

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

January 13, 2017

Judy Mohr-Peterson
Director
State of Hawaii, Department of Human Services
601 Kamokila Blvd, Room 518 PO Box 700190
Kapolei, HI 96709-0190

Dear Ms. Mohr-Peterson:

This letter is to inform you that CMS is granting Hawaii **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 May 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 May 2016 draft submitted by the state, CMS provided additional feedback on August 30, 2016 and held calls with the state in August and December 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 draft on December 1, 2016 and the final version on January 13, 2017. 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 Hawaii'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 Hawaii 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 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 Hawaii 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 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 HAWAII TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED JANUARY 13, 2017

- **Public Notice and Comment:** CMS requested that the “Notice for Public Forum” posted on the state’s website be included in the STP. CMS asked the state to confirm and include evidence within the STP of the non-electronic communications that were published to make the public aware of both 30-day public comment periods from January 2015 and January 2016. Additionally CMS asked the state to correct the link to the website posting they included in the STP.

State’s Response: The state included the electronic and non-electronic forms of communication for the Notice of Public Forum and public comment periods for January 2015 and January 2016 in the November 2016 transition plan as an attachment. The state included the attachment of comments which verifies both the electronic and non-electronic forms of public notice. The state indicated they have limited space on the website and some links may no longer be active because they are no longer in use.

- **Waivers and Settings Included in the STP:** Through a review of the 1915(c) Waiver Management System, CMS identified three services, Prevocational services, Group Employment Supports, and Residential Habilitation, not included in the STP. CMS asked the state to clarify in which settings these services are provided. The state was asked to ensure information regarding Therapeutic Living Programs was added to the STP and included in the systemic assessment.

State’s Response: The state provided further clarification on Prevocational services, Group Employment Supports and Residential Habilitation. Hawaii recently received approval of its renewal for the I/DD Waiver effective July 1, 2016. Prevocational Services ended and a new service “Discovery & Career Planning” is being provided. All new Discovery & Career Planning providers must be in full compliance with the CMS HCBS Settings Final Rule and be able to demonstrate the provision of services in fully integrated community settings. Group Employment was ended with the renewal. Hawaii clarified the Therapeutic Living Programs were being added back into their 1915(c) waiver which is why it was previously left out of the STP. Hawaii updated the systemic assessment crosswalk to include TLP settings.

- **Regulations for Adult Day Care Services:** CMS noted that the systemic assessment included a link to the regulations for Intermediate Care Facilities (ICF). The state was asked to clarify whether ICFs are settings where Adult Day Care or other services are provided.

State’s response: The state ensures that the ICF settings are not home and community based settings and shall not receive HCBS funding. The state removed the ICF citation

and included the correct citation for the Adult Day Care setting. In addition, the state converted the systemic assessment crosswalk into a readable format.

- **Systemic Assessment:** The state did not include the systemic assessment within the STP but rather provided a link to the document on the state website. However, the link was broken and a deeper search had to be conducted to locate the document. CMS asked the state to include the systemic assessment within the STP document so it is embedded within the STP and easier for the public to locate and review.

State's Response: The state included the updated systemic assessment crosswalk as an attachment to the transition plan making it accessible for the public to locate and review.

- **Systemic Assessment, Federal Home and Community Based Settings Rule:** CMS identified several requirements in the federal rule that were not included in the state's assessment of their regulations. CMS asked the state to include the following regulatory criteria in their state regulation review:
 - The setting provides opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources in the community, to the same degree of access as individuals not receiving Medicaid HCBS.
 - The individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the state, county, city, or other designated entity. For settings in which 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 HCBS participant, and the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.
 - Units have entrance doors lockable by the individual, with only appropriate staff having keys to the doors.
 - Individuals sharing units have a choice of roommates in that setting.
 - Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.

State's Response: The state has included all of the above criteria in the systemic assessment crosswalk. In addition, the state included the updated systemic assessment crosswalk as an attachment to the transition plan making it accessible for the public to locate and review.

- **Systemic Remediation:** The state provided information on how regulations will be amended to bring state standards into compliance with the federal regulations. However, the actual process and timeline of how this will be completed was unclear. CMS asked the state to clarify and include in the STP the steps and timeline the state will follow to adopt necessary language changes within the policies, standards, rules, and regulations.

State's Response: The state has included action steps and timelines for completion to the systemic assessment crosswalk and attached it to the transition plan. All modifications to state standards will be completed by December 2017. Any state standard that has been finalized and approved shall be effective immediately. The state has updated the timelines for each action step and updated the Adult Day Health timeline completion date as it is still in progress.

- **Systemic Remediation, Completion:** The state had identified a timeframe of March 2019 to complete the systemic remediation. CMS recommended that the state reconsider this timeframe and provide a much earlier endpoint for regulatory remediation in order to ensure full compliance well before the final deadline.

State's Response: The state reconsidered the timeframe for the completion of the systemic remediation and updated the transition plan from March 2019 to December 2017. This will allow the state a year, in 2018, to ensure that all HCBS settings are in full compliance with the final rule before the March 2019 deadline.

- **Systemic Remediation, Operational Procedures:** CMS asked for the state to clarify and align language regarding the trainings occurring after the completion of the remediation of the systemic assessment. While the overview states that once the state standards, policies, procedures, and contracts are updated, the new operational procedures will need to be implemented immediately and emphasized during trainings. Mandatory provider training on operational procedures is not scheduled to occur until 1/2018.

State's Response: The state included additional details regarding the development of operational procedures for standards that are identified as non-compliant during the systemic assessment review. Once state standards, policies, procedures, and contracts are updated, new operational procedures will need to be implemented immediately and emphasized during trainings. The state has updated the language to better align the timeline.

- **Systemic Assessment:** A spot check of the December 1, 2016 STP was completed and the following remaining items were requested to be addressed by the state.
 - CMS requested the state provide a link to its HCBS provider contracts as well as a link to the waiver standards when cited.
 - CMS informed the state of a repeated typo in the crosswalk for the Developmental Disability Adult Foster Homes (AFH) section. Several times the state referenced in the remediation HAR Chapter 11-149-29 when the correct reference is HAR Chapter 11-148-29.
 - In regard to the regulatory criteria of “the setting is integrated in and supports full access to community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.”
 - CMS requested additional remediation for HAR 11-148-25 for Adult Foster Homes, HAR 11-89-15 for DD Domiciliary Homes, and HAR 17-

- 1454-43 for Community Care Foster Family Homes; proposed remediation did not address all areas that were silent on the requirements of the rule.
- CMS did not agree with the state that HAR 11-100.1-21 for ARCH and E-ARCH were compliant with regulatory language and was instead silent; the state was asked to propose remediation. The state made the necessary updates.
 - CMS did not agree that HAR Chapter 17-1417 for Adult Day Care was silent in terms of compliance, but rather it was non-compliant; CMS asked the state to propose remediation.
- In regard to the regulatory criteria of “ensures an individual’s rights of privacy, dignity and respect, and freedom from coercion and restraint.”
- CMS requested that the state clarify the proposed remediation to indicate that the setting ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint. The following areas required remediation to comply with this requirement: HAR: Chapter 11-100.1-21 for ARCHs and E-ARCHs, provider contract for Adult Day Health, HAR Chapter 11-96-9 for Adult Day Health (1115 waiver), provider contract and the state’s waiver standards for Adult Day Health (1915(c) I/DD waiver), and provider contract and the state’s waiver standards for HAR 11-89-13 Section 6 for DD Domiciliary homes.
 - CMS noted HAR Chapter 11-96-9 (5) for Adult Day Health (1115 waiver) settings states “Be encouraged and assisted throughout their period of stay to exercise their rights as clients, and to this extent to have grievances and to recommend changes in policies and services to the center's staff and outside representative of their choice free from restraint, interference, coercion, discrimination, or reprisal”. The state does not need to remediate this but should put this language in their crosswalk to demonstrate partial compliance.
 - CMS found that the state’s proposed remediation of its provider contract and/or waiver standards for Adult Day Health (1915(c) I/DD waiver), Adult Foster Homes, and DD Domiciliary Homes conflicted with Appendix G-2 of the state’s 1915(c) I/DD waiver, which permits restraints under certain circumstances. CMS asked the state to clarify language in the remediation section.
 - CMS requested alternative remediation for HAR 11-90 for Assisted Living Facilities because it did not address all the areas in which it was silent in comparison to regulatory requirements. The state made the necessary updates.
 - CMS did not agree that HAR 11-148-29 for Adult Foster Homes was partially compliant. It is non-compliant, because HAR 11-148-29(2) permits the use of chemical and physical restraints if prescribed and sanctioned by the individual’s physicians or therapists and a Human

Rights Committee. This language conflicts with Appendix G-2 of the state's I/DD waiver, which specifies protocols for the use of restraints that do not include the sanction of the Human Rights Committee. The state was asked to remediate within the crosswalk.

- CMS found that the state's proposed remediation for HAR 11-148-29 for Adult Foster Homes was not sufficient. Although the proposed language remediated the silence concerning the right to be free from coercion, it did not address the conflict with Appendix G-2 of the state's I/DD waiver. The state was asked to propose alternative remediation.
- In regard to the regulatory criteria of "optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact."
 - CMS did not agree that HAR 11-96-34 for Adult Day Health and HAR 17-1417-6 for Adult Day Care was compliant, but rather was silent and asked the state to propose remediation.
- In regard to the regulatory criteria of "the unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity."
 - CMS found that the state's proposed remediation for HAR Chapter 11-1454 for Community Care Foster Family Homes was not sufficient because it did not require the setting to ensure that the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the state, county, city, or other designated entity. CMS asked the state to propose alternative remediation.
 - CMS did not agree that HAR 11-100.1-7 for ARCH and E-ARCH settings was compliant, rather it was partially compliant. HAR 11-100.1-7 was silent on the requirements that the agreement between the setting and the individual be legally enforceable and that the setting ensure that the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the state, county, city, or other designated entity. CMS requested that the state propose remediation.
- In regard to the regulatory criteria of "individuals have the freedom and support to control their own schedules and activities, and have access to food at any time."
 - CMS did not agree that HAR 11-100.1-18 for ARCH and E-ARCH settings was partially compliant, rather they were silent both on the individual's right to have the freedom and support to control their own schedules and activities and the individual's right to have access to food at any time. CMS requested the state propose remediation. Additionally,

- CMS found that the state’s proposed remediation (“amend to strengthen the language to having access to food at any time”) was insufficient because it was not clear what the state meant when it said it will “strengthen the language.” CMS requested the state provide the proposed language to amend “minimum of 3 meals per 24-hour period is required” to show how it will align with the federal HCBS requirements and include the language in the crosswalk.
- CMS found a typo in the proposed remediation for the provider contract for DD Domiciliary Homes. It appeared that “an individual’s” should be “that individuals.” CMS requested the typo be fixed so the language will comply with the federal requirement and the remediation will be sufficient.
 - CMS did not agree that HAR 11-89-19 for DD Domiciliary Homes was silent, but rather it was non-compliant. CMS requested the state clarify in which of the three regulations it intended to add the language.
 - CMS found the state’s proposed remediation for HAR Chapter 11-90-8 was not sufficient because the language around opportunities for individual and group socialization falls short of individuals directly controlling their own schedule and activities. CMS requested the state propose additional remediation.
- In regard to the regulatory criteria of, “individuals are able to have visitors of their choosing at any time.”
 - CMS found that the state’s proposed remediation for CCFFH settings, HAR 17-1454-50 , HAR 11-89-13, and HAR 11-89-15 for DD Domiciliary Homes, was not sufficient because the state did not propose to delete the language about the establishment of visiting hours, daily visiting hours, reasonable hours, from its regulation. CMS requested the state to propose alternative remediation.
 - CMS did not agree that HAR Chapter 11-100.1-13 for ARCH and E-ARCH was compliant. HAR Chapter 11-100.1-13 is silent on visitors at any time. HAR Chapter 11- 100.1-18 (R) states “Flexible daily visiting hours and provisions for privacy established,” and is non-compliant. CMS requested the state correct and propose remediation.
 - In regard to the regulatory citation of “the setting is physically accessible to the individual.”
 - CMS did not agree that HAR 11-148-45 for Adult Foster Homes was compliant, but rather partially compliant. CMS requested the state propose remediation.
 - CMS did not agree that HAR 11-100.1-23 for ARCH and E-ARCH settings was compliant; rather it was partially compliant. CMS requested the state propose alternative remediation.

- In regard to the regulatory citation of “any modification of the additional conditions for provider-owned or controlled residential settings must be supported by a specific assessed need and justified in the person-centered service plan.”
 - CMS found that the state’s proposed remediation of the provider contract for DD Domiciliary Homes was not sufficient because it did not require settings to comply with each of the specific steps in the final rule. CMS requested the state propose alternative remediation.
 - CMS did not agree that HAR 11-89-16 for DD Domiciliary Homes was compliant, but rather was silent. CMS requested the state propose alternative remediation that requires settings to comply with each of the specific steps in the federal setting regulation.

State’s Response: The state reviewed the systemic assessment crosswalk for accuracy and made all necessary revisions, including those identified above. The transition plan was updated to reflect these changes.