



Setting Provisions of the Final Home and Community-Based Services (HCBS) Regulations

Suggested Occupancy Agreement/Lease Terms and Conditions

The settings provisions of the final HCBS regulation establishes requirements for the characteristics that must be present in **provider owned or operated residential settings** in order to be eligible for reimbursement for Medicaid HCBS. To be considered home and community based, the following characteristics must be present in the setting:

- **The individual must have a signed lease or other legally enforceable agreement outlining his or her protections against eviction, with appeals processes explained.**
- The individual must have access to privacy in the sleeping unit including lockable doors, choice of roommates, and freedom to furnish or decorate the unit.
- The individual must have the ability to control his or her daily schedules and activities and have access to food at any time.
- The individual must have the ability to receive visitors at any time.
- The individual must be able to physically maneuver within the residential setting (e.g. setting is physically accessible).

Listed below are suggested occupancy agreement/lease terms and conditions intended to provide non-legal guidance to owners and providers whose properties are occupied by individuals receiving Medicaid Home and Community Based Services.

The setting provisions of the final HCBS regulations and the Virginia Landlord Tenant Act (Sections 55-248.2 through 55-248.40 of the Code of Virginia) can be accessed via the links included below:

Final CMS HCBS Regulation:

<http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/home-and-community-based-services.html>

Virginia Landlord Tenant Act

Handbook: http://www.dhcd.virginia.gov/HomelessnessToHomeownership/PDFs/Landlord_Tenant_Handbook.pdf

The following occupancy agreement/lease terms and conditions should be considered:

- Agreement must be legally enforceable in the Commonwealth of Virginia.
- Property address, description of the setting type and characteristics (e.g., number of bedrooms/bathrooms, included appliances), areas to which the occupant has sole access and communal access and those areas that are restricted.

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- Provisions relating to the length of the agreement (preferably an annual agreement) and detailing how the agreement can either be renewed or terminated and any associated deadlines for doing so.
- Provisions relating to the date in which rent is due, the rent amount, any proration of the rent amount and any associated late fees.
- Provisions relating to any funds that are to be requested from the occupant/tenant that is in addition to the rent amount (e.g., deposits, food, household supplies, etc.).
- Provisions regarding responsibilities for utilities (e.g., provision of them, payment of them, etc.)
- Provisions that clearly articulate home rules and occupant/tenant responsibilities (e.g., pets, visitors, noise, rent payment, utility payments, etc.). When drafting home rules, be mindful of the other elements of the settings final rule regarding 24-7 access to visitors and food.
- Provisions that clearly articulate how occupant/tenant related damages will be handled.
- Provisions that clearly articulate the owner/provider's responsibilities.
- Provisions that clearly articulate the conditions under which the owner/provider can access the occupant/tenant's space.
- Provisions that clearly articulate what constitutes a breach of the agreement by the owner/provider or the occupant/tenant.
- Provisions that clearly articulate the remedies available to either party related to the other party's breach of the agreement. In addition, the occupancy agreement/lease should clearly state what types of violations are non-remediable.
- Provisions that clearly articulate how disputes will be resolved related to the terms and conditions of the agreement.
- Provisions that clearly articulate the grounds on which the owner/provider can evict the occupant/tenant (must be in compliance with the Virginia Landlord Tenant Act (Sections 55-248.2 through 55-248.40 of the Code of Virginia)).
- Provisions that clearly articulate the process and timelines for eviction and all appeal rights that the occupant/tenant may have (must be in compliance with the VA Landlord Tenant Act Sections 55-248.2 through 55-248.40 of the Code of Virginia).

The following occupancy agreement/lease terms and conditions should be avoided:

Any term(s) or condition(s) that is non-compliant with the Virginia Landlord Tenant Act (Sections 55-248.2 through 55-248.40 of the Code of Virginia).

- Provisions that disallow multiple forms of payment of rent.
- Provisions that allow the owner/provider to assess rent for the remainder of the lease term to occupants/tenants who provide proper notice to vacate.

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- Provisions that allow the owner/provider to assess rent to occupants/tenants who provide proper notice to vacate until such time as the unit/space is occupied/leased to another individual or a new household.
- Provisions that require agreement by the occupant/tenant to be sued, to admit to guilt or to a judgment in favor of the owner/provider in a lawsuit brought in connection with the occupancy agreement/lease.
- Provisions that require agreement by the occupant/tenant that the owner may take, hold, or sell personal property of household members without proper notice to the occupant/tenant and a court decision on the rights of the parties. This prohibition, however, does not apply to an agreement by the occupant/tenant concerning disposition of personal property remaining in the home/housing unit after the occupant/tenant has moved out of the unit. The owner may dispose of this personal property in accordance with state law.
- Provisions that require agreement by the occupant/tenant not to hold the owner/provider or owner's/provider's agents legally responsible for any action or failure to act, whether intentional or negligent.
- Provisions that require agreement by the occupant/tenant that the owner may institute a lawsuit without notice to the occupant/tenant.
- Provisions that require agreement by the occupant/tenant that the owner may evict the occupant/tenant or household members without instituting a civil court proceeding in which the occupant/tenant has the opportunity to present a defense or before a court decision on the rights of the parties.
- Provisions that require agreement by the occupant/tenant to waive any right to a trial by jury.
- Provisions that require agreement by the occupant/tenant to waive his/her right to appeal, or to otherwise challenge in court, a court decision in connection with the occupancy agreement/lease.
- Provisions that require agreement by the occupant/tenant to pay attorney's fees or other legal costs even if the occupant/tenant wins in a court proceeding by the owner/provider against the occupant/tenant. The occupant/tenant, however, may be obligated to pay costs if he/she loses the court case.

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