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

Disabled & Elderly Health Programs Group

January 13, 2017

Ms. Nancy Smith-Leslie
Division Director
Medical Assistance Division
P.O. Box 2348
Santa Fe, NM 87504-2348

Dear Ms. Smith-Leslie:

This letter is to inform you that CMS is granting New Mexico **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 has completed its systemic assessment; included the outcomes of this assessment in the STP; clearly outlined remediation strategies to rectify issues that the systemic assessment uncovered, such as legislative/regulatory changes and changes to vendor agreements and provider applications; and is actively working on those remediation strategies. Additionally, the state submitted the November 1, 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 November 2016 draft submitted by the state, CMS provided feedback on December 21, 2016 and held calls with the state on December 21, 2016 and January 5, 2017 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 resubmitted an updated version on January 10, 2017 in response to CMS' feedback. 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. CMS also completed a spot-check of 50% of the state's systemic assessment for accuracy. Should any state standards be identified in the future as being in violation of the federal HCBS settings rule, the state will be required to take additional steps to remediate the areas of non-compliance.

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

- Complete comprehensive site-specific assessments of all home and community-based settings, implement necessary strategies for validating the assessment results, and include the outcomes of these activities 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 identified by the end of the home and community-based settings 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 home and community-based 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 New Mexico has made progress toward completing each of these remaining components, there are several technical issues that have been outlined in Attachment II of this letter that must be resolved before the state can receive final approval of its STP. Additionally, prior to resubmitting an updated version of the STP for consideration of final approval, the state will need to issue the updated STP out for a minimum 30-day public comment period.

Upon review of this detailed feedback, CMS requests that the state please contact Michele MacKenzie (410-786-5929 or michele.mackenzie@cms.hhs.gov) or Amanda Hill (410-786-2457 or amanda.hill@cms.hhs.gov) at your earliest convenience to confirm the date that New Mexico plans to resubmit an updated STP for CMS review and consideration of final approval.

It is important to note that CMS' initial approval of an 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,

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

ATTACHMENT I.

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF NEW MEXICO TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 1/10/2017

Public Notice and Engagement: CMS asked the state to clarify whether the state received any comments from the July 2016 comment period. If so, the state was asked to include those comments and the state's response in the STP.

State Response: The state included the public comments from the last round of public comment and their reaction to the comments in Appendix F of the STP.

Waivers and Settings Included in the STP: CMS requested that New Mexico include in the STP the specific settings where waiver services are provided in addition to listing the providers and services.

State Response: The state included this information in the STP

Appendix A: Mi Via Waiver:

- CMS requested that the state provide, in the Mi Via Waiver systemic remediation crosswalk, remediation language as well as the specific locations in the New Mexico Administrative Code (NMAC), waiver, service standards and vendor agreements where the state will make necessary changes.

  State Response: Appendix A was updated to include specific language regarding the documents, section and proposed language to be used for remediation.

- The state provided language in the provider attestation that indicated that the vendor will be required to comply with all HCBS requirements, with the remediation completed by September 2016. The proposed remedial language indicating that providers will facilitate individual choice regarding services and supports and who provides them and the attestation that all providers will be required to comply with the HCBS settings rule couldn't be located. CMS requested that the state provide the location of this information or revise the date of completion.

  State Response: The state indicated that the vendor agreements will be updated in order to meet compliance. Appendix A was updated to include the language that will be used for remediation. The completion date was updated to October 31, 2017.

Appendix B: Developmental Disabilities Waiver:

- The Developmental Disabilities Waiver and the provider applications for the waiver were noted by the state as being silent in terms of compliance with regulatory requirements. The Family Living Service standards for this waiver were noted as partially compliant. However, the state did not indicate where they were compliant and where they were not

compliant. CMS requested that the state add this information to the systemic assessment crosswalk.

State response: The state updated the document links in Appendix B to include the most recent provider applications and agreements and added specific locations for compliance and non-compliance.

- The state indicated that the current waiver standards, waiver, provider agreement and provider application will be amended to clarify that HCBS beneficiaries' settings ensure an individual's rights of privacy, dignity, respect and freedom from coercion and restraint. CMS requested that the state include the requirement that the use of restraint is supported by a specific assessed need and justified in the person-centered service plan, in accordance with the following regulatory language at 441.301(c)(4)(F)(1)-(8):

  State Response: The state included in the STP details on proposed language for remediation for waiver standards, the waiver application, provider agreements and provider applications on pages 17-22.

Appendix D: Centennial Care Demonstration:

- CMS requested that the state provide additional detail regarding the remediation for the Centennial Care Demonstration Waiver.

  State Response: In Appendix D, the link to the MCO contract #7 has been provided. Additional detail regarding the remediation activities was added to pages 24-25 of the STP.

- CMS requested that the state provide correct page numbers in the crosswalk to the Centennial Care Provider Manual requiring ALF providers to demonstrate compliance with the final rule.

  State Response: The state corrected the page numbers in the crosswalk to indicate that the requirements for assisted living providers is located on pages 57-61 of the policy manual.

- CMS requested that the state review and provide the correct link to the NMAC throughout the STP.

  State Response: The state updated the crosswalk to include the correct links to the administrative codes.

ATTACHMENT II: CHANGES THAT MUST BE MADE BY THE STATE OF NEW MEXICO BEFORE RESUBMITTING TO CMS FOR FINAL APPROVAL

(PUBLIC COMMENT PERIOD REQUIRED AFTER THESE ISSUES HAVE BEEN ADDRESSED)

Site-Specific Settings Assessment

- ***Assuring All Relevant HCBS Settings are included in State's Assessment & Validation Process:*** The STP must include all settings in which all individuals receiving Medicaid HCBS live and receive services. Some examples of potential settings that CMS would like the state to confirm are included in the setting assessment and validation activities are as follows:
    - The STP suggests that some Family Living Services are provided in host homes that are provider owned and controlled; as such, these host homes would need to be assessed and validated.
    - Settings in the Medically Fragile Waiver must also be included if they are provider-owned and controlled. This includes residential settings where one or more beneficiaries live that are owned by a paid caregiver who is not a family member.
    - Any nonresidential settings where individuals are grouped or clustered together for the purposes of receiving HCBS (including but not limited to group supported employment, adult day health centers, day habilitation, and group community-based day) must also be included in the STP.

- ***Individual, Privately-Owned Residences:*** 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 HCBS 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 must submit to CMS necessary information for CMS to conduct a heightened scrutiny review.
    - 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 services).
    - Please describe how any setting a participant resides in that is owned by a paid caregiver is being assessed and validated for compliance with the rule.

- Mi Via waiver (p. 14): Cites that certain HCBS provided under the Mi Via waiver (in-home living, homemaker, and home health aide) were considered to fully comport with the rule because they are provided in a participant's (or their families' or caregivers') non-vendor, privately owned homes.
- Developmental Disabilities Waivers (p. 16): Includes several categories of residential settings that list "privately-owned or rented homes by families *or surrogate families"*. If the "surrogate family" is being paid by one or more of the state HCBS authorities, the setting is considered provider-owned and controlled and must be assessed and validated for compliance with the federal HCBS rule.

Please include in the STP a more detailed description of how the state will monitor individuals' private or family homes where HCBS participants reside to ensure that all settings continue to remain in full compliance with the federal HCBS rule.

- ***Provider Self-Assessment:*** The state is reminded that all settings must be assessed and validated regarding compliance with the federal HCBS requirements.
  - Please provide more detail regarding the criteria providers had to complete during the self-assessment process. Were providers asked to attach evidence along with their completed assessments? If so, please describe the evidence submitted.
  - Please confirm that providers were required to complete a self-assessment for each setting. If providers only had to complete one self-assessment for all settings, then explain how the state is going to validate the findings for each setting at a site-specific level.
  - While there was a high participation rate to the provider self-assessment among providers across the state's various HCBS authorities overall, there were still providers that did not complete the self-assessment. On page 32, the STP states that "For providers that did not respond to the required provider self-assessment survey, at least one service setting will undergo an onsite review." CMS encourages the state to consider requiring an onsite review for all settings owned or controlled by a provider that did not complete the initial self-assessment. At a minimum, however, please articulate how any setting not included in a provider self-assessment and not receiving an onsite visit will be properly assessed and validated to assure full compliance with the federal HCBS rule.
  - The description of the onsite visits on page 34 appears to rely heavily on provider staff responses to questions posted by state personnel, but only requires a minimal (at least one) representation of consumer/guardian feedback. CMS requests the state consider increasing the base percentage of consumers/guardians to solicit

feedback from during the onsite visits in order to assure a more balanced approach to validating the provider self-assessment.

Site-Specific Setting Validation

- States are responsible for assuring that all HCBS settings comply with the final rule in its entirety. States cannot rely on provider self-assessments as a way to validate settings. New Mexico has laid out a description of its approach to validating the provider self-assessment survey results based on provider self-assessments. States may use a combination of various strategies to assure that each setting is properly validated (including but not limited to state onsite visits; data collection on beneficiary experiences and consumer feedback; leveraging of existing case management, licensing & certification, and quality management review processes; partnerships with other federally-funded state entities, including but not limited to DD and aging networks; and state review of data from operational entities, such as managed care organizations (MCOs) or regional boards/entities, provider policies, consumer surveys, and feedback from external stakeholders).

- States must include specific details as to how various settings will be validated, so that the STP reflects a comprehensive approach for validating all HCBS settings for compliance with the federal HCBS rule. Quality thresholds should not be used to reduce the state's requirement to assure compliance across all settings. The more robust the validation processes (incorporating multiple strategies to a level of degree that is statistically significant), the more successful the state will be in helping settings assure compliance with the rule. Please describe in the STP how the state will use validation mechanisms to validate provider self-assessments of compliance.

- ***Onsite Visits:***
    - The state provides a description of the sampling methods for onsite validation of the provider self-assessment surveys. Please provide additional details on how the state will ensure a sufficient representation of setting types is included in the sample for onsite visits. Additionally, the state should confirm the sample size of settings that are receiving an onsite visit as the method for validating the provider self-assessment results.
    - On page 32, the STP suggests that at least one service setting will undergo an onsite review for providers that had a certain response rate in their self-assessments. However, states should not be inferring compliance over a group of settings controlled or owned by the same provider based on validation of one setting. Please describe the state's validation strategy to confirm provider self-assessment results for each setting.

- ***Validation Reviews:*** The state must also explicitly identify the validation strategies that will be used for settings that will not receive an onsite visit. The STP suggests the state will be utilizing a contractor and existing state system personnel to conduct validation reviews of settings for those settings that do not receive an onsite validity audit. On page 31, the STP states, "Comprehensive validation will include validation reviews for 100% of all provider settings and a sample of individual participants and/or their guardian, receiving services in those settings…". Please provide additional details about what the validation reviews will entail in terms of what will be reviewed, how the information will be collected, who will be responsible for conducting the reviews, and how the personnel completing the reviews will be adequately trained on the federal HCBS requirements.
    - *Consumer/Guardian Feedback included in Validation Reviews:* CMS requests the state provide additional information about the consumer feedback to be included in the validation reviews. Please provide additional details as to what the sample size of consumer/guardian feedback will be per setting; how the sample of consumers/guardians selected to provide feedback will be determined; how the consumer/guardian feedback will be collected (electronically, in person, by phone, in writing); who will be collecting the consumer/guardian feedback, and what kind of training anyone involved in working with consumers/guardians to acquire feedback will receive. Additionally, please discuss how the state will address discrepancies between consumer/guardian survey feedback and provider self-assessment responses to assure that such discrepancies are handled and compliance with the specific federal HCBS requirements in question are verified.

    - *Role of MCOs in Validation Process:* If the state is using managed care organizations to complete validation activities of the provider self-assessment, please describe the state's oversight of the MCOs to assure quality in validation activities.

- ***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. This includes all group residential and non-residential settings, including but not limited to prevocational services, group supported employment and group day habilitation activities. Please describe in the STP how such settings will be assessed for compliance.

- ***Non-Disability Specific Settings:*** The STP does not sufficiently address the federal requirement that each individual has a choice of and access to a non-disability specific setting. Please provide additional clarity on the manner in which the state will ensure that beneficiaries have access to services in non-disability specific settings among their service options for both residential and non-residential services. This could include investments the state is making to create or expand non-disability specific settings, and/or

to help develop the competencies of existing providers to offer services in non-disability specific settings.

- ***Reverse Integration Strategies:*** 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 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. Please describe how the state will assure non-residential settings implement adequate strategies for adhering to these requirements.

- Please ensure that the outcomes of all setting assessment and validation activities are included in the revised STP. This includes identifying by category of setting all settings that fully comply with requirements, will comply with modifications, cannot comply, or settings that are presumed to have the qualities of an institution.

Site-Specific Remedial Actions

Please provide the following additional information regarding the site-specific remedial actions:

- Specify how the corrective action plans (CAPs) with providers will be developed, the date by which all CAPs will be submitted and the date by which they will be reviewed and approved by the state.
- Confirm that providers will need a remediation plan for each of their settings that are not fully compliant.
- Clarify the process that the state will use to ensure ongoing compliance with the remediation plan.
- Describe steps the state will take to assure that various personnel that are responsible for assessing/validating settings to assure they are compliant with the federal HCBS rule have access to ongoing training and technical assistance to support their work. The state should also include its strategy for implementing quality assurance checks in the process

to make sure that verification of setting compliance is being conducted consistently throughout the state.
- Include more specific details as to how the state is educating providers on any changes to state standards that will require providers to make specific adjustments or modifications systems-wide in order to comply with the federal HCBS rule.

Heightened Scrutiny

As a reminder, the state must clearly lay out its process for identifying settings that are presumed to have the qualities of an institution. 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 a setting meeting any of 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 settings or to non-HCBS 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.

Milestones

CMS requests that the state resubmit an updated milestone chart reflecting anticipated milestones for completing systemic remediation, site-specific assessment and remediation, heightened scrutiny, communication with beneficiaries, and ongoing monitoring of compliance. The milestone chart should be modeled on the most recent template supplied by CMS and also include timelines that address the feedback provided. CMS will send an updated milestone chart shortly after receipt of this letter.