

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 17, 2023

Cynthia Beane, Commissioner
Bureau for Medical Services
West Virginia Department of Health and Human Resources
350 Capital Street, Room 251
Charleston, WV 25301

Dear Commissioner Beane:

I am writing to inform you that the Centers for Medicare & Medicaid Services (CMS) is granting West Virginia **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). Upon receiving initial approval for completion of its systemic assessment and outline of systemic remediation activities on October 26, 2016, 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 July 25, 2022, CMS provided additional feedback on September 1, 2022. These changes necessitated another public comment period held Oct. 24 – Nov. 30, 2022. CMS provided subsequent feedback on December 2, 2022, December 27, 2022, and January 27, 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 February 14, 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 certain settings, and provider compliance with regulatory criteria facilitating community integration and employment opportunities. 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

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.

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 WEST VIRGINIA AS REQUESTED BY CMS IN ORDER TO RECEIVE FINAL APPROVAL
(Detailed list of clarifications made to the STP since July 25, 2022)**

Public Comment

- Provided the summary of public comments and the state’s responses from the July 25, 2022, comment period after initial approval in the STP (Appendix E, pg. 70, link to comments on page).
- Fixed broken links to public comment summaries and in the summaries in the STP (pgs. 9, 11, Appendices C, D, and E, pgs. 68-70).
- Provide missing date information on the public comment periods (pgs. 8-11).

Systemic Assessment & Remediation Activities

- Revised Specialized Family Care program policies to incorporate HCBS settings requirements (Appendix M, pages 136-138).

Site-Specific Assessment & Validation Activities

- Clarified the state’s desk review process for provider self-assessments, including defining Priority I and Priority II settings (pg. 33).
- Included Specialized Family Care homes in the site-specific assessment processes and the details on the assessment process for these settings (pg. 28).
- Provided the settings assessment and validation results, including the number of settings assessed by setting type (Exhibit 7, pgs. 32-33; Exhibit 8, pg.34; Exhibit 10, pg. 35).
- Corrected incorrect number entries on Exhibit 7 (page 33), Exhibit 9 (page 34), and Exhibit 12 (page 35).
- Clarified changes to the settings numbers throughout the assessment and validation process (pgs. 33, 34, 36).

Aggregation of Final Validation Results

- Provided a final disposition of validation results for all settings based on compliance level (fully comply; do not comply but could with modifications; cannot comply; and are presumed to have the qualities of an institution, but for which the state will submit evidence for the application of heightened scrutiny) (Exhibit 12, pgs. 35-36).

Ongoing Monitoring of Settings

- Revised the ongoing monitoring standards for provider-owned or controlled residential settings to include all of the HCBS criteria, including how often monitoring will occur, the method for the monitoring, and the entities responsible for doing the monitoring (pgs. 30-31).
- Revised the ongoing monitoring standards for individual private homes to include all of the HCBS criteria, including how often monitoring will occur, the method for the monitoring, and the entities responsible for doing the monitoring (pg. 30).
- Clarified the timelines around any needed beneficiary transitions from non-compliant settings (pg. 37).

- Corrected language to indicate that any settings that are found non-compliant will be required to develop and implement a remediation plan and that any beneficiaries in those settings will be assisted with transition to compliant settings (pg. 37).

Heightened Scrutiny

- Clarified the heightened scrutiny categories used by the state to align with the regulatory criteria (pg. 36).

Additional Feedback

- Addressed formatting issues for Exhibit 1 chart (pages 5-8).
- Corrected incorrect Appendices references in the document (pg. 31, 38).
- Clarified what settings can use the sample lease in Appendix N (pg. 158).

Corrective Action Plan

- The state will include in their submitted request for a Corrective Action Plan remediation for one Intellectual/Developmental Disabilities Waiver (IDDW) Intensively Supported Setting (ISS).