

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

September 6, 2017

Mr. Dave Richard
Deputy Secretary for Medical Assistance
State of North Carolina, Department of Health and Human Services
1985 Umstead Drive, 2501 Mail Service Center
Raleigh, NC 27699-2501

Dear Mr. Richard:

This letter is to inform you that CMS is granting North Carolina **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 January 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 updated STP dated January 18, 2017 submitted by the state, CMS provided feedback and requested that the state make several technical corrections in order to receive initial approval. After ongoing communication between the state and CMS, the state submitted their updated plan on August 30, 2017. These changes did not necessitate another public comment period and 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 North Carolina 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 North Carolina 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 Jessica Loehr (410-786-4138 or Jessica.Loehr@cms.hhs.gov) at your earliest convenience to confirm the date that North Carolina 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 NORTH CAROLINA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 7/18/17 AND 8/30/17

- **Systemic Assessment Process:** CMS asked the state to include more detailed information in the STP explaining the process through which the state completed a comprehensive review of relevant state standards in the systemic assessment process.

State's Response: The state further detailed the various departments involved in the review of regulations and described the review process (p. 20-21).

- **Systemic Assessment Results:** The state was asked to include all of the federal settings criteria in the crosswalk and to note if the state does not have applicable standards for any of the criteria. Specifically, the state was asked to address how they assessed state standards against the following criteria:

- The setting provides a specific unit/dwelling that is 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. 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 that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

State's Response: The state has updated its crosswalk to include this criterion (NCDHHS Rules Revision, Row 19).

- The setting provides units with lockable entrance doors, with appropriate staff having keys to doors as needed.

State's Response: The state provided clarification that all waiver policies will be updated by 10/1/18 to reflect the HCBS settings criteria, including that the setting provides units with lockable entrance doors, with appropriate staff having keys to doors as needed.

- The setting provides individuals who are sharing units with a choice of roommates.

State's Response: The state provided clarification in its response letter that all waiver policies will be updated by 10/1/18 to reflect the federal criteria that the setting provides individuals who are sharing units with a choice of roommates.

- 131D is the chapter in the state’s statutory code that governs adult day care licensing. However, the state did not include an assessment of Chapter 131D in its crosswalk. CMS requested that the state provide clarification and, if applicable, include the chapter in the state’s assessment.

State’s Response: The state added this information to their crosswalk (NCDHHS Rules Review Worksheet July 2017).

- The NC Innovations Waiver lists licensed child care centers as a setting where children can receive individual habilitative services programming. CMS requested that the state ensure this setting is included in the STP and that any state standards regulating these settings have been assessed for compliance with the settings criteria.

State’s Response: The state added information on developmental day services to page 5 of the transition plan as well as in lines 19-21 of the rules worksheet.

- **Systemic Assessment Remediation:**

- CMS asked that the state include language with regard to systemic remediation strategies to its “Compliance Status/Action Required” column.

State’s Response: The state added the necessary information to its crosswalk as well as supporting documents (NCDHHS Rules Review Worksheet July 2017). The state indicated that the waiver applications carry the full force of rule in North Carolina (page 21). The state also clarified in the STP that new rules will not need to be created where the current rules are silent, as those issues will be addressed in the waiver applications, and/or Clinical Coverage Policies.

- CMS asked the state to crosswalk the waiver applications and Clinical Coverage Policies against the settings criteria or include the language that demonstrates compliance.

State’s Response: The state added language to its statewide transition plan narrative to ensure all settings and services are in compliance with federal home and community-based settings criteria at 42 CFR 441.301(c)(4)-(5), and associated CMS guidance (pgs 21-22).

- The state included some target completion dates in 2018 in its crosswalk, despite noting in the STP that the rules will be altered to be in compliance by 6/30/17 (p. 20). Additionally, the state has not updated their milestone table, Section 3. The state was asked to align the timelines in the STP and milestone table.

State’s Response: The state updated the milestone template and the transition plan (p,21) to align completion dates.

- The STP indicated that NCGS 122C-62(b)(2) is compliant with the federal criteria that individuals can have visitors of their choosing at any time. However, this state standard limits visitors “between the hours of 8:00 a.m. and 9:00 p.m. for a period of at least six hours daily, two hours of which shall be after 6:00 p.m”. The state was asked to clarify how this comports with the regulatory criterion.

State’s response: The state clarified that the North Carolina Innovations Waiver states on page 34 that provider owned settings must allow visitors of choosing at any time.

- The only citations the state included regarding the settings criteria that individuals have access to food at any time and the freedom and support to control their schedules and activities are for standards that apply specifically to adult day care facilities and foster care for children. The state did not identify any standards pertaining to the residential facilities covered by the NC Innovations Waiver that correspond to these settings criteria. The state was asked to include this information in the STP.

State’s Response: The state incorporated this information into its crosswalk.

- The state cited 10A NCAC 27F.0102(b) as compliant with the criteria that individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement. Section 27F.0102(b) states, “Each client shall be free to suitably decorate his room, or his portion of a multi-resident room, with respect to choice, normalization principles, and with respect for the physical structure. Any restrictions on this freedom shall be carried out in accordance with governing body policy.” Restrictions on the individual’s right to furnish and decorate their sleeping or living unit are only permitted through the person-centered planning process as noted at 42 CFR 441.301(c)(4)(vi)(F). CMS requested that the state provide remediation to ensure compliance with the regulation.

State’s Response: The state provided clarification in its response letter indicating that all waiver policies will be updated by 10/1/18 to reflect the federal regulations that individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.