

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 16, 2015

Jason Helgerson
State Medicaid Director, Deputy Commissioner
State of New York, Department of Health
Empire State Plaza, Corning Tower, Room 1466
Albany, NY 12237

Dear Mr. Helgerson,

The Centers for Medicare & Medicaid Services (CMS) has completed its review of New York's Statewide Transition Plan (STP) to bring state standards and settings into compliance with new federal home and community-based settings requirements. New York submitted its STP to CMS on March 18, 2015. CMS needs more detail regarding the public comment process, assessment processes, outcomes, remedial action processes and monitoring. These items and related questions for the state are summarized below.

Public Comment:

New York describes a public comment process for an initial STP and a revised STP. However, the state did not fulfill the public input requirements. The state indicates that it posted the revised STP on the state's website, gave a preview of it via a webinar, and posted a notice in the State Register online. It appears that public notice was not provided in a timely manner to allow for the full 30-day public comment period of the revised STP. While the state indicates that the revised STP was on the state's website for at least 30 days, the notice in the State Register was published less than 30 days before comments were due. In re-posting a revised STP for public comment (as requested below), please provide evidence that sufficient notice was given to allow for the full 30-day public comment period.

Systemic Assessment:

The state offers no evidence in the STP that the systemic review has been completed. Although the STP indicates that the state completed a systemic review "to ensure that there were no systemic barriers to the implementation of the new home and community-based settings requirements" (p. 4),

no list of standards assessed was provided. Page 16 indicates that additional issues with the state's requirements may be identified "after full assessment is completed," indicating that assessment activities are ongoing with no end date provided. The STP includes a statement of the outcome of the state's initial systemic assessment on p. 5, but it does not list any standards or cite any specific regulations. Also, the STP stresses that the state's systemic review found no systemic barriers to the implementation of the new home and community-based settings requirements, but does not discuss whether there should be revisions to strengthen requirements to ensure compliance. Please cite the sections of the state's policies that apply to specific qualities mandated by the federal home and community-based settings requirements (i.e. a crosswalk of state policies and federal regulations). Please indicate which regulations, policies and procedures fall into each of the following three categories: conflicts with federal settings requirements (if any), remains silent on the specific qualities required and fully complies with the requirements in the federal regulation. Also provide, if needed, specific revisions necessary to comply with the federal requirements.

Setting Assessment:

- The STP describes how the state intends to complete site-specific assessments including surveys and site visits. However very little information is provided about the survey respondents, the content of the surveys, and how the site visits will be conducted. Please clearly identify which sites are being assessed and the assessment processes (e.g. surveys and site visits) associated with each setting type. Please identify who the respondents will be for surveys of residential and non-residential settings and describe how the state will ensure that responses are received. Also, please describe the content of the surveys.
- The state needs to describe how it assessed settings as fully or partially compliant and what these designations mean for further assessment of these settings. Once the state has completed additional assessments, it should report on the number of settings that comply, do not comply and will require modifications, cannot comply with the federal requirements, or presumptively have institutional qualities but for which the state will provide evidence to show they have the qualities of home and community-based settings. These outcomes should be reported for both residential and non-residential settings under the state's Section 1115 demonstration and 1915(c) waivers.
- The STP discusses the state's review of specific residential settings on p. 3-4. Regarding congregate care foster homes monitored by the Office of Children and Family Services, the state "attests that these congregate settings have the entire features one would find in a typical private home... Since the homes are located within the community, there is ready access to activities and facilities available to the general population of the locale." Some of these settings are listed as partially compliant in Appendix B. CMS notes that all Medicaid funded adult and child foster care settings should be treated as provider owned or controlled settings. The state notes that nine individuals in the Traumatic Brain Injury (TBI) waiver "chose to live in a setting that may be partially compliant from among other options, which the regulation

allows.” CMS notes that beneficiary choice of the setting does not mitigate the requirement for the setting to comply with all provisions of the settings rule. Please describe how the state will assure this compliance.

Monitoring of settings:

On p. 6, the STP indicates that for monitoring ongoing compliance, the state will adapt its processes from current protocols in place to monitor current 1915(c) and 1115 waivers. However, the STP needs more detail on what this process will involve, such as the frequency of monitoring activities and who will carry out the activities. Please provide additional information on these activities.

Remedial actions:

- The STP includes information on pp. 5-6 and 18-20 regarding the state’s intended remedial actions. However, it only indicates that the state plans to develop further guidance about remedial actions with no specificity about the remedial activities that will take place. The remedial actions do not indicate how the state will address non-compliance found in self-assessments by providers and site visits. Please identify steps the state will take, such as provider training or provider corrective action, and give the timeframe for accomplishing these steps.
- The remedial actions should apply to all setting types in the 1915(c) HCBS waivers and Section 1115 demonstration waivers found not to be in full compliance, including residential settings (TBI housing, congregate foster settings, and OPWDD waiver settings) and non-residential settings. Please describe how the state is including all settings in its remediation activities.

Heightened Scrutiny

The state should clearly lay out its process for identifying settings that are presumed to have institutional qualities. These are settings for which the state must submit information for the heightened scrutiny process if the state determines, through its assessments, that these settings do have qualities that are home and community-based in nature and do not have the qualities of an institution. If the state determines it will not submit information for settings meeting the scenarios described in the regulation, the presumption will stand and the state must describe the process for informing and transitioning the individuals involved to other compliant settings or to other settings not funded by Medicaid HCBS.

Settings presumed to be institutional include the following:

- Settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;
- Settings in a building on the grounds of, or immediately adjacent to, a public institution;
- Any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

CMS is concerned about the timeline the state has described for submitting evidence for heightened scrutiny. Submitting evidence to CMS in January 2018 does not allow sufficient time for CMS to make a determination and for the state to relocate individuals if necessary. Please describe steps the state will take to submit needed information to CMS in a timely manner.

Relocation of Beneficiaries:

- The state plans to implement transition or closure plans for presumed institutional settings that are not approved through the CMS heightened scrutiny process by March 2019. However, there is very little detail on this process and the steps that will be taken to assure that this process is completed by this time. The STP should include a start date for relocating individuals in settings found to be non-compliant. In addition, the STP should describe how individuals needing to relocate receive the information and supports necessary to make informed choices about alternate settings, and are assured all critical services and supports are in place at the time of transition.

CMS would like the state to submit a revised STP 75 days from when the state receives this letter. Within that time, the state will need to send a revised STP back out for public comment. CMS would like to have a call with the state to go over these questions and concerns and to answer any questions the state may have. A representative from CMS' contractor, NORC, will be in touch shortly to schedule the call. In the meantime, please do not hesitate to reach out to Colleen Gauruder, the CMS Central Office analyst taking the lead on this STP, at (410)786-4137 or at Colleen.Gauruder@cms.hhs.gov with any questions.

Sincerely,

Ralph Lollar, Director
Division of Long Term Services and Supports

cc. M. Melendez, ARA