DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Disabled & Elderly Health Programs Group

November 7, 2016

Dawn Stehle
Deputy Director, Division of Health and Medicaid Services
State of Arkansas, Department of Human Services
112 West 8th Street, Slot S401
Little Rock, AR 72201-4608

Dear Ms. Stehle:

This letter is to inform you that CMS is granting Arkansas **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 September 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 September 30, 2016 version submitted by the state, CMS provided additional feedback on October 24, 2016, and November 3 & 4, 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 subsequently addressed all issues, and resubmitted an updated version on November 4, 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 50% spot-check 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 Arkansas' 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 that 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.

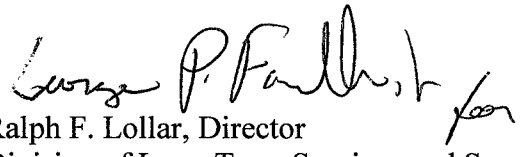
While the state of Arkansas has made much progress toward completing each of these remaining components, there are several technical issues that have been outlined in Attachment II of this letter that must be resolved before the state can receive final approval of its STP. Additionally, prior to resubmitting an updated version of the STP for consideration of final approval, the state will need to issue the updated STP for another minimum 30-day public comment period.

Upon review of this detailed feedback, CMS requests that the state please contact Susie Cummins (206-615-2078 or Susan.Cummins@cms.hhs.gov) or Michele MacKenzie (410-786-5929 or Michele.MacKenzie@cms.hhs.gov) at your earliest convenience to confirm the date that Arkansas 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.

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 ARKANSAS TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 11/04/16

Waiver Reference Table: On page 5 under the "Waivers" section, the state was requested to list each of its waivers and identify the residential/non-residential settings that are potentially at risk for non-compliance with the regulatory requirements. CMS requested that the state also add a reference table listing each waiver, all services provided under the waiver, and in what settings they are provided. This will help clarify that a systemic assessment has been completed for all waiver settings.

State's Response: The state has added Appendix L that includes the requested tables and provided a reference to the tables in the "Waivers" section.

Respite Services in the ACS Waiver: Clarification was requested in the STP with regard to respite services. Respite is a time-limited service usually not exceeding 30 days. The ACS Waiver indicates that respite services are provided on a short-term basis in facility based settings in addition to settings that must be HCBS compliant. However, short-term is not defined in the waiver or state regulations. The state was asked to include remediation in the STP describing how it will ensure that respite services provided in a facility based setting under the ACS Waiver will not exceed 30 days. (CMS notes time limits for respite services are already specified for the ARChoices Waiver in the waiver's Appendix C.1).

State's Response: The state has added clarification to the narrative in the section titled *Review of State Policies and Procedures* explaining that a "Waiver Alert" will be sent to providers explaining that respite services cannot be provided in a facility based setting for longer than 30 consecutive days. Also, the ACS Waiver, currently under review by CMS for renewal, will be updated to include this requirement.

Adult Family Homes: CMS requested the state to clarify that it has reviewed all of the state's regulations, policies and procedures associated with the Adult Family Home (AFH) to determine if they are in compliance with the federal regulations. CMS noted that an AFH is a service provided under the ARChoices Waiver and that the provider manual for this waiver has been updated to include requirements that mirror the federal regulations.

State's Response: The state has updated the narrative in the *Review of State Policies and Procedures* section with the following entry; "DAAS also reviewed provider certification requirements for Adult Family Homes. Adult Family Homes are a service allowed under the ARChoices waiver and the provider manual for this waiver has been updated to reflect the federal requirements outlined in the HCBS Settings rule".

Nonresidential Settings: CMS requested that the state assure the inclusion of language within its state standards clarifying that the experience of individuals receiving HCBS in nonresidential settings, such as access to food and visitors, should be consistent with how those settings would be experienced by individuals who are not HCBS recipients.

State's Response: The state added the following language to the section *Review of State Policies and Procedures*: "the state will issue a [Provider Information Memo] PIM bulletin to our HCBS non-residential providers explaining the requirement that the experiences of individuals receiving HCBS in non-residential settings must be consistent with those individuals not receiving HCBS, for example the same access to food and visitors".

Table 2. Assisted Living Facilities (ALF) Level II Policy Crosswalk: The following concerns for Table 2 were identified by CMS.

- **Access to Food at Any Time:** The State found the ALF Level II Regulation 700.3.2 partially compliant because it states: "As part of the basic charge, each assisted living facility must make available food for three (3) balanced meals, as specified in Section 601.3 (a)(6), and make between-meal snacks available. Potable water and other drinking fluids shall be available at all times. Meals shall be served at approximately the same time each day. There shall be no more than five (5) hours between breakfast and lunch and no more than seven (7) hours between lunch and the evening meal". However, CMS believed this rule to be only partially compliant. It is understandable that prepared meals may not be available at all times; nevertheless if a Medicaid HCBS participant misses a meal, he or she must have the ability to make a sandwich, for example. Therefore, just as "potable water and other drinking fluids shall be available at all times" under this state regulation, access to food must be available at all times. Remediation needed to be completed to bring regulation 700.3.2 into compliance.
    - ***State's Response for Access to Food at any Time:*** The state has added policy communication (such as via a Provider Information Memo) remediation strategies to the narrative on pg. 7-8 as well as throughout both DAAS policy crosswalks on pg. 53-69 and 70-79. The PIMs will be distributed specifying that they must bring themselves into compliance with the HCBS Settings rule even though the state has not codified the HCBS Settings rule into state statue or licensing regulations.
- **Visitors at Any Time:** The state found ALF Level II Regulations 505 compliant, however 505 allows the following restrictions: "...facilities may deny visitation when visitation results, or substantial probability exists that visitation will result, in disruption of service to other residents, or threatens the health, safety, or welfare of the resident or other residents". Therefore, CMS has determined that this regulation is only partially compliant with the federal HCBS regulations. Even though the intention of this language in protecting service delivery and safety of others is understood, there was concern that implementation of it could be inconsistent and result in unnecessary restrictions applied to HCBS beneficiaries. Remediation needed to be completed to bring regulation 505 into compliance for Medicaid HCBS participants.
    - ***State's Response for Access to Food at any Time:*** The state has added policy communication (such as via a Provider Information Memo) remediation strategies to the narrative on pg. 7-8 as well as throughout both DAAS policy crosswalks on pg. 53-69 and 70-79. The PIMs will be distributed specifying that they must bring themselves into compliance with the HCBS Settings rule even though the state has not codified the HCBS Settings rule into state statue or licensing regulations.

- **Remediation Strategy:** There are several sections that have the remediation: "The state will review the ALF Level II Rules and Regulations to ensure that the facilities that receive HCBS funding will be compliant with the HCBS Settings rule". The state may have still needed to review the ALF Level II Rules and Regulations. If this is the case, these rules and regulations must be evaluated and included in the STP before initial approval could be granted. However, if all of the pertaining ALF Level II rules and regulations have already been evaluated, an update was requested to the statement to make the state's intent clear.
    - ***State's Response:*** The state has changed the wording of a remediation strategy to past tense ("...has reviewed...") throughout both DAAS policy crosswalks, to assure CMS and the public that the state has already reviewed the ALF Rules and Regulations as part of the policy crosswalk/systemic assessment.

Table 4. Adult Day Care (ADC)/Adult Day Health Care (ADHC) Policy Crosswalk: The following concerns for Table 4 were identified by CMS.

- **ARChoices II Manual, Section 201.105 Provider Assurances:** Section C.6.f specifies that "Any modification of the additional conditions specified in items 1 through 4 above...", when it seemed that the state intended to specify items 6.a. through d. As it reads now it appears that modifications are allowed for C. 1 through 4.
    - ***State's Response:*** The state has reviewed and corrected the typo in the ARChoices provider manual.
- **Remediation Strategy:** The State included the following remediation strategy: "The state will review the ADC/ADHC Rules and Regulations to ensure that the facilities that receive HCBS funding will be compliant with the HCBS Settings rule." The state may have still needed to review the ADC/ADHC Rules and Regulations. If this is the case, these rules and regulations must be evaluated and included in the STP before initial approval could be granted. However, if all of the pertaining ADC/ADHC rules and regulations have already been evaluated, an update to statement was requested to make the state's intent clear.
    - ***State's Response:*** The state has changed the wording of a remediation strategy to past tense ("...has reviewed...") throughout both DAAS policy crosswalks, to assure CMS and the public that the state has already reviewed the ADC and ADHC Rules and Regulations as part of the policy crosswalk/systemic assessment.
- **Restraints:** Since the ARChoices waiver prohibits restraints, the state was asked to revise the STP and add a reference to Appendix G in that waiver where it is indicated that restraints are prohibited.
    - ***State's Response:*** The state added evidence to both DAAS policy crosswalks to reference ARChoices waiver, Appendix G to indicate that restraints are prohibited under this waiver.

Table 5. DDS Provider Owned/Controlled Residential Settings Policy Crosswalk: The following concerns for Table 5 were identified by CMS.

- **Definition of Supported Employment:** Under the systemic cross-walk in the remediation strategy, the state included remediation to add a new definition of supported employment to DDS Policy 1091. In follow-up conversations with CMS, the state expressed that the definition needed additional work to meet the HCBS and Department of Labor requirements. CMS suggested that the state make the following modifications to the remediation strategy: "The State will rewrite DDS Policy 1091 to incorporate a new definition of supported employment that fully addresses the HCBS requirements and was developed as part of the state's participation in the U.S. Department of Labor's Employment First State Leadership Mentoring Program."
    - ***State's Response:*** The state has added the suggested remediation strategy to the DDS policy crosswalk to address supported employment.
- **Restraints:** The state's remediation strategy indicated that "the State will amend the ACS Waiver Manual to incorporate specific HCBS Settings Rule language regarding individual's rights of privacy; dignity, respect, and freedom from coercion and restraint". However, the ACS Waiver allows physical restraints, so the state was asked to ensure remediation is completed that allows modification to the HCBS regulation via documentation in the person-centered service plan following the criteria in 42 CFR 441.301(c)(viii)(A) through (H).
    - ***State's Response:*** The state has added language to the remediation strategy outlined in the DDS policy crosswalk to clarify that modification to the HCBS regulation for restraints is allowed via documentation in the person-centered service plan following the criteria in 42 CFR 441.301(c)(viii)(A) through (H).

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.

Site-Specific Assessment & Remediation

Per CMS' request, please provide more details on the state's site-specific assessment and remediation.

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, the state must outline what it will do to monitor compliance of this category of settings with the federal home and community-based settings requirements over time. We remind the state that this monitoring applies to all private residences, given the reference in the STP that DDS ACS waiver staff will monitor services in these settings through a random home visit of a minimum 10% per staff caseload.
- Additionally, CMS reminds the state that settings where individuals reside in the home of an unrelated paid professional staff should not be considered an individual's private home, and should be assessed and validated for compliance with the federal HCBS rule like other provider-owned or controlled settings.
- 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).

Adult Family Homes: Please include the assessment and validation activities that will be performed among the state's existing AFH settings where individuals are living in the homes of paid staff to demonstrate compliance with the federal HCBS rule. The state includes in its STP links to its provider self-assessment reports. Please also include links to any site visit reports as well as other reports documenting validation results.

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 nonresidential 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, and to include these assessment, validation and remediation activities into the STP.

Beneficiary Input: CMS appreciates the level of detail provided by the state on how it derived a statistically significant sampling for beneficiary interviews during onsite visits across settings. However, it appears that the actual number of beneficiaries interviewed was significantly lower across settings than what the state's targets were based on their statistical methodology. Please describe what, if any, additional efforts the state will be making to conduct follow-along interviews and/or reach more beneficiaries as part of the state's site-specific validation, remediation, and/or ongoing monitoring processes.

- Per CMS' request, the state should provide additional detail as to how discrepancies between beneficiary interviews and data reported in provider self-assessments are addressed.
- *Onsite Visits:* CMS notes with some concern the state's approach to onsite visits as being unannounced. While CMS does not take a formal position on this approach, there may be issues related to beneficiary privacy as well as effectiveness of getting strong beneficiary/staff input when conducting unannounced visits that the state should consider for any additional onsite visits that may occur in the future.

Site-Specific Remedial Actions

Per CMS' request, please provide more detail on the state's proposed process and timeline for remediation of settings. Specifically, please clarify the following.

Remediating Major Thematic Areas of Non-Compliance across Setting Categories: The STP summarizes a number of areas of non-compliance that were identified across different categories of settings during the provider self-assessment and subsequent onsite visits that have been conducted thus far. Many of these areas suggest a system-wide misunderstanding of certain federal HCBS requirements. Please elaborate in more specific detail on the types of training and ongoing technical assistance the state is going to provide to assure that all providers fully understand their obligations under the federal HCBS rule.

Site-Specific Remediation Plans: The STP provides a high-level description of the remediation process the state will take to ensure the settings become compliant, and notes that corrective action plans from providers are due at the end of this year (see pp. 36-37, 39). CMS requests that the state provide additional details confirming how it will monitor the successful completion of any corrective actions that need to be made by settings during the transition period.

Remediation around Major Rule Requirements: CMS requests that additional details be provided in describing how the state will assure that settings are fully complying with the following requirements outlined in the home and community-based settings rule:

- Is integrated in and supports access to the greater community;
- Provides opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources; and
- Ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid HCBS.

***Reverse Integration**:* 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. CMS acknowledges and appreciates the state including within its STP confirmation that it is educating providers regarding their requirements for assuring access of beneficiaries into the broader community. CMS requests the state expand on this and provide additional detail as to how they will monitor setting compliance around this issue.

Non-Disability Specific Settings: The STP should indicate the steps the state is taking to build capacity among providers to increase access to non-disability specific setting options across home and community-based services. Please provide additional clarity on the manner in which the state will ensure that beneficiaries have access to services in non-disability specific settings among their service options for both residential and non-residential services.

Ongoing Monitoring for Compliance: The STP confirms that all personnel conducting ongoing monitoring and licensing/recertification activities have received initial training on the HCBS rule. Please provide additional details about what, if any, addition technical assistance and support will be provided as well as any steps the state is taking to verify the accuracy of the monitoring activities over time.

Heightened Scrutiny

All states must clearly lay out a process for identifying settings that are presumed to have the qualities of an institution. These are settings for which the state must submit information for the heightened scrutiny process if the state determines, through its assessments, 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 involved either to compliant settings or to non-HCBS funding streams.

- 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.

Submission of Heightened Scrutiny Evidentiary Packages: The state indicates in its narrative that the state will submit evidence for heightened scrutiny by July 2017 on a quarterly basis (see pp. 17, 20, 21). However, this date does not match the date on p. 39 of the timeline, which notes evidence from DDS will be submitted on April 1, 2017. The state should clarify on which date it will begin to submit evidence to CMS, and also provide additional information on the types of

evidence the state will be providing to support its request to CMS to approve specific settings presumed institutional under heightened scrutiny.

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

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

Per CMS' request, the state should include additional information about the assistance provided to beneficiaries, who are required to locate and transition to compliant settings. The state should also include additional information in the STP about the plan for these beneficiaries and their families. While the state indicates that beneficiaries will be transitioned during 2018 (p.17), the state does not specify a start or end date. Additionally, the state notes they "believe that it is premature at this phase to estimate the number of beneficiaries that may be impacted by the heightened scrutiny review process and subsequent outcome of transitioning to a compliant provider." The state plans to begin submitting heightened scrutiny evidentiary packets to CMS by July 2017 that will include the number of individuals served at each setting.

- ***Beneficiary Communication Timeline:*** CMS appreciates the level of detail articulated in the STP regarding the steps the state will take to relocate beneficiaries. However, CMS is concerned that the state is giving only a 30-day notice to beneficiaries and their families that may have to locate and transition to compliant settings if the setting cannot be compliant (for both residential and non-residential settings alike). This may not allow enough time for beneficiaries to explore additional setting options with their case managers, families and support networks. CMS requests the state re-evaluate its plan and build in longer periods of time to assist beneficiaries to complete this process.
- ***Adequacy of Available Provider & Setting Options:*** Please provide more specific details as to how the state will ensure that all critical services and supports are in place in advance of each individual's transition. It is incumbent upon the state to assure an adequate number of providers of HCBS, and as such CMS requests the state provide further information about the steps it will take to assure a continuity of service delivery among affected beneficiaries.
- ***Estimated Number of Beneficiaries Impacted:*** Please include the estimated number of beneficiaries that may be living or receiving services in settings that may not meet the requirements of the Final Rule, and update and tailor the state's beneficiary plan and timeline accordingly.

Milestones

Per CMS' request, the state should 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.