

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 6, 2016

Cynthia Jones  
Director, Department of Medical Assistance Services  
600 East Broad Street  
Richmond, VA 23219

Dear Ms. Jones:

This letter is to inform you that CMS is granting Virginia **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, which subsequently went out for public comment, CMS provided verbal feedback and technical assistance to the state in June 2016 and additional written feedback on September 19, 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 addressed all issues, and resubmitted an updated version on December 2, 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 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 Virginia'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 who 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 Virginia 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 Jessica Loehr (410-786-4138; [Jessica.Loehr@cms.hhs.gov](mailto:Jessica.Loehr@cms.hhs.gov)) or Michelle Beasley (312-353-3746; [Michelle.Beasley@cms.hhs.gov](mailto:Michelle.Beasley@cms.hhs.gov)) at your earliest convenience to confirm the date that Virginia 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 VIRGINIA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED DECEMBER 2, 2016**

- **Crisis Stabilization & Supervision Services:** CMS requested that the state provide additional detail about crisis intervention services provided for up to 90 days and crisis stabilization services with a duration of up to 60 days (in 15 day increments) under two of the waivers described in the STP. CMS asked Virginia to articulate how these services are delivered and where, and then distinguish how those services are different from crisis supervision. CMS also asked Virginia to explain how these services can be utilized concurrently by a waiver participant. CMS expressed concern that if these placements become longer than 30 days, a waiver participant may experience an institutional setting rather than a home and community-based setting. Finally, CMS asked for greater clarification as to why the state believes these settings do not need to be assessed for compliance with the settings requirements, as indicated in the STP.

**State's Response:** The state provided a description of the new Crisis Services implemented with the September 2016 waiver redesign and the amended waivers on page 49 of the revised STP. The description includes a definition of the three Crisis Services along with the settings where these services are provided. The state clarified that Crisis Support Services and Community Based Crisis Supports occur in an individual's home, in the community where the state is presuming the home and community-based characteristics are present or work settings, which are being assessed consistent with the STP. Center Based Crisis Supports take place in a residential setting (Crisis Therapeutic Homes) but are not approved for a duration longer than 30 days. Additionally, the state has indicated that Crisis Therapeutic Homes provide crisis prevention and stabilization in a residential setting through utilization of assessments, close monitoring, and a therapeutic milieu provided through planned and emergency admissions. Since this service is a type of respite service in the respect that it is temporary, to provide short-term relief to the long term service provider and allow a period of time to address specific needs, these settings do not need to be assessed in the HCBS STP for compliance with settings requirements.

- **Systemic Assessment & Remediation Timeline:** CMS requested that the state add smaller interim steps to its timeline to allow the state, CMS and the public to more effectively track progress. CMS suggested that the state consider modifying the STP to include interim milestones for the systemic remediation process and make distinctions between progress to date and current/future activities to more accurately track the state's actions.

**State's Response:** The state provided a chart detailing interim steps and milestones for systemic remediation of the Elderly or Disabled with Consumer Direction (EDCD) waiver on page 17 of the revised STP, and systemic remediation of the three Intermediate Care Facility/Individuals with Intellectual Disabilities (ICF/IID) Level of Care (LOC) waivers on page 50 of the revised STP. The charts include progress to date, target completion dates for future activities, and comments with additional details for each milestone.

- **Compliance Level Determinations:** CMS requested that Virginia clearly label determinations of whether each state standard identified in connection with a specific federal HCBS settings requirement is compliant, partially compliant, silent, or in conflict, as well as any additional rationale justifying how the state came to this determination (beyond the excerpts from the regulation already provided by the state) for each crosswalk in Appendices A.1 and B.1.

**State's Response:** The STP now includes a clear determination of state standard and provider manual compliance for each federal HCBS requirement in Appendices A.1 and B.1. The state marked each state standard and regulation as either compliant, partially compliant, silent, or in conflict with the HCBS requirements. The state has also included a short description of their remediation determination for each state HCBS regulation in which they determined remediation was needed. The state specifically noted that it modified the determination of compliance for the Nursing Facility (NF) LOC regulations and has included remediation actions for both the regulations and provider manuals. The modification of the state's determination is noted on the pages 8-10 in the revised STP, and the state's intention to validate Adult Day Health Care (ADHC) settings compliance is noted on page 10.

- **Identification of Standards Needing Remediation:** CMS asked the state to clearly identify in Appendices A1 and B1 those regulations needing remediation, including specifying which components of the rule are out of compliance and why.

**State's Response:** The state has identified the regulations and policies needing remediation in Appendix A.1, Appendix B.1, as well as the Provider Manual for DD Waivers which is addressed on pages 25-28 of the STP. In Appendix B.1 (beginning on page 133), the state provides additional information on what remediation is required for regulations and provider manuals, including updates to specific language and remediation timelines. The state has included the language it will use to update the applicable regulations and provider manuals throughout Appendices A.1 and B.1.

- **Accuracy of Systemic Assessment Crosswalks:** As part of the September 2016 feedback to Virginia, CMS performed a 50% spot-check of the information provided by the state in its systemic crosswalks in order to verify the accuracy of the state's interpretations in its

systemic assessment. CMS requested clarifications about some of the state's findings in its systemic assessment crosswalks, and provided more detailed feedback in a separate document. That document provided comments and feedback on a sample of the state's systemic assessment found in Appendix A.1 and Appendix B.1 of Virginia's revised STP. While it was not a comprehensive review of all of the information Virginia provided in its STP, it was provided to help the state consider revisions and modifications which will aid the public's understanding of the STP and ensure compliance with the HCBS regulations. In some cases, CMS indicated that more information would help determine whether the state regulations cited sufficiently address the HCBS rule. Additionally, CMS was concerned that many of the state standards categorized as compliant with the federal requirements were actually silent or partially compliant.

**State's Response:** The state updated multiple determinations of compliance in response to the spot check provided with CMS' September 2016 comments. The updates include:

- The state modified its determinations of compliance of NF/LOC waiver regulations in Appendix A.1 in response to the spot-check. The state also included a crosswalk of DSS Licensing Regulations on page 88-92 that confirms general support of HCBS requirements and states that they are not in conflict with HCBS regulations.
  - The state revised Appendix B.1 to include an updated crosswalk of the Emergency Regulations (effective 9/1/2016) on pages 134-145 for the three amended DD Waivers.
  - The state included a crosswalk of the Human Rights Regulations and Licensing Regulations on pages 146-156 of the updated STP that confirms general support of HCBS requirements and states they are not in conflict with HCBS regulations.
  - In the response document submitted with their STP, the state clarifies that for the ICF/IID LOC waivers, the provider manual and Community Living (CL), Family and Individual Supports (FIS) and Building Independence (BI) Waiver regulations are the vehicles by which the state will ensure Virginia's regulations and policies fully address the federal HCBS requirements.
- **Systemic Remediation:** CMS requested that the state provide specific, detailed language explaining how the state will remediate instances of non-compliance and silence identified in the state's systemic assessment. CMS reminded the state that it can utilize a plethora of strategies to remediate issues of non-compliance or silence, including but not limited to, changes in the state's administrative rule, the issuance of additional policy changes in key policy documents to the field (such as policy communications, provider manuals, licensing agreements, etc.), and/or the development of sub-regulatory guidance. CMS also asked the state to include the associated timelines for any instances in which the state regulations need modifications to come into compliance.

**State's Response:** The state has included a description of planned remediation in Appendices A.1 and B.1, in the systemic remediation timelines on pages 17 and 50, and on page 25 of the revised STP under the "Provider Manual" section header. The state included descriptions of remediation determinations, detailed timelines for systemic remediation, and text of the proposed updates to regulations and provider manuals. In particular, the state committed to including specific language addressing each component of the federal regulations in the provider manuals applicable to each waiver.

- **NF-LOC Systemic Assessment:** CMS noted to the state that in its systemic assessment of the NF-LOC waivers, there was no indication the state assessed where its existing policies and state standards addressed the additional requirements of provider-owned or controlled settings. CMS stated that these additional requirements must be reflected in the systemic assessment so that the public and CMS can verify whether the state's existing standards adequately address each of these provisions (for examples, issues related to lockable units, choice of roommate, unrestricted access to visitors and food, etc.). CMS requested that the state expand its systemic assessment crosswalk in Appendix A.1 to include this additional analysis and any areas where additional remediation is required.

**State's Response:** The three NF-LOC waivers are the EDCD, Technology Assisted (Tech) and Alzheimer's Assisted Living (AAL) waivers. The state clarified in the response document submitted with the STP that "there are no provider owned or controlled residential settings in the EDCD or Tech Waivers. Thus, a regulatory crosswalk on the additional requirements for provider owned or controlled residential settings was not performed." The state explains this determination on pages 8 and 9 of the STP. Additionally, Virginia indicates it does not plan to renew the AAL waiver. On page 9, the STP also noted "that services provided in an individual's home (a residence owned or leased by the individual or the individual's family, i.e. not a provider owned or operated setting), comply with the HCBS settings regulations. For this reason, DMAS concludes that personal assistance services (consumer and agency-directed) and private duty nursing service settings fully comply with the settings regulations. This means all settings in which Tech Waiver services and EDCD Waiver Personal Assistance Services comply based on settings where the services occur."

- **ICF/IID LOC Waivers Systemic Assessment (Issue 1):** In prior feedback, CMS noted that the state's policies that correspond with each distinct HCBS authority operating in the state need to comply with the entirety of the federal HCBS rule. In the ICF/IID LOC waivers, there are three sets of state regulations implicated in the systemic assessment process. What was not clear to CMS in the prior version of the STP was whether each of these standards govern separate categories of services under the ICF/IID LOC waivers. If this is the case, then the state was asked to verify how it is addressing gaps or areas where one of these state standards is currently silent with respect to one or more of the federal HCBS requirements.

However, if the three state standards overlap in terms of the settings they provide administrative guidance over, no additional analysis was necessary. CMS requested clarification on whether these standards overlap in coverage/authority across the various waivers in such a way that as long as one of these three standards cover a specific aspect of the federal HCBS rule, all settings falling under ICF/IID LOC waivers will be governed by the requirement.

**State's Response:** Virginia explained in the response document submitted with the STP that regulations are overlapping. Providers are regulated by the Department of Behavioral Health and Developmental Services (DBHDS) through licensing and human rights standards and then layered over those are the waiver-specific regulations promulgated by DMAS. This clarification was also made to CMS on a call on October 17, 2016. The state has also included language in Appendix B.1 indicating that the DMAS waiver regulations and the waiver provider manual will be the vehicles by which the state remediates non-compliance and assures the state's regulations and policies explicitly and sufficiently address the HCBS regulations (page 146).

- **ICF/IID LOC Waivers Systemic Assessment (Issue 2):** The April 2016 STP indicated that regulations for ICF/IID waivers were silent on many elements of home and community-based settings regulations and regulatory updates were currently underway to ensure the regulations are consistent (page 22). Until the current regulations are updated to reflect full adherence with the federal HCBS settings rule, the state has presumed that all providers of ICF/IID LOC waiver services may not be in compliance until the rules and enforcement authority requires compliance. The state's timeline indicated that regulations and provider manuals will be updated by 1/2018 and 6/2018, respectively. CMS requested that the state describe in more detail (with interim milestones) what additional steps it will take to assure that these regulatory, policy and provider manual updates will be accomplished by the anticipated deadlines.

**State's Response:** The state included a chart with interim steps and milestones for the systemic remediation of ICF/IID waivers on page 50 of the revised STP. The chart includes detailed steps the state will take to ensure rules, regulations, and policies fully comply with the federal HCBS regulations. The chart includes steps already taken as well as future steps and milestones.

- **ICF/IID LOC Waivers Systemic Assessment (Issue 3):** CMS thanked the state for its efforts to align its systemic assessment and remediation process in the STP with its ongoing efforts surrounding the state's ICF/IID LOC waiver redesign process in conjunction with its requirements under the 2012 *Olmstead* agreement with the U.S. Department of Justice, and noted the approval of its waiver renewal application. However, CMS had some questions

about the sequencing of ongoing STP implementation as it related to ongoing state transformation activities, specifically:

- In its April 2016 STP, Virginia did not appear to describe a **process for reassessing settings** after the new waiver services are implemented. Instead, Virginia presumed all settings are currently not in compliance with the HCBS regulations and stated, “The services, policies, and expectations currently being integrated into Virginia’s IDD system are aligned with the HCBS regulations and will facilitate and augment compliance of providers and settings.” CMS requested that Virginia include a process for reassessing settings in the STP.
- In examining Virginia’s waiver amendments and considering whether the settings where waiver services are offered will comply with the HCBS rule, CMS focused on three services: Group Day Services, Group Supported Employment, and Group Home Residential. CMS agreed that the new definitions of those services may “facilitate” compliance with the rule, but each of those services also appears to leave room for settings to operate in ways that violate the HCBS rule. Therefore, CMS noted that Virginia should outline in the STP a process for reassessing or validating settings after the new waivers are implemented.

**State’s Response:** The state responded with a detailed description of the assessment/reassessment of applicable waiver settings on pages 41-43 of the November 2016 STP. The state fully described the provider self-assessment process for impacted settings. The state provided a detailed timeline for implementation of the provider self-assessment process, and a validation process for settings identified as compliant, partially compliant, and settings identified as presumed to be institutional. For settings that do not meet the federal HCBS requirements, remediation will be managed individually with an individualized transition plan in coordination with impacted individuals/families, support coordinators and local Community Services Boards.

- **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 in provider-owned and controlled non-residential settings. 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, Virginia included remediation language in the provider manuals indicating that “individuals receiving Medicaid HCBS in non-residential provider owned or controlled settings should have the same experience in those settings as individuals not receiving Medicaid HCBS. Settings must meet all federal HCBS requirements for non-residential settings and settings must optimize an individual’s autonomy and independence in making life choices” (pages 26 and 79). The state also added

regulatory citations to both crosswalks indicating these settings are physically accessible to participants on pages 90 and 151.

- **Use of Restrictive Interventions:** CMS asked the state to ensure that any use of restrictive interventions is documented through the person-centered planning process. This information was asked to be added to the ICF-IID LOC systemic assessment remediation.

**State's Response:** The state indicated in the STP that the following language will be included in the appropriate provider manual: “Any use of restrictive interventions must be documented through the person-centered planning process” (page 26).

- **Remediation of Regulations:** CMS noted that page 28 of the STP indicated that the state is remediating the licensing regulations for the settings in the ICF/IID LOC waivers for compliance with the federal HCBS settings requirements. In Appendix B.1 on page 146, the STP indicated that the state does not intend to remediate areas of silence or general support for the licensing regulations. Instead, the DMAS waiver regulations and the waiver provider manual will be the vehicles by which the state remediates non-compliance and assures the state's regulations and policies explicitly and sufficiently address the HCBS regulations. CMS asked the state to clarify this discrepancy. CMS also asked the state to tweak the remedial regulatory language in order to clarify that all settings must comply with the federal settings requirements.

**State's Response:** The state indicated that they do not intend to amend the DBHDS licensing regulations to ensure compliance with the HCBS settings requirements. The licensing regulations will include a reference to the federal regulations related to the HCBS settings requirements and indicate that providers of services to which these apply must comply with those as well. There will not be specific additions throughout the revised licensing regulations about the specific provisions of the HCBS requirements. These will be handled through the DMAS waiver regulations and policy manual. Virginia clarified this in the STP on page 28. The state also changed the remediation language to the following: “Providers shall comply with requirements for person centered planning and home and community based settings as described in 42 CFR 441.301” (page 134).

## **ATTACHMENT II.**

**CMS FEEDBACK THAT MUST BE ADDRESSED BY THE COMMONWEALTH OF VIRGINIA PRIOR TO RECEIVING FINAL APPROVAL OF ITS HCBS STP (ADDITIONAL PUBLIC COMMENT PERIOD REQUIRED)**

*Please Note: It is anticipated that the state will need to go out for public comment once these changes are made and prior to 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.*

## **SITE-SPECIFIC SETTING ASSESSMENT, VALIDATION & REMEDIATION**

Please provide the following information regarding Virginia's site-specific assessment process.

### **General Feedback on Site-Specific Assessment, Validation & Remediation**

- ***Need for Further Clarification of State's Obligations regarding Setting Assessment and Validation:*** CMS requires states to assure that all HCBS settings are compliant with the federal HCBS settings requirements by assessing and validating the findings at an individual setting level. CMS suggests striking or reframing the language in the box located on page 32 to more clearly clarify how the state will comply with this requirement, including the options the state will use for assessing and validating compliance with the federal HCBS settings rule.
- ***Inclusion of Final Validation Results:*** Please make sure to include all final results of the state's validation activities in the final STP, including a clear summary by setting-type of level of compliance with the various requirements of the federal HCBS rule as determined by the state.

### **NF-LOC Settings Assessment, Validation & Remediation**

- ***ADCCs:*** In the Nursing Facility Level of Care (NF LOC) section, the STP indicates that the majority of Adult Day Care Centers (ADCCs) are fully compliant with the federal HCBS settings requirements (44 out of 46 total settings).
  - The state's assessment of its ADCCs seems to be largely categorical, and its determination that the majority of these settings fully comply with the HCBS requirements was largely informed through informal discussions with ADCC providers, VDSS licensing staff, DMAS Quality Management staff, and the state's ADCC provider trade association. What is not clear is whether each individual ADCC setting was assessed and validated, or whether the state's determination of compliance of the state's standards and practices related to these settings coupled with feedback from these informal stakeholder discussions led to the state making a general determination of compliance for the entire category of ADCC settings. This concern is further perpetuated by the evidence the state submitted for the two ADCCs identified for heightened scrutiny based on their geographic connectivity to an institutional setting. The evidence provided by the state demonstrated many features deemed by CMS to be institutional (limited, structured group schedules; limited food/menu options, posted medicine schedules; etc.). Thus, CMS is concerned that in its informal assessment

activities on ADCCs, the state may have missed critical gaps in compliance with specific requirements of the federal HCBS rule. Please explain in more detail how the state came to the determination that the 44 ADCCs identified as fully compliant meet all the requirements of the HCBS rule.

- The state has raised concerns about the settings rule and its discussion of employment as an aspect of community integration for individuals served in ADCCs. CMS has emphasized that employment services are not required to be provided by a state in every waiver, but that the state needs to remove obstacles or barriers to individual access to competitive integrated employment or other community activities outlined in individual person-centered service plan. Beneficiaries who wish to be supported in pursuing employment must have access to such supports. ADCCs provide a valuable model of social and medical care for individuals receiving services in that setting, and these centers should be determining how to facilitate community integration through a variety of methods, again based on the construct of individuals' person-centered service plans. CMS recognizes that many aging beneficiaries are not interested in seeking employment, and would not expect ADCCs to directly provide employment services, but rather to serve as a conduit to link interested beneficiaries to other sources of employment supports.
- ***Alzheimer's Assisted Living Waiver (AAL):*** CMS acknowledges the state's decision to not renew the AAL waiver once it expires on June 30, 2018. CMS is very concerned, however, about the lack of detailed strategy offered in the STP thus far regarding assuring the existing beneficiaries receiving residential supports under this waiver are provided sufficient alternative options to continue to receive HCBS services.
  - CMS urges Virginia to (a) design a more detailed strategy for exploring new alternatives with the existing beneficiaries who will be affected once the waiver expires in June 2018 so as to assure these beneficiaries continue to have non-institutional LTSS options.

### **ICF/IID Supports Waivers**

CMS has several questions pertaining to the state's proposed assessment and validation activities with respect to settings under the ICF/IID LOC waivers.

- ***Online Provider Self-Assessment Survey Process:*** CMS understands the state's presumption that all settings providing HCBS are not fully compliant until all state standards/policies are aligned by the state to comport with the various federal HCBS requirements. CMS also appreciates the initial analysis of preliminary provider self-assessment results that were received.

- Provider Self-Assessment Participation Rates: CMS notes with some concern the number of providers that did not participate in the online self-assessment activities. The STP states that initially only 244 residential providers and less than half of all non-residential providers in the state completed the provider online self-assessment survey. Apparently, later in the process, an additional 84 residential providers completed the online survey. Please address the following concerns:
  - Please explain how the state will assess any providers that did not respond to the self-assessment survey.
  - Please clarify whether the findings of the additional 84 providers that completed the online survey later were included in the initial results included in the STP.
  - Please clarify that providers are completing self-assessments for every setting they operate as opposed to one overarching survey for all settings in the aggregate.
  - The STP confirmed that the state had initially estimated that at least 109 providers had not completed the online assessment. Please clarify how many providers from each setting category did not complete the assessment, and what percentage of HCBS settings in each category these providers comprise.
  
- Sponsored Residential Services: As noted on pages 38-39 of the STP, the state acknowledges concerns about the lack of responses of providers of sponsored residential services in the online self-assessment process, particularly given a study conducted for the state by the Human Services Research Institute (HSRI) in 2014 that found that only 57% of individuals in sponsored residential service settings are accessing the community through Day Support or Supported Employment services. Given this concern, CMS requests the state provide additional information on what steps it is taking to assure a full assessment and validation of these settings, and any additional targeted training or technical assistance being provided to this segment of Virginia's provider network.
  
- ***Validation of Provider Self-Assessment Results***: In addition to the state's online provider self-assessment process, the state has described a number of activities it is conducting to validate the compliance levels of all HCBS settings. These include a hybrid of onsite visits, beneficiary surveys, desk reviews and incorporation of HCBS check-lists in the state's existing annual licensing reviews and quality monitoring visits. However, it is not entirely clear how the state is utilizing these various methods to assure that every setting is properly validated. Please provide additional clarity as to what percentage of each setting type is receiving each type of validation method.

- Onsite Assessments: The STP confirms the state’s intention to leverage its existing infrastructure to validate the ICF/IID LOC site-specific assessments through existing provider enrollment and licensing processes. However, to date, it appears that the state’s Licensing Specialist staff has conducted 217 site assessments to validate the provider self-assessment findings (page 34).
  - Please explain the evidentiary standards DBHDS Office of Licensing staff used during their onsite assessments to determine compliance beyond the one-page checklist (for example, did they speak to beneficiaries, or review person-centered plans?).
  - Please clarify how many settings will receive an onsite visit from the licensing staff beyond the original 217 visits that have already been conducted.
  - The STP indicates it will determine a methodology for identifying a statistically significant sample to validate the settings compliance review between 10/2016 and 6/2017, but it is unclear how this approach will fit in with the assessments the state has completed to date (page 44). Please provide additional details about the state’s approach, and explain how this process aligns with the onsite visits completed by the licensing staff.
  
- Consumer/Beneficiary Input: The STP mentions that consumer feedback will also be incorporated into the validation of settings, but it is unclear how this will be implemented by the state. Please provide the following additional information:
  - Will consumer/beneficiary feedback be a component of all HCBS settings review irrespective of validation technique applied (in other words, will settings that receive a desk review as opposed to an onsite visit also have consumer feedback completed)? If not, in what instances will consumer/beneficiary feedback be collected (i.e., what percentage of settings)?
  - How will the state collect consumer feedback? Will the state engage the support of advocates or other state partners to help collect consumer feedback (i.e., DD Council, self-advocacy groups, protection and advocacy units, university partners)?
  - How many individuals will be interviewed per setting? Will all HCBS beneficiaries have the opportunity to participate? If only a subset of beneficiaries are allowed to provide feedback, how will these individuals be selected and what percentage will the sample comprise across each setting?
  - How will the state take steps to assure confidentiality of individuals’ responses and how will the state ensure that the individual is completing the survey outside of the presence of staff impacted by the results?

- Desk Reviews: Please provide additional details regarding what type of information or documentation will be used by state personnel to conduct a desk review of a setting to validate compliance levels with the federal HCBS rule.

### **Other Areas of Concern**

- ***Training of Personnel Involved in Assessment & Validation Processes***: The STP provides some limited information on the training that will be provided to personnel who will be responsible for conducting one or more facets of the state’s setting assessment and validation processes. However, please provide more detail on how the state is assured that personnel possess the knowledge, skills and abilities to successfully complete these activities.
- ***Participant Choice of Setting & Non-Disability Specific Settings***: The preliminary assessment results refer to individuals having a choice of setting. In Appendix A1, citing the federal regulation, the STP indicates that the “state will provide services in same quality and manner as the general public.” CMS requests that the state clarify whether this means the services are integrated into the community and that individuals will have access to non-disability specific housing, employment and other services, etc. The STP does not indicate any steps the state is taking to assure that all beneficiaries have access to non-disability specific setting options across all home and community-based services. Please include this information in the STP.
- ***Individual, privately-owned homes***: The state may make the presumption that individual, privately-owned or rented homes and apartments of HCBS beneficiaries living alone or with family members, friends, or roommates meet the home and community-based 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. However, as with all settings, if the setting in question meets any of the scenarios in which there is a presumption of being institutional or isolating in nature and the state determines that presumption is overcome, the state should submit 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 that concentrates HCBS provision onsite).<sup>1</sup> The state must also address how it tracks these settings through its ongoing

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<sup>1</sup> Settings that commonly exhibit characteristics of isolating HCBS beneficiaries and thus fall under the third prong of criteria that would flag the CMS heightened scrutiny review process were outlined in the sub-regulatory guidance issued by CMS in 2015 entitled, “[Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community](#)”. The guidance contained a non-exhaustive list of settings that would likely

monitoring process to ensure they remain compliant through the transition period and into the future.

- Also note, settings where the beneficiary lives in a private residence owned by an unrelated caregiver (who is paid for providing HCBS to the individual), are considered provider-owned or controlled settings and should be evaluated as such.
- **Group Settings:** As a reminder, all settings that group or cluster individuals for the purposes of receiving HCBS must be assessed by the state for compliance with the rule. This includes all group residential and non-residential settings, including but not limited to prevocational services, group supported employment and group day habilitation activities. CMS requests the state confirm that all of these settings are being included in the state’s assessment and remediation strategies.
- **Reverse Integration Strategies:** Given that one of the most challenging compliance areas identified among the providers that completed the online provider self-assessment survey was assuring individual beneficiaries had access to the broader community, please provide more detail in the STP on what steps the state is taking to assure that settings follow-through in enhancing their approach to service delivery to assure a level of optimal integration for beneficiaries on par with individuals not receiving HCBS. As such, CMS requests additional detail from the state as to how it will assure that non-residential settings comply with the requirements of the HCBS rule, particularly around integration of HCBS beneficiaries to the broader community. As CMS has previously noted, states cannot comply with the rule simply by bringing individuals without disabilities from the community into a setting. Compliance requires a plan to integrate beneficiaries into the broader community. Reverse integration, or a model of intentionally inviting individuals not receiving HCBS into a facility-based setting to participate in activities with HCBS beneficiaries in the facility-based setting is not considered by CMS by itself to be a sufficient strategy for complying with the community integration requirements outlined in the HCBS settings rule. Under the rule, with respect to non-residential settings providing day activities, the setting should ensure that individuals have the opportunity to interact with the broader community of non-HCBS recipients and provide opportunities to participate in activities that are not solely designed for people with disabilities or HCBS beneficiaries that are aging but rather for the broader community. Settings cannot comply with the community integration requirements of the rule simply by only hiring, recruiting, or inviting individuals who are not HCBS recipients into the setting to participate in activities that a non-HCBS individual would normally take part of in a typical community setting. CMS wishes to emphasize that

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fall into the third prong under HS, including residential schools; gated/secured “communities” for people with disabilities; farmsteads or disability-specific farms; and multiple settings co-located and operationally related.

reverse integration in and of itself is not a sufficient strategy for settings to meet the integration requirements laid out in the HCBS settings rule, and encourages Virginia to provide sufficient detail as to how it will assure non-residential settings implement adequate strategies for adhering to these requirements.

### **SITE-SPECIFIC REMEDIAL ACTIONS**

Please provide clarification in the STP for the following items related to the site-specific remedial actions for providers found to be non-compliant with the federal regulation.

- ***Remediating Compliance Issues Identified through Onsite Visits:*** Please explain how the state is planning to correct any deficiencies found via the licensing onsite visits or other validation activities.
  - Please confirm whether providers who are in partial compliance or non-compliance will be required to develop a remediation or corrective action plan as part of their interactions with the state's Provider Development staff.
  - Also clarify how the state will monitor progress of the providers in completing specific remediation activities prior to the end of the transition period.
  
- ***Additional Provider Education & Training on the Federal HCBS Settings Requirements:***
  - CMS is concerned by the high percentage of providers that claimed full compliance with the rule as part of the online self-assessment process (as laid out in Table 2.1 on page 35), and believes this could be a consequence of providers not fully understanding the intent or requirements of the federal HCBS rule (as also noted by the state in the STP). Please provide additional details on any other steps the state is taking to disseminate information to and educate all providers of their responsibilities under the rule. Additionally, as providers gain a better understanding of the requirements of the HCBS rule, please indicate if there will be an opportunity for providers to modify their existing remediation plans as needed to assure full compliance with the rule by March 2019.
  - The state has identified ICF-IID LOC settings that may benefit from this targeted technical assistance (page 37) by working with its Provider Development team and the DMAS Quality Management Review (QMR) staff. The identification of these settings is based on their size and/or proximity to other settings serving individuals with disabilities. It appears the majority of TA will only be provided on a quarterly basis, and CMS is concerned that this may not be sufficient in increasing the providers' understanding of the rule. Please provide further details about the ongoing technical assistance the state is planning to make available to providers in helping them become compliant with the federal HCBS settings rule.

- ***Remediation or Corrective Action Plans:*** Please discuss the state’s plans for entering into remediation or corrective action plans with these settings based on the results from the onsite visit. Please describe this process and how it aligns with any corrective action items found by the Provider Development team and QMR staff.
- ***System-Wide Setting Remediation Strategies:*** During its initial onsite assessments of 217 settings, the state identified trends in areas of noncompliance, suggesting a set of system-wide compliance challenges. Please discuss what additional strategies the state is implementing as part of its site-specific remediation strategy to focus on these particular areas of noncompliance.
- ***Timing of Setting Remediation Efforts:*** Given the large number of providers that did not participate in the online self-assessment process and have not received any assessment or validation work from the state as of yet, CMS is concerned about the state’s ability to assure full compliance of all HCBS settings by the March 2019 deadline. Please provide additional details about how the state will leverage its resources, external partnerships, and provider TA to accelerate remediation efforts.

### **MONITORING TO ASSURE ONGOING SETTING COMPLIANCE**

Additional information about how the state will monitor settings on an ongoing basis is needed. Please incorporate the following information in the STP.

- ***Frequency of Monitoring Activities:*** Indicate the frequency of monitoring activities described as “ongoing” in the STP so that the state, CMS and the public can track progress toward full compliance. For example, please list how often the DSS Licensing Reviews and QMR Management Reviews will occur for each setting on page 18.
- ***Incorporation of HCBS Requirements into Existing Monitoring Tools:*** On page 19, please provide additional details on how the existing monitoring tools and processes will be updated to encompass all of the new federal HCBS setting requirements and how staff will be trained on the new process.

### **HEIGHTENED SCRUTINY**

CMS appreciates the state’s timely submission of evidence for heightened scrutiny of two adult day health centers, and will follow up with a separate communication to the state regarding its determination of whether the evidence packages submitted by the state support the settings as overcoming the institutional presumption and being compliant with the federal HCBS rule.

In the meantime, CMS requests the state please provide the following additional information about the state’s heightened scrutiny process within the STP:

- ***Identification of Settings Presumed Institutional:***
  - Specify the state’s criteria for identifying settings that have the effect of isolating individuals (i.e., the third prong for heightened scrutiny).
  - Provide details regarding how the state will review a setting that falls under one or more of the three prongs to determine whether the setting has the characteristics of a home and community-based setting, has overcome any institutional characteristics, and thus should be moved forward for CMS review under heightened scrutiny (including the steps the state is going to take to develop a robust evidentiary package on each setting).
  - Identify which of the three prongs of settings presumed to be institutional each specific setting flagged for heightened scrutiny falls into (i.e., settings located in a building that is also a publicly or privately operated facility providing inpatient institutional treatment; settings located in a building on the grounds of, or immediately adjacent to, a public institution; and settings that have the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS).
  
- ***State’s Internal Approach to HS:***
  - Clarify whether the state will use public comments and other stakeholder input to help determine if a setting has the qualities of an institution.
  - Confirm that the state will enter into a remediation plan with those settings it believes can overcome the institutional presumption and fully comport with the federal HCBS settings rule, and document these plans of action prior to submitting the evidence package to CMS for review.
  - Provide an explanation of the training that state employees or personnel within the state’s existing systemic infrastructure and assigned to completing the onsite assessments of settings under each of the three prongs will receive so they are adequately prepared to determine whether each setting flagged for potential heightened scrutiny overcomes the institutional presumption. The state must ensure that the onsite assessment process is implemented in a consistent manner across the state with accurate results that reflect each setting’s particular features.
  - Include a timeline of milestones and specific dates for implementing a plan for completing the heightened scrutiny process by the state. Please note that CMS suggests the state introduce a staggered application process to CMS that includes presenting settings for heightened scrutiny bundled on a quarterly basis.

Without these details included in the STP to garner a clearer understanding of the process the state is using to approach heightened scrutiny, it will be difficult for CMS to approve settings submitted for HS review. If the state would like additional guidance on heightened scrutiny,

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

### **COMMUNICATION WITH BENEFICIARIES WHO ARE RECEIVING SERVICES IN NON-COMPLIANT SETTINGS**

- The STP details a process and timeline for communicating and providing assistance to individuals impacted by the discontinuation of the AAL waiver, and identifies that 39-49 individuals may be impacted. However, as previously mentioned, CMS is concerned by the delayed timing of communicating the state's decision to not renew the AAL waiver to beneficiaries/families and new providers, as well as the lack of detail regarding how the state plans to support beneficiaries and families in exploring alternative options for continuing to receive HCBS.
- Under the ICF/IID section, the state has not yet identified any situations where individuals are living or receiving services in non-compliant settings, but indicates that a transition plan will ensure a smooth transition to a compliant setting. CMS requests that a more detailed explanation of interim steps/milestones be added to this transition process that is expected to be occurring between 6/1/2017-3/1/2019. Please ensure the following items are addressed in both the NF LOC and ICF/IID LOC sections the STP:
  - For those settings that are not able to be brought into compliance, outline a detailed process with timelines to describe how the state will communicate with and provide assistance to beneficiaries impacted by a setting's inability to provide HCBS in the future.
  - A description of how the state's plan is individualized and includes strategies for informing and engaging consumers, advocates and other stakeholders.
  - 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.
  - Report the estimated number of beneficiaries that may need to locate and transition to compliant settings in a future revised STP.
  - 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 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.

