

**Disabled & Elderly Health Programs Group**

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February 1, 2019

Maggie Anderson  
Director of Medical Services Division  
State of North Dakota, Department of Human Services  
600 E. Boulevard Avenue, Dept. 325  
Bismarck, ND 58505-0250

Dear Ms. Anderson:

I am writing to inform you that CMS is granting North Dakota **final 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). Upon receiving initial approval for completion of its systemic assessment and outline of systemic remediation activities on November 1, 2016, the state worked diligently in making a series of technical changes requested by CMS in order to achieve final approval.

**Final approval** is granted due to the state completing the following activities:

- Conducted a comprehensive site-specific assessment and validation of all settings serving individuals receiving Medicaid-funded HCBS, and included in the STP the outcomes of these activities and proposed remediation strategies to rectify any issues uncovered through the site specific assessment and validation processes by the end of the transition period.
- Outlined 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;
- Developed a process for communicating with beneficiaries who 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
- Established ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the rule in the future.

After reviewing the STP submitted by the state on November 1, 2018, CMS provided additional feedback on December 11, 2018 and requested several technical changes be made to the STP in order for the state to receive final approval. These changes did not necessitate another public comment period. The state subsequently addressed all issues and resubmitted an updated version on February 1, 2019. A summary of the technical changes made by the state is attached.

The state is encouraged to work collaboratively with CMS to identify any areas that may need strengthening with respect to the state's remediation and heightened scrutiny processes as the state implements each of these key elements of the transition plan. Optional quarterly reports through the milestone tracking system, designed to assist states to track their transition processes, will focus on four key areas:

1. Reviewing progress made to-date in the state's completion of its proposed milestones;
2. Discussing challenges and potential strategies for addressing issues that may arise during the state's remediation processes;
3. Adjusting the state's process as needed to assure that all sites meeting the regulation's categories of presumed institutional settings<sup>1</sup> have been identified, and reflects how the state has assessed settings based on each of the three categories and the state's progress in preparing submissions to CMS for a heightened scrutiny review; and
4. Providing feedback to CMS on the status of implementation, including noting any challenges with respect to capacity building efforts and technical support needs.

It is important to note that CMS' approval of a 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 v. LC* 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).

This letter does not convey approval of any settings submitted to CMS for heightened scrutiny review, but does convey approval of the state's process for addressing that issue. Any settings that have been or will be submitted by the state under heightened scrutiny will be reviewed and a determination made separate and distinct from the final approval.

Thank you for your work on this STP. CMS appreciates the state's effort in completing this work and congratulates the state for continuing to make progress on its transition to ensure all settings are in compliance with the federal home and community-based services regulations.

Sincerely,

Ralph L. Lollar, Director  
Division of Long Term Services and Supports

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<sup>1</sup> CMS describes heightened scrutiny as being required for three types of presumed institutional settings: 1) Settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment; 2) Settings in a building on the grounds of, or immediately adjacent to, a public institution; 3) Any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

# **SUMMARY OF CHANGES TO THE STP MADE BY THE STATE OF NORTH DAKOTA AS REQUESTED BY CMS IN ORDER TO RECEIVE FINAL APPROVAL**

**(Detailed list of technical changes made to the STP since November 1, 2018)**

## **Public Comment**

- Provided the two forms of public notice, clarified the dates of the 30 day public comment period and how someone could obtain a hard copy of the plan. (p. 50)

## **Site-Specific Assessment & Validation Activities**

- Clarified that all settings have been assessed and included in the validation results. The state also amended the chart to clearly delineate the compliance categories. (p. 10-11)
- Clarified the attestation that supported employment was rendered on an individual basis under HCBS. (p. 13)
- Clarified that settings are being assessed and validated with respect to ensuring beneficiaries' rights to dignity, respect, freedom from coercion, optimizing individual autonomy, and independence in making life choices. (p. 46)
- Clarified that the use of contingency admission plans are being used in accordance with the regulatory provisions describing how modifications of the settings criteria are to be implemented. (p. 47)
- Clarified how the state has assessed settings where beneficiaries live in a private residence owned by an unrelated caregiver who is paid for providing HCBS services to the individual. (p. 43)

## **Heightened Scrutiny**

- Clarified how the state identified settings that fell under any of the three categories of settings presumed to have institutional characteristics. (p. 6)

## **Settings Remediation**

- Provided the timeline by which the state intends to work with beneficiaries who are in settings that cannot comply with the regulatory criteria by the end of the transition period. (p. 7)