

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

November 16, 2018

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

Dear Ms. Frescatore:

This letter is to inform you that CMS is granting New York **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 September 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 September 2017 draft submitted by the state, CMS provided additional feedback on December 20, 2017 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 November 07, 2018. 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, all STPs should include:

- A comprehensive summary of completed site-specific assessments of all HCBS settings, validation of those assessment results, and inclusion of the aggregate outcomes of these activities;

- Draft remediation strategies and a corresponding timeline for resolving issues that the site-specific settings assessment process and subsequent validation strategies identified by the end of the HCBS settings transition period (March 17, 2022);
- A detailed plan for identifying settings presumed to have institutional characteristics, as well as the proposed process for evaluating these settings and preparing for submission to CMS for review under heightened scrutiny;
- A process for communicating with beneficiaries currently receiving services in settings that the state has determined cannot or will not come into compliance with the HCBS settings criteria by March 17, 2022; and
- A description of ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the federal settings criteria in the future.

While the state of New York 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 for a minimum 30-day public comment period.

Upon review of this detailed feedback, CMS requests that the state please contact Ondrea Richardson (Ondrea.Richardson@cms.hhs.gov) to confirm the date that New York 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 STP. 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 NEW YORK TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 11/7/2018

- **Public Notice and Comment:** CMS asked the state to clarify that the public had a 30-day period to provide comments on the STP, and to describe in the STP how individuals were able to submit comments.

State's Response: The STP has been updated on page 7 indicating the initial publication date was August 3, 2016 allowing for a 37-day comment period, and that comments were accepted via email and hard copy to a specified address and person.

- **PACE Program:** CMS asked the state to remove the PACE program from the STP, as PACE settings are not under the purview of the settings rule.

State's Response: The state noted that the PACE program is in the STP as part of the larger LTSS system (pp. 4 and 11 of the STP and 64 and 72 in PDF), and included a clarifying statement that PACE is not subject to the HCBS settings criteria in a footnote on page 4.

- **Institutional Respite Care:** CMS asked the state to confirm that Respite Care provided in any institutional setting under the state's various HCBS programs is not permitted for a duration of longer than 30 days.

State's Response: The STP has been updated on page 2 to indicate respite is limited to no more than 30 days except as noted in the systemic assessment charts.

- **Systemic Compliance Charts:** In the systemic compliance charts located throughout the STP, the state included the federal settings criteria and pertinent excerpts from state standards. CMS asked the state to ensure all state standards are classified under the categories of those that comply, do not comply, partially comply, or are silent as relevant to each requirement. Additionally, the Care At Home I, II, III, IV, VI, Nursing Home Transition and Diversion, Community First Choice Option and Office of Mental Health Serious Emotional Disturbance Programs did not have Systemic Compliance Charts completed. CMS asked the state to include the criteria in the settings rule that applies to all settings (42 CFR 441.301(c)(4)(i) through (v)) for these programs in the appropriate chart.

State's Response: The state labeled each state standard as fully compliant, partially compliant, not compliant, or silent with respect to each federal requirement. The state has also included completed charts for each program listed above.

- **Modifications to Settings Criteria:** CMS asked the state to ensure each Systemic Compliance Chart includes the federal settings provision at 42 CFR 441.301(c)(4)(vi)(F) which indicates that any

modification of the additional conditions, under 42 CFR 441.301(c)(4)(vi)(A) through (D), must be supported by a specific assessed need and justified in the person-centered service plan.

State's Response: The state included this information in each Systemic Compliance Chart.

The following includes a sample of the technical changes completed in response to a spot check of the state's standards completed by CMS.

- CMS asked the state to include a link(s) to the document(s) assessed in the 1115 Waiver/Mainstream Medicaid Managed Care Chart.

State's Response: This information has been included.

- The Social Adult Day Care (SADC) Chart indicated that the state will revise applicable policies pursuant to HCBS compliance prior to 2019. CMS asked the state to indicate in the chart which policies will be revised.

State's Response: The state included the following information in the Systemic Assessment Chart: "We will issue SADC HCBS sub-regulatory guidance by March 17, 2019 to explicitly include each silent or partially compliant standard in this chart pursuant to HCBS compliance."

- The Adult Day Health Care Programs Chart indicated the state is planning to amend regulation 10 NYCRR 415, which defines adult day health care programs as programs located at a licensed residential health care facility or an approved extension site. CMS asked the state to provide more details as to how the state plans to revise this regulation to come into compliance with the federal settings rule.

State's Response: The state amended the Systemic Assessment Chart at page 57 to indicate that "Compliance will be met through issuance of sub-regulatory guidance by 3/2019 and amendment of regulation 10 NYCRR 425 to include the language of and be fully aligned with 42 CFR 441.301 (c)(1 - 4) by 3/2020 - removing the requirement for a program to operate at a residential health care facility's primary site and ensuring program registrants are integrated into the broader community to the same degree of access as individuals not receiving Medicaid HCBS."

- The DOH 1115 Adult Care Facilities Chart indicated that 18 NYCRR 487.7 and 488.7 are partially compliant with the criterion that individuals are able to optimize individual initiative, autonomy, and independence in making life choices. Upon review, it appeared that 18 NYCRR 487.5(3)(xiii) indicates that residents in Adult Homes shall be permitted to leave and return to the facility and grounds at "reasonable hours" and not all hours. CMS asked the state to provide a remediation strategy in the chart or ensure in sub-regulatory guidance that "reasonable" is defined such that individuals can come and go from the facility at any time.

State's Response: The state amended the chart on page 86 to indicate that “By March 2019, the Department will issue guidance and by January 2020, update its regulations to reinforce this HCBS standard so that all settings housing residents who receive HCBS allow for the safe access to and from the facility at all hours. By January 2020, the Department will update its regulation and by March 2019, issue person-centered planning guidance in accordance with 42 CFR 441.301(c)(4)(vi)(F), stating that residents are able to have visitors of their choice at any time and any modification of the additional conditions, under 42 CFR 441.301(c)(4)(vi)(A) through (D), will be supported by a specific assessed need and justified in the person-centered service plan for those living or receiving HCBS in provider owned and controlled adult homes/adult care facilities.”

- The DOH 1115 Adult Care Facilities Chart indicated that current regulations are not specific to residents having their choice of visitors at any time and are labeled as silent. However, 18 NYCRR 485.14(b) describes visiting hours. CMS asked the state to provide a remediation strategy in the chart.

State's Response: The chart on page 89 now indicates “By January 2020, the Department will update its regulation and by March 2019, issue person-centered planning guidance in accordance with 42 CFR 441.301(c)(4)(vi)(F), stating that residents are able to have visitors of their choice at any time and any modification of the additional conditions, under 42 CFR 441.301(c)(4)(vi)(A) through (D), will be supported by a specific assessed need and justified in the person-centered service plan for those living or receiving HCBS in provider owned and controlled adult homes/adult care facilities.”

- Another regulation that pertains to the DOH 1115 Adult Care Facilities Chart (18 NYCRR 485.14(g)) indicated that the operator may prohibit access to the facility or interfere with confidential visits by individuals who the operator has reasonable cause to believe would endanger the safety of residents and the only recourse individuals have is to obtain a court order granting access to the facility. The federal settings criteria require that a setting comply with the requirements in 42 CFR 441.301(c)(4)(vi)(F) before modifying the individual's right to visitors. CMS asked the state to ensure this is followed when restricting visitors and provide a remediation strategy in the chart.

State's Response: The state amended the chart on page 89 to indicate that “By January 2020, the Department will update its regulation and by March 2019, issue person-centered planning guidance in accordance with 42 CFR 441.301(c)(4)(vi)(F), stating that residents are able to have visitors of their choice at any time and any modification of the additional conditions, under 42 CFR 441.301(c)(4)(vi)(A) through (D), will be supported by a specific assessed need and justified in the person-centered service plan for those living or receiving HCBS in provider owned and controlled adult homes/adult care facilities.”

- The OPWDD HCBS 1915(c) Waiver—Residential Chart indicated that 14 NYCRR Paragraph 636-1.4(b)(4) is compliant with the criterion that individuals are able to have visitors of their choosing at any time. The state standard referenced above indicates that individuals have the opportunity to receive visitors at “reasonable times”. CMS asked the state to provide a remediation strategy in the

chart or ensure in sub-regulatory guidance that “reasonable” is defined such that individuals can have visitors at any time.

State’s Response: The chart on page 188 now indicates that 14 NYCRR Subdivision 633.4(a)(4)(xxiv) (Rights and responsibilities of persons receiving services) will be amended by March 1, 2019 to state individuals will have "the opportunity to receive visitors at any time;"

- The OPWDD HCBS 1915(c) Waiver—Residential Chart indicated 14 NYCRR 635-7.3(d) and (h) as compliant with the criterion that the setting is physically accessible to the individual. However, these standards did not seem to apply to family care homes or Individualized Residential Alternatives (IRAs) for eight or fewer persons. CMS asked the state to provide a state standard showing compliance for these settings in the chart.

State’s Response: The state amended the chart on page 188 to indicate that 14 NYCRR 635-7.4(b)(3) (Family care homes and Individualized Residential Alternatives (IRAs) for eight or fewer persons) - "(xiii) Safe, continuous and unobstructed exits shall be maintained from the interior of the home or IRA to the exterior at a street or to a yard, courtyard or passageway leading to an open public area. A landlocked courtyard must have unrestricted access to a location which is at least 30 feet away from the building. (xiv) All ramps, doors, handrails, elevator controls, telephones and similar devices installed for use by individuals with physical disabilities are in operable/useable condition. (xv) Any hazardous conditions that present a threat to an individual's safety or welfare are repaired in a timely manner."