

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Disabled & Elderly Health Programs Group

June 2, 2017

Johanna Barraza-Cannon
Interim Director, Medical Services
South Dakota Department of Social Services
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Pierre, SD 57501-2291
Phone: (605) 773-3495

Dear Ms. Barraza-Cannon:

This letter is to inform you that CMS is granting South Dakota **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 April 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 April 2016 draft submitted by the state, CMS provided additional feedback on September 21, 2016 and during email and phone conversations with the state through April 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 May 22, 2017. 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 of South Dakota'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, 2022);
- 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 criteria by March 17, 2022; 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 South Dakota 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 review of this detailed feedback, CMS requests that the state please contact Michele MacKenzie at Michele.MacKenzie@cms.hhs.gov or Amanda Hill at Amanda.Hill@cms.hhs.gov at your earliest convenience to confirm the date that South Dakota 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 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 SOUTH DAKOTA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED MAY 2017

Systemic Assessment Results:

- Although the state correctly identified that many of its rules reinforce some of the home and community-based settings criteria, the state's systemic assessment did not evaluate whether or not state rules fully comply with the HCBS settings criteria. CMS asked the state to clarify.
 - For example, the DOH Licensure ARSD Chapter cited on page 14 of the STP included language about privacy and retaining personal possessions including furnishing as space permits, but did not specify that individuals have lockable doors, choice of roommates, or freedom to furnish and decorate his or her unit.
 - Additionally, while Rule 46:11:03:00 cited in the STP contained language that protects the rights of participants guaranteed under the constitution and laws of the United States and the state, it did not specify that individuals have control of their schedule including access to food at any time.

State's Response: In the revised STP, the state made several updates to its systemic assessment and now includes a detailed crosswalk for the CHOICES waiver and the Division of Adult Services and Aging Home and Community-Based Services waiver (ASA waiver) that addresses each of the federal home and community-based settings criteria. The state has addressed the specific issues noted in CMS' feedback as follows:

- The state updated its determination for ARSD Chapter 44:70:09 in relation to the criteria that the individual has privacy in his/her unit, including lockable doors, choice of roommates, and freedom to furnish and decorate (now on pages 22-23 of the STP). This standard is now listed as "partially compliant/silent" and the state proposed remediation to address the specific components of the federal standards.
- The state also updated its determination for ARSD Chapter 46:11:03 in relation to the federal criteria that individuals have freedom and support to control their own schedules and activities, and have access to food at any time (now on pages 34-35 of the STP). This standard is now listed as "fully compliant/silent." The state added Council on Quality and Leadership (CQL) measures that address control over schedules, routines, and activities, and the availability of food that is nutritious and meets individual dietary needs and preferences to its "South Dakota Interpretation of State Standard" column.

- For regulations that the state determined to be compliant with the federal standards, CMS requested the state include the language from their regulations that demonstrates compliance within the STP. For regulations that are partially compliant, CMS asked the state to identify the areas that are compliant and the areas that are in conflict or silent.

State’s Response: In response to CMS’ request, the state added detailed analysis to support each of the state standards in the crosswalks. The state included language from state standards that the state determined to be in compliance with the federal standards, as well as explanations of which areas are in compliance and which are silent for state standards that the state determined to be silent or partially compliant. (The state did not find any state standards to be non-compliant (i.e., in conflict) with the federal standards.)

Systemic Assessment of All Relevant State Standards:

- CMS requested that the state ensure all relevant state standards and policies related to HCBS settings are included in the systemic assessment.

State’s Response: For the ASA waiver systemic assessment, the state reviewed the Administrative Rule of South Dakota Article 44:70, Article 67:16, and Article 67:44; South Dakota Codified Law 34-1-20; and the waiver document. For the CHOICES waiver systemic assessment, the state reviewed ARSD 46:11, 67:16, and 67:54; the CQL Basic Assurances and Personal Outcome Measures; South Dakota Codified Law 27B-8-36 and 27B-8-45; and the waiver document.

- The state indicated in the systemic assessment that a sample of standards and policies related to the ASA were reviewed. CMS asked the state to clarify and indicated that all standards related to HCBS programs should be included in the crosswalks.

State’s Response: The state clarified that all relevant state standards for the ASA Waiver were assessed and included this information in the crosswalk.

- CMS noted that the state did not include any standards related to the ADLS or Family Supports 360 waivers and requested that the state include these waivers in the crosswalk.

State’s Response: The ADLS and Family Supports 360 waivers were added to the systemic assessment crosswalk.

Systemic Remediation:

- CMS requested that the state include remediation strategies to ensure state rules categorized as “silent,” “partially compliant,” or “non-compliant” are revised,

replaced or proper policy is implemented to bring them into compliance with the home and community based services criteria. The state was asked to include the language that the state will be changing to bring the regulations into compliance, as well as milestones with timelines for the remedial actions.

State's Response: In the ASA and CHOICES waiver crosswalks, for each state standard that the state determined to be partially compliant or silent, the state included a plan for remediation. The state included plans to make revisions to the HCBS Settings Guide to Expectations and Compliance, Assisted Living Provider Addendum the SD Medicaid Provider Agreement, and the ASA Policy Standards. The proposed remedial actions include the language the state will add to each state standard. The state included timelines and work plans for these remedial actions on pages 86-90.

- The state indicated that it requires all community supports providers to be accredited by CQL, and that all current providers have achieved the level of CQL accreditation referred to as “person-centered excellence.” The state included some of the CQL Basic Assurances® and Personal Outcome Measures® in the “South Dakota Interpretation of State Standard” column in the crosswalk. However, the state did not explain how these proprietary measures justify the state’s compliance findings. CMS asked the state to provide information regarding how these measures ensure provider compliance with the settings criteria.

State's response: The state added to the STP the supporting information indicating the requirements for CQL accreditation including the HCBS settings criteria supported through the state’s accreditation requirements.

- CMS requested that the state clarify that the CQL measures require providers to comply with the measures in order to be certified as a community supports provider and whether or not accreditation was required for all providers.

State's response: The state indicated on page 28 that all providers are required to comply with the measures to be accredited by the CQL and all providers must be accredited.

- CMS requested clarification on page 37 of the STP regarding the states assurance that individuals have access to visitors at any time.

State's Response: The state provided clarification that individuals have access to visitors at any time through the CQL basic assurances relevant probes that ensure that individuals have the ability to visit and be visited by whomever they choose and the

settings policies and practices promote frequent and informal visits at people's homes.

Continuum of Care:

- CMS and its federal partner, The Administration for Community Living (ACL), expressed concern with the statement on page 11 that stated: “However, South Dakota identified a conflict between the HCB Settings Rule and the emphasis on continuum of care models from the Administration for Community living (ACL) and other federal entities. Despite this conflict, South Dakota understands per CMS direction on this issue that all settings must meet all requirements of the federal regulations, including heightened scrutiny review.” Neither ACL nor CMS is aware of any continuum of care models proposed by the ACL or how ACL’s policies or technical assistance would be interpreted as being out of compliance with the principles of the federal HCBS settings rule. CMS requested that the state explain or remove this statement from the STP.

State’s Response: The state has revised the STP to remove these statements regarding conflict between the HCBS settings rule and the continuum of care model from ACL.

Spot Check of State Standards:

- A spot check of the state standards that are included in the state’s revised crosswalks has been completed, and CMS identified concerns with several of the state’s determinations regarding compliance with the federal standards, as described below.
 - CMS did not agree that ARSD 44:70:09:05, ARSD 44:70:09:08, and ARSD 44:70:09:09 are partially compliant with the federal criteria that individuals sharing units have a choice of roommates in that setting (page 22). None of these regulations addresses the individual’s right to have a choice of roommate when sharing a unit.

State’s response: The state provided additional remediation activities in the crosswalk to include HCBS Guide to Expectations and Compliance and the Assisted Living Provider Addendum to the SD Medicaid Provider Agreement to ensure that individuals have the choice of roommate when sharing a unit.

- CMS did not agree that ARSD 44:70:09:09 is partially compliant with the federal criteria that individuals have the freedom and support to control their own schedules and activities, and have access to food at any time (page 26); the regulation is silent on this provision.

State’s Response: The state edited the compliance determination to indicate that the rule is silent and included remediation strategies to include the HCBS Guide to Expectations and Compliance and the Assisted Living Provider Addendum to the SD Medicaid Provider Agreement and provider education.

- CMS did not agree with the state’s determination that state standards for the CHOICES waiver are in compliance with the criteria that the setting is integrated in and supports full access to the community (page 30). The state indicated that ARSD 67:54:04:09, SDCL 27B-8-36, SDCL 27B-8-45, and 46:11:02:02 are in compliance with this criteria; however, we found these standards to be silent.

State’s Response: The state revised the crosswalk to indicate that the state is revising waiver service definitions for Community Life Engagement, Supported Employment and Pre-vocational services. The state also clarified that the ARSD has been revised and the provider requirements have been amended to include these criteria.