

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Baltimore, Maryland 21244-1850



Disabled & Elderly Health Programs Group

July 14, 2016

Stephen Groff
Medicaid Director
State of Delaware, Department of Health and Social Services
1901 N. Dupont Highway, PO Box 906, Lewis Building
New Castle, DE 19720

Dear Mr. Groff:

I am writing to inform you that CMS is granting the state of Delaware **initial 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 Section 441.301(c)(4)(5) and Section 441.710(a)(1)(2). Approval is granted because the state completed its systemic assessment, included the outcomes of this assessment in the STP, and clearly outlined remediation strategies to rectify issues that the systemic assessment uncovered, such as legislative changes and changes to contracts, and is actively working on those remediation strategies. Additionally, the state submitted the March 2016 draft of the STP for a 30-day public comment period, made sure information regarding the public comment period was widely disseminated, and responded to and summarized the comments in the STP submitted to CMS.

After reviewing the March 2016 draft submitted by the state, CMS provided additional feedback on June 7th, requesting that the state make several technical corrections in order to receive initial approval. These changes did not necessitate another public comment period. The state subsequently addressed all issues, and resubmitted an updated version on July 11, 2016. These changes are summarized in Attachment I of this letter. The state's responsiveness in addressing CMS' remaining concerns related to the state's systemic assessment and remediation expedited the initial approval of its STP.

In order to receive final approval of Delaware's STP, the state will need to complete the following remaining steps and submit an updated STP with this information included:

- Complete a thorough, comprehensive site-specific assessment of all HCBS settings, implement necessary strategies for validating the assessment results, and include the outcomes of this assessment within the STP;

- Draft remediation strategies and a corresponding timeline that will resolve issues that the site-specific settings assessment process and subsequent validation strategies uncovered by the end of the HCBS rule transition period (March 17, 2019);
- Outline 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;
- Develop a process for communicating with beneficiaries that are 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, 2019; and
- Establish ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the rule in the future.

While the state of Delaware has made much progress toward completing each of these remaining components, there are several technical issues that have been outlined in Attachment II to this letter and that must be resolved to CMS' satisfaction before the state can receive final approval of its STP. Upon review of this detailed feedback, CMS requests that the state please contact George Failla at 410-786-7561 or George.Failla@cms.hhs.gov or Michelle Beasley at 312-353-3746 or Michelle.Beasley@cms.hhs.gov at your earliest convenience to confirm the date that Delaware plans to resubmit an updated STP for CMS review and consideration of final approval.

It is important to note that CMS' initial or final 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* 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.

I want to personally thank the state for its efforts thus far on the HCBS statewide transition plan. CMS appreciates the state's completion of the systemic review and corresponding remediation plan with fidelity, and looks forward to the next iteration of the STP that addresses the remaining technical feedback provided in the attachment.

Sincerely,

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

ATTACHMENT I.

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF DELAWARE TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 7-11-2016

- **Identification of Compliance for State Codes, Policies and Contracts:** CMS requested that the state update its STP to indicate which specific sub-codes, policies, or contracts uphold each federal requirement. CMS also asked the state to provide the correct link for each state standard. For each instance where the state has determined that state policies and regulations are in compliance with federal regulation, CMS asked the state to include more detailed information within the systemic assessment crosswalk (Attachment 6 of the STP) explaining how those state standards are in compliance.

State's Response: The state provided the specific sub-codes, policies or contracts and links that uphold each federal requirement throughout the systemic assessment. For example, on page 44 of the systemic assessment crosswalk, the state provided a link to the managed care organization contracts and also provided the specific sub-codes that comply with the federal requirement that assisted living facilities are integrated in and support full access to the community. The state also provided a companion document that provides the text from each code, policy or contract that complies with each federal requirement. For example, on page 5 of the systemic assessment crosswalk, the state listed the Division of Developmental Disabilities Services (DDDS) Policy: Rights and Responsibilities, January 2010 as compliant with the right to privacy for Day Habilitation. The companion document provides the following text from that policy showing compliance with the federal requirement: "The individual shall have the right to have time, space and opportunity to privacy; meet privately with people of your choice; privacy during treatment and care of personal needs" (page 14).

- **Additional Details Regarding State's Systemic Remediation:** CMS requested that Delaware provide more detail to the descriptions of the changes the state will make to its state standards to bring them into full compliance with the federal requirements in the "Corrective Action" column of the systemic assessment crosswalk (Attachment 6).
 - For example, on page 34, the state code is silent for the federal requirement that individuals have the right to privacy in their unit including lockable entrances with staff having keys as needed. CMS asked the state to lay out the specific remediation actions it is intending to conduct to resolve all gaps or areas of non-compliance in existing standards identified within the existing systemic assessment before initial approval of the STP can be granted. CMS asked the state to definitively indicate whether or not the code will be revised, and/or what additional remediation strategies will be implemented. If state code will not be revised, Delaware must provide another way to remediate this issue. The state should also include as much of the potential language that will be used to remediate the issue as possible in the crosswalk.

State's Response: In response to CMS' request, Delaware added the exact language to this table that will be used to modify the Administrative Code for compliance with the federal requirements throughout the systemic assessment. For example, page 30 of the revised systemic assessment now indicates that the Administrative Code will include language "allowing individuals privacy in their unit including entrances lockable by the individual (staff have keys as needed)." The companion document also provides the proposed language for how the state is planning to revise state standards in order to bring them into full compliance.

- **Provider Owned and Controlled Non-Residential Settings:** CMS asked the state to ensure individuals have access to food and visitors at any time for provider owned and controlled non-residential settings.

State's Response: In response to CMS' request, Delaware added language to the appropriate policy provider manuals indicating that individuals should have access to food and visitors of their choosing at any time for non-residential settings that are provider owned and controlled.

ATTACHMENT II.

ADDITIONAL CMS FEEDBACK ON AREAS WHERE IMPROVEMENT IS NEEDED IN ORDER TO RECEIVE FINAL APPROVAL OF THE STATEWIDE TRANSITION PLAN

[PLEASE NOTE: IT IS ANTICIPATED THAT THE STATE WILL NEED TO GO OUT FOR PUBLIC COMMENT AGAIN ONCE THESE CHANGES ARE MADE PRIOR TO RESUBMITTING TO CMS FOR FINAL APPROVAL. THE STATE IS REQUESTED TO PROVIDE A TIMELINE AND ANTICIPATED DATE FOR RESUBMISSION FOR FINAL APPROVAL AS SOON AS POSSIBLE.]

Site-Specific Assessments

The state should continue to develop and begin implementation of its site-specific assessment process. CMS appreciates the information that the state has added to the STP regarding the provider self-assessment process and corresponding validation strategies. However, the details of the assessment and validation processes are distributed in different areas of the plan, making it difficult to piece together each component. Also, a number of the deadlines appear to conflict, particularly for the onsite review process. CMS encourages the state to look at ways to streamline how this information is presented to ensure a more cohesive, digestible plan for both CMS and public review. Please describe in complete detail in one location in the plan the key elements of the site-specific assessment process and the corresponding validation strategies utilized for each HCBS authority. Please also provide the following additional information in the STP regarding the site-specific assessment process:

- ***Estimate on Number of Settings in the State at Various Levels of Compliance with Federal HCBS Rule:*** An estimate of the number of settings that comply with the federal regulation, may comply with modifications, cannot or will not comply by the end of the transition period, or are presumed to be institutional in nature for which the state may or may not submit requests to CMS for heightened scrutiny once those assessments have been completed.
- ***Questions on Use of Provider Self-Assessment Tool:*** Clarification whether the provider self-assessment tool used for the DDDS waivers was mandatory for all settings, the percentage of consumers surveyed at each setting, the process for conducting the consumer surveys, the difference between settings “presumed not to be compliant” and settings “likely not to be compliant” (page 16) and how the state handled discrepancies between consumer and provider responses for specific settings.
- ***Validation Strategies:***
 - ***Additional Information on “Look-Behind” Review Process:*** detail how the Advisory Council to DDDS will conduct “look-behind” reviews of a sample of provider self-assessment survey results (pages 15 and 36). Please explain how these reviews will be conducted, (i.e., how settings will be chosen for the review, how the results from the review will be recorded, who they will interview onsite, what documents they will review, etc.). CMS believes but wishes to confirm that a provider will not be a part of the validation strategy for its own self-assessment. Please also clarify the timeline for the look-behind reviews.

- Clarification Required on DDDS Participant Survey: More details on the DDDS participant survey, including whether the survey includes questions reflecting all aspects of the federal requirements, how the state assures confidentiality of participants' responses, and how the state will ensure that a participant's responses are not unduly influenced. Explain the extent to which these surveys will factor into the state's overall validation process.
- Confirmation of 100% Validation of All Provider Self-Assessments: Confirmation that all settings within the DDDS waiver will have their provider self-assessments validated in some form.
- Clarification of State's Approach to Handling Discrepancies between Provider and Consumer Survey Responses: Explanation as to how the state will address inconsistencies about provider compliance with the federal requirements revealed by the Diamond State Health Plan (DSHP) consumer survey.
- Desk Review: It appears that the desk review is a comparison of each provider's survey responses and the corresponding member survey responses for DSHP settings (page 70). Are reviewers using any other evidence to confirm the provider assessment responses other than the consumer survey responses? If so, detail this evidence in the STP.
- Onsite Review: Additionally, please provide more information regarding the onsite review process for DSHP settings, such as explaining the content of the review tool, who will be interviewed, how settings were chosen for the review, and the sample size of the settings reviewed (page 71).
- ***Participant Choice of Setting & Non-Disability Specific Settings:*** The preliminary results from DSHP's beneficiary survey suggest that in multiple settings participants report inadequate choice of setting. Moreover, the survey questions refer to having a choice of setting but make no reference to the federal requirement that individuals have a choice that includes a non-disability specific setting. The STP does not indicate steps the state is taking to assure that beneficiaries have access to non-disability specific setting options across home and community-based services, nor does the plan address how the state will resolve inconsistencies between provider and participant responses to questions about choice of setting. Please include this information in the STP.
- ***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 home and community-based settings requirements if they are integrated in typical community neighborhoods where people who do not receive HCBS also reside. A state will generally not be required to verify this presumption. However, as with all settings, if the setting in question meets any of the scenarios in which there is a presumption of being institutional in nature and the state determines that presumption is overcome, the state should submit to CMS necessary information for CMS to conduct a heightened scrutiny review to determine if the setting overcomes that presumption. In the context of private residences, this is most likely to involve a determination of whether a setting is isolating to individuals receiving HCBS (for example, a setting purchased by a group of families solely for their family members with disabilities using HCBS). The state must also address how it tracks these settings through its ongoing monitoring process to ensure they remain compliant through the transition period and into the future.

- **Group Settings:** As a reminder, all settings that group or cluster individuals for the purposes of receiving HCBS must be assessed by the state for compliance with the rule, including but not limited to prevocational services, group supported employment and group day habilitation activities. CMS requests the state confirm that all of these settings are being included in the state’s assessment and remediation strategies.
- **Reverse Integration Strategies:** CMS requests additional detail from the state as to how it will assure that non-residential settings comply with the various requirements of the HCBS rule, particularly around integration of HCBS beneficiaries to the broader community. As CMS has previously noted, states cannot comply with the rule simply by bringing individuals without disabilities from the community into a setting. Compliance requires a plan to integrate beneficiaries into the broader community. Reverse integration, or a model of intentionally inviting individuals not receiving HCBS into a facility-based setting to participate in activities with HCBS beneficiaries in the facility-based setting is not considered by CMS by itself to be a sufficient strategy for complying with the community integration requirements outlined in the HCBS settings rule. Under the rule, with respect to non-residential settings providing day activities, the setting should ensure that individuals have the opportunity to interact with the broader community of non-HCBS recipients and provide opportunities to participate in activities that are not solely designed for people with disabilities or HCBS beneficiaries that are aging but rather for the broader community. Settings cannot comply with the community integration requirements of the rule simply by only hiring, recruiting, or inviting individuals, who are not HCBS recipients, into the setting to participate in activities that a non-HCBS individual would normally take part of in a typical community setting. CMS encourages Delaware to provide sufficient detail as to how it will assure non-residential settings implement adequate strategies for adhering to these requirements.

Site-Specific Remedial Actions

CMS appreciates the additional details regarding the Corrective Action Plans (CAP) and the revised completion dates. Please include the following information in the STP.

- There are two locations in the STP where the CAP remediation completion dates have not yet been amended to July 2018 and still remain as March 17, 2019 (pages 17, 47). To avoid any confusion, please review the narrative and ensure that CAP completion dates are consistent throughout.
- Provide more details about the “appeal process for providers to dispute the state’s findings of non-compliance,” (page 15).
- The STP suggests that DSHP settings found to be 90% compliant after completion of the desk review will be categorized as “likely compliant” (page 70). These settings will not have any required remediation and will be monitored on an ongoing basis to ensure continued compliance with all applicable federal requirements. Please note that CMS requires 100% compliance with the new federal requirements for these settings. CMS requests the state develop another corrective action process to ensure that all settings implement the necessary remediation to achieve 100% compliance.
- The STP indicates that DDDS providers with deficiencies must develop CAPs within 60 days of receiving a Report of Findings from the state (page 37), while DSHP providers

must develop CAPs within 30 days of receiving a report of finding (page 72). Please explain why the state has chosen different standards for different provider groups.

Ongoing Monitoring

CMS appreciates the additional information provided regarding the state's ongoing monitoring process. However, the timeline for the ongoing monitoring process is confusing as different dates are mentioned in different sections of the STP. Please ensure that all dates have been updated and are internally consistent throughout the STP. Please also explain how the new Quality Assurance measures that will be added after STP approval (page 28) will relate to the monitoring tool mentioned in other sections of the STP and to the state's oversight process more generally. CMS recommends that the state lay out the ongoing monitoring process in a more streamlined manner, as many components are currently mentioned in numerous sections of the STP in varying degrees of specificity.

Heightened Scrutiny

Please describe in detail the process the state intends to utilize to determine whether or not to move a setting forward for CMS review under heightened scrutiny (including the steps the state is going to take to develop a robust evidentiary package on each setting). There are several tools and sub-regulatory guidance on this topic available online at <http://www.medicaid.gov/HCBS>.

- The state has provided a revised description of the heightened scrutiny process for DSHP settings and the provider tool verifies how settings that fall under the three prongs of heightened scrutiny will be identified by providers. However, the state has not provided information on how it will identify settings for heightened scrutiny under the DDDS program, nor does the provider survey include any questions identifying whether settings are located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment or are in a building on the grounds of, or immediately adjacent to, a public institution. Please provide a clear description of how DDDS settings will be evaluated against the criteria for heightened scrutiny and provide a plan for collecting evidence and a timeframe for submitting that evidence to CMS for heightened scrutiny.
- There are inconsistencies between the timeline and the narrative regarding heightened scrutiny. Under the DSHP program, the state indicated that the provider self-assessment will be used to identify settings that are located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment or are in a building on the grounds of, or immediately adjacent to, a public institution. However, in the timeline, the state noted that sites presumed not to be community based were identified in April 2015 (page 57) before the provider surveys were implemented, which took place September 2015 through January 2016. The state should update the timeline so that it is clear when data regarding heightened scrutiny will be collected and when evidence will be presented to CMS.
- The STP asserts that the state completed its review of settings presumed to have institutional characteristics in September 2015 but no such settings (apart from the two individuals living on the grounds of Stockley Center) are described in the STP. Did this

review include the assessment of residential schools, such as Summit Academy and St. George Academy? If so, please provide the results of these reviews and if not, please explain how the state intends to address these schools with regard to the federal requirements.

- It is unclear if the state has identified any settings with the effect of isolating individuals. Please provide the methodology for identifying such settings and the results from this review. As a reminder to the state, CMS' *Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community* states that the following two characteristics alone might have the effect of isolating individuals:
 - The setting is designed specifically for people with disabilities, or for people with a certain type of disability.
 - Individuals in the setting are primarily or exclusively people with disabilities and the on-site staff that provides services to them.
- Settings that isolate individuals receiving HCBS from the broader community may also have any of the following characteristics:
 - The setting is designed to provide people with disabilities multiple types of services/activities on-site such as housing, day services, medical, behavioral and therapeutic services, and/or social and recreational activities.
 - People in the setting have limited, if any, interaction with the broader community.
 - The setting uses/authorizes interventions/restrictions used in institutional settings or deemed unacceptable in Medicaid institutional settings (e.g. seclusion).
- CMS has also provided examples of large, congregate settings that will likely fall into this third prong, including farmsteads or disability-specific farming communities, residential schools, gated/secured communities (i.e. intentional settings), and multiple settings co-located and operationally related. This is not an exhaustive list but rather the examples set forth in previous guidance on the rule by CMS as examples of residential settings that have the effect of isolating people receiving HCBS from the broader community.
- CMS reminds the state that only settings the state believes successfully meet all of the requirements of the federal HCBS rule and have overcome any institutional qualities or characteristics should be submitted under heightened scrutiny. Any setting that falls under one of the three prongs identified for heightened scrutiny that does not comply with various requirements of the settings criteria should not be moved forward under heightened scrutiny unless or until all of these issues are addressed.

Communication with Beneficiaries of Options when a Provider Will Not Be Compliant:

Please describe the state's process in more detail, including:

- Timelines and who will be responsible for executing each step of the process;
- A description of how all beneficiaries impacted by the need to access a compliant provider will receive reasonable notice and due process, including a minimum timeframe for that notice;
- A description of how the state will ensure that beneficiaries are given the opportunity, the information, and the supports to make an informed choice of an alternate setting that aligns with the federal requirements; and

- A description of how the state will ensure that all critical services and supports are in place in advance of each individual's transition.

Milestones

CMS requests that the state resubmit an updated milestone chart reflecting anticipated milestones for completing systemic remediation, settings assessment and remediation, heightened scrutiny, communication with beneficiaries and ongoing monitoring of compliance. The milestone chart should be modeled on the most recent template that CMS will supply and include timelines that address the feedback provided, no later than 30 days after receiving this communication and the template.