

State of South Dakota
Department of Human Services
Division of Developmental Disabilities

**HCBS Settings Rule
Rights Restrictions
Guide to Compliance**



Introduction

It is the right of each person to choose which course in life best aligns with his or her beliefs and values. Each person being afforded the dignity of risk and having the opportunity to learn and grow in response to his or her choices is fundamental to the pursuit of a full life in one's community. In such cases where there are no imminent risks to a participant's health or safety, the freedom of choice afforded to a person should not be diminished or denied. It is with these principles in mind that this document has been written, and it includes the requirements set forth by the laws and administrative rules of the State of South Dakota, as well as the rules and regulations established by the Centers for Medicare and Medicaid Services (CMS). For more information about the key concept areas of the CMS HCBS Settings Rule, and the protections it affords participants, please refer to the HCBS Settings Guide to Expectations and Compliance.

Section I: Defining Rights Restrictions

What is a rights restriction?

A rights restriction is a limitation to a participant's autonomy due to a specific assessed need in order to ensure the health, safety, and well-being of the participant or the community. Restrictions can take a variety of forms including emergency restrictions, physical restraints, mechanical restraints, chemical restraints, medications for procedures, time out, etc. As described in the HCBS Settings Guide to Expectations and Compliance, the Division of Developmental Disabilities considers any modification made to a participant's plan in the seven key concept areas (Location, Living Arrangements, Privacy, Dignity and Respect, Physical Accessibility, Autonomy, and Community Integration) of the HCBS Settings Final Rule to be a rights restriction.

A rights restriction can only be used to address a real and imminent risk to the health and safety of the participant or others and cannot be used for the convenience of those who provide services and supports to the participant.

Section II: Proper Implementation of Rights Restrictions

When can a rights restriction be implemented?

Case managers and providers must optimize a participant's ability to make informed choices while minimizing the risk to the safety of the participant or others. There may be times when a participant and his or her ISP team decide that it is necessary to restrict a participant's rights only after all less restrictive interventions have been tried and determined to be unsuccessful.

Case managers and providers must ensure safety while maintaining a participant's right to make decisions in his or her life, to the greatest extent possible. All adults are afforded the dignity of risk and the ability to make decisions consistent with their own values and preferences. If there are concerns for a participant's health or well-being, the ISP team must consider the severity and likelihood of potential negative outcomes against the rights of the individual and limit those rights only when truly necessary, in accordance with the requirements outlined in the HCBS Setting Rule.

When can a rights restriction not be implemented?

A rights restriction cannot be used to impose the preferences, opinions, or values of the participant's ISP team or provider when there is no real and immediate risk to the participant's health or safety.

A rights restriction may only be implemented for the individual who needs the restriction and cannot be implemented for a group of individuals or for an entire setting. Rights restrictions cannot be used as “house rules” in any setting or for any population; they also cannot be used for the convenience of staff.

The following are examples of “house rules” or restrictions implemented by a provider across a group of individuals and **are not permitted**:

- Day program requirement that participants turn in their cell phones for the day
- Only staff have access to food (e.g. food is locked and individuals have to ask staff to access, only staff have access to kitchen area)
- Participants cannot come and go from the setting independently
- The setting is either fenced in or locked and staff have to let participants in and out of the setting
- Rules that limit visiting hours for everyone
- Overnight guests are not allowed in their home
- No one is allowed to have food or drinks in their rooms/units
- Alcohol is not permitted in their home
- Everyone is required to wake at the same time, eat at the same time, exercise at the same time, etc.
- Participants all have automatic supervision imposed (e.g. everyone within line of sight, no one can leave with unapproved friends or family, etc.)
- Required checks in a participant’s private living space (e.g. nighttime checks at designated times, limited alone time in an individual’s room during the day)
- No participants are allowed to manage their own medications. They are all locked up and staff are required to distribute them.

If all participants receiving services in the setting develop and agree to “house rules,” and these agreements are not enforced by staff, this arrangement would be permissible. At no time can the provider or staff implement or enforce these “rules”, and the participants reserve the right to modify the agreement at any time. The provider or staff may assist the participants in developing and adhering to the agreement, but may not enforce the “rules” at any time. Staff support could include scheduling a meeting, preparing for the meeting, and walking through the supported decision-making process.

Section III: Documentation Requirements

What are the documentation requirements to implement a rights restriction?

The process for implementing a rights restriction must be person-centered; the restriction must be both justified and well documented. The following are requirements that must be included in the documentation:

1. A specific and individualized assessed need.
2. The positive interventions and supports used prior to any modifications to the ISP.
3. Less intrusive methods of meeting the need that have been tried but did not work.
4. A clear description of the condition that is directly proportional to the specific assessed need.
5. A regular collection and review of data to measure the ongoing effectiveness of the modification.
6. Established and limited timeframes for periodic reviews to determine if the modification is still necessary or can be lifted.
7. Informed consent of the individual.
8. An assurance that interventions and supports will cause no harm to the individual.

In accordance with ARSD 46:11:03:08, participants must be afforded due process and all rights restrictions must be reviewed by the human rights committee (HRC) of the provider of direct HCB services prior to implementation and at least annually thereafter. HRC approval alone should not be construed to mean that a rights restriction is in compliance with the requirements of the HCBS Settings Rule. As outlined in the CHOICES waiver, the participant's case manager will review and approve all rights restrictions prior to implementation.

Please note that while informed consent is required for a rights restriction to be implemented, **informed consent alone is not considered substantive documentation to justify a rights restriction**; all other requirements must also be met.

Section IV: Understanding Informed Consent

What does informed consent mean?

South Dakota Codified Law (SDCL) 27B-1-17 defines informed consent as written consent voluntarily, knowingly, and competently given without any element of force, fraud, deceit, duress, threat, or other form of coercion, after explanation of all information that a reasonable person would consider significant to the decision in a manner reasonably comprehensible to general lay understanding.

The participant always leads the person-centered planning process where possible.

- If there is no guardian (or person with similar decision-making authority), then only the participant can grant, deny, or withdraw consent.
 - Consider supported decision making to assist the participant
- If there is a guardian (or person with similar authority), the court order must be adhered to. Does it say the guardian can make this kind of decision?

For parents/guardians of minors, there will not be a court order concerning their rights. Parents/guardians of minors can grant, deny, or withdraw consent.

Section V: Scope of Rights Restrictions

What if a participant's rights restriction affects others in a group setting?

In group settings, other participants must be unaffected to the greatest extent possible by the individualized restriction.

The provider must make reasonable efforts to decrease the impact of the restriction to other participants.

For those restrictions that affect other participants in the setting, there must be a way for those participants to continue to exercise their rights and autonomy which is accessible to all participants in the setting.

For example:

- When an individual in a group setting needs the kitchen cabinets locked due to a safety risk, the provider could give keys to other individuals in the setting so they may freely access the cabinets.
- If there is a participant with a media restriction in a group setting that limits any media rated PG 13 or above, there needs to be options for other participants in the setting to circumvent this restriction. Examples could include:
 - Watching media on personal devices (such as phone, tablet, computer) in their private living space or with headphones if in a shared space

- Settings with controlled-egress should be able to demonstrate how they can make individual determinations of unsafe exit-seeking risk and make individual accommodations for those who are not at risk.
 - Technological solutions, such as unobtrusive electronic pendants that alert staff when a participant is exiting, may be used for those at risk, but may not be necessary for others who have not shown a risk of unsafe exit-seeking behavior.

How does the HCBS Settings Rule impact reinforcements and consequences?

Personal property, personal funds, or activities a participant has a right to engage in cannot be withheld as a form of reinforcement for a desired behavior. Additionally, money that already belongs to a participant cannot be used as a reinforcement.

A participant's rights cannot be restricted due to unsuccessful completion of or refusal to participate in their program goals, except when refusal to participate in program goals results in a health or safety risk to the individual or others.

Personal property, personal funds, or activities can be restricted when there is documented evidence that access to the money, items, or activities, pose a risk to the health and safety of the participant or others.

The following are examples of consequences implemented by the provider as a result of participants not meeting their goals or exhibiting unwanted behavior and are therefore not permitted:

- Video Games- Limiting or taking away an individual's personal property such as their video game console and video games
- Family Time/Visitors- Limiting or taking away visits with family or friends
- Money- Limiting or taking away an individual's money
- Food- Limiting or taking away food

What if a rights restriction is implemented as an emergency in response to a crisis situation?

Emergency rights restrictions can be utilized if the participant displays behavior that endangers self or others. All emergency rights restrictions must be in compliance with ARSD 46:11:03:03. If after the implementation of an emergency rights restriction, the ISP team determines that the restriction will be utilized on an ongoing basis, the restriction must be documented in the ISP and due process afforded to the participant.