

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-14-26
Baltimore, Maryland 21244-1850



Medicaid Benefits and Health Programs Group

September 28, 2023

Lisa Lee, Commissioner
Department for Medicaid Services
Kentucky Cabinet for Health and Family Services
275 East Main Street, 6 West A
Frankfort, KY 40621

Dear Commissioner Lee:

This letter and accompanying attachment represent the Centers for Medicare & Medicaid Services (CMS) approved corrective action plan (CAP) for the State of Kentucky to bring settings into compliance with the federal home and community-based services (HCBS) regulations found at 42 CFR §441.301(c)(4)-(5). The CAP is effective March 17, 2023.

The CAP provides the state with additional time to bring settings into compliance with the regulatory criteria directly impacted by the COVID-19 public health emergency. For remaining HCBS settings regulations not subject to the CAP, the state and all settings are expected to be fully compliant by the end of the transition period on March 17, 2023.

The state will report to CMS on progress with activities, milestones, and timeframes outlined in the attachment. Full compliance is achieved when all Medicaid-funded HCBS is rendered in a compliant setting. Closure of the CAP will be granted after the state completes the activities described in the attachment, at which point the state will be in full compliance with all HCBS settings provisions of the regulation.

It is important to note that CMS approval of a CAP 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 v. LC* 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.

Thank you for your efforts in establishing a CAP and completing this work to ensure all settings are in compliance with the federal HCBS regulations. If you have questions or need further assistance, please contact Ondrea Richardson at ondrea.richardson@cms.hhs.gov or 410-786-4606.

Sincerely,

Ryan Shannahan, Deputy Director
Division of Long-Term Services and Supports

Attachment

cc: George Failla, Director, Division of HCBS Operations and Oversight, CMCS, CMS

MEDICAID HOME AND COMMUNITY-BASED SERVICES SETTINGS REGULATIONS
CORRECTIVE ACTION PLAN FOR THE STATE OF KENTUCKY

Medicaid authorities subject to the CAP

1915(c) HCBS Waivers:

- Home and Community-Based, KY.0144; and
- Supports for Community Living, KY.0314.

Regulatory criteria subject to the CAP

All settings:

- The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS at 42 CFR §441.301(c)(4)(i) (entire criterion except for “control personal resources”),
- The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual’s needs, preferences, and for residential settings, resources available for room and board at 42 CFR §441.301(c)(4)(ii),
- Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact at 42 CFR §441.301(c)(4)(iv), and
- Facilitates individual choice regarding services and supports, and who provides them at 42 CFR §441.301(c)(4)(v).

Provider-owned or controlled residential settings:

- Individuals sharing units have a choice of roommate in that setting at 42 CFR §441.301(c)(4)(vi)(B)(2), and
- Individuals have the freedom and support to control their own schedules and activities at 42 CFR §441.301(c)(4)(vi)(C) (entire criterion except for “have access to food at any time”).

State milestones and timeframes under the CAP

Milestone	Begin Date	Completion Date
Policy Guidance Activities		
Update policy guidance to reflect all requirements listed in the HCBS settings final rule for congregate settings under the Home and Community Based waiver.	March 18, 2023	December 31, 2023
Heightened Scrutiny Activities		
Complete submission of information to CMS regarding the list of 22 settings that the state determined to be isolating initially submitted to CMS for heightened scrutiny review in 2017 and cited in the June 5, 2019 communication from CMS.	June 5, 2019	October 15, 2023
As applicable, post any of the 22 settings previously determined to be presumptively institutional that meet the CMS criteria for isolation for public comment.	December 1, 2023	December 31, 2023
As applicable, for any of the 22 presumptively institutional settings that require heightened scrutiny review, submit the list of settings identified by settings type and category of institutional presumption to CMS.	February 1, 2024	February 29, 2024
As applicable, for any of the 22 presumptively institutional settings that require heightened scrutiny review, submit information to CMS on presumptively institutional settings selected by CMS for a sampled heightened scrutiny review.	Date CMS pulls the appropriate list of settings and sends the list of settings to the state	Within 30 days of receipt of the listing from CMS
As applicable, for any of the 22 presumptively institutional settings that require heightened scrutiny review, address heightened scrutiny findings related to CMS’ heightened scrutiny review including, as applicable, remediation of all similarly situated settings that utilize a similar service delivery model and, as applicable, any overall assessment processes of all providers of HCBS in the state to ensure that all providers are being assessed appropriately against the regulatory settings criteria.	Date CMS issues findings to the state	3 months post the date CMS issues heightened scrutiny findings to the state.

Milestone	Begin Date	Completion Date
Statewide Compliance		
Final compliance statewide with HCBS settings rule.	—	The later of December 31, 2023 or, as applicable, 3 months post the date CMS issues heightened scrutiny findings to the state.