

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 2, 2016

Ms. Lori Coyner
Director
State of Oregon, Oregon Health Authority
500 Summer Street, NE E49
Salem, OR 97301

Dear Ms. Coyner:

This letter is to inform you that CMS is granting Oregon **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 changes required in regulations, policies and contracts; and is actively working on those remediation strategies. Additionally, the state submitted the October 2014 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. Furthermore, since the formal public comment period, the state has continually engaged stakeholders and the general public through various electronic and non-electronic methods.

After reviewing the October 2014, and revised April 2015, October 2015, and April 2016 drafts submitted by the state, CMS provided additional feedback on August 21, 2015, January 7, 2016, and June 6, 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 October 31, 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 conflict with 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 Oregon's STP, the state will need to complete the following remaining steps and submit an updated STP:

- 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 where the state has determined the setting overcomes the presumption;
- 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 Oregon has made much progress toward completing each of these remaining components, there are several technical issues that have been outlined in Attachment II of this letter that must be resolved before the state can receive final approval of its STP. 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 Susie Cummins (206-615-2078 or Susan.Cummins@cms.hhs.gov) or Michele MacKenzie (410-786-5929 or Michele.MacKenzie@cms.hhs.gov) at your earliest convenience to confirm the date that Oregon 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 provided in the attachment.

Sincerely,

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

ATTACHMENT I

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF OREGON TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 10/31/16

Public Notice and Engagement: The Centers for Medicare and Medicaid Services (CMS) expressed concern that the state appears to engage providers more actively than the individuals and families who receive services. CMS recommended that the state ensure stakeholders are part of the development of any materials developed as guidance or education to ensure the individual perspective is appropriately reflected.

State's Response: The state has added information to the STP clarifying how individuals, family members, and providers are all engaged in the transition plan process (see Phase II. Statewide Training and Education Efforts). This description includes information on how the state reaches stakeholders through community meetings, website updates, a designated email address for HCBS-related concerns, and messages from program directors. Additionally, the website alerts subscribers to when updates have been made to the STP. The state also conducts program-specific trainings on the HCBS regulations for both individuals and providers and has included the dates of those trainings in the STP.

Identification of Compliance for State Standards: CMS requested that the state update its STP to include:

- the title, code, and sub-code for each policy identified; a general description of each policy and its relevance to the home and community-based settings rule;
- the key aspects of the home and community-based settings rule that should be taken into consideration when reviewing the specific policy; and
- each section of the policy that either aligns with, conflicts with, or is silent on the requirements of the home and community-based settings rule.

State's Response: The state provided a new systemic assessment in Appendix E to the STP. This crosswalk includes the federal regulations and corresponding state standards, including the title, code, and sub-code for each policy; determination of compliance; remediation activities; and a timeline for when new and amended regulations became effective.

Organization of Systemic Assessment: CMS requested that the state provide robust details to explain which aspects of each state regulation comply with the necessary components of the federal requirements, which areas do not comply, and areas in which a state policy may be missing language that is necessary to comply with one or more aspects of the federal requirements.

- In doing so, the state was asked to include the following labels in organizing this information for each regulation, policy, etc.: “Aligns/Complies with the regulation,” “Silent on the regulation,” or “Conflicts with the regulation.”
- The state was asked to include details outlining its justification for how it came to the determination regarding the level of compliance an existing state standard had in relation to the federal HCBS settings rule, including but not limited to citing the exact language within the state standard supporting the state's determination.

- For any regulations that partially comply, the state was asked to describe specific language in the section that complies with the home and community-based settings rule and what language does not and thus needs to be modified.

State's Response: The state added Appendix E to the STP, which includes a narrative explaining that an overarching HCBS rule was created to govern all settings in which services are provided under 1915(c), 1915(k), or 1915(i). The global HCBS rule, OAR 411-004, became effective January 1, 2016. It includes the federal HCBS language and applies to all corresponding program, service and setting-specific rules. To strengthen compliance further, the state added clarifying language to each specific program, service and setting rule to highlight or clarify new requirements or practices expected as a result of the new HCBS regulations.

Appendix E also includes a flow chart demonstrating the function of the global HCBS rule over the state's HCBS authorities. Furthermore, the systemic assessment crosswalk in the appendix identifies the specific state standards corresponding to each federal setting regulation. The crosswalk includes the remediation actions the state took to bring non-compliant and silent standards into alignment with the federal rules, including the policies that would need to be updated with specific language to fully comply with the regulations.

Systemic Assessment Results: CMS asked the state to provide the language for the overarching OAR that was put into effect on January 1, 2016 as well as the revised language for the following settings that were identified as non-compliant or silent: APD Adult Family Homes, AMH Non-licensed Housing, AMH Residential Treatment Facilities/Homes, and ODDS Children's Foster Homes.

Additionally, CMS requested that the state include information within its systemic assessment on (a) where existing state standards include language regarding the requirement that non-disability specific options be available to HCBS beneficiaries in each setting category as part of participants' choice of offerings; or, if there is no such language within the current state standards, then (b) where the state plans to include such language in existing or new state standards.

Finally, CMS requested that the state include assurances that it will include language that confirms such settings must, at a minimum, facilitate access to opportunities for individualized, integrated activities in the broader community and interaction with community members that do not have disabilities outside of the facility-based setting.

State's Response: The state provided a link to text of the overarching rule, OAR 411-004, as well as information about how state standards for APD Adult Family Homes, HSD (formerly "AMH") Residential Treatment Facilities/Homes, and ODDS Children's Foster Homes that were silent or non-compliant were updated to come into compliance with the federal setting rules. The state also included information on where language regarding non-disability specific setting options and community integration was added to specific program rules and to OAR 411-004. The state has amended all of its program rules to incorporate the overarching rule by reference.

Restraints Allowed in Adult Foster Homes: CMS identified three of the authorities that govern adult foster homes – OAR 411-050-0655(9)(a)(L), ORS 443.739(8), and Supplement 4 to Attachment 3.1-A of the Oregon State Plan – permit the use of chemical and physical restraints in adult foster homes if "ordered by a physician or other qualified practitioner." However, the global HCBS regulation at OCR 411-004-0020(1)(c) prohibits restraints. CMS asked the state to

add to the appropriate sections the required remediation for allowing exception to the rule, such as the other exceptions allowed under 411-004-0040.

State Response: The state has added language to the narrative at the beginning of Appendix E explaining the allowable modification for restraints. Additionally, the remediation for allowing modification from the HCBS regulation for restraints has been added to the crosswalk for APD, ODDS and HDS. The timeline for this action is included in the crosswalk.

Appendix C: Rules from OAR 411-028 were reviewed as part of the systemic assessment crosswalk, however this section of rules was not included in Appendix C. It would be helpful to have a link to that section of rules added to the appendix.

State Response: A link to OAR 411-028 has been added to Appendix C.

Appendix E: In CMS' 50% spot check, some discrepancies were identified and the state was requested to resolve them.

- In row 1 of the systemic assessment crosswalk for *1. Is the setting integrated into the greater community?* There is a citation for OAR 309-040-0305(1)(a)(B, D), however (B,D) don't appear to exist. In row 2.a., *Opportunities to seek employment and work in competitive integrated settings?* There is a citation for OAR 309-040-0305(1)(a)(A), however it should actually reference 0301 instead.
- In row 2.b., *Engage in community life?* There is a citation for 309-040-0305(a)(B) but it appears it should be 309-040-0301(a)(B). Also in this section there is a citation for 309-035-0110(1)(a)(B), however it seems that the reference should be 309-035-107(1)(a)(B).
- In row 3, *Are the individual's essential personal rights of privacy, dignity and respect, and freedom from coercion and restraint protected?* There is a citation for OAR 309-040-0310(42)(h), (76)(a, g, i), however this doesn't appear to exist.
 - Also, for Adult Foster Homes, ORS 443.739 should be included.
- In row 6, *Do individuals have privacy in their sleeping or living unit?* There is a citation for OAR 309-040-0310(42)(h). However, this citation doesn't appear to exist.

State Response: The state has updated all sections and citations.

Nonresidential Settings: CMS requested that the state add language to the STP to enforce that the experience of individuals receiving HCBS in nonresidential settings is consistent with the experience others, who are not HCBS recipients.

State's Response: The state added to Phase V the remediation action that "The state will send communication to providers of non-residential HCBS explaining the requirement that the experiences of individuals receiving HCBS in non-residential settings must be consistent with those individuals not receiving HCBS".

ATTACHMENT II.

ADDITIONAL CMS FEEDBACK ON AREAS WHERE IMPROVEMENT IS NEEDED IN ORDER TO RECEIVE FINAL APPROVAL OF THE STATEWIDE TRANSITION PLAN

PLEASE NOTE: It is anticipated that the state will need to go out for public comment once these changes are made before resubmitting to CMS for final approval. The state is requested to provide a timeline and anticipated date for resubmission for final approval as soon as possible.

HCBS Settings to Be Included in State’s Site-Specific Assessment/Validation & Remediation Process

Per CMS’ request, please provide more details on the HCBS settings that will be included in the state’s site-specific assessment/validation and remediation process.

Individual, Private Homes: The state may make the presumption that privately owned or rented homes and apartments of people living with family members, friends, or roommates meet the HCBS settings requirements if they are integrated in typical community neighborhoods where people who do not receive HCBS also reside. A state will generally not be required to verify this presumption, but does need to include details within the STP as to how the state will monitor these settings to assure ongoing compliance with the rule. Additionally, as with all settings, if the setting in question meets any of the scenarios in which there is a presumption of being institutional in nature and the state determines that presumption is overcome, the state should submit to CMS necessary information for CMS to conduct a heightened scrutiny review to determine if the setting overcomes that presumption. In the context of private residences, this is most likely to involve a determination of whether a setting is isolating to individuals receiving HCBS (for example, a setting purchased by a group of families solely for their family members with disabilities using HCBS services).

- On page 7, the STP states under the sections for both 1915(i) and 1915(k) that, “Individuals receiving services through the 1915(i) reside in their own or family homes or provider-owned, controlled or operated settings.” However, on page 13, the STP states, “Oregon provides HCBS to individuals residing in their own or family homes through the 1915(k) Community First Choice State Plan Option and the 1915(c) HCBS waivers operated by APD and ODDS and the 1915(i) HCBS State Plan Option operated by OHA, HSD.” Please clarify that while some individuals receiving HCBS under these two state plan options reside in their own or family homes, that other HCBS participants reside in provider-owned, controlled and operated homes.
- Please also note that settings where the beneficiary lives in a private residence owned by an unrelated caregiver (who is paid for providing HCBS services to the individual), are considered provider owned or controlled settings and should be evaluated as such.

Assessing/Validating HCBS Group Settings: CMS wishes to remind the state that any setting in which individuals are clustered or grouped together for the purposes of receiving HCBS must be assessed for compliance with the federal HCBS settings requirements, and that these assessment findings must be validated in some way. This would include both group residential and non-residential services, including but not limited to group supported employment and day services.

The state may presume that any setting where individualized services are being provided in typical community settings comport with the rule.

- **ODDS Licensed/Certified Employment Services:** The state currently supports 2577 individuals in Employment Services. The STP states there are “no sites”, because the services are all provided in community-based settings. However, the settings where individuals are clustered or grouped together for the purposes of receiving HCBS must be assessed. Please distinguish the number of settings that are providing group-based services under ODDS Licensed/Certified Employment Services from the number of participants who are receiving services under this category in an individualized manner (and thus the settings they are receiving such services in would not need to be assessed and validated).

State of Oregon’s HCBS Setting Site-Specific Assessment & Validation Process: States are responsible for assuring that all HCBS settings comply with the final HCBS rule in its entirety. Quality thresholds should not be used to reduce the state’s requirement to assure compliance across all settings. States may deploy a number of validation strategies to determine compliance within settings, including but not limited to consumer feedback, onsite visits, external stakeholder engagement, case manager surveys, licensure/certification reviews, and state review of data from operational entities. The state must ensure at least one validation strategy is used to confirm provider self-assessment results, and should also supplement strategies where there may be a perceived conflict of interest with additional validation tactics. The more robust the validation processes (incorporating multiple strategies to a level of degree that is statistically significant), the more successful the state will be in helping settings ensure compliance with the rule.

Utilization of Provider Self-Assessment Tool (PSAT): It is unclear whether all providers completed a PSAT for each of the sites in the state. Please provide additional information on the number of PSATs that have been returned and corresponding methods that the state used to validate the PSATs for those sites across service/setting categories. Please also provide additional details on the steps the state is taking to assess and validate those settings where providers did not complete the PSAT.

Validating PSAT Results: The state described that it would validate the PSAT results with outcomes from the Individual Experience Assessment (IEA), but noted that if a setting did not have a sufficient number of corresponding IEA responses, the state would validate the PSAT through the service delivery system and licensing site-review process. Please provide more information about the validation methods proposed:

- **Individual Experience Assessments (IEAs):**
 - Indicate the minimum proportion of IEAs needed in order to fully validate a setting.
 - Details on how the state will address discrepancies between information collected in the PSAT and information reflected in the IEAs.
 - While the individual survey asks if an individual received assistance in filling out the survey and by whom, the STP should also reflect additional details regarding the training and qualifications required of individuals assisting beneficiaries in completing the IEA.

- Additionally, CMS is concerned by the methodology described in the STP for getting a response on the IEA (ie. providers following up directly with beneficiaries in HCBS settings), and believe it would be more effective and introduce less conflict of interest if the participant were assisted by a case manager or other individual that is not financially connected to the provider of HCBS. Having strong response and responses protected from conflict-of-interest are critically important, especially given the critical role of the IEAs in the state’s validation plan.
- CMS asks that the state clarify what a “lack of substantial response” on the IEAs means that will flag the site for review during the service delivery and licensing site review process, and explain how this review would be any different from the process such sites would generally go through for licensure.
- Please confirm whether the IEA will be incorporated into the state’s ongoing licensing and certification requirements or case management processes so as to help inform monitoring activities for ongoing compliance and also assure beneficiary participation in the future.
- **Other Validation Activities:** Please provide more detail on how all staff from external entities and within state operating entities involved in the site-specific assessment and validation processes were trained on the federal HCBS rule so that they have the knowledge, skills and abilities to successfully complete the assessments and validations. Also include information about the following:
 - The ongoing education, training, and technical assistance that will be provided to these individuals;
 - A description of the state’s plans for engaging external stakeholders and assuring ongoing public input to inform the review of the settings for HCBS compliance;
 - Clarification of whether organization partners will be trained on evaluating sites for characteristics of the home and community-based rule in order to appropriately identify concerns;
 - A description of the process, including timeframes, and tools used for the service delivery system and licensing site-review process;
- **Reporting Results of Validation Activities:** Finally, the state indicates that an estimate of the number of settings based on compliance level will be provided in the January 2017 submission of the STP. Please makes sure all assessment and validation activities across settings and HCBS authorities have been properly captured and summarized.
- Additionally, please explain how the state is confident of these findings without conducting a site visit.

Setting Remedial Actions and Ongoing Monitoring and Compliance Activities

Per CMS’ request, please provide more details on the state’s proposed process and timeline for remediation of settings. Specifically, please clarify the following.

Non-Disability Specific Settings: Please provide more specific details demonstrating how the state assures beneficiary access to non-disability specific settings in the provision of residential and non-residential services. This additional information should include how the state will plan to build capacity across the state to assure non-disability specific options.

Site Specific Remediation Activities: CMS requests the following information about the site specific remediation activities.

- The STP does not describe who is on the review committee reviewing the final determination of the areas that must be remediated. This is a critical piece of compliance as the remediation plan will determine the level of compliance with the wording and intent of the regulations. Similarly, the make-up of the advisory panel for provider adaptation plans is not well-defined.
- Please provide clarification as to whether the centralized system for information extends to the compliance staff review (pg. 34).
- Finally, include remedial actions the state intends to take for each setting once the assessments are complete.

Monitoring of Settings

Per CMS' request, the state should continue to provide more details on the processes used for ongoing monitoring including the frequency of monitoring activities, the ongoing training and technical assistance available to the entities/individuals that conduct monitoring, and the processes and tools utilized to monitor these settings.

Heightened Scrutiny

The state has provided some initial details to its evolving approach to identifying and reviewing settings that may require heightened scrutiny, but needs to clearly lay out a more comprehensive process for identifying settings that are presumed to have the qualities of an institution. 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, the institutional presumption will stand and the state must describe the process for informing and transitioning the individuals living in or receiving services in these settings to either compliant settings or settings receiving non-HCBS funding.

These settings 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 home and community-based services from the broader community of individuals not receiving Medicaid home and community-based services.

Several tools and sub-regulatory guidance on this topic are available online at <http://www.medicaid.gov/HCBS>.

It is unclear if the state has identified any settings with the effect of isolating individuals. Provide the methodology for identifying such settings and the results from this review. As a reminder to the state, CMS' *Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community* states that the following two characteristics alone might have the effect of isolating individuals:

- The setting is designed specifically for people with disabilities, or for people with a certain type of disability.
- Individuals in the setting are primarily or exclusively people with disabilities and the on-site staff that provides services to them.

Submission of Heightened Scrutiny Evidentiary Packages: To assist states in developing an evidentiary package in support of each setting submitted to CMS for heightened scrutiny review, please refer to Frequently Asked Questions published by CMS in 2015¹.

Caution regarding Submitting Non-Compliant Settings under Heightened Scrutiny: CMS reminds the state that only settings the state believes successfully meet all of the requirements of the federal HCBS rule and have overcome any institutional qualities or characteristics should be submitted under heightened scrutiny. Any setting that falls under one of the three prongs identified as presumed institutional that do not comply with requirements of the HCBS rule should not be moved forward under heightened scrutiny unless or until all of these issues are addressed.

Communication and Assistance for Beneficiaries Receiving Services from Providers Unable to Achieve Compliance

Per CMS' request, please provide more information around the communications with beneficiaries, including the estimated number of HCBS beneficiaries who may need assistance to locate and transition to compliant settings or other funding streams.

Transition Time Period: The state anticipates notifying recipients in non-compliant settings by October 15, 2018 that they need to transition to another setting, and then individuals will have until February 28, 2019 to transition to “available compliant settings.” (pg. 35). CMS is concerned that this leaves only 4 ½ months for an individual to transition, assuming that sufficient compliant settings exist to meet demand. The state should start the transition process earlier for any settings it knows cannot comply.

Process for Communicating and Providing Support to Impacted Beneficiaries: The tight timeframe also necessitates that the state has a well-developed plan for communicating to beneficiaries and their families regarding the need to transition to compliant settings. As such, CMS requests the state provide more details on this process, including:

- A detailed process with timelines and who will be responsible for executing each step of the process;
- A description of how all beneficiaries receiving services from providers not able to achieve compliance will receive reasonable notice and due process, including a minimum timeframe for that notice;

¹ <https://www.medicaid.gov/medicaid/hcbs/downloads/home-and-community-based-setting-requirements.pdf>

- A description of how the state will ensure that beneficiaries are given the opportunity, the information, and the supports to make an informed choice of an alternate setting that aligns with the federal requirements; and
- A description of how the state will ensure that all critical services and supports are in place in advance of each individual's transition.

Milestones

- A milestone template will be supplied by CMS. Please resubmit the chart with any updates no later than 30 days after receiving this communication and the template. The chart should reflect anticipated milestones for completing systemic remediation, settings assessment and remediation, heightened scrutiny, communications with beneficiaries, and ongoing monitoring of compliance. It should also include timelines that address the feedback provided in this letter.
- The dates for completion of the PSAT and IEA listed on p. 28 do not align with those identified in the timeline of action items (p. 39). Please correct.