

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

Ms. Maggie Anderson
Executive Director
Department of Human Services
600 E. Boulevard Avenue, Dept. 325
Bismarck, ND 58505

Dear Ms. Anderson:

Thank you for your submission of the North Dakota Statewide Transition Plan (STP) to bring state standards and settings into compliance with the new federal home and community-based settings requirements. North Dakota submitted its STP on November 28, 2014, as required by 42 CFR 441.301 (c) (6). In this STP the state submitted information for heightened scrutiny, requesting CMS to review residential and non-residential settings located on the grounds of an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID). CMS completed its review of the STP, evidence of public notice, the state's summary of public comments, and the information for heightened scrutiny.

CMS finds that North Dakota's STP addresses most of the requirements. However, there are several areas where additional information is needed as noted below.

1. The state has provided the process for ongoing monitoring of settings for compliance. Please include information confirming that the ongoing monitoring process also applies to those settings that are presumed to have institutional characteristics and subject to the CMS heightened scrutiny review.
2. Please align milestones and action items with those already approved in the Traditional IID/DD waiver specific transition plan.

With regard to the heightened scrutiny review by CMS, the state's request included three homes and two apartments housing a total of 10 individuals living on the grounds of the Life Skills Transition Center (LSTC), an ICF/IID serving approximately 93 individuals in Grafton, ND. The request also included a facility-based Day Program located on the campus, serving 12 individuals who are home and community-based waiver participants living in the community. CMS conducted two on-site reviews to determine if these settings overcome the institutional presumption and meet the requirements of a home and community-based setting.

During the week of May 5th through 7th, CMS observed and interviewed the 10 individuals who reside in the three homes and two apartments on campus. These observations included conversations with individuals and the staff that work with them (both in their work assignments and in their homes) visits to a variety of employment sites (on and off the campus) and visits to shared homes and individual apartments where waiver participants live. The person-centered service plans were reviewed for these 10 individuals to determine if: (1) individuals were receiving the services described in their plans; (2) restrictions were documented in the plan; and (3) to see how the plans documented individual opportunities for choice of where to live and receive services. All 10 individuals were engaged in a wide variety of employment or education activities, including entrepreneurial activities. Each individual had their own room. The participants' homes and rooms reflect each individual's choice of living arrangement, individual interests and hobbies. Participants interacted with the broader community on a daily basis, including many community activities that enabled participants to engage directly, throughout the day, with people who are not paid to provide them with services. In addition, many of the community activities were not organized only for the benefit of the residents, thereby fostering relationships with the broader community. Participants had access to food at any time and visitors did not have to adhere to a schedule. Residents had individually-defined schedules that support their specific interests and preferences. Individuals participated in menu planning, meal preparation and clean-up and had the opportunity to participate in activities within and around the home such as gardening and lawn care. Individuals had access to transportation options to enable them to participate in community activities in the broader community away from the campus setting.

CMS reviewers also conducted general observations of the facility-based Day Program which included services to twelve individuals who live off-site in community settings, but come on-site to attend this Day Program. This program is under ICF/IID leadership, but separately licensed as a North Dakota Day Program. Activities in this program take place on the ICF/IID campus alongside ICF/IID residents, under the direct supervision of the ICF/IID staff. Staff engaged in programs serving individuals who are receiving home and community-based services must complete additional training requirements. Approximately 10 of the 12 individuals in this program spend the majority of their day on-site engaged in such activities as mail and package delivery, swimming, a sensory stimulation room, the greenhouse, laundry, etc. Individuals are transported back to their community living arrangements at the end of the day. Person-centered service plans were reviewed for these individuals as well.

Based on observations, interviews and information specific to these settings, CMS concluded that the information submitted by the state for the heightened scrutiny review is sufficient for the three homes and two apartment units as HCBS residential settings, with the caveats articulated below. This decision is applicable only to the specific settings in question, with the number of beneficiaries per setting, and all characteristics of the current services and settings must be retained. Any increase in the number of residents, changes in provider, or other significant changes to the service delivery must be reported to CMS and may be subject to additional heightened scrutiny. CMS has determined that the following residential settings do

not have the qualities of an institution and do have the qualities of home and community-based settings after meeting the provisions identified below:

- 700, 716, 752 Cottage Road and 808 W. 5th Street, #208. Although CMS included this setting in its review, the state must officially include the apartment located at 808 W. 5th Street, #108 in its Statewide Transition Plan with appropriate information to provide documentation of its characteristics.
- Leases: Seven individuals have leases; however, the leases for 716 Cottage Road are between LSTC and the provider organization REM. Leases or written agreements should also exist between guardians of the participants and the provider, REM.
- Locks: One individual at 752 Cottage Road should have a lock on his bedroom door. According to the state, by July 2016, the Administrative Code will be changed to ensure all settings identified in the STP will comply by having lockable doors.
- Although the person-centered service plans provided ample documentation of reasons for modifying the characteristics of community living for several individuals, the clear process for allowing such modifications as described in Section 42 CFR 441.301(c)(4)(vi)(F) was not followed and the person-centered plans should be revised accordingly.
- The person-centered service plans did not adequately reflect that residents had been given choices of other settings, including non-disability specific settings as described in Section 42 CFR 441.301(c)(4)(ii) and as indicated in North Dakota's STP. North Dakota should follow through and comply with this requirement of the rule and its own STP.

Information submitted by the state for the heightened scrutiny review is not sufficient for the facility-based Day Program. CMS finds that the Day Program setting does not meet the characteristics of home and community-based because the majority of individuals receive most of their services at the facility-based program and are not integrated into the greater community. Therefore, the state must take significant action to ensure greater community integration during the transition period, including providing increased opportunities for individuals to participate in community-based, rather than facility-based work, activities, and services and supports if the state wishes to continue using this setting for home and community-based services. If this is the state's intent, the state will need to add information into the STP about the actions that will be taken during the transition period to bring the non-residential setting into compliance. Until that time, the institutional presumption stands. However, the state may continue billing during the transition period as they work toward compliance.

With regard to the other waivers in the state, including those serving individuals who are elderly or disabled, please clarify the state process for identifying settings that are presumed to have the characteristics of an institution. CMS wishes to ensure that the state has address this issue in all of its waiver programs. 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

settings meeting the scenarios described in the regulation, the presumption will stand and the state must describe the process for informing and transitioning the individuals involved either to compliant home and community-based settings or to non-Medicaid funding streams.

These settings include the following:

- Settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;
- Settings in a building on the grounds of, or immediately adjacent to, a public institution;
- Any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

If the state wishes to submit such information for any settings in other waivers, it will need to do so in an amended STP that has completed the public input process. If the state determines the setting is institutional in nature, the STP should specifically address how the impacted individuals will be informed and transitioned.

The state must submit the revised STP to CMS within 30 days from the date of receipt of this letter. CMS will coordinate with the state to schedule future meetings, if necessary, to discuss the results of CMS' review and how the state should proceed with making revisions.

Please contact Ondrea Richardson of my staff in the CMS Central Office at 410-786-4606, Ondrea.Richardson@cms.hhs.gov with any questions related to this letter.

Sincerely,

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

cc: Richard Allen, Denver Regional Office, Associate Regional Administrator