

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



Disabled & Elderly Health Programs Group

May 16, 2019

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

Dear Ms. Frescatore:

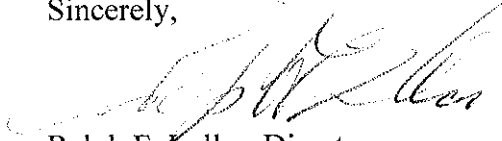
In follow-up to the 11/16/2018 initial approval granted to New York's Home & Community Based Services (HCBS) Statewide Transition Plan (STP), CMS provided additional detailed feedback to the state to assist with final approval and implementation of its STP. CMS acknowledges that since this technical assistance was provided, work has continued within the state to bring settings into compliance and further develop the STP; however, a summary of this feedback is attached for reference to assist in the state's efforts as it works towards final approval.

In order to receive final approval, the STP should include:

- A comprehensive summary of completed site-specific assessments of all HCBS settings, validation of those assessment results, and inclusion of the aggregate outcomes of these activities;
- Draft remediation strategies and a corresponding timeline for resolving issues that the site-specific settings assessment process and subsequent validation strategies identified by the end of the HCBS settings transition period (March 17, 2022);
- A detailed plan for identifying settings presumed to have institutional characteristics, as well as the proposed process for evaluating these settings and preparing for submission to CMS for review under heightened scrutiny;
- A process for communicating with beneficiaries currently receiving services in settings that the state has determined cannot or will not come into compliance with the HCBS settings rule by March 17, 2022; and
- A description of ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the federal settings criteria in the future.

Prior to submitting the updated version of the STP for consideration of final approval, the state will need to issue the STP for a minimum 30-day public comment period. I want to personally thank the state for its efforts thus far on the HCBS STP, and look forward to the next iteration of the STP that addresses the feedback in the attachment.

Sincerely,

A handwritten signature in black ink, appearing to read "Ralph F. Lollar". The signature is fluid and cursive, with a large initial "R" and "L".

Ralph F. Lollar, Director
Division of Long Term Services and Supports

ATTACHMENT

Additional CMS feedback on areas where improvement is needed by the State of New York in order to receive final approval of the New York HCBS Statewide Transition Plan

PLEASE NOTE: It is anticipated that the state will need to go out for public comment once these changes are made and prior to resubmitting to CMS for final approval. The state is requested to provide a timeline and anticipated date for resubmission for consideration of final approval as soon as possible.

General Request

Please ensure the STP reflects the current status of all waiver programs.

Site-Specific Settings Assessment Process:

The New York STP is organized by HCBS operating agencies and the state indicates that, “While the overall policy governing the New York State Transition Plan provides a uniform framework across the agencies, the specific way agencies have developed their assessment methodologies, tools and compliance approaches reflects their unique systems for quality improvement and budgetary resources (p. 2).” The following comments reflect clarifications requested of the state regarding the site-specific assessments of HCBS settings, including validation of assessments when provider self-assessments are utilized, and how all settings will be assessed for compliance with the HCBS settings criteria, including group non-residential settings. Please incorporate the following into the STP.

Department of Health (DOH)

1. CMS requests the state provide additional details in the updated STP regarding how the state will assess all Social Adult Day Programs and licensed adult homes for compliance with the HCBS settings rule, not just those that are presumed institutional due to their location or their potential to isolate.
2. In the Public Comment section, the state responded to a question of whether Structured Day settings would be assessed for compliance with the regulation by stating that “New York plans on assessing Structured Day Programs as they must comply with the HCBS rule in the same manner as other programs receiving HCBS Medicaid-funding (p. 12).” CMS notes that the STP does not specifically address Structured Day Programs as a setting that will be assessed for compliance with the HCBS settings requirements. Please clarify in the STP if Structured Day Programs are HCBS settings and, if so, how they will be assessed for compliance with the HCBS settings criteria.
3. In the Assisted Living Program (ALP) Transition Plan, the state will use a provider self-assessment, in which providers will submit pertinent information needed by the state to make a determination of their level of compliance, and the state will conduct periodic site-specific evaluations for a statistically significant sample of ALPs. CMS requests the state confirm that all ALP settings will be validated in some way and the timeline for completion of these activities. Please include in the STP the type of information the state required to be submitted by providers in order to determine compliance. Once all settings have been validated, please include those results in the STP.

Office for People With Developmental Disabilities (OPWDD):

4. CMS notes the state has not included information regarding Group Supported Employment. Regarding assessment of employment settings, the STP references the “New York State Plan to Increase Competitive Employment Opportunities for People with Developmental Disabilities (Final Plan Approved – May 1, 2014) (p. 118).” The state plans to close OPWDD Sheltered Work Shops by April 2020. The NY State Plan to Increase Competitive Employment Opportunities for People with Developmental Disabilities describes options for existing workshops to develop provider owned and operated community businesses, and notes that these will complement individual and group job placements within the private sector (pg. 9). CMS reminds the state that all HCBS settings must be evaluated for compliance with the HCBS settings criteria and the results included in the STP. Please include information regarding the assessment and validation of employment settings where Medicaid beneficiaries are receiving HCBS in the STP.

Office of Mental Health (OMH):

5. OMH is disseminating a provider self-assessment for adult OMH residential providers to complete and self-assess compliance with the HCBS settings criteria. The STP indicates that providers will be required to complete a Compliance Plan and maintain documentation of remediation on-site for validation by OMH or other auditors/reviewers (p. 205). The STP does not specify if all provider self-assessments will be validated. CMS requests additional information in the STP regarding how the state will validate compliance for all settings.
6. OMH has identified the following settings as automatically not compliant with the HCBS settings rule: OMH Licensed Congregate Treatment Sites (Community Residences), Family Care Programs, and owned and/or operated sites located on the grounds of or adjacent to a psychiatric institution. The STP indicates these settings are not required to complete a self-assessment at this time, and may be assessed at a later date (p. 199). Please confirm whether these settings will be submitted under heightened scrutiny and remediated to come into compliance, and/or explain more clearly within the STP that they have been determined not to be home and community-based settings and will not receive Medicaid HCBS funding after the expiration of the transition period.
7. Please clarify if OMH operates non-residential settings subject to the settings criteria and if so, please describe the state’s site-specific assessment, validation and remediation processes for these settings.

Office of Alcoholism and Substance Abuse Services (OASAS)

8. The STP indicates that OASAS conducts annual monitoring reviews, and moving forward this review can also be utilized to ensure that all Permanent Supportive Housing units maintain compliance with the HCBS settings rule (p. 226). CMS requests the state clarify how the annual monitoring process is carried out (e.g. onsite, telephone) and confirm that all settings will be assessed prior to publishing the results in the STP.

Office of Children and Family Services (OCFS)

9. The OCFS Site Level Assessment Timeline and Process Steps (p. 265) does not include site-specific assessment of Day Habilitation, Pre-Vocational and Supported Employment services offered under the Bridges to Health Waivers. Please note that all settings that group or cluster individuals for the purposes of receiving HCBS should be assessed and validated by the state for compliance with the settings criteria. CMS requests the state include site-specific assessment strategies for non-residential settings in the updated STP.
10. OCFS notes that virtually all of its participants in the Bridges to Health Waivers live in family homes, however at any given time a number of participants may live in foster care Group Homes and Agency Operated Boarding Homes (p. 264). Please clarify if foster care Group Homes or Agency Operated Boarding Homes are providers of HCBS services. If they are, please describe in the STP how these settings will be assessed for compliance with the regulatory criteria.

The following applies to all HCBS programs:

Site-Specific Assessment and Validation: Please describe the process that the state will take to assure that any discrepancies between the validation strategies and provider self-assessments are adequately addressed.

Reverse Integration Strategies: CMS requests additional detail from the state as to how it will assure that settings comply with the various criteria of the HCBS rule, particularly around integration of HCBS beneficiaries to the broader community. States cannot comply with the rule simply by bringing individuals without disabilities from the community into a setting. Reverse integration, or a model of intentionally inviting individuals not receiving HCBS into a facility-based setting to participate in activities with HCBS beneficiaries is not considered by CMS by itself to be a sufficient strategy for complying with the community integration criteria outlined in the regulation.

Individual, Privately Owned Homes: The state may make the presumption that privately owned or rented homes and apartments of people living with family members, friends, or roommates meet the HCBS settings criteria. A state will generally not be required to verify this presumption. However, the state must outline what it will do to monitor compliance of this category of settings with the regulatory criteria over time. Note, settings where the beneficiary lives in a private residence owned by an unrelated caregiver (who is paid for providing HCBS to the individual) are considered provider-owned or controlled settings and should be evaluated as such.

Group Settings: As a reminder, any setting in which individuals are clustered or grouped together for the purposes of receiving HCBS must be assessed and validated by the state for compliance with the rule. This includes all group residential and non-residential settings (including but not limited to prevocational services, group supported employment and group day habilitation activities). The state may presume that any setting where individualized services are being provided in typical community settings comport with the rule. Please confirm that the STP accurately includes all group residential and non-residential settings in its assessment and validation activities.

Non-Disability Specific Settings: Please provide clarity on the manner in which the state will ensure that beneficiaries have access to services in non-disability specific settings among their service options for residential and non-residential services. The STP should also indicate the steps the state is taking to build capacity among providers to increase access to non-disability specific setting options across home and community-based services.

Reporting of Setting Validation Results: Please report the findings of all validation activities once they are completed. In this analysis, please delineate the compliance results across categories of settings for all population groups in a manner that is easy for the public to review and understand. At a minimum, please confirm the number of settings in each category of HCBS setting that the state found to be: fully compliant with the federal HCBS criteria, could come into full compliance with modifications, cannot comply with the federal HCBS criteria, or presumptively institutional in nature.

Remediation Strategies

Please provide the following information in the next submission of the STP:

- Provide target dates for the completion of site-specific remediation for each setting type.
- Describe the process the state will employ to track progress with site-specific Corrective Action Plans to ensure HCBS settings will achieve compliance by the March 2022 deadline.

Communication with and Support to Beneficiaries when a Provider Will Not be Compliant: Please provide a detailed strategy for assisting participants receiving services from providers not willing or able to come into compliance by the end of the transition period. CMS asks that New York include the following details of this process in the state's next installation of its STP:

- Please include a timeline and a description of the processes for assuring that beneficiaries, through the person-centered planning process, will be given the opportunity, the information and the supports necessary to make an informed choice among options for continued service provision, including in an alternate setting that aligns, or will align by the end of the transition period, with the regulation. CMS requests that this description and timeline specifically explain how the state intends to assure beneficiaries that they will be provided sufficient communication and support, including options among compliant settings and assurance that there will be no disruption of services during the transition period.
- Please provide an estimate of the number of individuals who may need assistance in this regard.

Ongoing Monitoring of Settings

Please ensure the state clarifies which processes will be used to continually assess settings for ongoing compliance versus processes used only to screen settings prior to enrollment as a provider. Each waiver program should have a process to ensure settings are continuing to comply with the settings rule. Please provide as part of the oversight and monitoring plan, the monitoring timeframe/frequency of review, and the entity responsible for all settings.

Heightened Scrutiny

As a reminder, the state must clearly lay out its process for identifying settings that are presumed to have the qualities of an institution. These are settings for which the state must submit information for the heightened scrutiny process if the state determines, through its assessments, that these settings do have qualities that are home and community-based in nature and do not have the qualities of an institution. If the state determines it will not submit information on a presumptively institutional setting, the institutional presumption will stand and the state must describe the process for determining next steps for the individuals involved. Please only submit those settings under heightened scrutiny that the state believes will overcome any institutional characteristics and can comply with the federal settings criteria by the end of the transition period. Please include further details about the criteria or deciding factors that will be used consistently across reviewers to make a final determination regarding whether or not to move a setting forward to CMS for heightened scrutiny review. There are state examples of heightened scrutiny processes available upon request, as well as several tools and sub-regulatory guidance on this topic available online at <http://www.medicaid.gov/HCBS>. Please include the following in the next submission of the STP:

- The STP indicates that OPWDD has identified 68 non-residential settings, 243 residential settings, and potentially an additional 363 residential settings (Intermediate Care Facilities converting to HCBS) as requiring heightened scrutiny review. Please clarify why the state believes all 363 of the ICFs converting to HCBS settings will fall under heightened scrutiny and under which category of heightened scrutiny these settings belong.

Milestones

A milestone template has been completed by CMS with timelines identified in the STP and has been sent to the state for review. CMS requests that the state review the information in the template and send the updated document to CMS. The chart should reflect anticipated milestones for completing systemic remediation, settings assessment and remediation, heightened scrutiny, communications with beneficiaries and ongoing monitoring of compliance.

Section 508 Compliance

Regardless of format, all Web content or communications materials produced are required to conform to applicable Section 508 standards to allow members of the public with disabilities to access information that is comparable to information provided to persons without disabilities. We have reviewed your Statewide Transition Plan and found 508 compliance issues that need to be fixed before the document can be posted onto the CMS Website. The following is a non-exhaustive list indicating some, issues identified:

- The title in the document needs to...
- Documents need to contain bookmarks
- Any figures or images need alternate text
- All tables need identified header rows