

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

February 14, 2023

Henry Lipman, State Medicaid Director
Office of Medicaid Business and Policy
State of New Hampshire Department of Health and Human Services
129 Pleasant Street
Concord, NH 03301-6521

Dear Director Lipman:

I am writing to inform you that the Centers for Medicare & Medicaid Services (CMS) is granting New Hampshire **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)-(2). Upon receiving initial approval for completion of its systemic assessment and outline of systemic remediation activities on February 15, 2022, 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 these 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.

New Hampshire submitted the STP on November 14, 2019 after the state sought public comment and CMS provided feedback on December 17, 2019. The state submitted the STP again on March 15, 2022, September 9, 2022, November 3, 2022, and November 29, 2022. CMS provided feedback on April 17, 2022, September 29, 2022, and December 2, 2022. After

reviewing the STP submitted by the state on December 8, 2022, CMS provided feedback on December 22, 2022 requesting 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 on January 13, 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.

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.

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.

Sincerely,

Mary Marchioni, Acting Director
Division of Long-Term Services and Supports

Attachment

SUMMARY OF CHANGES TO THE STP MADE BY THE STATE OF NEW HAMPSHIRE AS REQUESTED BY CMS IN ORDER TO RECEIVE FINAL APPROVAL

(Detailed list of clarifications made to the STP since November 14, 2019)

The state updated throughout the STP the date by which all settings must be in full compliance and all remediation and transition activities are to be completed, no later than March 17, 2023.

Public Notice

The state went out for public comment after changes were made and prior to resubmitting to CMS for final approval. The most recent public commenting period ended February 1, 2019 (pg. 92).

Site-Specific Assessment, Remediation and Validation/Evaluation Activities

New Hampshire clarified in the STP goals section its approach that all settings are initially presumed to be out of compliance with one or more of the federal HCBS settings criteria and thus require modifications to come into full compliance; described how it is working with settings to remediate areas of non-compliance; and specified how settings would be validated to ensure full compliance with the rule by the end of the transition period (pgs. 20-51).

New Hampshire clarified that the provider owned or controlled settings, certified under the state's rule He-M 1001 and defined as a Community Residence (an agency residence or family residence that provides residential supports - typically, adult foster care home or staffed residence) were included in the assessment of all provider owned or controlled settings (pgs. 6, 14).

Provider Self-Assessment

The tools/process used for assessing compliance with the HCBS criteria as noted in the STP's Developmental Disabilities/Acquired Brain Disorders (DD/ABD) Short-Term Monitoring Goal #1 and Choices for Independence (CFI) Short-Term Monitoring Goal #1 have been noted as updated to accurately assess for all settings criteria, reflect accurate setting compliance status, and describe how the state is engaging with providers to discuss areas of non-compliance (pgs. 72-74).

Remediation

New Hampshire's request for a Corrective Action Plan includes remediation for both DD/ABD and CFI waivers (pg. 78).

Validation

Methodology:

The state clarified in the STP three strategies for identifying the level of compliance of HCBS settings. These strategies include:

- Short-term monitoring strategies which will occur during the transition process and will identify the status of settings during the transition process (pgs. 20-70).

- Providing on-going monitoring to ensure that all settings continue to maintain compliance (pgs. 71-79).
- Completing a re-evaluation of settings to ensure that the goals that were implemented succeeded in reaching 100% compliance for all HCBS settings. The timeframe for the re-evaluation process allows for time if there are settings that still require remediation (pgs. 79-83).

Validation Strategies:

New Hampshire outlined in Short-Term Monitoring Goal #1 the validation mechanisms that will be used in addition to the self-assessments (pg. 71).

Timeline:

The state indicated the STPs goal concerning the Re-Evaluation Processes has been revised to allow a longer period of transition should the need arise, and the Relocation Process has been updated to align with the Re-Evaluation Process and include the finalized state Residency Agreement (pg. 4).

Monitoring of Settings

New Hampshire presumed compliance of individual/private homes. Compliance will be met/monitored through use of the service agreement template, complaint process, participant directed and managed services certification request and quarterly satisfaction surveys. As identified in the STP, all settings will be monitored for isolation according to the isolation monitoring process (pg. 14).

Reverse Integration

New Hampshire added Community Integration Services to its 2021 waiver renewals. Reverse integration is not considered a component of community integration (pg. 38).

Non-Disability Specific Settings

As described in the STP, New Hampshire engaged in the Charting the Life Course Community of Practice to help individuals and families consider a greater array of options for supports that do not focus on just the disability service delivery system (pgs. 38-39).

Heightened Scrutiny

New Hampshire updated their heightened scrutiny process to include the following (pgs. 27, 83-88):

- Revised the ongoing Monitoring Goals #8 for DD/ABD waivers and #7 and #8 for the CFI Waiver to include the frequency of the assessments.
- Articulated how the final decision will be made on whether or not to proceed to move a setting to CMS for heightened scrutiny review.
- Provided a timeline of milestones for completing the heightened scrutiny process for other settings flagged by the state under prongs 1, 2 and 3.