

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**

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June 2, 2016

Stephen P. Miller  
Commissioner, Department for Medicaid Services  
Commonwealth of Kentucky, Cabinet for Health and Family Services  
275 East Main Street, 6 West A  
Frankfort, KY 40621

Dear Commissioner Miller:

I am writing to inform you that CMS is granting the state of Kentucky **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 March 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 March 2016 draft submitted by the state, CMS provided additional feedback on May 5, 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 May 17, 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.

In order to receive final approval of Kentucky's STP, the state will need to complete the following remaining steps and submit an updated STP with this information included:

- 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 Kentucky has made much progress toward completing each of these remaining components, there are several technical issues that have been outlined in the attachment to this letter that must be resolved to CMS' satisfaction before the state can receive final approval of its STP. Upon review of this detailed feedback, CMS requests that the state please contact George Failla at 410-786-7561 or [George.Failla@cms.hhs.gov](mailto:George.Failla@cms.hhs.gov) or Michelle Beasley at 312-353-3746 or [Michelle.Beasley@cms.hhs.gov](mailto:Michelle.Beasley@cms.hhs.gov) at your earliest convenience to confirm the date that Kentucky 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](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,

/s/

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

## ATTACHMENT I.

### SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF KENTUCKY TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 5-17-2016

- **Documentation of Systemic Remediation Actions Already Completed:** CMS requested that the state update its STP to indicate which regulatory changes had already been completed within its proposed systemic remediation plan. Additionally, among the first round of regulatory changes that have been already been completed by the state, CMS requested the state provide links to the revised regulations, as well as the state's summary document that describes the language added to each regulation and update the STP to indicate which regulatory changes have already been completed.

**State's Response:** The state provided the following links to the revised regulations:

- **Acquired Brain Injury (ABI):** <http://www.lrc.ky.gov/kar/907/003/090.htm> – regulation is in effect.
- **Acquired Brain Injury-Long Term Care (ABI-LTC):** <http://www.lrc.ky.gov/kar/907/003/210.htm> – regulation is in effect.
- **Home and Community Based (HCB):** <http://www.lrc.state.ky.us/kar/907/007/010.htm> - please note, this regulation is anticipated to become effective in July (pending waiver renewal application approval from CMS). Please note, the citation of this waiver regulation was formerly 907 KAR 1:160 but is now 907 KAR 7:010.
- **Michelle P. (MPW):** <http://www.lrc.state.ky.us/kar/907/001/835reg.htm> - please note, this regulation will take effect on June 3, 2016.
- **Supports for Community Living:** <http://www.lrc.ky.gov/kar/907/012/010reg.htm> - please note, this regulation is anticipated to become effective in July (pending waiver renewal application approval from CMS).

A streamlined summary table of the inclusion of the HCBS Final Rules setting requirements into Kentucky state waiver regulations was also added on pages 7-12 of the STP. Outdated information was deleted. Additionally, the state included a new attachment to the STP entitled, "HCBS Rules Definitions\_2015-02-20", which laid out all language included in each of the waiver regulations to address existing gaps or inconsistencies with the federal settings rule in existing state standards.

- **Additional Details Regarding State's Systemic Remediation:** CMS requested that Kentucky provide more detail to the descriptions of the changes the state will make to its regulations to bring them into full compliance with the federal requirements in the systemic remediation table (pages 23-29).
  - For example, on pages 23-24, one of the proposed remedial actions was to "clarify indicators of integration into the greater community and incorporate into the regulation." CMS requested the state include more precise language regarding the planned revision and what type of language would be added to the regulation.

**State's Response:** In response to CMS' request, Kentucky added the exact language to this table that was included in our revised waiver regulations. For the four requirements of the HCBS Final

Rules that are not yet in state regulations, Kentucky included the exact language the state is planning to include in the second round of regulations to be revised and filed.

- **Stakeholder Engagement:** CMS recommended that the state include highlights of its efforts to solicit feedback from stakeholders throughout the systemic assessment and remediation process, including meetings and discussions with stakeholders, in the STP.

**State's Response:** A list of meetings with stakeholders was inserted on pages 23-24.

- **State Standards Already in Full Compliance with HCBS Settings Rule:** CMS requested Kentucky provide a list of the state regulations along with citations that the state found to already be fully compliant with the federal requirements during its systemic assessment process, i.e., those that fell into “group one” (p. 6-7) and did not need any changes to come into compliance. Additionally, CMS asked the state to provide an explanation of how it determined each of these state regulations were compliant with one or more specific elements of the HCBS rule.

**State's Response:** The state responded that none of the existing state HCBS waiver regulations were originally in full compliance with the HCBS settings rule. There were some requirements within the state's waiver regulations that were similar to the federal requirements, but all state waiver regulations were updated to fully comply with the HCBS settings rule. This information was further clarified by the state on page 7 of the most recent STP submission.

## ATTACHMENT II.

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

#### **Public Engagement:**

- Please clarify which stakeholders participated in the two rounds of comments. It is not clear if community advocates for elders were involved.

**Systemic Assessment Remediation:** Please update the systemic assessment remediation section of the STP with any additional actions that have been completed.

#### **Site-Specific Setting Assessment Process:**

**Training of Staff in Assessment Process:** CMS requests additional details regarding the training provided to state employees who are conducting onsite assessments and/or reviewing provider self-assessment data and other supplemental information regarding the federal HCBS settings rule, so as to assure strong quality in the review process.

**Non-Disability Specific Settings:** 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 additional information should include how the state is strategically investing to build capacity across the state to assure non-disability specific options.

**Individual, Private Homes:** It is unclear whether the state is presuming one or more categories of settings to automatically comply with the rule (e.g. individually owned private homes). In a situation where the state is presuming any category of setting that receives HCBS funding to be automatically in full compliance with the rule, please outline how this determination was reached and how compliance of each of these categories will be monitored over time.

**Locked Units:** The STP does not address locked units, perhaps because the residential assessment survey has no related question around residents' freedom from restraint. While it is clear that the systemic assessment remediation strategy undertaken by the state will assure that locked units and restraints are not allowed in residential settings under state regulations, please indicate whether this requirement is being included in the assessment process of residential settings.

#### **Reverse Integration:**

- CMS is concerned that Kentucky has added language suggesting that bringing individuals from the community into service settings – particularly non-residential settings – would enable them to meet the integration requirements of the HCBS settings rule. For instance, Kentucky added the following language to Table 5.5 of the plan:
  - *“With respect to Adult Day Health Centers and Day Training sites, a potential provider compliance action would be to: “Bring the greater community to the day site to interact with the participants in a meaningful way in areas of interest to them.” (p. 38)*
  - *“With respect to Day Training sites, a potential provider compliance action would be to: “Consider options for bringing non-Medicaid HCBS individuals to the setting for meaningful interaction based on participants’ interests.” (p. 40)*
- 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 is not considered by CMS in itself to be a sufficient strategy for complying with the community integration requirements outlined in the HCBS settings rule.

- The new framework in Kentucky’s plan to rely on reverse integration strategies as a way for settings to comport with the HCBS settings rule appears to have impacted how the state assessed and categorized its non-residential settings.
  - 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. Settings cannot comply with the community integration requirements of the rule simply by only hiring, recruiting, or inviting individuals who are not HCBS recipients into the setting to participate in activities that a non-HCBS individual would normally take part of in a typical community setting.
  - Individuals receiving HCBS nonresidential services should be engaged in activities they choose, that reflect their individual interests and goals and simultaneously promote the individual’s desired level of community integration.
- CMS thus requests that Kentucky add further details in its assessment process to assure that settings fully comply with the following requirements outlined in the HCBS 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.
- Furthermore, CMS requests the state re-examine its current assessment of any settings that relied on reverse integration as the sole strategy for meeting any of the requirements above so as to enter into a remediation strategy with each provider who is not currently in compliance.

**Validation of Provider Self-Assessments:** Validation of the provider self-assessments is a critical element of success in the implementation of the HCBS rule. Please provide additional details about how the state intends to validate each provider self-assessment, and also how it plans to assess settings that did not respond to the initial assessment process. CMS would like to reinforce to the state that every provider self-assessment must be validated in some way by the state in order to secure final approval of the STP. Successful state examples have embedded a robust combination of multiple validation strategies into the setting assessment process, including but not limited to the following activities: conducting site-visits on an adequate sample size of each category of settings; utilizing consumer survey tools or other vehicles for receiving consumer and family perspectives that can be cross walked to the specific setting; leveraging Federally-funded aging and disability networks in the state to help provide verbal, written, or onsite support in the assessment process; leveraging the state’s pre-existing infrastructure used to operationalize and manage the current HCBS infrastructure.

### **Assessment Results**

CMS notes that the settings assessment results in Kentucky’s revised STP differ significantly from the estimates the State previously reported.

- Please compare the May 2015 version of Kentucky’s plan and the most current submission and clarify how the state reconciled those differences. Please identify residential settings previously thought to be presumptively institutional including those that are potentially isolating based on

provider self-assessments following the state's validation of the provider self-assessments. The revised plan does not sufficiently explain why the state identified only six percent of those residential settings that it previously thought might be in the presumptively institutional category.

- With regard to non-residential settings, the current plan identifies only 4 percent of non-residential settings as being presumptively institutional (12 of 308). This result is a significant departure from the original estimate submitted in May 2015 that identified 15% of the state's non-residential settings as being presumptively institutional and an additional 18% of non-residential settings as being "potentially isolating" and anticipated to be determined presumptively institutional as well.
- As Kentucky begins on-site assessments of settings, it is critical that the state identify and appropriately categorize them in its transition plan. The STP indicates that only those settings in categories 3 and 4 will receive onsite visits beyond those that occur as part of the state's normal monitoring process. The state should include additional information about whether all settings in categories 1 and 2 will receive an onsite visit through the normal monitoring process before the compliance deadline. If there are settings in categories 1 and 2 that will not receive an onsite visit, please explain how the state will assure that those settings are appropriately categorized.

#### **Site-Specific Remedial Actions:**

- Please add details about how the state will work with settings that may not currently be compliant but could come into compliance during the transition period by making necessary changes under a corrective action or remediation plan. (p. 5)
- CMS is concerned that without further specifics on how the state will work with providers that have settings that are out of compliance, there may be an overreliance on introducing modifications within beneficiary person-centered plans (PCPs). CMS requests that the state provide additional detail about how it intends to instruct providers on the requirements for how/when to introduce modifications within individual PCPs, and the other steps a provider must take to address other elements where a setting is out of compliance with the rule.

**Monitoring of Settings:** Please provide more details on the monitoring process the state intends to use to ensure continued compliance of its settings with the federal requirements, as well as a timeframe for each specific monitoring step listed. This section should also include details of how the staff responsible for conducting the ongoing monitoring process will be trained or informed of the changes the state has made to existing requirements based on the federal regulation.

#### **Heightened Scrutiny:**

- Please describe in detail the processes the state used or will use to identify settings that fall under any of the three prongs of settings presumed to have institutional characteristics.
- Please differentiate which specific settings are presumed to have institutional characteristic due to their location (i.e., settings located in a building that is also a publicly or privately operated facility providing inpatient institutional treatment; and settings located in a building on the grounds of, or immediately adjacent to, a public institution) and which specific settings have the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

- Please describe the state process for review of a setting that falls under the institutional presumption to determine that it has the characteristics of a home and community-based setting and does not have institutional characteristics (including the steps the state is going to take to develop a robust evidentiary package on each setting).
- Based on the previous concerns expressed regarding reverse integration as a strategy for complying with several of the key requirements of the HCBS settings rule, CMS would like the state to confirm based on this feedback and the state's reassessment of its initial estimate that only 12 non-residential settings will necessitate heightened scrutiny.
- Please explain how the state employees completing the onsite assessments of settings that are presumed to have institutional characteristics will determine the setting overcomes the presumption. The state must ensure that the onsite assessment process is implemented in a consistent manner across the state with accurate results that reflect each setting's particular features.
- The time period for settings that are going through the heightened scrutiny process seems to be too late (2018) in that it does not provide much opportunity for dialogue and site visits if necessary. CMS suggests the state introduce a staggered application process to CMS that includes presenting settings for heightened scrutiny on a quarterly basis.

**Communication with Beneficiaries of options when a provider will not be compliant:**

- The state presumes that all settings currently receiving HCBS funding will be brought into compliance by the end of the transition period. However, it is important for the state to outline a detailed communication process with timelines, and describe how the state will protect beneficiaries impacted by a setting's inability to provide services in the future should the setting fail to comply. This plan should include details about the steps the state will take to notify beneficiaries, and who will be responsible for executing each step to determine how service provision can continue. Additionally, as the state continues to complete its site-specific settings assessment process, the state will need to report the estimated number of beneficiaries that may be impacted in a future revised STP, and update and tailor the state's beneficiary communication plan and timeline accordingly.
- As part of this process, the state is encouraged to include information about how it will engage other federally-funded entities in the state (e.g. DD networks, LTC ombudsman program, etc.) to help support beneficiaries and families as the individual selects and transitions to home and community-based settings.