

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

April 5, 2017

Nathan Checketts
Interim Director, Medicaid and Health Financing
Utah Department of Health
P.O. Box 143101
Salt Lake City, UT 84114-1010

Dear Mr. Checketts:

This letter is to inform you that CMS is granting Utah **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 September 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 September 27, 2016 draft submitted by the state, CMS provided additional feedback on November 21, 2016 requesting that the state make several technical corrections in order to receive initial approval. These changes did not necessitate another public comment period. In response to CMS' additional feedback, the state submitted an updated STP on December 28, 2016. Upon review of the new version of the STP, CMS found that further technical corrections were necessary and communicated this to the state through comments provided on March 6, 2017. The state subsequently addressed all issues, and resubmitted an updated version on March 28, 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. 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 Utah'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;
- 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 information for submission to CMS for those settings identified by the state to 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 the end of the transition period; 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 Utah 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 (410-786-5929 or Michele.MacKenzie@cms.hhs.gov) or Amanda Hill (410-786-2457 or Amanda.Hill@cms.hhs.gov) at your earliest convenience to confirm the date that Utah 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

Systemic Assessment: Missing Federal Setting Criteria: An assessment of three of the federal setting criteria are not included in the crosswalk. The state was asked to account for each criterion.

- The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, 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.
- Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.
- Individuals sharing units have a choice of roommates in that setting.

State's Response: The state indicated that any residential setting would be at a minimum subject to the protections afforded in the state's landlord/tenant law (Utah Code Annotated § 78B-6-802). In addition, certain settings may have less restrictive requirements. For example, assisted living facilities must provide a minimum of 30 day notice for evictions as required under Utah Administrative Code R432-270-11 (2)(b), and in the case of providers with the Division of Services for People with Disabilities (DSPD) where contractually a 90 day notice is required. Information has been added to the crosswalk to acknowledge and describe the needed remediation for this settings rule requirement.

Additionally, the state responded in regard to lockable doors and choice of roommates to indicate that while these provisions are not specifically addressed in landlord/tenant provisions, or other administrative rules/policies, the state has included these items in the crosswalk to acknowledge and describe the needed remediation for these settings requirements.

Additional CMS Comment: While the state acknowledged in its responses to CMS feedback (document submitted on 12/28 with the STP: Utah_Systemic_Assessment_Feedback-State_Responses20Dec16.pdf) that residential settings would be subjected to the state's landlord/tenant law (Utah Code Annotated § 78B-6-802), this information remained absent from the crosswalk. The crosswalk did not explicitly include the three settings criteria listed above. The language referenced by the state in its responses to CMS feedback about tenant protections, lockable doors, and choice of roommates was not included in the crosswalk.

State's Response: A general statement was added to the beginning of the crosswalk to explain the overarching Administrative Rule and its purpose. The three items noted by CMS are addressed in section (1)(vi)(B) of the Utah Administrative Rule (HCBS Setting Transition Crosswalk, Attachment 1). In the State's 12/28 response, the state inadvertently deleted each of the three federal settings criteria addressed above. Please see pages 32-33 of the Systemic Assessment Crosswalk. The compliance status of these records has been changed from "does not yet comply with the regulation" to "silent on the regulation." See overarching Utah HCBS Settings Administrative Rule DRAFT and updated crosswalk.

Systemic Assessment Process: CMS requested that the state add to the STP a description of

the process the state used to complete the systemic assessment. The state was asked to also include clarification regarding the state's compliance determinations.

State's Response: The systemic assessment crosswalk was updated to include the information requested. At the beginning of the crosswalk, the state provided a brief narrative describing the process and contents of the crosswalk. The state also added clarification on the compliance determinations in the crosswalk.

Additional CMS Comment: It appears the state unintentionally deleted the beginning of the first sentence of its crosswalk description. The text, "The State collaborated with Operating Agency partners, provider representatives, consumer advocacy groups, and other stakeholders to identify state level rules and regulations which required review for purposes of the Systemic" was absent but the second half of the statement, "Assessment, and work through proposed remediation activities," remains. CMS requested that the state add the missing text to the STP.

State's Response: The State had unintentionally deleted the first sentence of the Crosswalk and has ensured it is showing in the PDF crosswalk document. A statement was added to the beginning of the crosswalk to explain the overarching Administrative Rule and its purpose. The first two paragraphs of the crosswalk outline the process for development and review. The draft Administrative Rule with the above requested information has been added to the crosswalk document and has been designated as Attachment 1 within the HCBS Settings Transition Crosswalk document.

Lack of Correlation between Some of the State's Standards and the Federal Regulation:

It appears that the state did not always correctly correlate its state standards with the federal setting rules. For example, in its assessment of the federal regulation that requires freedom from restraints (§441.301(c)(4)(iii)), the state did not include the requirements at 42 CFR §441.301(c)(4)(vi)(F) to ensure that the use of restraints is based on a specific assessed need and documented in the person-centered plan.

State's Response: The state reviewed and revised the Crosswalk. Multiple records have been identified as non-applicable and removed based on relevance to policy/rule. In addition, multiple records have been updated with a status of 'Partially Compliant' to indicate that they only address part of the HCBS Settings Rule cited.

Spot Check of State Regulations: In several instances, CMS did not agree with the state's compliance determinations. The state did not propose remediation for standards determined to be non-compliant. CMS could not locate changes the state indicated were made to Attachment A; for example:

- Concerning R539-9-2(4), CMS noted that (1) group size does not guarantee that the individual is integrated into the community, and (2) the state has not ensured that the setting for this service is in compliance with the federal regulation. However, the state did not make any revisions to its proposed remediation for R539-9-2(4).
- R501-19-13 indicates a restriction on overnight visitors; this must be addressed to ensure that individuals have the right to have visitors at any time.

State's Response: The State has updated the crosswalk to revise R539-9-2(4) to define integrated work settings to comply with 42 CFR 441.301.

The state has added the following language to the description of the Administrative Rule: *The Administrative Rule will apply to all HCBS programs and all settings where individuals live and receive services.*

The restriction of overnight visitors in R501-19-13 is in section B: *The program shall have policy specifying the amount of time family or friends may stay as overnight guests.* This can be found in the crosswalk under R501-19-13 “Key Aspects for Review.” The state has updated the crosswalk to revise R501-19-13 to ensure provider policies/requirements are not more restrictive than state landlord-tenant law (Utah Code Annotated § 78B-6-802).

Lack of Consistency between State Standards and CMS Guidance on Restraints:

Regarding restraints, the federal regulation requires freedom from restraints. However, restraints are allowed if a modification is expressly documented in the person-centered service plan following the criteria in 42 CFR 441.301(c)(4)(vi)(F) and defined in the waiver. Since restraints are allowed in the Community Supports, Acquired Brain Injury, and Medicaid Autism Waivers, the state must have standards in place that enforce this federal regulation.

State’s Response: The state has administrative rules in place that define appropriate restraints as noted in the systemic assessment (R539-4). The state recognized that these rules do not fully address all required elements of the new regulation including the requirement to have the restraints documented in the person centered plan. The state ensured the person centered planning process will be amended in coordination with DSPD in order to meet these requirements. This is described in the remediation noted in the Systemic Assessment Crosswalk to indicate that any restrictions to client's rights must be documented in the person centered plan in accordance with 42 CFR §441.301(c)(4)(vi)(F). A draft of the Utah HCBS Settings Administrative Rule has been attached to the systemic assessment crosswalk.

Non-Residential Settings: The state was asked to indicate how the state would ensure that providers of non-residential HCBS will meet the parameter that the experiences of individuals receiving HCBS in non-residential settings must be consistent with those individuals not receiving Medicaid HCBS.

State’s Response: The state attested that it will address these topics in Utah’s overarching settings rule. The statewide transition plan has been updated to include the development and implementation of this Rule.

Additional Details Regarding State’s Systemic Remediation: For standards that require remediation, target completion dates, key aspects of review and a high-level description of the proposed remediation were included. CMS requested that the state include a timeline for the compliance activities outlined in the STP:

State’s Response: Utah added specific language to the proposed remediation in the systemic assessment where possible. The state outlined the milestones, deliverables and timelines of the activities in the STP and will continue to update the STP with additional progress, goals and timelines. The state modified dates to ensure compliance before the end of the transition period. The state established milestone dates no later than December 2018 in order to allow providers

and other stakeholders time to comply with the identified remediation strategies. In addition to working with individual providers to remediate issues identified in the self-assessments and on-site validation visits, the state will work with external stakeholders, providers, support coordinators, and program participants to identify potential areas of concern. The state is currently working to establish a process by which issues can be reported, investigated and resolved.

Additional CMS Comment: CMS requested that the state update links in the crosswalk to the Aging Waiver Provider Manual that were no longer functioning.

State's Response: All links have been reviewed and updated to ensure accuracy. Appendix pages have been updated to reflect accurate page numbers.