

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

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

Dear Director Zalkovsky:

I am writing to inform you that the Centers for Medicare & Medicaid Services (CMS) is granting Texas **final 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 § 441.301(c)(4)-(5). Upon receiving initial approval for completion of its systemic assessment and outline of systemic remediation activities on December 21, 2022, the state worked diligently in making a series of technical changes requested by CMS in order to achieve final approval.

Final approval is granted to the state after completing the following activities:

- Conducted a comprehensive site-specific assessment and validation of all settings serving individuals receiving Medicaid-funded HCBS, included in the STP the outcomes of these activities, and proposed remediation strategies to rectify any issues uncovered through the site-specific assessment and validation processes;
- Outlined 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 the settings and preparing for submission to CMS for review under heightened scrutiny;
- Developed a process for communicating with beneficiaries who are currently receiving services in settings the state has determined cannot or will not come into compliance with the home and community-based settings criteria by March 17, 2023; and
- Established ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the rule in the future.

After reviewing the STP submitted by the state on March 2, 2023, CMS provided additional feedback on March 16, 2023, April 3, 2023, June 2, 2023, and July 11, 2023, and requested several technical changes be made to the STP in order for the state to receive final approval. These changes did not necessitate another public comment period. The state subsequently addressed all issues and resubmitted an updated version of the STP on July 13, 2023. A

summary of the technical changes made by the state is attached.

The state is encouraged to work collaboratively with CMS to identify any areas that may need strengthening with respect to the state's remediation and heightened scrutiny processes as the state implements each of these key elements of the transition plan. Optional quarterly reports through the milestone tracking system designed to assist states to track their transition processes, will focus on four key areas:

1. Reviewing progress made to-date in the state's completion of its proposed milestones;
2. Discussing challenges and potential strategies for addressing issues that may arise during the state's remediation processes;
3. Adjusting the state's process as needed to assure that all sites meeting the regulation's categories of presumed institutional settings¹ have been identified, reflects how the state has assessed settings based on each of the three categories and assures the state's progress in preparing submissions to CMS for a heightened scrutiny review; and
4. Providing feedback to CMS on the status of implementation, including noting any challenges with respect to capacity building efforts and technical support needs.

It is important to note that CMS 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 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.

This letter does not convey approval of any settings submitted to CMS for heightened scrutiny review, but does convey approval of the state's process for addressing that issue. Any settings that have been or will be submitted by the state under heightened scrutiny will be reviewed and a determination made separate and distinct from final STP approval.

Additionally, CMS recognizes the state's request for a corrective action plan (CAP) to allow for additional time for the continued assessment of settings that fall under the institutional presumption to assure compliance with the settings criteria. The state will report to CMS on progress with activities outlined in the CAP.

Thank you for your work on this STP. CMS appreciates the state's effort in completing this work and congratulates the state for continuing to make progress on its transition to ensure all settings are in compliance with the federal HCBS regulations.

¹ Medicaid regulations at 42 CFR § 441.301(c)(5)(v) describe heightened scrutiny as being required for three types of presumed institutional settings: 1) Settings located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment; 2) Settings in a building on the grounds of, or immediately adjacent to, a public institution; 3) Any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

Sincerely,

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

Attachment

**SUMMARY OF CHANGES TO THE STP MADE BY THE STATE OF TEXAS AS
REQUESTED BY CMS IN ORDER TO RECEIVE FINAL APPROVAL
(Detailed list of clarifications made to the STP since March 2, 2023)**

Public Comment

- Included in the response to comment, the specific changes that were made to the STP as well as the page numbers where the changes were incorporated in the STP as a result of public comment. (Appendix E)

Site-Specific Assessment & Validation Process:

- Clarified that the state is conducting site-specific assessments of prevocational and supported employment settings where more than one individual is grouped together for the purpose of receiving services. Ongoing validation and remediation will be included in the state's HCBS setting's CAP request. (pgs. 33-34, 57, 73, 80)
- Included the remediation strategies that will be used for prevocational or supported employment settings that were not fully compliant and the timeframes by which providers had to complete the remediation. (pg. 33-34)
- Confirmed that Home and Community-based Services (HCS) three- and four-person residences and host home/companion care (HH/CC) settings ensures modifications of additional conditions are based on individualized, assessed needs and that those are documented in the person-centered service plans. Clarified service coordinators are responsible for ensuring modifications are discussed during regular service planning meetings and documented in compliance with the settings rule on an ongoing basis. (pg. 39-40)
- Clarified that Health and Human Services Commission (HHSC) Long-Term Care Regulation Staff will conduct monitoring of HCS three and four person residences and host home/companion care (HH/CC) settings for ongoing compliance with all HCBS settings criteria. (pgs. 39-41)
- Confirmed that all adult foster care (AFC) providers in the State of Texas Access Reform PLUS (STAR+PLUS) program, completed a self-assessment and received a virtual site visit to validate the self-assessment. (pg. 48)
- Clarified that participants were free to decline participating in the member interview process and clarified that participant surveys were not linked to specific settings and were not used to validate provider self-assessments. (pgs. 46, 49, 72)
- Clarified HHSC will utilize similar processes to those used in the STAR+PLUS HCBS ALF site-specific assessment process to ensure members' responses are the prevailing response and members are offered privacy and freedom from coercion in the interview process. (pg. 72)
- Clarified that monitoring staff conducted on-site visits to all seven assisted living facilities (ALF) and three licensed home health assisted living (LHHAL) settings in the Deaf Blind with Multiple Disabilities (DBMD) program. (pgs. 44-46)
- Outlined for STAR+PLUS how the state was reviewing managed care organization (MCO) compliance determinations and outlined contract language by which the MCOs are required to ensure that any settings in which STAR+PLUS HCBS services are provided complies the settings criteria. (pgs. 47-48, and Appendix A, pg. 53)

- Clearly broke out all setting types and updated compliance counts for all setting types. (pgs. 37, 41-46, 50)
- Described how providers were informed that reverse integration is not considered an appropriate strategy for complying with community integration requirements. (pg. 54)

Site-Specific Remedial Actions:

- Detailed the process that the MCOs use to verify completion of remediation for ALFs in the STAR+PLUS program. (pgs. 47-48)
- Confirmed that AFC settings in STAR+PLUS were given two weeks to complete remediation with additional time as needed. (pg. 49)
- Confirmed that all DBMD ALF and Licensed Home Health Assisted Living (LHHAL) settings completed remediation and were validated. (pg. 45)
- Confirmed that all Texas Administrative Code (TAC) rule amendments were completed by March 1, 2023. (Appendix A)
- Confirmed that beneficiaries will be given at least 30 days' notice if they need to transition to another setting or locate an alternative funding source. (pg. 80 and 82)
- Clarified that the service planning team must convene within 14 days after the date of an individual's transfer. (pg. 81)

Ongoing Monitoring of Settings:

- Clarified that National Core Indicators (NCI) survey results would not be used for monitoring individual setting compliance. (pgs. 73-74)
- Clarified that the state will rely on the person-centered planning process for ongoing monitoring of compliance for people receiving services in non-provider owned or controlled settings that were presumed compliant and that all HCB settings criteria will be monitored through this process. (pg. 73)
- Confirmed that DBMD ALF and LHHAL settings will receive ongoing monitoring site visits at least once every two years (Section 8), STAR+PLUS ALF and AFC settings will be assessed at least once every three years, and MCOs will validate provider attestations through site-specific desk reviews. (pg. 72)
- Updated the frequency of ongoing monitoring for each program's settings in Section 10. (pgs. 67-73)

Heightened Scrutiny:

- Clarified how the state identified settings that had the effect of isolating. (pg. 77)
- Clarified that prior to March 1, 2023, intentional communities were non-allowable settings by the state, but that under new Texas Administrative Code (TAC) rules they may be allowed if they can overcome the institutional presumption should they have isolating characteristics. One setting has been submitted for heightened scrutiny; future intentional communities will also need to go through the heightened scrutiny process if they have the effect of isolating individuals. (pgs. 78-79).
- Clarified the process that the state used to make the decision to move a setting to heightened scrutiny. (pgs. 77-79)
- Clarified that 191 STAR+PLUS ALF settings were presumed institutional under settings that isolate, six settings in the same building as a public or private institution, and 21 settings on

the grounds of or immediately adjacent to a public institution. (pg. 78)

- Confirmed that rules, managed care contracts, and managed care handbooks have all been updated to remove systemic policy barriers that prevented STAR+PLUS ALFs from complying with the HCBS Final Rule. (footnote on pg. 78)

Individualized Skills and Socialization in HCS, TxHmL and DBMD Programs:

- Confirmed that HHSC will require service plans to be reviewed and updated at the first available opportunity to reflect the individual’s preferences and goals for individualized skills and socialization. (pg. 67)
- Clarified the community-based aspect of the service included in the implementation of individualized skills and socialization services that was impacted by the Public Health Emergency (PHE) will be part of the state’s CAP request. (pg. 65)
- Informed CMS HHSC’s Contract Administration and Provider Monitoring (CAPM) staff is conducting on-site assessments of all individualized skills and socialization providers to assess for compliance with the HCBS Settings Rule for all settings that have not yet received a full license. HHSC’s CAPM unit will work with providers to complete any remediation activities necessary to achieve full compliance as quickly as possible. (pg. 66)

Other Feedback:

- Outlined areas in the STP that will be clarified through the HCB Settings CAP work. (Section 15, pgs. 87-88)