

**TITLE 410 INDIANA DEPARTMENT OF HEALTH****Regulatory Analysis**

LSA Document #26-149

**I. Description of Rule**

[IC 16-28-2-11](#) provides: "The state department shall amend rules concerning the licensure of a residential care facility to comply with federal law and regulation concerning the provision of home and community-based services in the Medicaid program in order for a residential care facility to qualify as a home and community-based services provider."

**a. History and Background of the Rule** - The Indiana Department of Health (IDOH) licenses two types of long-term care facilities, residential care facilities and comprehensive care facilities. Residential care facilities provide residential nursing care or administer medications prescribed by a physician. Comprehensive care facilities are licensed to provide more complicated nursing and medical services than residential care facilities, but may have separate parts of the facility that operate as residential care facilities. Comprehensive care facilities are not required to be licensed as a residential care facility, but Indiana does do separate surveys for any residential sections. These rule updates pertain to the residential care facilities or residential care portions of comprehensive care facilities.

On March 17, 2014, the Centers for Medicare & Medicaid Services issued regulations, known as the HCBS Settings Final Rule, that define the settings in which it is permissible for states to pay for Medicaid Home and Community-Based Services (HCBS). The purpose of these regulations is to ensure that individuals receive Medicaid HCBS in settings that are integrated and that support full access to the greater community. Community integration includes opportunities for residents who receive HCBS waiver funds to seek employment and work in competitive and integrated settings, engage in community life, control personal resources, and receive services in the community to the same degree as individuals who do not receive HCBS. These changes will maximize the opportunities for participants in HCBS programs to have access to the benefits of community living and to receive services in the most integrated setting.

Indiana offers eight Medicaid (HCBS) programs that target specific groups. To be eligible for any HCBS program, you must meet Medicaid guidelines and HCBS program-specific eligibility guidelines. HCBS programs allow members to live in a community setting and avoid institutional placement. Indiana's HCBS programs are administered through the Family and Social Services Administration (FSSA). [IC 16-28-2-11](#) provides: "The state department shall amend rules concerning the licensure of a residential care facility to comply with federal law and regulation concerning the provision of home and community-based services in the Medicaid program in order for a residential care facility to qualify as a home and community-based services provider."

States must ensure all HCBS settings comply with the new requirements by completing an assessment of existing state standards including rules, regulations, standards, policies, licensing requirements, and other provider

requirements to ensure settings comport with the HCBS settings requirements. States must submit a transition plan to CMS that includes timelines and deliverables for compliance with 42 CFR 441.301(c) (4) (5), and Section 441.710(a) (1) (2). States must be in full compliance with the federal requirements by the time frame approved in the transition plan but no later than March 17, 2023.

FSSA created a Statewide Transition Plan to assess compliance with the Final Rule and identify strategies and timelines for complying with the Plan as it relates to all FSSA HCBS programs.

**b. Scope of the Rule** - The HCBS Settings Final Rule requires that all home and community-based settings meet certain criteria. These include:

- The setting is integrated in and supports full access to the greater community;
- The setting is selected by the individual from among setting options;
- Each individual has a right to privacy, is treated with dignity and respect, and is free from coercion and restraint;
- The setting provides individuals with independence in making life choices; and
- The individual is given choices regarding services and who provides them. In residential settings owned or controlled by a service provider, additional requirements must be met:
  - The individual has a lease or other legally enforceable agreement providing similar protections;
  - Each individual must have privacy in their living unit including lockable doors;
  - Individuals sharing a living unit must have choice of roommates;
  - Individuals must be allowed to furnish or decorate their own sleeping and living areas;
  - The individual controls his/her own schedule including access to food at any time;
  - The individual can have visitors at any time; and
  - The setting is physically accessible.

Any modification to these additional requirements for provider-owned home and community-based residential settings must be supported by a specific assessed need and justified in the person-centered service plan.

The HCBS Settings Final Rule clarifies settings in which HCBS cannot be provided. These settings include comprehensive care facilities that do not have separate residential sections, institutions for mental disease, intermediate care facilities for individuals with intellectual disabilities, and hospitals.

[410 IAC 16.2-5](#) must be modified to conform to the Federal rule, as the rule requires states to ensure all HCBS settings comply with the new requirements by completing an assessment of existing state standards including rules, regulations, standards, policies, and licensing requirements.

This modification is necessary to keep federal funding, but more importantly it provides Indiana's vulnerable populations with opportunities to work, play, learn, and volunteer in the community. The modification also gives HCBS residents rights to privacy and autonomy in their home, and protections from being evicted without a hearing before an administrative law judge with experience and understanding of the issues specific to the type of facility involved.

*Additional Changes*

In addition, FSSA's Division of Aging requested a more complete definition of a provided "meal" because many individuals do not have monetary means to purchase food above and beyond what is provided at their facility. The Division of Aging has received complaints that certain meals (primarily breakfast) provided have lacked substance (i.e. a granola bar and a piece of fruit). Therefore, ensuring that balanced meals with an appropriate caloric distribution is necessary.

IDOH is also clarifying staffing expectations. The current rule requires a minimum of one (1) awake staff member with CPR and First Aid training to be present 24 hours a day. IDOH is changing the rule to a "nursing" staff member. This would permit a nurse's aide or qualified medication assistant to be present but requires more medical training and experience than a security guard or maintenance person to ensure that resident health emergencies can be met. The necessity for this rule change became apparent after a resident in a facility was found deceased when only a security guard was in the facility.

IDOH has also updated the tuberculosis section in the rule to mirror the most recent guidance. This update will be easier for providers and residents alike, as it is less restrictive than the previous requirements.

### **c. Statement of Need**

[IC 16-28-2-11](#) requires IDOH to update its rules to comply with the HCBS Settings Final Rule. For Indiana to receive the necessary funds to operate our waiver services we are required to follow the rules and regulations set by CMS for home-and community-based services.

### **d. Statutory Authority for the Proposed Rule**

These rules changes are required under [IC 16-28-2-11](#) and Indiana's approved Statewide Transition Plan. This rule does not add any fiscal burden to the Indiana Department of Health (IDOH) or local governments. However, in order to ensure that resident's rights are maintained when eviction of a resident is pursued, the rule proposes that a system similar to the long-term care involuntary transfer system will be used. This will require filings for eviction to the Indiana Office of Administrative Law Proceedings (OALP) and an ALJ to hear the matter. The cost of the average involuntary transfer matter is approximately \$600.00 each for ALJ fees. No additional staff or funds are necessary to implement the changes in the rule. There are no sources of revenue, appropriation, distribution, or other expenditure of revenue affected by this rule.

This rule creates no unfunded mandate on a state agency or political subdivision, but the heightened rights granted residents will require an administrative process for evictions.

**e. Fees, Fines, and Civil Penalties** The proposed rule does not add or increase any fees, fines, or civil penalties.

## **II. Fiscal Impact Analysis**

**a. Anticipated Effective Date of the Rule:** July 1, 2026.

**b. Estimated Fiscal Impact on State and Local Government** - This rule has limited impact on expenditures and revenues of State Government to the extent it sets forth an expedited administrative review process to allow for emergency evictions where resident safety is an immediate concern. There is no impact on Local Government.

**c. Sources of Expenditures or Revenues Affected by the Rule** - The proposed rule changes expand the role of OALP to ensure that emergency eviction proceedings/interim orders can be obtained in those cases where a

resident is a significant risk to themselves or others. It will impact OALP and IDOH. The necessity for the rule is ongoing to comply with federal regulations.'

### **III. Impacted Parties**

Facilities that are licensed by IDOH as Residential Care Facilities are impacted by this rule. There are approximately 368 residential care facilities licensed in Indiana that provide some form of residential care, either free standing or attached to a long term (comprehensive) care facility. Approximately 68% of these facilities are owned by hospitals. Most of the remaining providers have a large corporate structure where each facility is listed as a separate LLC under a larger umbrella. Because the majority of residential care facilities are owned by hospitals or large corporations, IDOH has determined that the implementation of the proposed rule should not have any significant impact on small business.

### **IV. Changes in Proposed Rule**

See attached chart.

### **V. Benefit Analysis**

These rule changes are required under [IC 16-28-2-11](#) and Indiana's approved Statewide Transition Plan. The creation of a process for eviction directly benefits the residents as well as the facilities, as it creates a streamlined process for handling eviction issues without the need for costly court actions. Further, the facility has a legal obligation to provide continuity of care and notify the resident's legal representatives. This obligation to provide continuity of care minimizes harm to residents and reduces the need for court action which would have been needed to ensure residents receive care.

Changes have been made pertaining to tuberculosis of residents and health care personnel (HCP). These changes require less testing and are a cost-saving measure. The changes mirror the latest CDC recommendations, stemming from a systematic review that found a low percentage of HCP have a positive TB test at baseline and upon serial testing. Updated recommendations for screening and testing HCP include an individual baseline (preplacement) risk assessment, symptom evaluation and testing of persons without prior TB or latent TB infection (LTBI), no routine serial testing in the absence of exposure or ongoing transmission, treatment for HCP diagnosed with LTBI, annual symptom screening for persons with untreated LTBI, and annual TB education of all HCP. This benefits facilities because the new recommendations require less x-rays and testing.

The requirement that facilities have one awake "nursing" staff member with CPR and First Aid training directly benefits residents, who should have someone available to handle medical emergencies. This is standard practice in most facilities, and the requirement protects them from liability in the event a resident requires emergency care. The requirement that three calorically sufficient meals per day be provided in settings that include meal service was added at the request of FSSA's Division of Aging, who had received complaints in the past that some providers did not serve an appropriate breakfast. The addition has not been raised as a concern by stakeholders, who have held several meetings with IDOH regarding the rules and have raised concerns and participated in problem-solving regarding language in the rule. This directly benefits residents, many of whom do not have discretionary income for groceries or restaurants and rely on what is served and available in the facility.

The majority of facilities will not face additional costs to comply with this rule because those facilities are substantially complying with this rule, including the requirement to have an awake nurse. There are no sources of revenue, appropriation, distribution, or other expenditure of revenue affected by this rule.

This rule creates no unfunded mandate on a state agency or political subdivision, but the heightened rights granted residents will require an administrative process for evictions.

## **VI. Cost Analysis**

### **a. Estimate of Compliance Costs for Regulated Entities -**

The vast majority of this rule is based on the Federal settings rule. There are no fees or fines imposed by this rule amendment and there are no annual reporting, record keeping, and other administrative costs that the regulated entities will incur to comply with this rule. Facilities are already required to be in compliance with this rule, and therefore any "up front" costs, such as locks on doors, snack areas with microwaves and refrigerators, and the creation of leases, have already occurred. FSSA has reviewed and approved leases over the past few years to ensure compliance with the Federal Rule.

### **b. Estimate of Administrative Expenses Imposed by the Rules -**

These rule changes are required under [IC 16-28-2-11](#) and Indiana's approved Statewide Transition Plan. This rule does not add any fiscal burden to the Indiana Department of Health (IDOH) or local governments. However, in order to ensure that resident's rights are maintained when eviction of a resident is pursued, the rule proposes that a system similar to the long-term care involuntary transfer system will be used. This will require filings for eviction to the OALP and an ALJ to hear the matter. The cost of the average involuntary transfer matter is approximately \$600.00 each for ALJ fees. The previous rule did provide administrative appeal rights to residents who disputed an involuntary transfer, and it is not anticipated that this change will result in a large increase in litigation.

IDOH held several meetings with facility stakeholders and the State Long-Term Care Ombudsman over the past two years and made changes to our proposed rule based on feedback from stakeholders.

### **c. The fees, fines, and civil penalties analysis required by [IC 4-22-2-19.6](#)**

There are no fees, fines or civil penalties imposed by this rule.

### **d. If the implementation costs of the proposed rule are expected to exceed the threshold set in [IC 4-22-2-22.7\(c\)\(6\)](#).**

The implementation cost of this rule is expected to be below \$1,000,000 over any two (2) year period because this rule implements federal and state requirements that already exist in law.

## **VII. Sources of Information**

**a. Independent Verification or Studies** - IDOH did not rely on any studies or outside materials to prepare this analysis.

**b. Sources Relied Upon in Determining and Calculating Costs and Benefits** -The changes being proposed are required by state and federal law. Information about the costs of ALJ fees is an approximation given what IDOH previously paid ALJs but an ALJ's pay and costs is within the purview of OALP.

## **VIII. Regulatory Analysis**

The cost to the regulated entities from this rule is zero because the rule is a codification of federal and state requirements that are already in effect. Further, because this rule is a codification of federal and state requirements, there is not an option for less stringent requirements for regulated entities.

The cost to the state is the cost of ALJ fees for the eviction cases. According to IDOH records, there were approximately one hundred four (104) eviction cases between January 2021 to early September 2023, or an average of forty (40) per year. At a cost of \$600 in ALJ fees per case, the cost to the state will be \$24,000 per year.

The benefit to residents is unquantifiable because there is no way to determine how intangible benefits such as the choice of roommates, choice of furnishing or the ability to control their own schedule improve a person's life. The continuity of care and eviction protection set by this rule are similarly difficult to quantify. However, given the alternative to these provisions may be homelessness, the benefit of these provisions outweighs the costs.

#### **IX. Contact Information of Staff to Answer Substantive Questions**

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