

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Disabled & Elderly Health Programs Group

October 13, 2017

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 Delaware 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 July 14, 2016, the state worked diligently in making a series of technical changes requested by CMS in order to achieve final approval.

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, 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, 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.

In the July 14, 2016 letter conveying initial approval of the STP, CMS requested a set of changes be made to the STP in order for the state to receive final approval.¹ The state released an amendment to the STP addressing these changes for public comment during the public notice period beginning on September 30, 2016 and was submitted to CMS on November 21, 2016. CMS provided feedback on April 6, 2017 and during conference calls on June 26, 2017 and October 5, 2017. The state resubmitted the STP amendment on October 9, 2017. CMS determined the remaining changes that needed to be made were technical in nature and did not require a further public comment period. A summary of the state's technical changes made since the last public comment period 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 it identifies all sites meeting the regulation's categories of presumed institutional settings², reflects how the state has assessed settings based on each of the three categories, and describes 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.

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. Any settings

¹ See Appendix II: <https://www.medicaid.gov/medicaid/hcbs/downloads/de/de-initial-approval.pdf>.

² CMS describes heightened scrutiny as being required for three types of 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.

that have or will be submitted by the state under heightened scrutiny will be reviewed and a determination made separate and distinct from the final approval.

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 DELAWARE AS REQUESTED BY CMS IN ORDER TO RECEIVE FINAL APPROVAL

(Detailed list of technical changes made to the STP since the September 2016 Public Comment Period)

Public Notice

- Confirmed that the STP amendment was incorporated within the original STP document and that both the original STP and the amendment were available to the public during the public comment period. Since the STP amendment references the original document in multiple places, both documents are needed in order to have a full understanding of the state's plan (pages 3, 38).

Site-Specific Setting Assessment & Validation Activities

Diamond State Health Plan (DSHP) Settings

- Clarified that the DSHP site-specific assessment tool included each of the settings criteria in the HCBS final rule. The tool was developed using CMS' exploratory questions as the foundation and included other relevant guidance to ensure the state conducted the most appropriate and thorough reviews possible (pages 38-39).
- Explained that as an additional validation measure, members were selected at random and were interviewed during onsite reviews. (pages 5, 39).
- Provided more information about the site-specific assessments that revealed several Assisted Living provider settings utilized restrictive characteristics regarding privacy in member units. The issue was included in the corrective action plan (CAP) for each relevant provider setting and was remedied timely by installing lockable bathroom doors within all units (pages 6, 39).
- Explained how Adult Day Services providers will come into compliance with the rule and provide adequate community engagement for participants. (pages 6, 39).
- Deleted language on page 69 of the STP indicating that there is a "difference" column showing the difference in compliance score between provider and member responses, as the table does not contain this column. The state deleted this language (page 39).

Division of Developmental Disabilities Services (DDDS) Settings

- Clarified that participant surveys have now all been completed. The information gathered from the surveys was fed back into the review of the settings and any issues that required follow-up or remediation were addressed with the provider. (pages 8-9, 40).
- Explained that shared living is delivered in a family's home and already embodies the characteristics of "home and community based settings" to explain why those settings did not receive any onsite visits. Clarified that the state modified the participant survey to ensure all settings criteria were included (page 41).
- Provided the primary modifications needed for residential settings and day services (pages 41-42).

- Indicated that participants have the choice of where they would like to receive services and that choice includes private residences and non-disability specific setting (pages 14, 18, and 42).

Ongoing Monitoring

- Updated the amendment to clarify that the state will employ multiple measures to monitor HCBS provider setting compliance with community integration requirements (page 18).

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 (pages 12-15).
- Indicated that in the event that a discrepancy existed between a participant survey and the provider self-assessment, the member-identified issue would be evaluated during the onsite review. Any issues not adequately addressed during the onsite review will be included in the provider CAP and monitored for full remediation (page 14).
- Clarified that all providers with identified areas of non-compliance were assessed to be Category 2 settings, which are settings assessed by the state as compliant with modifications (page 15).
- Confirmed that additional settings could be submitted for heightened scrutiny in the future and the state will use its ongoing monitoring processes to ensure any such settings are appropriately addressed (page 15).