

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

June 2, 2017

Marie Zimmerman
Medicaid Director
State of Minnesota, Department of Human Services
540 Cedar Street PO Box 64983
St. Paul, MN 55167-0983

Dear Ms. Zimmerman:

This letter is to inform you that CMS is granting Minnesota **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 issued the December 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 December 2016 draft submitted by the state, CMS provided feedback on March 17, 2017 and May 19, 2017 requesting that the state make several technical corrections in order to receive initial approval. The state subsequently addressed all issues, and resubmitted an updated version on May 25, 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.

In order to receive final approval of Minnesota'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, 2022);

- 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, 2022; 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 Minnesota 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 Jessica Loehr at Jessica.Loehr@cms.hhs.gov or Michelle Beasley Michelle.Beasley@cms.hhs.gov at your earliest convenience to confirm the date that Minnesota 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 MINNESOTA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 5/25/2017

- **Systemic Assessment Crosswalks:** In the systemic assessment crosswalks attached to the STP, the state included the federal settings criteria and pertinent excerpts from state standards. CMS asked the state to clarify which state standards comply, do not comply, partially comply, or are silent as relevant to each federal standard and include an analysis of the state's determinations. The state was asked to identify the steps the state will take to address areas of non-compliance with the HCBS settings criteria and the anticipated remediation timelines. CMS also requested that the state use a consistent method to crosswalk its findings for the Disability Waivers, Elderly Waiver and Alternative Care Program.

State's Response: The state provided two revised systemic assessment crosswalks that label each state standard as fully compliant, partially compliant, not compliant, or silent with respect to each federal standard and explained how it reached this determination. For those standards that are not in full compliance with the federal criteria, the state included remedial action steps. The state also used a consistent method to present its analysis of the federal standards in both of its crosswalks.

- **Systemic Remediation:** The STP indicated that legislative changes were necessary to remediate its systemic infrastructure, but gave no details on the policies that need to be changed, noting "the bulk of the legislative changes will be proposed during the 2017 legislative session" (page 16). CMS asked the state to detail what changes the state plans to make to individual statutes, waiver documents, and other state standards to achieve compliance with the settings criteria.

State's Response: In response to CMS' request, the state added information to both systemic crosswalks detailing the changes that will be made to state standards and corresponding timelines to come into compliance with the federal regulation.

- **Remediation Activities:** The Elderly Waiver and Alternative Care Program Systemic Assessment Crosswalk indicated in the "Barriers to Full Compliance" column that a potential barrier to the listed remedial activities is inadequate administrative resources to support the activities for each state standard with remedial action steps. CMS asked the state to provide more information about this barrier and strategies to overcome it.

State's Response: The state has removed this column as barriers are addressed in the narrative of the transition plan (page 20). The state will move forward with transition plan activities by using and reprioritizing existing resources.

- **Prevocational Services:** Prevocational services were referenced on page 2 of the Disability Waivers Regulatory Review attachment and page 10 of the STP, but the state did not provide any details on how and where the state delivers those services. The state was asked to provide this information.

State's Response: The state provided detail on prevocational services on page 35 and noted on page 18 that they are provided in a day service facility.

- **Adult Day Care:** On page 13, Table 3 indicated the status of “no modifications needed,” for the adult day care service provided under the Alternative Care (AC) program. Services marked as “no modifications needed” will not undergo the site-specific assessment process. However, on page 18 of the STP, adult day care was listed as being provided in a provider-controlled setting that will be further assessed. CMS asked the state to clarify whether the adult day care services provided under the AC program are fully compliant or whether they are being assessed under the site-specific assessment process.

State's Response: The state made the following changes to the STP: Table 3; Compliance status by service and program – The state revised the status of adult day service for the Elderly Waiver (EW) and AC (page 13) and family adult day service (page 15) to indicate that modifications to these settings are needed. The state also included the following narrative to the plan (page 6): “Adult day services are provided in provider-controlled settings that group people together and are therefore among the settings that will be further assessed under the site-specific assessment process. Adult day service centers that meet the criteria for being presumed not to meet the requirements of the settings rule will also receive an on-site assessment.”

The following technical changes are related to a spot check CMS completed of a sample of the state standards assessed for compliance in the “MN Disability Waivers Crosswalk” and the “Elderly Waiver and Alternative Care Program: Systemic Assessment Crosswalk.”

Disability Waivers Systemic Assessment Crosswalk:

- The STP indicated that Minnesota statutes 245D.07, 245D.071, 256B.092 subdivision 1b and 8 were compliant with the criteria that the setting is integrated in and supports full access of individuals to the greater community including opportunities to seek

employment and work in competitive integrated settings to the same degree of access as individuals not receiving Medicaid HCBS (page 2). Upon CMS review, there were not any references to an individual's opportunity to seek employment and work in competitive settings to the same extent as individuals not receiving Medicaid HCBS in these state statutes. CMS asked the state to provide remediation.

State's Response: The state removed references to Minn. Stat. 245D.07 and 245D.071 from the crosswalk and updated the STP to include the following: the state determined that full compliance for this standard is met through the Disability Linkage Line, Disability Benefits 101, Minn. Stat. 256B.0911 subd. 1a(9), Minn. Stat. 256B.092 subd. 1a and the MnCHOICES assessment. Minnesota's Employment First Policy and the development of new employment services are additional remedial activities that will be implemented to give people greater opportunity to seek competitive employment and work in integrated settings.

- The regulation and statutes provided to show compliance for Customized Living (CL) and Adult Day Care (ADC) settings for the federal criteria that the setting ensure an individual's rights of privacy, dignity, and respect and freedom from coercion and restraint were found non-compliant. CMS requested the state provide additional information.

State's Response: Coercion and restraints are not permitted in CL or ADC settings. The crosswalk has been amended accordingly to reflect this and to indicate that a setting must ensure an individual's rights of privacy, dignity, and respect.

- The STP indicated that Minnesota rule 9555.9700 is compliant with the criteria that the setting 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 found the state standard to be silent and asked the state to provide a remediation strategy.

State's Response: The state revised the reference to Minnesota Rules, part 9555.9700 in the crosswalk to indicate that the rule is silent on this issue (page 23 of the crosswalk). The following remedial actions have been added to the crosswalk to ensure the setting 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:

- develop HCBS standards guidebooks;
- develop sample policies and forms;
- conduct training and provide technical assistance, including on demand videos, webinars and open office hours; and

- update policy manuals.
- CMS asked the state to ensure that the remediation language for Minnesota Statute 245D.10 regarding residency agreements includes language indicating that it will provide protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord/tenant law (page 20).

State’s Response: The state clarified that protections in the residency agreement are comparable to protections in Minnesota’s landlord tenant law related to eviction process and appeals (page 31). Minn. Stat. 245D.10 requires license holders to have service termination policies in place that include due process rights prior to termination of services. This affords people due process when eviction is warranted.

- The STP indicated that 245D.04, subdivision 3 is compliant with the criteria that each individual has privacy in his or her sleeping or living unit. CMS found the statute to be silent with regard to this requirement (page 20) and asked the state to provide a remediation strategy.

State’s Response: The state updated the crosswalk (page 32) to indicate that remedial strategies will include the following to assure that providers understand that personal privacy includes privacy in a person’s sleeping or living unit:

- develop HCBS standards guidebooks;
- develop sample policies and forms;
- conduct training and provide technical assistance, including on demand videos, webinars and open office hours; and
- update policy manuals.
- CMS requested the state to correct the statutory citation for the criteria that each individual has privacy in his or her sleeping or living unit in CL settings; the relevant statute is 504B.211

State’s Response: The state has revised the crosswalk to include a reference to Minn. Stat. 504B.211 regarding a tenant’s right to privacy (page 33).

- The STP indicated that the state was proposing to remediate the silence of statute 245D by amending 245D.24 to state that “bedrooms have lockable doors unless otherwise specified as a restriction in the person’s plan,” and amending 245D.04 to “include a person’s right to use the lock on their bedroom or unit door” (page 22). CMS asked the state to clarify that modifications to additional conditions for provider owned and controlled settings must follow guidelines outlined at 42 CFR 441.301(c)(4)(vi)(F).

State's Response: The state revised the crosswalk to remove the reference to the restrictive language (“unless otherwise specified as a restriction in the person’s plan”); the proposed legislative language does not include this language. Remedial strategies including the process to modify additional conditions will be included in the following guidance and training to assure providers understand that individuals have lockable doors with only appropriate staff having keys to their sleeping or living unit:

- develop HCBS standards guidebooks;
 - develop sample policies and forms;
 - conduct training and provide technical assistance, including on demand videos, webinars and open office hours; and
 - update policy manuals.
- The STP indicated that statute 144D.04 is partially compliant with regard to the criteria that individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement for CL services (page 23). CMS found this statute to be silent with respect to this settings criterion.

State's Response: The state revised the crosswalk (page 41) to indicate Minn. Stat. 144D.04 will be revised to require that, as part of the housing with services contract, people have the freedom to furnish and decorate their bedroom/living unit. Additionally, remedial strategies will include the following:

- develop HCBS standards guidebooks;
 - develop sample policies and forms;
 - conduct training and provide technical assistance, including on demand videos, webinars and open office hours; and
 - update policy manuals.
- The STP indicated that 256B.0911 is compliant with the criteria that individuals have the freedom and support to control their own schedules and activities (page 27). CMS found this statute to be partially compliant as it does not include language about identifying the person’s schedule and preferences of activities. CMS asked the state to provide a remediation strategy in the crosswalk.

State's Response: The state revised the reference to Minn. Stat. 256B.0911 to clarify that people are required (as part of long term care consultation) to have a MnCHOICES assessment (page 44). The assessment must include the health, psychological, functional, environmental, and social needs of the individual necessary to develop a community support plan that meets the individual's needs and preferences. Schedules and preferences are identified through MnCHOICES using the following tool:

http://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs16_180272.pdf

- CMS asked the state to correct the reference to 245D.35 in the state’s rationale column on page 29. The correct citation is 245D.25.

State’s Response: The state revised the crosswalk (page 46).

- The state’s remediation language for state standard 144D.04 for the criteria that individuals are able to have visitors of their choosing at any time indicates this can be restricted for health and safety reasons (page 31). CMS asked the state to clarify that any restrictions will be documented through the person-centered planning process as outlined at 42 CFR 441.301(c)(4)(vi)(F).

State’s Response: The state revised the remedial action language for Minn. Stat. 144D.04 to match what is contained in the legislative proposal. The legislative proposal eliminates language restricting a person’s right to have visitors.

- The state listed state standard 245D.07, subdivision 4 as compliant with the criteria that the setting is physically accessible (page 28). It appears that the correct citation is 245D.071, subdivision 4. The state was asked to correct this in the crosswalk.

State’s Response: The state has made this revision in the STP (see page 50).

Elderly Waiver and Alternative Care Program: Systemic Assessment Crosswalk

- Minnesota administrative rule 9555.9600 defines adult day care centers as “a facility that provides adult day care or adult day services to functionally impaired adults on a regular basis for periods of less than 24 hours a day in a setting other than a participant's home or the residence of the facility operator.” Administrative rule 9555.9610 indicates that “an identifiable unit in a nursing home, hospital, or boarding care home licensed by the commissioner of health that regularly provides day care for six or more functionally impaired adults at any given time who are not residents or patients of the nursing home, hospital, or boarding care home must be licensed as an adult day care center or adult day services center.” CMS asked the state to clarify whether this means all adult day care centers are located as units in a nursing home, hospital, or boarding care home or if this is just a subset of adult day care centers.
- **State’s Response:** The state has added the following clarification to the service description for adult day services (see page 1 of the crosswalk).

“Adult day services provided in a setting other than a participant's home or the residence of the facility operator is licensed as an adult day services center or adult day care center. A sub-set of licensed adult day services include centers that are located in an identifiable unit in a nursing home, hospital, or boarding care home licensed by the commissioner of health that regularly provides day care for six or more functionally impaired adults at any given time who are not residents or patients of the nursing home, hospital, or boarding care home.”

Out of the 130 total settings located in a publicly or privately operated facility that provides inpatient institutional treatment listed in Table #8 in Minnesota’s statewide transition plan, 40 are adult day settings that serve people on the Elderly Waiver.

- The systemic assessment crosswalk indicated that statute 256B.0915 is compliant with the federal criteria that the setting is integrated in and supports full access of individuals to the greater community, including opportunities to seek employment and work in competitive integrated settings to the same degree of access as individuals not receiving Medicaid HCBS (page 2). CMS found this statute to be silent with respect to opportunities for competitive employment and work in integrated settings and asked the state to provide a remediation strategy in the crosswalk.

State’s Response: The state added references to Minn. Stat. 256B.0911 and 256B.0915 in the crosswalk to demonstrate compliance with this standard (pages 2-4). The state also included links to the following: “LTCC Service Assessment Tools” that specifically assess people’s employment interests and needs (page 3), Minnesota Long Term Care Consultation Services Assessment Form: page 7, questions D.12a, D.13 and D.14, and MnCHOICES Assessment module: Employment, Volunteering and Training Assessment Domain.

- CMS asked the state to ensure that the state standards applicable to Customized Living and Family adult day settings allow participants to receive services in the community to the same degree of access as individuals not receiving Medicaid (pages 7-9).

State’s Response: The state determined that these statutes are silent in regard to compliance with the federal standard, and revised the crosswalk accordingly. The state indicated that the following steps will be implemented to assure the setting is integrated in and supports full access of individuals to the greater community including opportunities to engage in community life and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS (pages 9-11):

- Develop HCBS Standards guidebooks
- Conduct training and provide technical assistance, including on demand videos, webinars and open office hours
- Update policy manuals

- The systemic assessment crosswalk indicated that statutes 256B.0911 and 256B.0915 are compliant with the criteria that settings must provide opportunities to control personal resources (page 10). CMS found these standards to be silent with respect to control over personal resources. CMS asked the state to provide the language demonstrating compliance or provide a remediation strategy in the crosswalk.

State's Response: The state removed the references to Minn. Stat. 256B.0911 and 256B.0915. The state determined that compliance for this standard is met through individual rules and statutes regarding service provision and licensing, under Minn. Stat. ch. 245A. The state also added remedial actions for statutes that are determined to be either partially compliant or silent with the federal standard (see pp. 12-13). The state added the following steps that will be implemented to assure people are provided opportunities to control their personal resources to the same degree of access as individuals not receiving Medicaid HCBS:

- Develop HCBS Standards guidebooks
 - Sample policies and forms
 - Conduct training and provide technical assistance, including on demand videos, webinars and open office hours
 - Update policy manuals
- The systemic assessment crosswalk indicated that statutes 144A.44, 144A.441, and 144A.479 are all compliant with the standard that the setting provides opportunities to control personal resources (page 12). CMS found the state standards to be silent with respect to this requirement and asked the state to provide the language demonstrating compliance or provide a remediation strategy in the crosswalk.

State's Response: The state removed references to Minn. Stat. 144A.44 and 144A.441 as they are not relevant to this standard of the federal rule. The state determined that Minn. Stat. 144A.479 is silent in regards to compliance with the federal standard and revised the crosswalk accordingly and added remedial actions that will ensure individuals have personal control of resources similar to those listed in the bullet above.

- The systemic assessment crosswalk indicated that statutes 256B.0911 and 256B.0915 are compliant with the criteria that the setting is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting (page 15,) and the setting options are identified and documented in the person-centered service plan. CMS asked the state to provide the language showing compliance or provide a remediation strategy in the crosswalk.

State's Response: The state determined that Minn. Stat. 256B.0911 partially complies with the criteria and revised the crosswalk accordingly (pages 14-15). The state proposed legislative changes to Minn. Stat. 256B.0911 subd. 3a(e)(2) to add language requiring the support plan to include service options for non-disability specific settings and private units in residential settings. The state also removed the reference to Minn. Stat. 256B.0915 from this section.

- The crosswalk listed several state standards that are deemed compliant with the criteria that the setting must ensure an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint (pages 16-22). CMS found these standards to be partially compliant and asked the state to include language showing compliance or provide a remediation strategy in the crosswalk for all applicable settings.

State's Response: The state has indicated that the Elderly Waiver and Alternative Care programs do not allow coercion and restraint. The state added language to the crosswalk to clarify that statutes and rules applicable to the Elderly Waiver and Alternative Care ensure individuals' rights of privacy, dignity and respect, and freedom from coercion and restraint.

- CMS asked the state to ensure that the remediation language for statute 144D.04 ensures a setting may not modify an individual's right to a lockable unit door with only appropriate staff having keys without following the criteria in 42 CFR 441.301(c)(4)(vi)(F).

State's Response: The state updated the remedial actions for Minn. Stat. 144D.04 to reflect the state's proposed legislative changes (pages 44-45). The new language provides that only staff with a specific need to enter the unit shall have keys and advanced notice will be given to the resident before entrance whenever possible. Additional remedial actions were added to ensure only appropriate staff may have keys to unit doors.

- CMS asked the state to propose remediation for rules 9555.6255 and 9555.6215 that ensure a setting may not modify an individual's right to control their schedules and activities and access to food without complying with the requirements in 42 CFR 441.301(c)(4)(vi)(F).

State's Response: The state updated the remedial actions for Minnesota Rules, parts 9555.6215 and 9555.6255 to reflect the state's proposed legislative changes (pages 53-54). They are proposing to repeal Minnesota Rules, part 9555.6255 and amend Minn. Stat. 245A.11 to include a subdivision addressing the rights of residents in adult foster care. The state has also included remedial actions that include developing tools and resources for providers, such as a Resident's Rights template. The Department's

Licensing Division has revised the Adult Foster Care Program Plan to include the HCBS settings criteria.

- The systemic assessment crosswalk indicated that 256B.0911 and 256B.0915 are compliant with the criteria that settings ensure individuals have access to food at any time (page 47). Upon review, CMS found the state standards to be silent with respect to this criterion. CMS asked the state to provide the language showing compliance or provide a remediation strategy in the crosswalk.

State's Response: The state removed references to Minn. Stat. 256B.0911 and 256B.0915. The state clarified in the STP that compliance with this standard will be accomplished through remedial actions regarding the service requirements for adult foster care and customized living services (page 53).

- CMS asked the state to ensure that the remediation language for 144D.04 complies with modifications criteria at 42 CFR 441.301(c)(4)(vi)(F) to modify an individual's access to visitors at any time.

State's Response: The state updated the remedial actions for Minn. Stat. 144D.04 to reflect the state's proposed legislative changes to indicate that individuals have access to visitors without restriction (pages 56-57).

- The systemic assessment indicated that 9555.5605 and 9555.6175 are compliant with the criteria that settings be physically accessible to the individual (page 54). CMS found these state standards to be partially compliant. CMS asked the state to provide the language showing compliance or provide a remediation strategy in the crosswalk.

State's Response: The state determined that Minnesota Rules, part 9555.5605 partially complies with the requirement above and revised the crosswalk accordingly (pages 58-60). The state replaced the reference to Minnesota Rules, part 9555.6175 with a reference to part 9555.6255 as this rule is relevant to this settings criterion. The state also added remedial actions regarding this rule ensuring that settings are physically accessible to the individual (pages 58-59).