

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**

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May 25, 2017

Dr. David J. Dzielak  
Executive Director  
Mississippi Division of Medicaid  
550 High Street, Suite 1000  
Jackson, Mississippi 39201

Dear Dr. Dzielak:

This letter is to inform you that CMS is granting Mississippi's **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 February 2017 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 February 2017 draft submitted by the state, CMS provided additional feedback on March 14<sup>th</sup> 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 May 15, 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 Mississippi'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 criteria 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 Mississippi 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 Michelle Beasley at [Michelle.Beasley@cms.hhs.gov](mailto:Michelle.Beasley@cms.hhs.gov) or Jessica Loehr at [Jessica.Loehr@cms.hhs.gov](mailto:Jessica.Loehr@cms.hhs.gov) at your earliest convenience to confirm the date that Mississippi 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](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 MISSISSIPPI TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 5/15 /17

- **Public Notice and Engagement:** The Centers for Medicare and Medicaid Services (CMS) requested the state address the following comments regarding the public notice process:
  - *Concerns regarding accessibility:* CMS suggested that Mississippi revise its response to confirm that an accessible version of the STP was available during the initial public comment period on their website. CMS encouraged the state to include language in the introductory section of the STP that confirmed the existing STP is fully accessible to individuals with visual impairments.
  - *Summary of comments:* CMS requested that the state provide an updated summary to reflect new comments and state responses after submitting the updated draft STP for public comment again.
  - *Confirming activities already completed:* Under the section describing the public notice process on page 8 (see Sub-point “4.”), CMS requested the state change the tenses of the language to confirm these activities were completed in 2015.
  - *Evidence of public notice:* The state was asked to clarify how the most recent public notice was disseminated.

#### **State’s Response:**

- The state added that “an adapted, accessible version of the STP was available during the public comment period on the Division of Medicaid’s website” (p. 5). The state also clarified that the state “strives to reasonably accommodate all target audiences through communications tools, including the external website...” (p. 6). The state developed a website with a variety of audiences in mind and included tools to address issues for individuals who are non-English speaking, aged, disabled and/or otherwise impaired.
  - The state included a summary of public comments from its latest public comment period (November 28, 2016 – December 28, 2016) on pages 14-17 of the STP.
  - The state changed the tenses of the language to confirm that these activities were already completed.
  - The state provided information indicating the public was notified of the most recent public notice.
- **State’s Presumption of Compliance for all Settings under the 1915(c) Traumatic Brain Injury/Spinal Cord Injury (TBI/SCI) Waiver and the 1915(c) Independent**

**Living (IL) Waiver:** CMS requested that that the state confirm that all services under each waiver are provided in the individual’s privately owned home or family home.

**State’s Response:**

- The state confirmed that the services provided in the TBI/SCI and IL waivers are always provided in the individual’s privately owned home or family home except institutional respite which is limited to thirty days.
  - The state has explained in the STP that a person’s home environment is assessed prior to admission to any of the state’s waivers. The state also conducts random home visits throughout the year to ensure that the person’s home continues to meet their health and safety needs as well as all waiver requirements.
- **Supported Employment:** CMS requested the state revise the STP to reflect that Supported Employment services provided under its HCBS Intellectual Disabilities/Developmental Disabilities Waiver (ID/DD) are provided in integrated work settings, not in private homes.

**State’s Response:** The state revised the STP as requested (p. 3).

- **Beneficiary Choice:** The language in Part 208, Chapter 2, Rule 2.5, *Freedom of Choice* states that a beneficiary must be given the choice of either institutional or HCBS, but did not articulate that the individual is provided a choice among providers or settings in which to receive HCBS (including non-disability specific setting options). CMS suggested the state propose remediation language to address this gap between what the state standard currently articulates and the federal criteria.

**State’s Response:** The state clarified that the following verbiage will be added to the IL and TBI/SCI waivers respectively: “3. *Provided a choice among providers or settings in which to receive HCBS including non-disability specific setting options*” (p. 31) and “C. *Persons have the choice among providers or settings in which to receive HCBS including non-disability specific setting options*” (p. 40).

- **Institutional Respite Services:** CMS requested that the state add additional language in the STP indicating that the state defines “short-term basis” within the existing institutional respite service definition to be limited to 30 days or less.

**State’s Response:** The state has indicated the administrative code contains language that institutional respite services are limited to thirty days per fiscal year which has been added to the STP (p. 21).

- **Timeline of Systemic Remediation:** CMS suggested that the state include a detailed timeline of its systemic assessment remediation activities in the STP (within the narrative, the crosswalk, and the timeline), including the steps for, and timing of, systemic remediation actions.

**State's Response:** The state revised the timeline to state that the proposed administrative code changes were initially filed on 9/30/2016 and once finalized the changes were filed again on 10/27/2016 to be effective 12/1/2016.

- **Remediation Language:** The STP indicates that the waiver renewal will address how the Elderly and Disabled waiver will comport with the requirement that settings must optimize but not regiment individual initiative, autonomy, and independence in making life choices, including, but not limited to daily activities, physical environment and personal preference (p. 19). CMS requested that the state provide the expected language that will be included with the renewal to comply with this aspect of the HCBS rule.

**State's Response:** The following verbiage will be deleted at the time of the 2017 waiver renewal: “A waiver participant must stay at least four continuous hours in order for the ADC to be reimbursed for a day of services for the individual participant” and instead the ADC services will be reimbursed in 15 minute increments.

- **Adult Day Care Services:** CMS suggested the state clarify the proposed draft remediation language regarding access to food at any time on page 16 (under Part 208, Chapter 1, Rule 1.6 *Covered Services*) consistent with similar proposed language of the state on page 57 under Part 208, Chapter 5, Rule 5.5.

**State's Response:** The state revised this proposed language.

- **Individual Private Homes:** Mississippi noted for its 1915(c) Elderly & Disabled (E&D), IL, and TBI/SCI waiver participants, residential settings require no compliance review or validation. Instead, Mississippi had drafted proposed regulatory language as follows:
  - “1. Waiver persons must reside in private homes or a relative’s home which is fully integrated with opportunities for full access to the greater community, and meet the requirements of the Home and Community-Based (HCB) settings. 2. The Division of Medicaid does not cover [E&D] waiver services to persons in congregate living facilities, institutional settings or on the grounds of or adjacent to institutions” (pages 14, 25).

CMS recommended that Mississippi incorporate additional language that clarifies that waiver services are not provided in settings that isolate, to align with all of the examples of presumed institutional settings articulated in the regulation.

**State's Response:** In response to this concern, the state added the following proposed language: "Waiver persons must reside in private homes or a relative's home which is fully integrated with opportunities for full access to the greater community, and meet the requirements of the Home and Community-Based (HCB) settings. 2. The Division of Medicaid does not cover IL waiver services to persons in congregate living facilities, institutional settings, on the grounds of or adjacent to institutions or in any other setting that has the effect of isolating persons receiving Medicaid Home and Community-Based Services (HCBS)" (pp. 28-29).

- **1915(c) Assisted Living Waiver Larger Facilities (page 31):** The STP provided details in regulations covering larger facilities that indicated locked bedrooms are not available if they "conflict with [the local] fire code." CMS asked the state to explain how it would ensure that individuals can have privacy in their living units in these instances. Additionally, CMS asked the state to provide information about whether and to what degree these settings facilitate access to the community.

**State's Response:** The state has indicated the reference to the fire code will be deleted with the October 1, 2018 renewal as it is not applicable. Additionally, all Assisted Living facilities completed a self-assessment and will have an on-site validation review to assess whether these settings provide access to the community.

- **Covered Services – Supervised Living:** On pages 44 and 45 (Part 208, Chapter 5, Rule 5.5, sections C.4.g and C.4.h), the state deleted aspects of its proposed draft language related to key elements of the federal HCBS criteria. CMS asked the state to provide clarification as to why the state is no longer proposing to include this language, as well as where the state intends to address these issues in other existing state standards.

**State's Response:** The state revised the proposed language to address the settings criteria.

- **Day Services-Adult:** The STP indicated that adult day care regulations are in full compliance with the Final Rule criteria that the setting must be integrated in and support full access of individuals to the greater 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 HCBS. CMS asked the state to consider the following points and revise the STP as needed:

- The state found its adult day care regulation, Rule 1.3 of Part 208, compliant for the four setting qualifications in 42 CFR §441.301(c)(4)(i)-(iv) (p. 19). However, Rule 1.3 is actually silent concerning all four qualifications. The state was asked to clarify whether the STP was intending to refer to Rule 1.6.A.2.(d) and (e) as the remediation language.

**State's Response:** The state has indicated that they were intending to reference Rule 1.6.A.2.(d) and (e) and revised the STP.

Proposed draft remediation language under this section indicated that participants will have weekly access to the community (p. 55). CMS was concerned that weekly access did not afford individual participants sufficient opportunity to access the community to the same degree as people not receiving Medicaid HCBS.

**State's Response:** The state indicated that it will be revising Part 208, Rule 5.5.C.5 at the time of the 2018 waiver renewal to add “Community participation activities occur at times and in places of a person’s choosing . . .” and to delete the weekly access standard.

- CMS asked for clarification of the state’s requirement that individuals “have documentation in their record to indicate they have received either a diploma or certificate of completion if they are under the age of 22.” CMS asked the state to either confirm that this is an eligibility requirement of recipients to become eligible for the state’s HCBS Intellectual Disabilities/Developmental Disabilities Waiver, or if this is a qualification for this particular setting.

**State's Response:** The state confirmed that a diploma or certification of completion is not an eligibility requirement for the program and revised the language to clarify.

- CMS requested the state consider including language that confirms that the individual may have visitors of their choosing at any time of the day in this setting.

**State's Response:** The state will be adding the following language to Part 208, Rule 5.5.C.5: “(f) Allow persons to have visitors of their choosing at any time they are receiving Day Services-Adult services” (p. 58).

- CMS requested the state provide language showing how adults in day care settings have access to employment in competitive integrated settings and control over personal resources.

**State's Response:** The state indicated adults in day care settings have access to employment if requested and control over personal resources (p. 125-133).

- **Restrictive Interventions:** The state's proposed remediation of Part 208, Rule 5.8.G does not address physical restraints other than to require that their use be reported to the state (p. 66). CMS asked the state to ensure that any use of restraints or other restrictive practices is documented through the person-centered planning process. The state was asked to address this in the systemic assessment crosswalk.

**State's Response:** The state has indicated that they will ensure any use of restraints or other restrictive practices is documented through the person-centered planning process, as outlined in the DMH Operational Standard 14.6.

- **Prevocational Services:** The regulatory requirements for Mississippi's prevocational services raised concerns that these settings may serve to isolate individuals with disabilities from the community. CMS asked the state to consider the following points and revise the STP as needed.
  - Community job exploration is offered once per month (p. 116). CMS asked the state to describe in more detail how these settings will ensure individualized access to the community.

**State's Response:** The state has indicated they will include the following language to Part 208, Rule 5.5.C.6 at the time of the 2018 waiver renewal indicating that "Community job exploration activities must be based on the choices/requests of the persons served" and that "the choices offered and the chosen activities must be documented."

- Mississippi's rules describe services provided in a facility with a minimum of 50 square feet per person, and a staffing ratio of sixteen participants to two staff members (p. 115). CMS asked the state to provide more information about the characteristics of these settings and how individuals can gain full access to the community.

**State's Response:** The state plans to remove the 16-to-2 ratio in favor of a new model. Upon approval of the ID/DD Waiver amendment, staffing will be assigned based on tiered levels of support need, depending on their Inventory for Client

and Agency Planning (ICAP) score rather than a ratio of staff to individuals. These settings are located at sites in local communities that afford access to the community and job market at large.

- On page 61, the draft language for the definition of prevocational services proposes that, “Mobile crews, enclaves and entrepreneurial models that do not meet the definition of Supported Employment and that are provided in groups of up to three (3) people can be included in Prevocational Services away from the program site and be documented as part of the Plan of Services and Supports.”

**State’s Response:** On page 57 of the STP, the state cited the existing monthly limit on the number of prevocational hours an individual may receive, and noted in draft proposed language on page 58 that, “Prevocational services are expected to be provided over a defined period of time with specific outcomes to be achieved as determined by the person and his/her team.”

**State’s Response:** The state has indicated they are in the initial stages of developing a comprehensive plan to reduce its use of prevocational services so that employment outcomes and meaningful day services can be further enhanced.

- Similar to the above-mentioned concern under Adult Day Services, CMS was concerned by the requirement that individuals “have documentation in their record to indicate they have received either a diploma or certificate of completion if they are under the age of 22” (p. 61). CMS asked the state to confirm either that this is an eligibility requirement of all recipients to become eligible for the state’s HCBS ID/DD Waiver, or provide clear rationale as to why the state is proposing this qualification for this particular setting.

**State’s Response:** Verbiage will be revised in the 2018 waiver and DMH Operational Standards 6/1/2017 to clarify “Persons must be at least 18 years of age and have documentation in his/her record to indicate if he/she has a diploma, certificate of completion, or letter from the school district stating the person is no longer enrolled in school”.

- **Physical Accessibility:** CMS requested the state clarify in the systemic assessment crosswalk that all non-residential settings must be physically accessible to participants.

**State’s Response:** The state has included this information in the STP for non-residential settings.

- **Supervised Living Homes and Host Homes, IDD Waiver:** Mississippi provides Supervised Living Homes and Host Homes under its IDD waiver and has stated in the STP that the regulations governing these settings are fully compliant with the Final Rule. However, on page 121, the state provided information about the contents of the “Community Living Handbook” governing Supervised Living and Host Home placements. The handbooks contain guidelines for visitation, alcohol, curfew, unannounced room searches, and household tasks. CMS asked the state to clarify if these settings impose a uniform set of house restrictions on participants and whether providers of these settings are made aware of the need for individualized modifications. CMS also asked the state to clarify the language in Rule 30.2.Y regarding individuals’ access to visitors at any time.

**State’s Response:** The state has indicated that providers are aware of the need for individualized modifications, as found in DMH Operational Standard 17.2.C.(m).(1)-(8) and (n). Additionally, the state has removed the requirement of having a Community Living Handbook. The state has also indicated they will amend Rule 30.2.Y for Supervised Living indicating that there “may” be visiting hours in place of the language stating there “must” be visiting hours, if all residents agree.

- **Provider Owned and Controlled Residential Settings:** CMS asked the state to include 42 CFR 441.301(c)(4)(vi)(F) in the systemic assessment crosswalk, which pertains to the process the state must follow in order to modify any of the criteria under the settings rule that apply to provider owned and controlled residential settings.

**State’s Response:** The state has indicated this provision is located in DMH Operational Standard 17.2.C. (m)(1)-(8) and (n).