

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



## Medicaid Benefits & Health Programs Group

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October 25, 2023

Emily Zalkovsky  
Chief Medicaid and CHIP Services Officer  
P.O. Box 13247  
4601 W. Guadalupe St.  
Austin, TX 78711-3247

**RE: Heightened Scrutiny Review of:**  
29 Acres, Denton County, TX

Dear Director Zalkovsky:

This letter is in reference to the setting submitted to the Centers for Medicare & Medicaid Services (CMS) for a heightened scrutiny review, in accordance with the federal home and community-based services (HCBS) regulations found at 42 CFR Section 441.301(c)(4)(5). Texas submitted an intentional community presumed to have the qualities of an institution. An evidentiary package was submitted by the state of Texas to CMS for heightened scrutiny review on August 1, 2023. The CMS February 2023 site visit findings for this setting were also considered in the review.

CMS provided feedback on 29 Acres in the site visit report issued to the state in April 2023, to which the state provided responses on August 1, 2023. CMS sent additional feedback to the state in October 2023, to which the state responded. Based on the site visit report response, the initial submission and additional information submitted by the state for heightened scrutiny review, CMS agrees with the state's determination that this setting overcomes the institutional presumption and meets the HCBS settings criteria. In the pages that follow, the initial CMS feedback to the state is provided as well as the state's responses and CMS reaction to those responses.

CMS appreciates the effort of the state to provide a comprehensive evidentiary package regarding the setting's characteristics. CMS' understanding is that the state plans to allow for the delivery of HCBS in additional settings at 29 Acres; the state should apply this feedback to those additional settings prior to their providing Medicaid HCBS to ensure compliance with the settings criteria across the community.

Upon review of this feedback, please contact Michele MacKenzie at (410) 786-5929 or [michele.mackenzie@cms.hhs.gov](mailto:michele.mackenzie@cms.hhs.gov) if you would like to schedule a follow-up conference call with the CMS team to discuss next steps or request technical assistance.

Thank you for your continued commitment to the state of Texas' successful delivery of Medicaid-funded home and community-based services.

Sincerely,

Curtis Cunningham, Director  
Division of Long-Term Services and Supports

## Heightened Scrutiny Summary of Findings

Name of Setting: 29 Acres

Address: Denton County, TX 76227

Type of Setting: Residential – Intentional Community

Heightened Scrutiny Category: Setting has the effect of isolating individuals receiving Medicaid home and community-based services (HCBS) from the broader community of individuals not receiving Medicaid HCBS.

Date Submitted: August 1, 2023

Brief Description of Setting: Setting is an intentional community for adults with autism and other neuro-diversities. The provider offers residential and non-residential services on site and accepts various forms of payment. There are 40 people who live at the setting, 3 of whom participate in the HCBS program. There are single-story homes with 4 bedrooms and 4 bathrooms; duplexes that have 2 bedrooms and 2 bathrooms, and two-story homes with 5 bedrooms and 4 bathrooms. The state submitted one of the residential homes on the campus for heightened scrutiny review. The setting is located approximately 3 miles from local restaurants, shops and churches.

This setting was included in the February 2023 CMS site visit. Findings for this setting from that visit are included here as well as the state's responses and the provider remediation plan.

### Support Submitted by the State to Demonstrate Setting's Progress in Overcoming the Institutional Presumption

- 29 Acres is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to engage in community life and receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS. The resident interviewed by the state does not currently work, but she volunteers regularly at the local thrift store. She confirmed she is able to participate in community activities away from the setting and receives behavioral support services while out in the community. 29 Acres staff work with residents and their guardians to help plan activities. The Life Plan tool used by 29 Acres documents community involvement and support for an individual, and addresses preferences for delivery of residential, behavioral and medical services.
- 29 Acres assists individuals with access to transportation to facilitate full access to the greater community and provides transportation for community activities.
- The resident's legally authorized representative (LAR) interviewed by the state confirmed the individual is treated with respect; staff address her by her first name or a nickname, as indicated in her plan. The LAR knows how to submit a complaint. In interviews with the state, direct care and administrative staff states individuals' personal information is kept private. 29 Acres' code of ethics states the setting will safeguard and respect the confidentiality and privacy of individuals and respect their dignity and uniqueness.

- The LAR interviewed by the state indicated the resident and direct care staff make decisions about her schedule each day. Staff respect her decision or behavior indicating when she does not want to interact with other individuals. In interviews with the state, direct care and administrative staff confirmed they regularly ask individuals about their needs and preferences related to daily activities and the people they interact with. State assessors observed staff assisting and supporting individuals to make choices about their activities.
- The LAR interviewed by the state confirmed the individual was able to visit the setting before deciding to move in. The resident interviewed is satisfied with services provided at the setting and knows how to make a request for a new provider if needed. In interviews with the state, administrative staff stated individuals can request changes at any time. Policies state individuals may choose qualified service providers of their choice.
- The state reviewed the 29 Acres lease; it is a lease under the Texas Property Code and is subject to Texas law governing residential tenancies. The LAR interviewed by the state confirmed the individual has a lease agreement with 29 Acres.
- State assessors observed that individuals' bedroom doors are lockable. The LAR interviewed stated that staff and other residents knock before entering the room. In interviews with the state, administrative staff confirmed individuals can close and lock their bedroom door. Direct care staff have access to keys.
- In interviews with the state, the LAR stated that the individual visited the setting several times before moving in and developed friendships to assist with deciding on the house she would live in. In interviews with the state, staff explained process for individuals desiring to change roommates or rooms. The lease agreement includes a provision stating individuals will choose their housemates.
- Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement. State assessors observed bedrooms were furnished and decorated with personal effects and memorabilia. The LAR interviewed by the state confirmed the individual's room is decorated how she likes it. In interviews with the state, direct care and administrative staff confirmed individuals are able to furnish and decorate their rooms as they wish.
- The LAR interviewed by the state confirmed the individual's schedule varies from others' schedules. In interviews with the state, direct care and administrative staff confirmed individuals' schedules vary greatly from one another. Individuals have flexibility to change their schedules.
- The setting's policy manual states that residents will maintain adequate food and accessibility of the kitchen. The state assessors did not observe any physical barriers to food.
- The LAR interviewed by the state confirmed that the individual can have visitors when she wishes. In interviews with the state, direct care and administrative staff confirmed there are no visiting hours. Visitors may come when they and the individual wish, and individual can have visitors without providing advance notice to the setting. The setting's community policies state individuals may have guests at any time.
- The setting is physically accessible. The LAR interviewed by the state confirmed there are no obstructions that make it difficult for the individual to move around the setting, and there are supports available if needed. In interviews with the state, direct care and administrative staff confirmed the setting is physically accessible. State assessors did not

observe any barriers or obstructions in the setting that would make it difficult for individuals to move around.

- The state considered the following evidence to demonstrate the setting is integrated and supports full access to the greater community by the individuals: state onsite visit to include interviews with an individual and her LAR, interviews with direct support staff, and interviews with administrative staff; review of provider-submitted lease agreement, setting policies, Life Plan Tool, Code of Ethics, and public comments received for 29 Acres.

#### Initial Determination

- Evidentiary Package requires additional information before a final decision can be made.

#### Additional Information Requested to Confirm Setting Is Compliant with the Federal HCBS Settings Criteria and has Overcome any Institutional Presumption:

CMS requests the State of Texas provide the following:

- Verification that the setting supports full access for individuals to have opportunities to seek employment and work in competitive integrated settings [42 CFR 441.301(c)(4)(i)].
  - **Texas response:**
  - The setting implemented the following remediation activities:
    - 29 Acres updated their written policies to ensure individuals wishing to seek and work in competitive, integrated settings have the opportunity to do so. Policies reflect that individuals may be referred to their Local Intellectual and Developmental Authority (LIDDA) Service Coordinator if he/she wishes to utilize employment services. Policies include a description of how the setting will support individuals who wish to seek employment.
    - 29 Acres will ensure that all individuals are informed of their choices for competitive, integrated employment. 29 Acres will ensure that all new policies and procedures regarding employment services will be shared with individuals.
  - **CMS agrees the state's response is sufficient.**
- Confirmation that the setting supports full access of individuals to control their personal resources [42 CFR 441.301(c)(4)(i)].
  - **Texas Response:**
    - HHSC confirms that 29 Acres supports full access of individuals to control their personal resources. This has been confirmed by the provider and validated by HHSC's review of the provider's policy and forms. In response to the remediation plan developed by HHSC, the setting updated its forms to include a form which allows residents to determine how their personal finances will be managed. This update was made prior to the CMS site visit in February 2023.
  - **CMS agrees that the state's response is sufficient.**

- Attestation from the state through the review of person-centered service plans and/or interviews with individuals residing in the setting that:
  - the setting is selected by the individual from among a variety of setting options and there was an option of a private living unit [42 CFR 441.301 (c)(4)(ii)]; and
  - 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. [42 CFR 441.301(c)(4)(ii)].
  - **Texas response:**  
The setting implemented the following remediation activities:
    - 29 Acres reviewed person-centered plans to ensure individuals were offered a choice of setting and that the choice was documented in the individual's person-centered plan.
  - **CMS agrees that the state's response is sufficient**
- CMS requests confirmation that the state Medicaid agency and the entity responsible for ensuring the development of the person-centered service plan, not the provider, is ensuring that individuals are afforded a choice of setting, including a choice of non-disability specific settings, as required through the regulation [42 CFR 441.301(c)(4)(ii)].
  - **Texas Response:**
    - HHSC and the entity responsible for the development of person-centered service plans, local intellectual and developmental disability authorities (LIDDAs), ensure that individuals are given a choice of setting, including a choice of non-disability specific settings. These requirements are outlined in 26 TAC 263.502 and are included in the service planning assessment tool used by LIDDA service coordinators.
  - **CMS agrees that the state's response is sufficient**
- Attestation that the setting ensures an individual's rights of privacy and freedom from coercion and restraint [42 CFR 441.301(c)(4)(iii)].
  - **Texas Response:**  
The setting implemented the following remediation activities:
    - 29 Acres will ensure individuals have privacy when receiving their mail. 29 Acres will move the mailbox keys from next to the mailboxes and ensure individuals only have access to their specific mailbox key.
    - 29 Acres will remove cameras from the common areas.
  - **CMS agrees the state's response sufficient.**
- Attestation that each individual has privacy in their sleeping or living unit [42 CFR 441.301(c)(4)(vi)(B)].
  - **Texas Response:**  
The setting implemented the following remediation activities:
    - 29 Acres will ensure that each individual has privacy in their sleeping or living unit and remove any cameras in individual rooms that are not based on assessed need that is documented in the individual's person-centered plan in accordance with 42 CFR 441.301(c)(4)(vi)(F).
  - **CMS agrees the state's response sufficient.**
- Confirmation that any modifications to the additional conditions under

441.301(c)(4)(vi)(A) through (D) are supported by a specific assessed need and justified in the person-centered service plans. [42 CFR 441.301(c)(4)(vi)(F)].

- **Texas Response:**

- The setting implemented the following remediation activities:

- 29 Acres will review individuals' plans to ensure any relevant modifications for a specific individual are incorporated in the plan, and that modifications to the settings criteria are limited to only a specific assessed need as opposed to a blanket modification.
    - 29 Acres will send the individual's LIDDA service coordinator a description of any needed modifications for current and future Home and Community-Based Services (HCS) members and work with the LIDDA service coordinators to ensure the modifications are documented in accordance with 42 CFR 441.301(c)(4)(vi)(F).
      - 29 Acres will ensure that any modifications are implemented in accordance with what is documented in the individual's person-centered plan.

- In addition to the information provided above, CMS requests information to demonstrate that the need for modifications is not assessed solely by the provider. The state Medicaid agency and the entity responsible for ensuring the development of the person-centered service plan must ensure that person-centered service plans comply with all regulatory requirements and that any modifications are supported by a specific assessed need and justified in the person-centered service plan.

- **Texas Response:**

- HHSC confirms that the need for modifications is not assessed solely by the provider. The need for a modification may be identified by the LIDDA service coordinator during the course of regular service coordination visits or by the provider. Program rules at 26 TAC §263.502 require a provider to notify the individual's LIDDA service coordinator of any needed modification to HCBS requirements. The LIDDA service coordinator must then convene a service planning team meeting in response to determine if a modification is appropriate. The LIDDA service coordinator must follow rules at 26 TAC §263.901, which include ensuring that any modifications are based on an assessed need that justifies the modification, and a description of positive interventions and supports that were tried but did not work.

- **CMS agrees the state's response is sufficient**

- Description of how staff have been properly trained in the provision of home and community-based services (<https://www.medicaid.gov/federal-policy-guidance/downloads/smd19001.pdf>).

- **Texas Response:**

- The setting implemented the following remediation activities:

- 29 Acres will hold additional training to ensure staff can demonstrate knowledge of the HCBS Settings Rule criteria.
    - 29 Acres will keep records of staff trainings to ensure all staff receive

training on the HCBS settings criteria.

- **CMS agrees the state's proposed remediation is sufficient.**