCBS.Oregon@state.or.us

If you have any questions about this information, contact:

Contact(s): Bob Weir	
Phone: 971-600-7876	Fax:
Email: bob.weir@dhsoha.state.or.us	

APD Home and Community Based Services (HCBS) and Settings

Individually Based Limitations (IBL) Frequently Asked Questions (FAQ) 7/17/20

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Acronym Explanations	Acronyms

F A Q

General Final Phase	Updated	Location
<p>What is the final phase of HCBS?</p> <p>In 2014, the Centers for Medicare and Medicaid Services (CMS) implemented new Home and Community Based Services (HCBS) and Settings rules. Each state, including Oregon, was required to develop a Transition Plan for how they would come into compliance with these rules. CMS had to approve each state’s plan.</p> <p>The final phase for APD licensed facilities moves all compliance with HCBS regulations to the regular licensing and survey structure under Safety, Oversight, and Quality (SOQ). This final phase runs from 7/1/20 to 3/19/22, at which time Oregon will be considered fully compliant with federal HCBS regulations. During this final phase, APD will be operating within the normal licensing and survey structure to assure APD providers are compliant by the end of the state’s transition period. In practice, there will be little difference between operations 7/1/20 and the end of Oregon’s Transition Plan period.</p>	6/12/20	GEN A1
<p>What do I need to do during the final phase year?</p> <p>Make sure that you continue to follow all HCBS regulations in OAR including Chapter 411, Division 004 and your specific licensing rules. Additionally, for Individually Based Limitations (IBL), providers should always assess whether an individual needs an IBL and make a concerted effort to review any IBL during regular plan review periods. If the need for an IBL is possible, the provider must use the questions in form APD 0556 as the process to determine if an IBL is appropriate. For Medicaid consumers, providers should share the APD 0556 with the Case Manager as soon as they think an IBL is justified and appropriate. The Case Manager will further screen the request and provide alternative solutions, if available or obtain consent if appropriate to propose limitation. For private-pay, complete and obtain signatures on the APD 0556 and update the care plan to reflect any IBLs.</p>	6/12/20	GEN A2

<p>Why do we need to do IBLs?</p> <p>In 2014, the federal government released new HCBS rules that define certain rights and freedoms for people who live in congregate care settings and those who live on their own, regardless of whether they receive Medicaid. A process, called Individually-Based Limitations (IBL), was created to address situations where a person may be unable to safely manage these rights/freedoms, and they put their own, or someone else’s, health or safety at risk. After less restrictive options have been tried and failed, an IBL may be considered. For more information on IBLs, refer to the HCBS IBL Oregon Administrative Rule <u>OAR 411-004-0040</u>.</p> <p>The federal government allowed states a transition period to come into compliance with the new rules. APD providers began using IBLs on July 1, 2019, receiving technical assistance when needed. Starting July 1, 2020, all providers are required to be in full compliance with all HCBS rules.</p>	7/9/20	GEN A3
<p>How long do I have before I must allow the HCBS rights?</p> <p>The HCBS rights should already be in place for everyone in your foster home/facility unless an IBL is justified and consented to by the individual or their representative.</p>	6/12/20	GEN A4
<p>General Forms</p>	<p>Updated</p>	<p>Location</p>
<p>Where do I get a copy of the APD 0556, Individual Consent to HCBS Limitation(s) form?</p> <p>An initial form was mailed to all Community-Based Residential providers. While the form number is sometimes listed as “SDS 0556” or “SE0556”, it is the same as the APD 0556. The form may be downloaded from the following sites:</p> <p>CBC website (SDS 0556):</p> <p style="padding-left: 40px;">https://www.oregon.gov/DHS/PROVIDERSPARTNERS/LICENSING/CBC/Pages/forms.aspx</p> <p>DHS forms server (APD 0556):</p> <p style="padding-left: 40px;">Scroll down to box “DHS/OHA publication or form number –” and enter the numbers 0556 in the empty box to the right. Hit Enter or scroll down and click SEARCH. Select/Highlight the form in one of the nine available languages. Then click the blue text on the webpage that</p>	6/12/20	GEN B1

<p>says, “Click to view the highlighted document”. On the next screen, click on either the PDF (se0556.pfd) or the Word (se0556.docx) version.</p> <p>https://aixxweb1p.state.or.us/es_xweb/FORMS/</p>		
<p>Why does the APD 0556 have a Private-Pay Witness signature line? And who can I use for it?</p> <p>The rules that allow for limitations to individual’s rights also prohibit coercion and threatening by anyone in order to obtain consent to a proposed limitation. Advocates were concerned that the power differential between a provider and resident may create situations where a resident’s agreement is not totally voluntary. The private-pay witness may be anyone that does not work for the residential care provider who is willing to act voluntarily in the role of a witness such as family members, friends, or others involved with the individual.</p>	6/12/20	GEN B2
<p>IBLs Generally</p>	<p>Updated</p>	<p>Location</p>
<p>Won’t asking questions show I am not implementing IBLs correctly and get me in trouble?</p> <p>It’s always ok to ask questions to learn how to do your job correctly. During the rollout period it is even more important. This period is designed for you to learn how to do this correctly, so you don’t make mistakes later. We are only providing technical assistance to providers during the rollout period for IBL implementation. Once the rollout period ends, we expect providers to understand the process. But, like always, we encourage providers to ask questions rather than guess if they are unsure about the rules.</p>	6/12/20	IBL C1
<p>I am worried that Licensors/Surveyors, APS and Case Managers will give me different advice. What should I do if that happens?</p> <p>We are working very hard to make sure all APD and AAA staff share the same information and we have the same expectations of providers. All staff have received training and we communicate regularly with them about IBLs and the rollout period. We will be communicating with them as we gain experience throughout the rollout period. If you think you are getting conflicting information, use the contact information listed in <i>FAQ IBL C9</i> to ask questions. We appreciate any feedback, as you may alert us to any issue that we need to work on during the transition period.</p>	6/12/20	IBL C2

<p>What is an IBL?</p> <p>An IBL is an individually based limitation to a resident’s right that is proposed to protect the individual’s health or safety or the health or safety of others. The process for IBLs can be found in Oregon Administrative Rule (OAR) 411-004-0040.</p>	6/12/20	IBL C3
<p>What areas can be limited?</p> <p>As described in OAR 411-004-0040:</p> <p>...the following rights may have an individually based limitation if needed by the consumer to ensure their health and safety:</p> <ul style="list-style-type: none"> • Access to <i>(the individual’s own)</i> food at any time • Choice of roommate in shared units • Control own schedule and activities • Freedom from restraint • Furnish and decorate bedroom or living unit • Privacy-Lockable doors <i>(of bedroom or living unit entry door)</i> • Visitors at any time 	6/12/20	IBL C4
<p>When would an IBL be needed?</p> <p>An IBL should only be proposed to protect the health or safety of a resident or others. An IBL involves a proposal to limit rights and is intended as an option of last resort . The APD 0556 (see FAQ GEN B1) has several questions that must be answered prior to proposing a limitation. The following are the only rights that can potentially be limited using the IBL process.</p> <p>An IBL is not needed if:</p> <ul style="list-style-type: none"> • The person is competent because s/he can make the decision(s) to stay healthy and keep him/herself and others safe, or choose to take risks and suffer the consequences; • The individual is not seeking to exercise the right (e.g., does not attempt to control their own schedule). 	6/12/20	IBL C5

<p>What if someone does not want to exercise their rights?</p> <p>If a resident does not want, for example, to lock their door for privacy, purchase additional food to have access to their own food anytime, decorate their room, have visitors, or any other of the IBL rights, they do not have to. No IBL is needed when it is the person’s choice to not access their rights.</p>	6/12/20	IBL C6
<p>What if we have rules that protect everyone’s health or safety, like not storing food in rooms?</p> <p>Blanket restrictions are particularly risky and not allowed under HCBS regulations and rules. While there is no right to store food in a person’s own room, there is the right for residents to access their own food 24/7. If food is not allowed in resident rooms, provisions need to be made to provide access to their food when the resident wants it. Some providers have a cabinet or closet set aside for consumers to store their own food.</p> <p>Another way to address the issue is to determine if a resident can safely handle having food in their room, such as having locked containers for shelf-stable food. A foster home/facility should focus on resident strengths and abilities on an individual basis.</p>	6/12/20	IBL C7
<p>Do I need to have IBLs documented for blanket visitation restrictions related to COVID-19?</p> <p>No, you do not have to have IBLs documented for blanket visitation restrictions related to COVID-19. Rights to visits still exist, but may happen in other ways, such as: With a barrier (like through window), by phone, by FaceTime, by computer/iPad, by Zoom, etc. CMS approved Oregon’s request to allow mass restrictions during the pandemic.</p>	6/16/20	IBL C8
<p>What if I have questions not listed here?</p> <p>For Adult Foster Home questions, please contact: APD.AFHteam@state.or.us</p> <p>For Community Based Care questions, please contact: CBC.team@state.or.us</p> <p>For any other HCBS questions, please contact: HCBS.Oregon@state.or.us</p>	6/12/20	IBL C9
<p>IBLs – Competent but Unwilling to Consent</p>	<p>Updated</p>	<p>Location</p>

<p>You say an IBL is not needed if a person is competent, but what if they <i>won't consent</i> to an IBL and <i>they are a danger to self or others</i>?</p> <p>Being a danger to others is never ok. Criminal activity is never ok. Someone who endangers others by allowing disruptive visitations, violent guests, providing food that is unsafe to others, or otherwise harming others, should be counseled on the inappropriateness of their behavior. Providers may use all tools available, up to and including move out, for individuals choosing to harm others.</p> <p>Harm to self only is more variable and less likely to escalate to a move out notice if the person is competent. Providing information in a nonjudgmental way to allow for informed decision-making is a good practice.</p> <p>Regardless of whether an IBL is needed for these situations, providers should document discussions and interventions used in circumstances where a competent person is creating a risk to self or others. Early intervention steps may support later actions a provider might take (such as a move out notice) to protect someone's health and safety.</p>	6/12/20	IBL D1
IBLs – Not Competent / Unable to Consent	Updated	Location
<p>Who signs the APD 0556, Individual Consent to HCBS Limitation(s) form, if the individual is not competent?</p> <p>The form allows for the signature of the persons legal representative or guardian. Use this order to determine the first available, responsible adult who will sign:</p> <ul style="list-style-type: none"> • Guardian • Person the individual has designated in writing to make decisions • Person that has been acting in the best interest of the individual and is knowledgeable of the individual's beliefs and preferences • Spouse • Majority of adult children • Parent • Majority of adult siblings 	6/12/20	IBL E1

<ul style="list-style-type: none"> • Any adult relative or friend • Advocacy Agency or Individual 		
<p>For purposes of IBLs, what is a written medical statement?</p> <p>A written medical statement is a doctor or health professional’s written statement that the individual does not have the ability to make an informed decision in the specific IBL area. The written statement may not be used as evidence of incapacity or incompetency.</p> <p>42 CFR 483.10(b)(3) [Exercise of (Resident) rights]: In the case of a resident who has not been adjudged incompetent by the state court, the resident has the right to designate a representative, in accordance with State law and any legal surrogate so designated may exercise the resident's rights to the extent provided by state law. The same-sex spouse of a resident must be afforded treatment equal to that afforded to an opposite-sex spouse if the marriage was valid in the jurisdiction in which it was celebrated.</p>	6/12/20	IBL E2
<p>What should the provider do while waiting for a requested medical statement?</p> <p>If a provider has requested a written medical statement and is waiting for a response, the provider may continue to safeguard the individual by taking protective measures to keep the individual safe. The provider must document that they have requested the medical statement and what protective measures they have put in place. The provider must obtain the written medical statement within 30 days of requesting it, otherwise the individual retains their full rights.</p>	6/16/20	IBL E3
<p>What if none of the people on the list (<i>in FAQ IBL E1</i>) are available and there is no one else to sign the APD 0556?</p> <p>With a statement from a doctor or other independent health professional (neither of whom can be an employee of the individual’s care facility) that the individual is unable to make the LTSS decision in question, the provider may include that statement with the APD 0556 and implement the limitation. The provider must note on signature portion of the APD 0556 that the individual is “Unable to Consent.” For Medicaid consumers, the same process is used with one additional step. If the Medicaid CM, doctor/other health professional, and provider all agree the limitation is</p>	6/12/20	IBL E4

<p>appropriate, it may be implemented and will be documented in the Medicaid Service plan noting the individual's inability to consent.</p> <p><i>NOTE: A policy transmittal with more information on this specific issue is forthcoming. We are developing a flowchart that further clarifies this process.</i></p>		
IBL Timeline	Updated	Location
<p>What is the IBL rollout timeframe?</p> <p>The initial rollout year was from July 1, 2019, to June 30, 2020. During this period no corrective action occurred, other than technical assistance, to allow time to learn new practices.</p>	6/12/20	IBL F1
<p>What were providers supposed to do over the rollout year?</p> <p>During the rollout year, providers reviewed and documented proposed IBLs. All providers were sent a letter outlining the basic instructions for the rollout year. A copy of the letter and form for documenting IBLs for both private-pay and Medicaid residents can be found in APD-IM-19-039. Now that the rollout year is over, providers should understand how to implement an IBL and should follow procedures for initiating any new IBL.</p>	6/12/20	IBL F2
<p>Can I be fined for noncompliance with HCBS and IBLs?</p> <p>Civil penalties are one corrective action tool that can be used starting July 1, 2020. Regulators will use all the corrective action tools such as warnings, corrective action plans and time for correction, technical assistance, civil penalties, etc., like they do with any other violation. So, while civil penalties (fines) are possible, they may not be the first step in every situation.</p>	6/12/20	IBL F3
<p>What happens after the rollout year?</p> <p>Starting July 1, 2020, providers will continue to assess whether an IBL may be necessary (or is no longer necessary). For private-pay residents, this will occur at each care plan review. For Medicaid residents, the provider will contact the CM if there is a need or change in circumstances that warrants a new IBL or removal of an existing IBL. Licensors and Surveyors will work with providers to ensure full compliance with HCBS rules and may utilize the full range of corrective actions, as appropriate.</p>	6/16/20	IBL F4

Between July 1, 2021, through March 17, 2022, all final compliance activities occur, which may include Heightened Scrutiny or closure for providers who remain out of compliance with HCBS rules.		
Implementation – Case Managers	Updated	Category
<p>When are Case Managers supposed to discuss possible IBLs?</p> <p>CMs will discuss the need for a possible IBL or continuation of a current IBL at each reassessment, when an individual’s circumstances change (between reassessments), or (starting July 1, 2020) when requested by a provider.</p>	6/12/20	IMP G1
<p>If a provider has an IBL in place, or wants to put an IBL in place, is the CM or the provider responsible for completing the APD 0556?</p> <p>While the APD 0556 form is not required for a Medicaid IBL, answers to the questions on the APD 0556 are required. CMs should request those questions/answers from the provider as basis for understanding why the IBL is seen as needed. The provider is responsible for providing the answers to the CM.</p>	6/16/20	IMP G2
<p>If the CM agrees that an IBL is needed, what is the next step?</p> <p>The CM will next go through the IBL screening tab in the OACCESS Service Plan to be sure the individual qualifies. If so, the CM will send out a modified Service Plan Agreement with the IBL plan indicated. The CM will get signatures from both the individual and the provider on the IBL plan and provide final copies to both. Then the CM will scan the provider’s plan and Service Plan Agreement into EDMS.</p>	6/16/20	IMP G3
<p>How often should the CM talk to the individual about ending the IBL?</p> <p>CMs should talk to the individual and their provider about their IBL(s) during their direct/indirect calls to see if the plan can be ended. An IBL cannot go longer than a year. So, if it is still in place at the annual reassessment, it must be fully reviewed and documented in the Service Plan including having new signatures, etc. Regular discussions with the individual and the provider should help the CM be aware of the individual’s needs and guard against missing this expectation.</p>	6/16/20	IMP G4

Implementation (Non)Compliance/Licensors & Surveyors	Updated	Category
<p>What will Licensors and Surveyors be looking at regarding IBLs?</p> <p>Licensors and Surveyors will select a number or percentage of cases (i.e., a statistically valid sampling) to look at as part of their regular review process. If limits are in place, they will check to see if documentation is in the resident’s file.</p>	6/16/20	IMP H1
<p>What happens if there is nothing in the client’s case record/on file?</p> <p>If there is no documentation of an IBL, and one is in place, the provider may receive a citation and appropriate corrective action. The only way a person’s rights should be limited is if there is an IBL in place to which the person or someone supporting them has consented.</p> <p>If the individual’s rights are being limited but there is no corresponding documentation (e.g., no lock on the inside of the resident’s bedroom/living unit door), the Licensor/Surveyor may use appropriate corrective action tools. (See FAQ IBL F3)</p>	6/16/20	IMP H2

Acronym	Meaning
APD	Aging and People with Disabilities
APD 0556	Individual Consent to HCBS Limitation(s)
CM	Case Manager (Medicaid)
DHS	Department of Human Services
FAQ	Frequently Asked Questions
HCBS	Home and Community-Based Services
IBL	Individually-Based Limitation
OACCESS	Oregon ACCESS (system used by Medicaid CMs)