

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

October 26, 2016

Cynthia Beane
Acting Commissioner
Bureau for Medical Services
350 Capitol Street, Room 251
Charleston, WV 25301

Dear Ms. Beane:

I am writing to inform you that CMS is granting the state of West 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 completed its systemic assessment, included the outcomes of this assessment in the STP, and clearly outlined remediation strategies to rectify issues that the systemic assessment uncovered, such as legislative changes and changes to contracts, and is actively working on those remediation strategies. Additionally, the state submitted the September 2016 draft 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 2016 draft submitted by the state, CMS provided additional feedback on September 27th and October 4th, requesting that the state make several technical corrections. These changes did not necessitate another public comment period. The state addressed all issues, and resubmitted the STP on October 25, 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 non-compliant with the federal HCBS settings rule, the state will be required to remediate the areas of non-compliance.

In order to receive final approval of West Virginia's STP, the state will need to submit an updated STP based on the following actions:

- Complete a thorough, comprehensive site-specific assessment of all HCBS settings, implement necessary strategies for validating the assessment results, and include the outcomes of this assessment 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 uncovered by the end of the HCBS 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 HCBS 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 West Virginia has made much progress toward completing each of these remaining components, Attachment II to this letter outlines additional changes that must be resolved before the state can receive final approval of its STP. Upon review of this detailed feedback, CMS requests that the state please contact Patricia Helphenstine at 410-786-5900 or Patricia.Helphenstine1@cms.hhs.gov or Michelle Beasley at 312-353-3746 or Michelle.Beasley@cms.hhs.gov at your earliest convenience to confirm the date that West Virginia plans to resubmit an updated STP for CMS review and consideration of final approval.

It is important to note that CMS' initial or final approval of a STP solely addresses the state's compliance with the applicable Medicaid authorities. CMS' approval does not address the state's independent and separate obligations under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act or the Supreme Court's Olmstead decision. Guidance from the Department of Justice concerning compliance with the Americans with Disabilities Act and the *Olmstead* decision is available at http://www.ada.gov/olmstead/q&a_olmstead.htm.

I want to personally thank the state for its efforts thus far on the HCBS statewide transition plan. CMS appreciates the state's completion of the systemic review and corresponding remediation plan with fidelity, and looks forward to the next iteration of the STP that addresses the remaining technical feedback provided in the attachment.

Sincerely,

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

ATTACHMENT I.

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF WEST VIRGINIA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 10-25-16

- **Settings:** CMS requested that West Virginia provide a list of all settings where home and community-based services (HCBS) are provided.

State's Response: The state provided a revised STP with an accurate list of all settings across HCBS funding authorities.

- **Identification of Compliance for State Standards:** CMS requested that West Virginia review the crosswalk to assure that all relevant state standards are clearly and accurately labeled in terms of compliance status with the federal HCBS settings rule (i.e., fully comply, do not comply, or silent).

State's Response: The state has provided a revised STP that labels each state standard as fully compliant, non-compliant, or silent with respect to each federal requirement.

- **Additional Details Regarding State's Systemic Remediation:** CMS requested that West Virginia provide more detail to the descriptions of the changes to be made to its state standards to bring them into full compliance with the federal requirements in the STP. In instances when the reported regulations and policies are non-compliant, partially compliant, or silent with regard to the federal HCBS requirements, the assessment table did not describe how the current language will be remediated in the new regulations and policies to address the requirement. CMS asked the state to include proposed draft language in Appendix B for each instance of non-compliance or, silence with the federal requirements. The STP and Appendix B should also contain the dates by which all of the regulations are expected to be issued and the policies revised and these dates should not exceed March 2019. CMS also asked the state to ensure Appendix B includes all of the remediation strategies discussed throughout the narrative of the STP and Appendix A.

State's Response: In response to CMS' request, West Virginia added the language to Appendix B that the state expects to use for modifying existing state standards for compliance with the federal requirements throughout the systemic assessment. Additionally, the state has indicated they will modify state code to indicate that settings options are discussed and included in the person-centered plan used by the licensed Behavioral Health Centers. The state has also provided the dates by which all of the regulations are expected to be issued and the policies revised.

- **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.

State's Response: In response to CMS' request, West Virginia added language to the remediation of the appropriate state standards indicating that individuals should experience all provider owned and controlled settings in the same manner as individuals in provider-owned and controlled settings who do not receive Medicaid HCBS.

- **Provider Owned and Controlled Residential Settings:** CMS asked the state to include 42 CFR 441.301(c)(4)(vi)(F) in the systemic assessment crosswalk (Appendix B), which pertains to the process that must be followed in order to modify any of the conditions under the settings rule for an individual in a provider owned and controlled residential settings. CMS also asked the state to ensure that the state's remediation language regarding lockable doors also indicates that only appropriate staff will have access to keys, that the leases provide protections comparable to those provided under the jurisdiction's tenant law and that all settings are physically accessible to participants.

State's Response: The state included 42 CFR 441.301(c)(4)(vi)(F) in the systemic assessment, and indicated the policy documents they will edit to remediate this issue. The state also included remediation language indicating that only appropriate staff will have access to keys for lockable doors, that leases must provide protections comparable to those provided under the jurisdiction's tenant law, and that settings are physically accessible.

- **Institutional Settings:** CMS asked the state to include remediation language indicating that home and community-based services cannot be provided in institutional settings or settings with institutional qualities, including nursing facilities, institutions for mental diseases, intermediate care facilities for individuals with intellectual disabilities, or hospitals.

State's Response: The state indicated in Appendix B they will include this language in each waiver's policy manual.

- **Respite:** CMS asked the state to indicate in the STP that the Respite (Agency Service) is time-limited in nature and does not exceed 30 days.

State's Response: The state included this information in the STP.

- **Citations:** CMS asked the state to ensure that Appendix B contains citations for each instance where the state references a state standard.

State's Response: The state has provided citations throughout Appendix B.

ATTACHMENT II.

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

PLEASE NOTE: It is anticipated that the state will need to go out for public comment again 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.

Public/Stakeholder Input

Please address the following concerns regarding the state’s public/stakeholder input and engagement process in the STP.

- CMS requests that the state make sure to update its section re: public/stakeholder input and engagement to confirm recent activities that have been completed and assure consistency in the information provided throughout the section. For example, on page 5, the STP includes, “a public forum for the first version” in the list of three main channels used to solicit public/stakeholder input, but then on page 6 describes two distinct public forums that were held to inform each version of the STP. Also on page 5, the state discusses conducting a second 30-day public comment period from June 13-July 13, 2016, but that has already been completed.
- On page 5, the STP states, “CMS required only two forms of public comment, the Bureau for Medical Services (BMS) utilized four forms of public comment for each version.” Please clarify the four forms of public comment the state allowed for within this section of the STP.

Site-Specific Assessments

Please address the following concerns regarding the state’s site-specific assessment process within the STP.

- ***Settings Presumed by West Virginia to be Fully Compliant with Federal HCBS Rule:*** Please clearly articulate whether there are any categories of settings that the state is presuming automatically comply with the rule.
 - **Settings in the ADW & TBIW Waivers:** On page 3, the STP states “The ADW and TBIW do not offer services at licensed sites. All services are in the home or in the community.” Then on page 10, the state indicates that services offered in both the Aged and Disabled Waiver Program (ADW) and the Traumatic Brain Injury Waiver Program (TBIW) are offered only in non-institutional settings compliant with the regulation.
 - **Individual, Privately-Owned Homes:** The state may make the presumption that privately owned or rented homes and apartments of people living with family

members, friends, or roommates meet the home and community-based settings requirements if they are integrated in typical community neighborhoods where people who do not receive home and community-based services also reside. A state will generally not be required to verify this presumption. However, please outline what the state will do to monitor compliance of this category of settings with the federal home and community-based settings requirements over time. Also, as with all settings, if the setting in question meets any of the scenarios in which there is a presumption of being institutional in nature and the state determines that presumption is overcome, the state should submit to CMS necessary information for CMS to conduct a heightened scrutiny review to determine if the setting overcomes that presumption. In the context of private residences, this is most likely to involve a determination of whether a setting is isolating to individuals receiving home and community-based services (for example, a setting purchased by a group of families solely for their family members with disabilities using home and community-based services).

- Family Person-Centered Support and Participant Directed Goods and Services: The STP verifies that these are not included among the list of I/DD waiver services because these “do not take place in settings that are owned or leased by the provider.” Please confirm whether or not all family person-centered support and participant directed goods and services are being provided in the individual’s private home.
- Supported Employment: On page 11, the STP includes the definition of supported employment services. Please confirm the assumption that, based on the definition provided, all supported employment services available through the state’s HCBS waiver authorities are offered on an individualized basis, and that no group supported employment services are provided by the state under any HCBS waiver authority.
- ***Individuals and Family Members Survey:*** As part of its initial assessment activities, the state implemented a provider self-assessment process with a corresponding survey of waiver recipients and family members. CMS requests the state include the following additional information with respect to the corresponding participant survey:
 - Please clarify whether or not all HCBS participants were given the opportunity to complete the survey. If they were, please confirm the survey participation rate across setting categories, as well as additional details for how the state assured optimal participation. If not all participants were asked to complete the initial survey, please provide additional details regarding the percentage of participants surveyed in each setting and across setting categories, and how the participants were selected to take the survey.

- **Validation Process:** The state has indicated that site visits will be conducted for all settings labeled as Priority I, as well as all facility-based day habilitation, supported employment and residential settings housing 4 or more individuals. Site visits will be conducted for 50% of all 1-3 bed settings and the state will assure that all providers have at least one setting reviewed. Please address the following concerns in the STP:
 - Please explain how the state will validate those settings that do not receive an onsite visit. The state must ensure that all settings will have their self-assessment results validated in some manner before the end of the transition period.
 - Please describe the training staff will receive on the federal settings requirements prior to completing the site visits.
 - Please provide further clarification on the process for determining the Priority I and Priority II site visits as requested below.
 - The criteria for determining which sites are categorized as Priority I and Priority II on pages 125 and 126 appear to be different. Please ensure that the criteria is consistent throughout the STP.
 - The state should provide further detail on the key indicator factor, “Provider responses that self-identify gross non-compliance among the five requirements of 42 CFR 441.301(c)(4)(i-v)/441.710(a)(1)(i-v)/441.530(a)(1)(i-v)” (pg. 125). Please define what the state means by term “gross non-compliance” and the threshold used to determine if a setting meets the definition.
 - The state should clarify the process described in Appendix N for selecting Priority II settings to be visited and ensure that the process shown in Exhibit 2 (pg. 16) is consistent with the information in Appendix N.
 - On pages 14-15, the state provides a summary section specific to Intellectual Developmental Disability Waiver (IDDW) settings that describes the process for site visits and remediation. The state should confirm that the settings discussed in this section will follow the same site-specific review and validation process as all other settings, or describe any differences.
 - The state provides conflicting dates for when site visits will be completed throughout the STP. The state should ensure the dates for completing Priority I and Priority II site visits are consistent throughout the STP. The various dates include:
 - On page 12, the state says, “As surveys were completed, BMS reviewed the submitted information and conducted/will conduct initial on-site assessments/visits for all sites or settings. The anticipated timeframe for site visits is 10/1/2015 to 1/31/2017.”
 - On page 16, in the “West Virginia HCBS Provider Assessment Flow Chart,” the state says that both Priority I and Priority II site visits were completed on 6/1/2016.

- On page 101, the state included in its remedial actions milestone table, “Conduct site visits and implement remedial actions” with a completion date of 10/1/2016.
 - On pages 126-127, the state says that it will complete all Priority I site visits by 12/15/2016 and that all Priority II site visits were completed on 5/15/2016.
- Please provide your best estimate of the number of settings that fully comply with the federal requirements; do not yet comply with the federal requirements and will require modifications; and cannot meet the federal requirements and require removal from the program and/or communication with individuals. CMS understands that this number may change once the setting assessments have been completed.
- **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: CMS requests additional detail from the state as to how it will assure that non-residential settings comply with the various 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. CMS encourages West 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 address the following issues regarding the state's site-specific remedial actions in the STP:

- ***Timeline:*** Please provide a more specific timeline for each specific remedial action. For example, explain how long after the initial site visits providers will receive the Setting Assessment Visit and Evaluation Report from the state. Please also confirm when settings are expected to submit the Plan of Compliance and at what point the state will complete the Return Setting Visits.
 - For example, page 128 indicates that providers have 30 days upon receipt of the Setting Assessment Visit and Evaluation Report from BMS to submit a Plan of Compliance. However, the STP also states that IDWW agencies have two weeks to submit a Plan of Compliance on page 15. The state should clarify the amount of time providers have to submit a Plan of Compliance.
- ***Plan of Compliance:*** CMS requests clarification on the following details regarding follow up visits to settings whose Plans of Compliance are approved by the state (pg. 127):
 - The state should align the annual review criteria in the Plan of Compliance section in Appendix N (pg. 127) and Exhibit 2 (pg. 16). In Exhibit 2, the STP states that 100% of Priority I providers will receive an annual follow up visit and only 30% of the Priority II providers will receive an annual follow up visit. Appendix N indicates that annual reviews will be conducted for all Priority I settings and Priority II settings will be reviewed annually as well, with settings not visited the previous year as the first to be reviewed, as this will assure that each setting has an on-site review every other year at a minimum. Please clarify which criteria is correct in the STP.
 - The state should clarify whether the annual reviews are separate from the follow up visits/return setting visits and whether all Priority I and II sites with approved Plans of Compliance will receive a follow up visit to come into compliance prior to March 2019 (pages 127-129).
- ***Non-Disability Specific Setting Capacity:*** The STP does not sufficiently address the federal requirement that each individual has a choice of and access to a non-disability specific setting. Please provide more specific details demonstrating how the state assures beneficiary access to non-disability specific settings in the provision of residential and non-residential services. This could include investments the state is making to create or expand non-disability specific settings, and/or to help develop the competencies of existing providers to offer services in non-disability specific settings.

- **Milestones:** Please include a timeline and milestones for when the state plans to start and finish the follow up site visits to ensure that settings are brought into compliance prior to March 2019. Please note that the state should also include separate milestones for any remedial actions separate from the site-specific assessment milestones.

Monitoring of Settings

Please include the following information about the state's plan for the ongoing monitoring of settings in the STP.

- The STP indicates that the West Virginia Office of Health Facility Licensure and Certification conducts provider reviews, including site visits for all licensed sites (pg. 130). These occur every 2 years and may occur more frequently if problems are found resulting in settings having a license for shorter than 2 years. Please provide additional details on how the existing licensing process will be revised to incorporate the federal settings requirements and how staff will be trained on the new requirements.
- Please explain how the state will assure the ongoing compliance of unlicensed settings.
- The state references Attachment 6, the Administrative Services Organization (ASO) monitoring tool, on pages 14 and 130 of the STP, but Attachment 6 is not included in the STP. Please provide.
- Please explain how the licensing reviews will work in conjunction with the reviews completed by the ASO. For example, please clarify whether certain setting categories are monitored on an ongoing basis through licensing while others are not.
- Please provide a timeframe for each specific monitoring step listed.
- Include additional information on how the state will share its plans for the monitoring of ongoing compliance of settings with beneficiaries, external stakeholders and the public.
- For all monitoring plans, describe the ongoing monitoring processes that will occur beyond March 2019.

Heightened Scrutiny

The state must clearly lay out its process for identifying settings that are presumed to have the qualities of an institution. These settings should be submitted through the heightened scrutiny process if the state determines that these settings do have qualities that are home and community-based in nature and do not have the qualities of an institution. If the state determines it will not submit information, the presumption will stand and the state must describe the process for informing and transitioning the individuals living in or receiving services in these settings.

These settings include the following:

- Settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;
- Settings in a building on the grounds of, or immediately adjacent to, a public institution;
- Any other setting that has the effect of isolating individuals receiving Medicaid home and community-based services from the broader community of individuals not receiving Medicaid home and community-based services.

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

- ***State Process for Heightened Scrutiny:*** Please provide a timeline of milestones and specific dates for completing the heightened scrutiny process by the state. Please note that CMS suggests the state utilize a staggered process for submitting settings to CMS for heightened scrutiny. For example, the state can choose to present settings for heightened scrutiny bundled on a quarterly basis.
- It is unclear if the state has identified any settings with the effect of isolating individuals. Provide the methodology for identifying such settings and the results from this review. As a reminder to the state, CMS' *Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community* states that the following two characteristics alone might have the effect of isolating individuals:
 - The setting is designed specifically for people with disabilities, or for people with a certain type of disability.
 - Individuals in the setting are primarily or exclusively people with disabilities and the on-site staff that provides services to them.

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

Caution regarding Submitting Non-Compliant Settings Under Heightened Scrutiny: On page 132, under the *Heightened Scrutiny* section of the STP, the state notes, “*There may be times that a provider cannot comply or refuses to come into compliance with the Home and Community Based Services Rule. In these cases, BMS will identify this setting as ‘Presumptively Non-HCBS Setting’ and will submit evidence to CMS of provider non-compliance to CMS. This will include state as well as other stakeholders’ evidence.*” CMS reminds the state that only settings the state believes successfully meet all of the requirements of the federal HCBS rule and have overcome

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

any institutional qualities or characteristics should be submitted under heightened scrutiny. Any setting that falls under one of the three prongs identified for heightened scrutiny that do not comply with various requirements of the HCBS rule should not be moved forward under heightened scrutiny unless or until all of these issues are addressed.

Communication with Beneficiaries of Options when a Provider will not be Compliant

CMS requests that the state include additional information in the STP about the information and assistance provided to beneficiaries to locate and transition to compliant settings.

- The STP includes a description of the plan that individual providers will follow to transition participants, but it does not include a timeline for when the state will notify beneficiaries and begin this process to ensure transition of all members by March 2019. The state should provide a timeline for when it will begin the process to ensure that all beneficiaries are in compliant settings or receiving services funded by non-HCBS authorities by March 2019.
- Provide more detail about the steps the state will take to communicate with beneficiaries, and who will be responsible for executing each step of this process.
- Describe how the state will ensure that all critical services and supports are in place in advance of each individual's transition.
- Report the estimated number of beneficiaries that may need to be transitioned in a future revised STP, and update and tailor the state's plan and timeline accordingly.

Milestones

CMS requests that the state resubmit an updated milestone chart reflecting anticipated milestones for completing systemic remediation, site-specific assessment and remediation, heightened scrutiny, communication with beneficiaries, and ongoing monitoring of compliance. The milestone chart should be modeled on the most recent template supplied by CMS and also include timelines that address the feedback provided.