

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

December 28, 2016

Jon Sherwood
Deputy Commissioner for Medicaid and Health Care Policy
State Medicaid Director
Department of Health and Social Services
4501 Business Park Boulevard Building L
Anchorage, AK 99503-7167

Dear Mr. Sherwood:

This letter is to inform you that CMS is granting Alaska **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 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 April 29, 2016 and December 19, 2016 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 December 23, 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. CMS also completed a 50% spot-check 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 Alaska'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 Alaska has made much progress toward completing each of these remaining components, there are several technical issues that must be resolved before the state can receive final approval of its STP. CMS will be providing detailed feedback about these remaining issues under separate cover shortly. 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 Susie Cummins (206-615-2078 or Susan.Cummins@cms.hhs.gov) or Michele MacKenzie (410-786-5929 or Michele.MacKenzie@cms.hhs.gov) at your earliest convenience to confirm the date that Alaska 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 that is forthcoming.

Sincerely,

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

ATTACHMENT I

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF ALASKA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED DECEMBER 23, 2016

Systemic Assessment Crosswalk: The Centers for Medicare and Medicaid Services (CMS) requested the state clearly provide the following information within the crosswalk: complete citation (including a title, date, and page number if appropriate) and web link for each policy identified; and indicate each section of the policy that either aligns with, conflicts with, or is silent on the requirements of the home and community-based settings rule.

State's Response: The state has provided a revised STP with complete citations (including a title, date, and page number if appropriate) and web link for each policy identified; and labeled each state standard as fully compliant, not in conflict, not compliant, or silent with respect to each federal requirement as well as provides an explanation of the state's rationale.

Systemic Assessment Results: CMS requested that the state provide more detail to the description of the changes the state will make to its state standards to bring them into full compliance with the federal requirements in the STP. Through a spot check of state regulations provided in the systemic assessment, CMS identified a number of regulations where CMS' determinations differed from that of the state. CMS requested that the state review the crosswalk and assessment and ensure all determinations are accurate. Some examples of determinations that raise concerns were as follows.

- **Provider-owned or-Controlled Settings:** It appeared that Alaska believed they were only required to assure compliance for provider-owned or controlled settings. CMS asked the state to describe how the state will verify that none of these homes were purchased or established in a manner that isolates beneficiaries from the larger community.

State's Response: The state added the following language to the *Internal Review of Waiver Programs* section: "these [private] homes can be presumed compliant but will be monitored, with remedial actions taken if service providers are found to have a stake in home ownership". The state has also clarified that "settings where individuals reside in the home of an unrelated paid professional staff will not be considered an individual's private home, and will be assessed and validated for compliance with the federal HCBS rule like other provider-owned or controlled settings".

- **Statute on House Rules:** Previously CMS requested that Alaska include how it plans to revise the statute requiring house rules and noted that, "Any restrictions or modifications to home and community-based settings requirements must be a component of the individual's person-centered plan of care and not determined by the provider." However, the revised STP simply stated that the state was reviewing whether a statutory change is needed, but not committing to change it.

State's Response: The state updated the finding in the regulations crosswalk for AS 47.33.060 to non-compliant and added to the STP a detailed timeline and narrative to explain how this conflicting rule will be addressed.

- **Right to Control Personal Finances:** For the federal requirement that beneficiaries have a right to control personal resources, Foster Homes regulation 7 AAC 50.430 (g) [FH

may limit amount of money child may possess or have unencumbered access if in child's best interest] indicates that it is up to the discretion of the provider, rather than the person-centered plan, to determine a child's access to money. The state was asked to clarify whether this regulation refers to a guardian or other representative of the child or whether it refers to the Foster Home provider. CMS was concerned that regulations enabling providers to restrict access to funds may be a conflict with the regulation.

State's Response: The state added a note to the crosswalk that the Interagency Settings Compliance Committee (ISCC) will review 7 AAC 50.430 (g) to ensure that it does not create a conflict with the regulation and included this action in the *Detailed Timeline for Amendments to Regulations and COPs*.

- **Rights to Privacy, Dignity and Freedom from Coercion and Restraint:** For the federal requirement that settings must ensure an individual's rights to privacy, dignity, and respect, and freedom from coercion and restraint, the state has provided regulation 7 AAC 130.229, which specifies limited circumstances for use of restrictive intervention. This regulation does not specify that restraint may only be used as specified through the person-centered planning process.

Additionally, FH 7 AAC 50.435(h) is listed as compliant for freedom from coercion/restraint, however, this regulation is non-compliant because it allows isolation and isolation of HCBS beneficiaries is prohibited under all circumstances. The state was asked to identify how it will remediate this conflict.

State's Response: The state added language to the regulations crosswalk in the STP that ensures restraints will be properly documented in the plan of care developed in accordance with 7 AAC 130.217 and 7 AAC 130.220(p).

Also, The *Detailed Timeline for Amendments to Regulations and COPs* has been updated to include updating FH 7 AAC 50.435(h) and the issue of non-compliance is identified in the Compliance Level column of the regulations crosswalk.

- **Rental Agreements:** For the federal requirement that the unit or dwelling is a specific physical place that can be owned, rented, or occupied, the state listed the comment, "AS 43.03.20 Rental agreement may be written or verbal". The state was asked to determine how this language complied with the regulatory requirement that in settings where landlord tenant laws do not apply, the state must ensure that a lease, residency agreement or other form of written agreement will be in place for each participant and that the document provides protections that address eviction processes and appeals comparable to those under the jurisdiction's landlord tenant law.

State's Response: The state added the following language to the STP: "Consultation with state Attorney General's office will help us determine whether this statute's failure to specify that a rental agreement must be written can be remediated through a regulation revision rather than a statute change. Subsequent to that review, the state will also consider adding language specifying that where a HCBS beneficiary is involved, there has to be an enforceable written agreement." These actions have also been included in the *Detailed Timeline for Amendments to Regulations and COPs*.