

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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December 28, 2016

Ms. Becky Pasternik-Ikard  
Director  
Oklahoma Health Care Authority  
4345 North Lincoln Boulevard  
Oklahoma City, OK 73105

Dear Ms. Becky Pasternik-Ikard,

This letter is to inform you that CMS is granting Oklahoma **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 November 2016 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 November 2016 STP submitted by the state, CMS provided additional feedback on November 29, 2016 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 December 22, 2016. 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. CMS also completed a 50% spot-check of the state's systemic assessment for accuracy. Should any state standards be identified in the future as being in violation of the federal HCBS settings rule, the state will be required to take additional steps to remediate the areas of non-compliance.

In order to receive final approval of Oklahoma'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, 2019);
- 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, 2019; 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 Oklahoma 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 receipt of this detailed feedback, CMS requests that the state please contact Susie Cummins (206-615-2078 or [Susan.Cummins@cms.hhs.gov](mailto:Susan.Cummins@cms.hhs.gov)) or Michele MacKenzie (410-786-5929 or [Michele.MacKenzie@cms.hhs.gov](mailto:Michele.MacKenzie@cms.hhs.gov)) at your earliest convenience to confirm the date that Oklahoma 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 OKLAHOMA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED DECEMBER 22, 2016

**Public Notice and Engagement:** CMS was concerned that the STP did not clearly explain how the public notice requirements were met. It stated that the STP was posted on the OHCA website for public comment on October 5, 2016. However, it did not specify the start and end dates for the public comment period and it did not include a description of the method for individuals to obtain a non-electronic copy. Likewise, the process for submitting comments, including non-electronically, was not described in the STP. There was no description of how the announcement was disseminated except for the email to stakeholders (in contrast, the previous public comment period was advertised in newspapers).

A search of the OHCA website returned a [page](#) with the October 2016 STP, which allowed for the submission of electronic comments and provided instructions for providing comments by mail. It also contained instructions for obtaining a non-electronic copy of the STP. The state was asked to include the following information in the STP.

- Start and end dates of the public comment period
- A link to where the STP is posted online
- A copy of or link to the public notice announcement
- A description of how the state met the requirements to provide public notice non-electronically

**State's Response:** The State has added the requested information to the STP in Section D: Public Input.

**Respite Services:** Respite is a time-limited service usually not exceeding 30 days. Both the Medically Fragile and ADvantage waivers allow respite services in a nursing facility on a short term basis. CMS requested that clarification be added to the STP to specify what short-term means, including the time limit that the state imposes on the service through each waiver. The state was asked to include in the STP the steps that will be taken to ensure that respite provided in a nursing facility does not exceed the time limit.

**State's Response:** The State has added the following clarification to Section B: NF LOC Waivers, "Respite is a service provided in both the Medically Fragile and the ADvantage waiver. Oklahoma Administrative Code 317:35-17-3(C)(6) gives that respite is a time limited service that does not exceed 30 days".

**Medically Fragile Waiver Settings:** CMS requested the state to clearly explain that all services for the Medically Fragile waiver (except NF Respite) are provided in the person's private home.

**State's Response:** The State has clarified in Section B: NF LOC that all services provided under the Medically Fragile Waiver are provided in the waiver member's home.

**ICF/ID Settings:** It was unclear if the Systemic Remediation Grid for ICF/ID settings included a review for the Habilitation Training Specialist Service in the community setting because it was

not included as setting types. The state was asked to include this setting or provide an explanation as to why it was not included.

**State's Response:** The State provided clarification in their response to the CMS feedback that the Habilitation Training Specialist Service is not a setting. Rather, it is a Home and Community Based service that is provided in settings such as Daily Living Supports, Agency Companion, Specialized Foster Care, and others.

**Systemic Remediation Grid:** A spot check of the state standards that are included in the state's Systemic Remediation Grids was completed and CMS had concerns with several of the state's determinations regarding compliance with the federal requirements.

- The state's regulation, OAC 317:40-1-3(a)(4), mirrors the federal rule, requiring that individuals have freedom from restraints. However, this conflicts with the Appendix G-2 sections of the state's waivers for individuals with an intellectual or developmental disability, which permit restraints under certain circumstances. Per guidance from CMS, restraints can be allowed if modification to the HCBS regulation is expressly documented in the person-centered service plan following the criteria in 42 CFR 441.301(c)(viii)(A) through (H). Since restraints are allowed in these waivers, the state was asked to include remediation describing how the state will ensure that restraints are only allowed under these waivers if the specified requirements are followed.

**State's Response:** The State will revise the policy to specify that restraints are only allowed when specific conditions are met. The State has made the appropriate changes and proposed remediation in the Systemic Remediation Grid.

- The state's regulation OAC 317:40-1-3(b)(6) is silent concerning the right for an individual to have visitors of their choosing.

**State's Response:** The State will revise the policy to include the right for an individual to have visitors of his or her choosing at any time. The State has made the appropriate changes and proposed remediation in the Systemic Remediation Grid.

- The state regulation OAC 317:30-5-763(18)(D)(i)(I) says, "Keys to rooms may be held by appropriate ALC staff as designated by the member's choice". However, it does not ensure that only appropriate staff have keys.

**State's Response:** The State will revise the policy to ensure that only appropriate staff have keys. The State has made the appropriate changes and proposed remediation in the systemic assessment grid.

- The state regulation OAC 317:30-5-763(18)(B) is found by the state to be fully compliant with the federal regulation requirement that "an individual's essential personal rights of privacy, dignity, respect, and freedom from coercion and restraint are protected", however it is silent concerning the rights of respect and freedom from coercion and restraint. It would be more appropriate to list OAC 317:30-5-763(18)(C), which is fully compliant.

**State's Response:** The State revised the grid with a more appropriate OAC 317:30-5-763(18)(C) which is fully compliant.

- The state regulation OAC 310:663-7-1 is found by the state to be fully compliant with the federal regulation requirement that “the setting is physically accessible to the individual”. However, OAC 310:663-7-1(e) states, “On and after the effective date of this subsection, each assisted living center that undergoes design changes or construction and each newly licensed assisted living center shall be designed and constructed in conformity with requirements for accessibility to physically disabled persons as specified in Chapter 11 of the International Building Code, 2003 Edition, published by the International Code Council.” This conflicts with the federal setting requirement that a setting be physically accessible because it permits an existing assisted living center to delay complying with the state’s accessibility requirements for people with physical disabilities until the setting undergoes design changes or construction. The state was asked to include remediation describing how the state will ensure that all assisted living centers will be physically accessible by March 2019.

***State’s Response:*** The state provided clarification that remediation is not required because OAC 317:30-5-763(18)(D)(XIII) fully complies with the federal regulation as it directly requires that all ADvantage Assisted Living Centers be physically accessible.