

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**

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June 13, 2017

Stephen P. Miller  
Commissioner, Department for Medicaid Services  
Commonwealth of Kentucky, Cabinet for Health and Family Services  
275 East Main Street, 6 West A  
Frankfort, KY 40621

Dear Commissioner Miller:

I am writing to inform you that CMS is granting Kentucky **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 Section 441.301(c)(4)(5) and Section 441.710(a)(1)(2). Upon receiving initial approval for completion of its systemic assessment and outline of systemic remediation activities on June 2, 2016, the state worked diligently in making a series of changes requested by CMS in order to achieve final approval. Additionally, the state submitted the February 2017 draft for a 30-day public comment period beginning December 20, 2016, made sure information regarding the public comment period was widely disseminated, and responded to and summarized the comments in the STP submitted to CMS.

**Final approval** is granted due to the state completing the following activities:

- Conducted a comprehensive site-specific assessment and validation of all settings serving individuals receiving Medicaid-funded HCBS, and 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.
- 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 that are currently receiving services in settings that the state has determined cannot or will not come into compliance with the home and community-based settings criteria by March 17, 2022; 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 February 1, 2017 draft submitted by the state, CMS provided additional feedback on May 23, 2017 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 on May 30, 2017. 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 settings<sup>1</sup> have been identified, reflects how the state has assessed settings based on each of the three categories and 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](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. CMS will opine on any requests for heightened scrutiny under separate cover.

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<sup>1</sup> CMS describes heightened scrutiny as being required for three types 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 home and community-based services regulations.

Sincerely,

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

## **SUMMARY OF CHANGES TO THE STP MADE BY THE STATE OF KENTUCKY AS REQUESTED BY CMS IN ORDER TO RECEIVE FINAL APPROVAL**

**(Detailed list of technical changes made to the STP since February 2017)**

### **Site-Specific Setting Assessment & Validation Activities**

- Clarified compliance actions to be taken in tables 5.2, 5.3, 5.4, 5.5, 5.6 (pgs. 34-48). Added information to the STP to assure that non-residential settings fully comply with HCBS and updated the STP to reflect the incorporation of changes to its assessment and remediation processes for non-residential settings to meet the community integration criteria. This is completed through regular monitoring, which includes open-ended survey questions that ask about the experience of the individual, including how staff support and encourage individuals to go out into the greater community and what activities the participant prefers and regularly engages in. The surveys are analyzed by Kentucky's Cabinet for Health and Family Services (CHFS) to identify trends of non-compliance so as to develop additional targeted technical assistance to providers (pgs. 13, 18).

### **Site Specific Outcomes & Remediation:**

- Added language to the STP that describes how the state will work with settings that may not currently be compliant but could come into compliance during the transition period. This includes conducting regular certification reviews with revised monitoring tools, at least one on-site visit, and monitoring of provider compliance plans. CHFS will also provide technical assistance which includes: webinars focusing on integration, individual choice and autonomy; providing examples of positive practices and one on one provider training (pgs.14, 18).

### **Ongoing Compliance Monitoring:**

- Updated monitoring tools to include the HCBS final rules in order to effectively monitor providers' compliance. These include: Participant Non-Residential Survey, Participant Residential Survey, Staff Non-Residential Survey and Staff Residential Survey, all of which focus on the *experience* of the participants to better gauge the providers' current level of compliance. Following completion of monitoring tools, the results are entered into a database where trained staff determine compliance (Table 5.2, pgs. 34-7).
- Clarified its remedial strategy including details about continued service provision to beneficiaries living in settings the state determines to be non-compliant. This includes using data to identify trends in order to provide targeted technical assistance (pgs. 14, 40).
- Added additional language regarding how the state plans to reconcile discrepancies between staff and participant survey responses (p.13).

### *Heightened Scrutiny*

- Added additional detail about how the final determination will be made on whether or not to submit a setting to CMS for heightened scrutiny review (pgs. 44-45). The final determination on whether or not to proceed to move a setting to CMS under heightened scrutiny will be based upon consensus from the stakeholder group, including self-advocates, families, advocates, and providers. This consensus will be largely based upon the provider's evidence of participant integration into the greater community, as well as individual choice and autonomy. For future reviews, if consensus among the stakeholder group is not reached, CHFS will ultimately make the decision based upon stakeholder input and an additional review of the provider's compliance with integration, choice, and autonomy.