

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-14-26
Baltimore, Maryland 21244-1850



Medicaid Benefits and Health Programs Group

October 23, 2023

Amir Bassiri
Medicaid Director, Deputy Commissioner
New York State Department of Health
Empire State Plaza, Corning Tower, Room 1466
Albany, NY 12237

Dear Director Bassiri:

I am writing to inform you that the Centers for Medicare & Medicaid Services (CMS) is granting New York **final approval** of its Statewide Transition Plan (STP) to bring settings into compliance with the federal home and community-based services (HCBS) regulations found at 42 CFR §§ 441.301(c)(4)-(5) and 441.710(a)(1). Upon receiving initial approval for completion of its systemic assessment and outline of systemic remediation activities on November 16, 2018, the state worked diligently in making a series of technical changes requested by CMS in order to achieve final approval.

Final approval is granted to the state after completing the following activities:

- Conducted a comprehensive site-specific assessment and validation of all settings serving individuals receiving Medicaid-funded HCBS, included in the STP the outcomes of these activities, and proposed remediation strategies to rectify any issues uncovered through the site-specific assessment and validation processes by the end of the transition period on March 17, 2023;
- Outlined a detailed plan for identifying settings that are presumed to have institutional characteristics, including qualities that isolate HCBS beneficiaries, as well as the proposed process for evaluating the settings and preparing for submission to CMS for review under heightened scrutiny;
- Developed a process for communicating with beneficiaries who are currently receiving services in settings the state has determined cannot or will not come into compliance with the home and community-based settings criteria by March 17, 2023; and
- Established ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the rule in the future.

After reviewing the STP submitted by the state on January 20, 2023, March 9, 2023, May 10, 2023, July 11, 2023 and September 13, 2023, CMS provided additional feedback on February 9, 2023, March 16, 2023, May 31, 2023, July 27, 2023 and September 26, 2023 and requested several technical changes be made to the STP in order for the state to receive final approval. These changes did not necessitate another public comment period. The state subsequently addressed all issues and resubmitted an updated version of the STP on October 6, 2023. A summary of the technical changes made by the state is attached.

The state is encouraged to work collaboratively with CMS to identify any areas that may need strengthening with respect to the state's remediation and heightened scrutiny processes as the state implements each of these key elements of the transition plan. Optional quarterly reports through the milestone tracking system designed to assist states to track their transition processes, will focus on four key areas:

1. Reviewing progress made to-date in the state's completion of its proposed milestones;
2. Discussing challenges and potential strategies for addressing issues that may arise during the state's remediation processes;
3. Adjusting the state's process as needed to assure that all sites meeting the regulation's categories of presumed institutional settings¹ have been identified, reflects how the state has assessed settings based on each of the three categories and assures the state's progress in preparing submissions to CMS for a heightened scrutiny review; and
4. Providing feedback to CMS on the status of implementation, including noting any challenges with respect to capacity building efforts and technical support needs.

It is important to note that CMS approval of a STP solely addresses the state's compliance with the applicable Medicaid authorities. CMS approval does not address the state's independent and separate obligations under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act or the Supreme Court's *Olmstead v. LC* decision. Guidance from the Department of Justice concerning compliance with the Americans with Disabilities Act and the *Olmstead* decision is available at: http://www.ada.gov/olmstead/q&a_olmstead.htm.

This letter does not convey approval of any settings submitted to CMS for heightened scrutiny review, but does convey approval of the state's process for addressing that issue. Any settings that have been or will be submitted by the state under heightened scrutiny will be reviewed and a determination made separate and distinct from final STP approval.

Additionally, CMS recognizes the state's request for a corrective action plan (CAP) to allow for additional time for the continued assessment of settings that fall under the institutional presumption to assure compliance with the settings criteria. The state will report to CMS on progress with activities outlined in the CAP.

Thank you for your work on this STP. CMS appreciates the state's effort in completing this work and congratulates the state for continuing to make progress on its transition to ensure all settings are in compliance with the federal HCBS regulations.

¹ Medicaid regulations at 42 CFR § 441.301(c)(5)(v) describe heightened scrutiny as being required for three types of presumed institutional settings: 1) Settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment; 2) Settings in a building on the grounds of, or immediately adjacent to, a public institution; 3) Any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

Sincerely,

Curtis Cunningham, Director
Division of Long-Term Services and Supports

Attachment

**SUMMARY OF CHANGES TO THE STP MADE BY THE STATE OF NEW YORK
AS REQUESTED BY CMS IN ORDER TO RECEIVE FINAL APPROVAL
(Detailed list of clarifications made to the STP since January 13, 2023)**

Site-Specific Settings Assessment Process

- **Department of Health (DOH)**
 - Confirmed all authorizers of Community First Choice Option (CFCO) services and supports (Managed Care Organizations-MCO and Local Department of Social Services-LDSS) received notice of revised Person-Centered Service Plan guidelines and template with directions to begin using immediately. (pg. 53)
- **Office of Mental Health (OMH)**
 - Confirmed the state validated each setting rather than assuming compliance based on a sample of settings and assured provider self-assessments for each setting were validated by a method independent of the provider. (pg. 103, Table 1)
 - Clarified the OMH settings determined by the state to be non-compliant (Community Residences, Family Care Programs, and programs adjacent to or on the grounds of a psychiatric institution) are not part of the New York HCBS delivery system. (pg. 101)

Site-Specific Assessment and Validation

- Clarified DOH will work with Special Needs Assisted Living Program and Special Needs Assisted Living Residence (SNALP/SNALR) providers directly and through their trade associations to provide sufficient guidance, training, and support to allow individualized, person-centered care planning modifications and no blanket restrictions to ensure that the setting can comply with the final HCBS Rule. (pgs. 6 and 17)
- Described the process the state uses to assure any discrepancies between the validation strategies and provider self-assessments were adequately addressed. (pgs. 16, 27, 48, 63, 93, 107, and 142)
- Included the total number of settings by setting type in the state's HCBS delivery system and included the results of the validation process as well as the validation methods used in the STP. (pgs. 13, 61-62, 103, 120, and 161)
- Clarified that the virtual site review process conducted at Social Adult Day Care (SADC) settings (where compliance cannot be validated through the Quality Assurance reviews) is a validation process to determine that remediation is complete. (pg. 137)
- Confirmed Office for People with Developmental Disabilities (OPWDD) settings (Individual Residential Alternatives (IRAs) and Site-Based Pre-Vocational services) were assessed and validated. (pg. 120, Table 3)
- Confirmed the 730 Continuum of Care settings were assessed by provider self-surveys administered to providers in 2017. These settings were included in the onsite inspections by state staff from the Office of Addiction Services and Supports (OASAS) Housing Bureau that was completed by June 2021. Apart from six Continuum of Care settings previously identified in the STP as requiring heightened scrutiny, all settings were compliant. (pg. 92)

Reporting of Setting Validation Results

- Included charts that encompass the results for all settings by setting type in each HCBS program. (pgs.13, 61-62, 103, 120, and 161)
- Described how the state assured compliance prior to reopening the 66 DOH Adult Day

- Health Care Programs (ADHCP) following the public health emergency. (pg. 25-26)
- Provided detail regarding the state agencies that assessed pre-vocational, group supported employment, habilitation support services/settings available to Mainstream Managed Care (MMC) members and included the methods used. (pgs. 68-69)

Remediation Strategies

- Clarified the individual's setting options includes a non-disability specific setting option. (pgs. 23, 40, 47, 50, 66, 75, 82, 89, 94, 109, 131, and 145)
- Provided a timeframe for when the programs will meet full compliance with the settings rule. (pg. 142)
- Clarified the number of individuals affected, and the process for resolution, for all settings when a setting is not and cannot become compliant. (pgs. 23, 40, 67, 76, 83, and 94)
- Provided timelines for the planned process for settings that cannot come into compliance. (pg.90)
- DOH prepared training focused specifically on the new PCSP template and process and its role in assuring that authorizers are adequately ensuring that the settings in which HCBS recipients live and/or receive services are fully compliant with the settings rule. The state notified MCOs about the revised PCSP guidelines and template in November 2022 and notified LDSS on February 17, 2023, with directions to begin using them immediately. An updated webinar to provide additional instruction on the guidance and template was developed and presented, as well as recorded and posted on the web on July 31, 2023. (pg. 54)
- Provided detail on the status of the settings criteria not affected by the public health emergency that are not eligible for a corrective action plan (CAP) (i.e., access to food at any time) as an area that still needs remediation and the expected completion date. (pgs. 5, 86, 93, and 141-142)
- DOH included provider policy remediation for Adult Care Facilities (AFCs) that related to person-centered planning and modification to the additional conditions of the settings rule, indicating a completion date of March 17, 2023. (pg. 17, Table 3)

Heightened Scrutiny

- Clarified settings will be posted for public comment and will be submitted to CMS. (pg. 138)

Ongoing Monitoring of Settings

- Clarified that the HCBS recipient's own home or the home of a family member, friend, or neighbor, who does not provide HCBS services, were not planned for site-level assessment, as these are presumed to be compliant. Ongoing monitoring and quality assurance processes are in place to ensure compliance with the settings criteria. (pg. 73)