

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

March 29, 2019

Beth Kidder
Deputy Secretary for Medicaid
Florida Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 8
Tallahassee, FL 32308

Dear Ms. Kidder:

This letter is to inform you that CMS is granting Florida **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 is actively working on those remediation strategies. Additionally, the state issued the September 30, 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 draft submitted by the state on August 16, 2018, CMS provided feedback on September 24, 2018 and requested that the state make several technical corrections in order to receive initial approval. These changes did not necessitate another period of public comment period. The state subsequently addressed all issues and resubmitted an updated version on March 22, 2019. 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.

In order to receive final approval, all STPs must include:

- A comprehensive summary of completed site-specific assessments of all HCBS settings, validation of those assessment results, and inclusion of the aggregate outcomes of these activities;
- Draft remediation strategies and a corresponding timeline that will resolve issues that the site-specific settings assessment process and subsequent validation strategies identified, to include strategies to build capacity for non-disability specific settings, by the end of the home and community-based settings rule transition period (March 17, 2022);

- A detailed plan for identifying settings 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;
- A process for communicating with beneficiaries currently receiving services in settings that the state has determined cannot or will not come into compliance with the HCBS settings criteria by March 17, 2022; and
- A description of ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the federal settings criteria in the future.

While the state of Florida 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 shortly. Additionally, prior to resubmitting an updated version of the STP for consideration of final approval, the state will need to publish the updated STP for a minimum 30-day public comment period.

Upon review of this detailed feedback, CMS requests that the state please contact Ondrea Richardson (Ondrea.Richardson@cms.hhs.gov) at your earliest convenience to confirm the date that Florida 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, including issues under investigation by the U.S. Department of Health and Human Services Office for Civil Rights. 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 STP. 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 FLORIDA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 4/1/2018, SUBMITTED 3/22/19

- **Public Engagement:** CMS asked the state to clarify the dates of the 30-day public comment period, to clarify whether members of the public who do not have access to the internet could access a non-electronic copy of the STP; the state was also asked to include the URL where the actual STP can be found.

State's Response: The state provided the requested information on pages 25 and 26 including the 30 day public comment period that ran from August 26, 2016-September 25, 2016, the methods by which the public could access a non-electronic copy of the STP, and the URL where the STP is located.

- **Waivers Included in the STP:** CMS asked the state to clarify the settings included in the STP.

State's Response: The state has provided the requested information on page 6 (Table 3) and corrected the inconsistencies.

- **Systemic Assessment & Remediation:** CMS asked the state to provide a comprehensive list of regulations, policies and handbooks, and wherever possible, links to where these regulations can be accessed electronically.

State's Response: The state has provided links to policies and handbooks within Attachment II of the Florida Systematic Assessment Crosswalk on pages 28 through 97.

- **Systemic Assessment Crosswalk:** Within the systemic assessment crosswalk, Florida provides the title or code of the state regulation assessed. For each state regulation reviewed, CMS asked that the state clarify the home and community-based setting(s) and/or waiver(s) to which the regulations apply.

State's Response: The state provided the requested information on page 27.

- **Systemic Remediation:** CMS requested the state provide detail in regard to the state's new HCBS Administrative rule to ensure compliance with the settings criteria, including language to be used and to which programs the rule will apply, and to provide details on amendments to Statewide Medicaid Managed Care Contracts.

State Response: The state confirmed that the rule codifies the federal HCBS requirements and specifies that non-compliant settings will not be eligible to receive reimbursement for HCBS services post implementation. The state also provided the requested information regarding the Statewide Medicaid Managed Care contract amendment on pages 8-9.

- **Systemic Remediation:** CMS requested that the state provide an attestation that the state's HCBS administrative rule supersedes all existing regulations and rules where there may be areas of non-compliance.

State Response: The state provided the requested information on page 11.

- **Systemic Remediation:** CMS requested that the state add language to the STP that ensures that the state will make any necessary updates to provider manuals, sub-regulatory guidance, etc. that are necessary to align with the state's HCBS administrative rule, or provide information for communicating that the state's HCBS administrative rule are widely disseminated and supersedes all existing state standards.

State Response: The state provided the requested information on page 11.

The following technical changes are related to a spot check CMS completed of a sample of the state standards assessed for compliance in each Systemic Compliance Chart.

- On pages 35 and 36, Florida cited several state standards in support of the settings criteria that the setting is selected by the individual from among setting options including non-disability specific settings and the option for a private unit in a residential setting. However, the various state standards did not address these criteria. CMS also noted that several of these standards also appeared to be in conflict with the requirements for access to food and visitors at any time. The state was asked to provide a remediation plan in the systemic assessment crosswalk.

State Response: The state re-categorized these standards as compliant in support of the requirement that individuals have the option of a private unit in a residential setting, and silent in support of the requirements for individuals' right to select from among setting options including non-disability specific settings and the documentation of those setting options in the person-centered service plan, as specified on pages 40-41.

- On pages 39-67, the state found that 393.13(4)(h), 429.41(1)(k) (statutes) and 58A- 5.0182(6)(g) (a regulation), respectively, are compliant with the federal rule concerning an individual's right to privacy, dignity, respect, and freedom from coercion and restraint. CMS indicated that the statute 393.13(4)(h) appears to be silent on the criterion concerning freedom from coercion, while sections 429.41(1)(k) and 58A- 5.0182(6)(g) are non-compliant. The state was asked to ensure that the use of restraint is supported by a specific addressed need and justified in the person-centered service plan following the criteria in 42 CFR 441.301(c)(4)(vi)(F)(l) through (8).

State Response: The state re-categorized these provisions as partially compliant and silent on page 44. The state did not agree that section 429.41 (1)(k), F.S. and Rule 58A- 5.0182(6)(g) are inherently non-compliant, however they did re-categorize them as partially compliant, as they agreed that they do not provide complete instruction consistent with the federal regulation.

- On pages 85 - 87, Florida cited statute 393.13(4)(a)(3) in support of the federal requirement that individuals are able to have visitors of their choosing at any time. However, the statute indicates that the right to visitation is subject to reasonable rules of the facility. Florida was asked to provide a remediation plan that indicates individuals can have visitors at any time.

State Response: The state has provided a plan for remediating all areas of non-compliance on page 25.

- On page 80, Florida found administrative code 58A-14.009(3)(d) compliant with the criterion that individuals sharing units have the choice of roommates. CMS, however, found 58A-14.009(3)(d) to be silent because it only addresses the right of married residents to a choice of roommates. The state was asked to re-categorize this provision.

State Response: The state has re-categorized Rule 58A-14.009(3)(d), F.A.C. as silent on page 86.

- On pages 83 and 85, Florida cited 58A-5.020(2)(f), 64E-12.004(2)(n) and 64E-12.004(3)(a) in support of the criterion that residents of provider-owned or controlled residential settings have access to food at any time. These codes address time spans between meals and indicate that residents may participate in food preparation under the supervision of a designated staff person, but are silent with regards to having access to food at any time. The state was asked to explain how this issue will be remediated in the systemic assessment crosswalk.

State Response: The state re-categorized these standards as silent on pages 88-89 and provided a plan for remediating all areas of non-compliance on page 27.

- The state has indicated that code 429.02(6) is non-compliant. This code defines "chemical restraint" as a pharmacologic drug that physically limits, restricts or deprives an individual of mobility and is used for discipline or convenience. The state indicates that remediation is not required as code 65G-8.008 identifies the appropriate use of chemical restraints. Code 65G-8.008 indicates that individuals may be given a chemical restraint on the order of an authorized physician who has determined that the chemical is the least restrictive, most appropriate alternative available. Please clarify how code 65G-8.008 addresses the use of chemical restraints in a way that comports with the federal requirements and how it relates to 429.02(6) which is in conflict with CMS' policy regarding the use of restraints.

State Response: The state indicated that the two provisions are not related, as Section 429.02(6), F.S. pertains to licensure requirements for assisted care communities in Florida, and Rule 65G-8.008 pertains to reactive strategies for the developmentally disabled population. The state provided a plan for remediating all areas of non-compliance on page 27.

- The "Attachment I: Implementation Action Plan," includes one milestone, "regulation and policy updates" to take place from 1/12/2016 to 12/30/2016. The state was asked to provide a timeline and description of any interim steps that will be taken to update regulations and policies and to implement the new Home and Community-Based Services Administration rule described above.

State Response: The state has updated its action plan using the CMS-provided milestone chart.