

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

July 3, 2017

Deborah Fournier
Medicaid Director
Office of Medicaid Business and Policy
New Hampshire Department of Health and Human Services
129 Pleasant Street
Concord, NH 03301-6521

Dear Ms. Fournier:

This letter is to inform you that CMS is granting New Hampshire **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 June 28, 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 June 2016 draft submitted by the state, CMS provided feedback on February 6, 2017 and held a call on February 7, 2017 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 resubmitted an updated version on June 9, 2017 in response to CMS' feedback. 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 New Hampshire's 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, 2022);
- 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, 2022; 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 New Hampshire has made much progress towards completing each of these remaining components, there are several technical issues that must be resolved before the state can receive final approval of its STP. CMS will be providing detailed feedback about these remaining issues shortly. 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 a minimum 30-day public comment period.

Upon review of this detailed feedback, CMS requests that the state please contact Michele Mackenzie (410-786-5929 or Michele.Mackenzie@cms.hhs.gov) or Jessica Loehr (410-786-4138 or Jessica.Loehr@cms.hhs.gov) at your earliest convenience to confirm the date that New Hampshire 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,

A handwritten signature in blue ink that reads "George P. Faller" followed by a vertical line and the word "for".

Ralph F. Lollar, Director

Division of Long Term Services and Supports

ATTACHMENT I.

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF NEW HAMPSHIRE TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 6/28/16

- **Public Notice and Engagement:** The Centers for Medicare and Medicaid Services (CMS) requested the state confirm that the updated STP and complete attachments were posted on the state's website on February 5, 2016 when the public comment period began (page 139) and that the public notice was provided in a non-electronic form.

State's Response: The state confirmed that it posted its updated and complete attachments on the state's website prior to the notice of public hearings. Notice of the public hearings was posted in two statewide newspapers on February 5, 2016 (pgs. 6-7).

- **Systemic Assessment:** CMS requested the state address the following comments regarding the systemic assessment.
 - Ensure each systemic assessment crosswalk includes the excerpted regulation, policy, licensing or other state standard language that identifies whether the state is compliant, partially compliant, silent or non-compliant with each federal standard.

State's Response: A crosswalk has been completed identifying compliance, partial compliance, silence or non-compliance for each of the requirements for the three waivers. The crosswalks include remediation steps, as necessary (documents C and D).

- Instances of state standards requiring remediation due to silence or non-compliance should contain changes the state is planning to use to amend the state standards in order to come into compliance with the federal rule.

State's Response: The state has updated its crosswalks to include the proposed language that will be submitted to New Hampshire's Joint Legislative Committee on Administrative Rules (documents C, D).

- The state indicated in several places in the systemic assessment crosswalks that a legal review will be conducted to determine whether any changes are necessary to comply with the federal criteria. The results of the legal reviews of state standards against the federal criteria should be included in the systemic assessment.

State's Response: In consultation with the DHHS legal team, it was determined that the overarching regulation outlining rights and protections is He-M 310, Rights of Persons Receiving Developmental Services or Acquired Brain Disorder Services in the

Community. The updated crosswalk identifies the remediation steps necessary to ensure full compliance.

- The state was asked to confirm that they will communicate to provider owned or controlled non-residential settings that the experiences of individuals receiving Medicaid HCBS in these settings must be consistent with those individuals not receiving Medicaid HCBS.

State's Response: Trainings regarding HCBS expectations include that participants have the same experiences as citizens not receiving Medicaid HCBS regardless of the type of setting.

- CMS requested clarification that state standards related to foster care settings were reviewed and/or remediated for compliance with the federal criteria.

State's Response: There are participants in adult foster care settings under the Developmental Disabilities, Acquired Brain Disorder and Choices for Independence waivers. The pertinent regulations were reviewed as outlined in Response # 3 and the accompanying crosswalks.

- CMS requested the state to ensure the assessment of its standards against the federal criterion stating that individuals should have access to food at any time. Please see the below examples:
 - a. State rule He-M 1001.06(k) (attachment F-1) is not consistent with the federal criterion as it states that access to food may be restricted if a licensed practitioner deems it necessary and the legal guardian consents to the restriction. The state was asked to ensure that any restrictions on access to food are addressed through the person-centered planning process.
 - b. He-E 801.24 (attachment G-2) is accurately classified as non-compliant. However, the state's proposed amendment to He-E 801.24, does not remedy the non-compliance because it addresses only meals (time, place, location, alternative meal) and does not indicate that the setting should provide access to food at any time. The state was asked to ensure individuals can access food at any time.

State's Response: Revisions to He-M 310, Rights of Persons Receiving Developmental Services or Acquired Brain Disorder Services in the Community, have been drafted and will be presented to the state's Joint Legislative Committee on Administrative Rules (JLCAR). Revisions include a section specific to modifications and the requirements for those to occur, including documentation in the person-centered plan (Service Agreement). Revisions to He-E 801, Choices for Independence

Program, have also been drafted and will be presented to the state’s Joint Legislative Committee on Administrative Rules (JLCAR). These revisions include the expectation of food being accessible at any time unless an appropriate modification has been implemented.

- CMS requested the state to ensure the assessment of its state standards correctly against the federal criterion providing for access to visitors at any time. Please see the below examples:

- a. State rule He-M 310-09(a)(3)c (attachment F-1) is not consistent with the federal criterion because it permits settings to impose “reasonable restrictions on the number and time of visits . . .” The state was asked to ensure that the state standards indicate that any restriction on visitors is handled through the person-centered planning process.

State’s Response: Revisions to He-M 310, Rights of Persons Receiving Developmental Services or Acquired Brain Disorder Services in the Community, have been drafted and will be presented to the state’s Joint Legislative Committee on Administrative Rules (JLCAR). Revisions include a section specific to modifications and the requirements for those to occur, including documentation in the person-centered plan (Service Agreement).

- b. State rule He-E 801.24 (Attachment G-1) is labeled as non-compliant. However, the state’s proposed amendment does not remedy the non-compliance because it permits a setting to have a policy that prohibits visitors if they are “infringing on the rights of other residents.” The state was asked to ensure that any restrictions on visitors are handled through the person-centered planning process.

State’s Response: Revisions to He-E 801, Choices for Independence Program, have been drafted and will be presented to the state’s Joint Legislative Committee on Administrative Rules (JLCAR). Revisions are identified in the updated crosswalk, including a modification process and use of the person-centered planning document.

- The state was asked to ensure the provision of the appropriate remediation for the federal criterion ensuring individuals have setting options that include non-disability specific options.

State’s Response: Revisions to He-E 801, Choices for Independence Program, have been drafted and will be presented to the state’s Joint Legislative Committee on Administrative Rules (JLCAR). Revisions are identified in the updated crosswalk.

- The state was asked to ensure provision of the appropriate remediation for the federal criterion that settings facilitate individual choice regarding services and who provides

them. For example, the state's remediation language for this criteria in Attachment G-3 does not indicate individuals have choice regarding services and who provides them.

State's Response: Revisions to He-E 801, Choices for Independence Program, have been drafted and will be presented to the state's Joint Legislative Committee on Administrative Rules (JLCAR). Revisions are identified in the updated crosswalk.

- State rule He-E 801.24 (attachment G-1) was listed as non-compliant with the federal criterion that individuals have privacy and access to units with lockable doors, with only appropriate staff having access to the keys. However, the state's proposed amendment did not remedy the non-compliance because it did not require settings to limit the distribution of keys to individuals' rooms to "appropriate staff." The state was asked to include this remediation language in the crosswalk. In addition, the proposed amendment conditions the individual's right to a lockable door on consistency with the "New Hampshire fire safety regulations." The state was asked to describe why fire safety regulations would impinge on an individual's right to a lockable door.

State's Response: Revisions to He-E 801, Choices for Independence Program, have been drafted and will be presented to the state's Joint Legislative Committee on Administrative Rules (JLCAR). Revisions are identified in the updated crosswalk. In a follow up conversation with the state's Office of Legal and Regulatory Services and the state's Fire Marshall's office, it was clarified that there are no fire safety issues that would prevent a participant from having a lockable door as long as the individual is able to evacuate the premises in timely manner in the event of a fire.

- State rule He-E 813.04(c) (attachment G-1) was listed as non-compliant with the federal criterion that settings ensure an individual's right to privacy, dignity and respect and freedom from coercion and restraint. However, the state's proposed remediation language does not remedy the non-compliance because it does not require an adult family care residence to ensure an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint. The state was asked to explain how this will be remediated in the STP.

State's Response: Revisions to He-E 801, Choices for Independence Program, have been drafted and will be presented to the state's Joint Legislative Committee on Administrative Rules (JLCAR). Revisions are identified in the updated crosswalk.

- The federal criterion of physical accessibility applies to all provider owned or controlled settings, including non-residential settings. The state was asked to clarify where this is

included in the state's existing standards, or alternatively include how the state will address this issue in the STP.

State's Response: Revisions to He-E 801, Choices for Independence Program, have been drafted and will be presented to the state's Joint Legislative Committee on Administrative Rules (JLCAR). Revisions are identified in the updated crosswalk.

- CMS agreed that state He-M 310.06(a)(4) (attachment F-2) is non-compliant with the federal criterion that settings must facilitate individual choice regarding services and supports and who provides them. However, the state's proposed amendment to ensure compliance with the federal criterion included the phrase "where possible."

State's Response: New Hampshire was in error when identifying He-M 310.06(a)(4) as the reference for the facilitation of individual choice regarding services and supports and who provides them. He-M 310.06(a)(4), the reference used, speaks to the person-centered planning process and the participant/representative's role. The updated crosswalk identifies that New Hampshire is compliant as outlined in He-M 310.06(a)(11).

- The state was asked to further describe in attachment G-1-5 how settings would be assessed for compliance with the federal criterion that 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, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.

State's Response: Revisions to He-E 801, Choices for Independence Program, were drafted and will be presented to the state's Joint Legislative Committee on Administrative Rules (JLCAR). Revisions were identified in the updated crosswalk.

- The state was asked to ensure that all of the state regulations or other state standards related to assisted living residences and adult day settings have been assessed against the settings criteria, with the results reflected in the systemic assessment crosswalks.

State's Response: Revisions to He-E 801, Choices for Independence Program, have been drafted and will be presented to the state's Joint Legislative Committee on Administrative Rules (JLCAR). Revisions are identified in the updated crosswalk.