

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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January 5, 2017

Mr. Darren McDonald  
Deputy Medicaid Director  
State of Rhode Island, Executive Office of Health and Human Services  
74 West Road, Hazard Building #74  
Cranston, RI 02920

Dear Mr. McDonald:

This letter is to inform you that CMS is granting Rhode Island **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 March 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 March 2016 draft submitted by the state, CMS provided feedback on August 12, 2016 and December 16, 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 resubmitted an updated version on January 3, 2017 in response to CMS' feedback. 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 spot-check of 50% 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 Rhode Island'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 Rhode Island has made 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 review of this detailed feedback, CMS requests that the state please contact Pat Helphenstine (410-786-5900 or [patricia.helphenstine1@cms.hhs.gov](mailto:patricia.helphenstine1@cms.hhs.gov)) or Michelle Beasley (312-353-3746 or [michelle.beasley@cms.hhs.gov](mailto:michelle.beasley@cms.hhs.gov)) at your earliest convenience to confirm the date that Rhode Island 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 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 RHODE ISLAND TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 1/3/2017

- **Public Notice and Engagement:** CMS asked the state to clarify whether the state received any comments from the March 2016 comment period. If so, the state was asked to include those comments and the state's response in the STP.

**State Response:** The state responded that no comments were received in March 2016 during the public comment period, but advocates did provide informal feedback on the systemic assessment grid related to specific language, and their feedback was incorporated.

- **Public Notice and Engagement:** CMS requested the state provide evidence indicating that the public was notified of the comment period on or before the first day of the public comment period, and evidence that the state included a non-electronic notification to the public of the comment period.

**State Response:** The state submitted a notice of public comment that was signed on March 1, 2016, which was the first day of the public comment period. The state also included this notice in its submission to exhibit the non-electronic notification to the public of the public comment period.

- **Waivers and Settings Included in the STP:** CMS requested that Rhode Island add further details on the coordination of the STP assessment and remediation activities with the state's existing consent decree it entered with the Department of Justice (DOJ) in 2014. Rhode Island's March 2016 STP draft referenced all waivers and settings, but the detailed information on the HCBS settings that are further implicated under the DOJ Consent Decree was included only as part of the Conversion Institute attachments. CMS requested that additional details be included in the narrative of the actual STP around how the state is coordinating its work under the consent decree with implementation of the federal HCBS rule.

**State Response:** The state confirmed that, as part of the consent decree, all nine sheltered workshops currently operating in Rhode Island are required to close by 2023. The state further explained the transition program for each of the nine sheltered workshops that have received funding dedicated to restructuring their programs to be able to provide Supported Employment services in an integrated/community setting. Additionally as part of the consent decree, Rhode Island will not allow new sheltered workshops to open. All day programs, including day/employment services and adult day programs, will be required to incorporate more integration activities into their models.

- **Systemic Narrative in STP:** CMS requested the state include a narrative section within the STP that describes the process the state took to complete its systemic assessment and develop its proposed remediation strategy, including details on who was involved in the completion of the systemic assessment. The state was told that the narrative may also include the additional detail requested regarding how the state was coordinating and aligning systemic assessment and remediation activities with policy requirements outlined in the state’s consent decree with DOJ.

**State Response:** Rhode Island updated the narrative section of the STP and has provided additional the details about their systemic assessment process. Rhode Island has conducted a thorough assessment of regulations and licensure requirements that are relevant to its 1115 waiver program and providers. These regulations and licensure requirements include Developmental Disabilities Organization (DDO) licensure, the Rhode Island Department of Health assisted living regulations, the Division of Elderly Affairs (DEA) assisted living certification standards, and the Rite@Home program standards. Each applicable regulation and licensure requirement was assessed to determine if the existing language is compliant, not compliant, or silent, with each of the setting requirements in the HCBS Final Rules. State staff from the Executive Office of Health and Human Services (EOHHS) and the Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals (BHDDH) led the assessment of their regulations and licensure requirements. All regulations and licensure requirements will be revised by 2018, which will include revisions to comply with the consent decree and compliance with Rhode Island’s initiative for all state regulations. The state addressed the public engagement and consent decree issues in questions above.

- **Identification of Compliance for State Standards:** The systemic assessment did not clearly identify whether each state standard was compliant, partially compliant, noncompliant or silent with regard to each federal requirement. CMS asked the state to ensure each state standard was appropriately labeled with a compliance level for each federal requirement.

**State Response:** The state updated its crosswalk to include a column indicating whether each state standard is compliant, partially compliant, noncompliant or silent with regard to each federal requirement. Each state standard is also appropriately labeled with a compliance level for each federal requirement.

- **Identification of Federal Regulation in Systemic Crosswalk:** CMS requested that Rhode Island add this information in separate columns in the current crosswalk, indicating specifically which state regulation, policy or standard is being assessed against each federal requirement and including the actual language that is compliant, partially compliant or silent.

**State Response:** The state updated its crosswalk to identify the specific federal setting regulations/provisions against which the state assessed its state standards, as well as the specific language within the state regulations, standards, and policies that is compliant, non-compliant or silent.

- **Inclusion of all Federal Regulations in Systemic Assessment:** CMS asked the state to address three of the federal setting regulation requirements in its systemic assessment: 1) Ensures an individual’s rights of privacy, dignity and respect, and freedom from coercion and restraint; 2) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact; and 3) Facilitates individual choice regarding services and supports, and who provides them.

**State’s Response:** The state updated its crosswalk to include the review of its state standards against the federal setting regulation requirements listed above.

- **Proposed Remediation Language:** CMS agreed with the state’s assessment that BHDDS regulation section 20.12 was silent in terms of compliance with the federal requirements, but did not agree that the state’s proposed remediation (to add a new subsection, (i), that states, “To have a legally enforceable written agreement detailing protections from eviction”) was sufficient. CMS recommended strengthening the proposed language such that HCBS beneficiaries, “have a legally enforceable written agreement that includes, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity.”

**State Response:** The state updated the crosswalk to strengthen the proposed remediation plan by including the language listed above.

- **Proposed Remediation Language:** CMS also agreed with the state’s assessment that BHDDS regulation section 20.12 was silent on the requirement on lockable doors. However, CMS asked the state to ensure that the remediation includes language indicating that only appropriate staff have access to keys.

**State’s Response:** The state updated the remediation plan to include the language listed above.

- **Proposed Remediation Language:** With regard to the requirements documented in the person-centered service plan, BHDDS regulation section 20.12, CMS agreed that it is non-compliant with federal requirements. In addition, CMS’ review found that the state’s proposed remediation was insufficient in some areas. The state proposed to delete “Except to the extent the residential program director determines that a limitation or a denial of any of the following rights would be in the Participant’s best interest and further, unless the director documents the good cause reasons for the denial or limitations in the Participant’s individual service plan,” and add “unless the Participant’s individual service plan reflects a need for limitation.” CMS requested that the draft remedy language be expanded to require that the plan include documentation of any less-restrictive interventions that have been attempted prior to asserting a modification into the person-centered service plan, as well as describing any modification of a requirement that has been agreed to by the individual beneficiary and their person-centered planning team.

**State's Response:** The state updated the crosswalk to require that the plan include documentation of any less-restrictive interventions that have been attempted prior to asserting a modification into the person-centered service plan, as well as describing any modification of a requirement that has been agreed to by the individual beneficiary and their person-centered planning team.

- **Proposed Remediation Language:** In addition, while the state was correct that RIGL Section 40.1-22-13 is non-compliant with federal requirements concerning the right to have visitors at any time, CMS indicated that the proposed remediation would not bring the law into compliance. The state proposed to include the definition of home and community-based services, but Section 40.1-22-13 permits a setting to restrict visits by saying that “in special circumstances when the client is ill or incapacitated and a visit would not be in his or her best interest, visitation may be restricted temporarily during the illness or incapacity.” CMS asked the state to ensure that any exceptions to a participant’s access to visitors is addressed through the person-centered planning process.

**State's Response:** The state updated the crosswalk to ensure that any exceptions to a participant’s access to visitors is addressed through the person-centered planning process. The state will add language to the existing statute noting the requirement that restriction on visitors must be documented in the person-centered plan. The DDO licensing regulation includes the requirements that must be met in order to modify/restrict a person's right to visitors, and providers would need to comply with this licensing regulation in order to restrict a person's visitors.

- **Additional Details Regarding State's Systemic Remediation:** The state’s description of planned systemic remediation indicated an intention to make important changes to state code and policy documents to comply with the federal requirements. However, the language describing these planned changes lacked specificity. CMS requested that the state provide detailed language explaining how the state will remediate instances of non-compliance and silence in the state’s systemic assessment.

**State's Response:** The state provided the detailed language it will use to remediate instances of non-compliance and silence in the state’s systemic assessment.

- **Waiver Settings:** CMS asked the state to include a comprehensive list of all settings where home and community-based services (HCBS) are provided in the state.

**State's Response:** The state provided a comprehensive list of all settings and the state standards that apply to each setting on page 1 of the systemic assessment grid.

- **Systemic Assessment:** CMS asked the state to ensure that the state is appropriately assessing several sections of the rules and regulations for the licensing of Developmental Disability Organizations. Section 44.02 appeared to be silent concerning supports of individuals seeking employment and working in competitive settings and controlling personal resources to the same degree of access as individuals not receiving Medicaid

HCBS. CMS asked the state to develop a remediation plan indicating that Day Program settings should be expected to serve as a conduit of information/referral to where beneficiaries can explore or attempt to garner employment or volunteer opportunities in the community. CMS also asked the state to ensure that Section 20.09 include remediation language indicating that participants have opportunities to seek employment and work in competitive integrated settings, to the same degree of access as individuals not receiving Medicaid HCBS and the ability to control their own personal resources. Additionally, the state needed to ensure any use of restraints, as referenced in Section 20.09, is documented in the individual's person-centered plan. CMS also asked the state to ensure that the proposed remediation language for section 39.01 uses the term "non-disability-specific" as opposed to "non-disabled" to align more closely with the federal regulation.

**State's Response:** The state has addressed each of the issues listed above in the systemic assessment and has developed appropriate remediation language. See pages 2-9 of the systemic assessment grid for details regarding supports for individuals seeking employment and working in competitive settings, control of personal resources, and non-disability specific settings. Additionally, the state has indicated that any use of restraints will be documented in the individual's person-centered plan.

- **Systemic Assessment:** CMS asked the state to ensure the state's assisted living residence statute (RIGL 23-17.4) and the assisted living licensing regulations (CRIR 14-090-025) have been assessed for compliance with all of the federal requirements.

**State's Response:** The state responded that Rhode Island's assisted living residence statute and the assisted living licensing regulations apply to all assisted living facilities in the state. However, not all assisted living facilities render services to Medicaid HCBS participants. Therefore, Rhode Island will not be editing its assisted living residence statute nor its assisted living licensing regulations to include the HCBS Final Rules since not all of the settings are required to be compliant with the HCBS Final Rules. Any assisted living facility that renders services to Medicaid HCBS participants must adhere to the Division of Elderly Affairs Assisted Living Certification Standards. The HCBS Final Rules will be added to these standards, thereby assuring that any assisted living facility that serves Medicaid HCBS participants will be required to be fully compliant with the federal requirements.

- **Systemic Assessment:** CMS asked the state to reevaluate its assessment and remediation plan for BHDDS regulation section 20.13. CMS believes the state's criteria to restrict an individual's right to the setting requirements for provider owned or controlled residential settings are not consistent with the eight requirements for modification of the settings criteria in the federal regulation. The state's remediation of 20.13 must include the following three requirements in 42 CFR 441.301(c)(4)(vi)(F):

- (2) Document the positive interventions and supports used prior to any modifications to the person-centered service plan;
- (4) Include a clear description of the condition that is directly proportionate to the specific assessed need; and
- 7) Include the informed consent of the individual.

**State's Response:** The state has included the provisions listed above in the remediation plan for 20.13 (see pages 24-29 of the systemic assessment grid).

- **Provider Owned and Controlled Non-Residential Settings:** CMS asked the state to ensure individuals experience these settings in the same manner as individuals who do not receive Medicaid HCBS. CMS also requested that the state provide any policies or regulations that address physical accessibility in non-residential settings.

**State's Response:** In response to CMS' request, Rhode Island included remediation language in the systemic assessment grid under the Adult Day Care (ADC) certification standard and in section 41 of the DDO licensing rules and regulations (pages 2-3). The state also added regulatory citations indicating these settings are physically accessible to participants. The Department of Health (DOH) licensure for ADCs that requires the facility and grounds to be accessible to all participants has been added to the grid. For DDO day programs, the compliant language is already included on pages 23-24, and this requirement for DDOs applies to both residential and non-residential settings. Shared living settings are also subject to these physical accessibility requirements because this language will be added to the Rite@Home certification and it already exists in the DDO licensing, which governs the shared living settings.

- **Division of Elderly Affairs (DEA) Assisted Living Standards:** CMS asked the state to provide an electronic copy of the DEA Assisted Living Standards.

**State's Response:** The state provided an electronic copy of the standards to CMS.