

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 once these changes are made before 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.

HCBS Settings to Be Included in State’s Site-Specific Assessment/Validation & Remediation Process

Per CMS’ request, please provide more details on the HCBS settings that will be included in the state’s site-specific assessment/validation and remediation process.

Individual, Private 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 HCBS settings requirements if they are integrated in typical community neighborhoods where people who do not receive HCBS also reside. A state will generally not be required to verify this presumption, but does need to include details within the STP as to how the state will monitor these settings to assure ongoing compliance with the rule. Additionally, 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 HCBS (for example, a setting purchased by a group of families solely for their family members with disabilities using HCBS services).

- On page 7, the STP states under the sections for both 1915(i) and 1915(k) that, “Individuals receiving services through the 1915(i) reside in their own or family homes or provider-owned, controlled or operated settings.” However, on page 13, the STP states, “Oregon provides HCBS to individuals residing in their own or family homes through the 1915(k) Community First Choice State Plan Option and the 1915(c) HCBS waivers operated by APD and ODDS and the 1915(i) HCBS State Plan Option operated by OHA, HSD.” Please clarify that while some individuals receiving HCBS under these two state plan options reside in their own or family homes, that other HCBS participants reside in provider-owned, controlled and operated homes.

State’s Response:

The language in the STP has been updated to reflect the clarification requested by CMS. Please see pages 14-15 of the STP.

- Please also note that settings where the beneficiary lives in a private residence owned by an unrelated caregiver (who is paid for providing HCBS services to the individual), are considered provider owned or controlled settings and should be evaluated as such.

State's Response:

Language has been added to the STP address unrelated caregivers paid to provide HCBS. Please see pages 14-15 of the STP.

Assessing/Validating HCBS Group Settings: CMS wishes to remind the state that any setting in which individuals are clustered or grouped together for the purposes of receiving HCBS must be assessed for compliance with the federal HCBS settings requirements, and that these assessment findings must be validated in some way. This would include both group residential and non-residential services, including but not limited to group supported employment and day services. The state may presume that any setting where individualized services are being provided in typical community settings comport with the rule.

State's Response:

The state acknowledges the reminder and thanks CMS. Please see pages 15, and 20-21 of the STP for updated language.

- **ODDS Licensed/Certified Employment Services:** The state currently supports 2577 individuals in Employment Services. The STP states there are “no sites”, because the services are all provided in community-based settings. However, the settings where individuals are clustered or grouped together for the purposes of receiving HCBS must be assessed. Please distinguish the number of settings that are providing group-based services under ODDS Licensed/Certified Employment Services from the number of participants who are receiving services under this category in an individualized manner (and thus the settings they are receiving such services in would not need to be assessed and validated).

State's Response:

The language in the STP has been updated. Please see pages 15, and 20-21 of the STP.

State of Oregon's HCBS Setting Site-Specific Assessment & Validation Process: States are responsible for assuring that all HCBS settings comply with the final HCBS rule in its entirety. Quality thresholds should not be used to reduce the state's requirement to assure compliance across all settings. States may deploy a number of validation strategies to determine compliance within settings, including but not limited to consumer feedback, onsite visits, external stakeholder engagement, case manager surveys, licensure/certification reviews, and state review of data from operational entities. The state must ensure at least one validation strategy is used to confirm provider self-assessment results, and should also supplement strategies where there may be a perceived conflict of interest with additional validation tactics. The more robust the validation processes (incorporating multiple strategies to a level of degree that is statistically significant), the more successful the state will be in helping settings ensure compliance with the rule.

State's Response:

The validation process and language in the STP have been updated. Please see Phase III of the STP starting on page 47 of the STP.

Utilization of Provider Self-Assessment Tool (PSAT): It is unclear whether all providers completed a PSAT for each of the sites in the state. Please provide additional information on the number of PSATs that have been returned and corresponding methods that the state used to validate the PSATs for those sites across service/setting categories. Please also provide additional details on the steps the state is taking to assess and validate those settings where providers did not complete the PSAT.

State's Response:

The PSAT process and language in the STP have been updated. Please see pages 47-49 and 51-52.

Validating PSAT Results: The state described that it would validate the PSAT results with outcomes from the Individual Experience Assessment (IEA), but noted that if a setting did not have a sufficient number of corresponding IEA responses, the state would validate the PSAT through the service delivery system and licensing site-review process. Please provide more information about the validation methods proposed:

- **Individual Experience Assessments (IEAs):**
 - Indicate the minimum proportion of IEAs needed in order to fully validate a setting.
 - Details on how the state will address discrepancies between information collected in the PSAT and information reflected in the IEAs.
 - While the individual survey asks if an individual received assistance in filling out the survey and by whom, the STP should also reflect additional details regarding the training and qualifications required of individuals assisting beneficiaries in completing the IEA.
 - Additionally, CMS is concerned by the methodology described in the STP for getting a response on the IEA (ie. providers following up directly with beneficiaries in HCBS settings), and believe it would be more effective and introduce less conflict of interest if the participant were assisted by a case manager or other individual that is not financially connected to the provider of HCBS. Having strong response and responses protected from conflict-of-interest are critically important, especially given the critical role of the IEAs in the state's validation plan.
 - CMS asks that the state clarify what a "lack of substantial response" on the IEAs means that will flag the site for review during the service delivery and licensing site review process, and explain how this review would be any different from the process such sites would generally go through for licensure.
 - Please confirm whether the IEA will be incorporated into the state's ongoing licensing and certification requirements or case management processes so as to help inform monitoring activities for ongoing compliance and also assure beneficiary participation in the future.

State's Response:

The IEA process and language in the STP have been updated. Please see Phase III of the STP beginning on page 47.

- **Other Validation Activities:** Please provide more detail on how all staff from external entities and within state operating entities involved in the site-specific assessment and validation processes were trained on the federal HCBS rule so that they have the knowledge, skills and abilities to successfully complete the assessments and validations. Also include information about the following:
 - The ongoing education, training, and technical assistance that will be provided to these individuals;
 - A description of the state’s plans for engaging external stakeholders and assuring ongoing public input to inform the review of the settings for HCBS compliance;
 - Clarification of whether organization partners will be trained on evaluating sites for characteristics of the home and community-based rule in order to appropriately identify concerns;
 - A description of the process, including timeframes, and tools used for the service delivery system and licensing site-review process;

State’s Response:

Please see Phase II of the STP beginning on page 24.

- **Reporting Results of Validation Activities:** Finally, the state indicates that an estimate of the number of settings based on compliance level will be provided in the January 2017 submission of the STP. Please make sure all assessment and validation activities across settings and HCBS authorities have been properly captured and summarized.
- Additionally, please explain how the state is confident of these findings without conducting a site visit.

State’s Response:

The language in the STP has been updated. Please see Phase III of the STP beginning on page 47.

Setting Remedial Actions and Ongoing Monitoring and Compliance Activities

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

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 will plan to build capacity across the state to assure non-disability specific options.

State’s Response:

Please see pages 15, 22, 70, 87

Site Specific Remediation Activities: CMS requests the following information about the site specific remediation activities.

- The STP does not describe who is on the review committee reviewing the final determination of the areas that must be remediated. This is a critical piece of compliance as the remediation plan will determine the level of compliance with the wording and intent of the regulations. Similarly, the make-up of the advisory panel for provider adaptation plans is not well-defined.
- Please provide clarification as to whether the centralized system for information extends to the compliance staff review (pg. 34).
- Finally, include remedial actions the state intends to take for each setting once the assessments are complete.

State's Response:

The remediation process and language in the STP have been updated. Please see Phase V of the STP starting on page 81 of the STP.

Monitoring of Settings

Per CMS' request, the state should continue to provide more details on the processes used for ongoing monitoring including the frequency of monitoring activities, the ongoing training and technical assistance available to the entities/individuals that conduct monitoring, and the processes and tools utilized to monitor these settings.

State's Response:

The ongoing monitoring process and language in the STP have been updated. Please see Phase VI of the STP starting on page 96 of the STP.

Heightened Scrutiny

The state has provided some initial details to its evolving approach to identifying and reviewing settings that may require heightened scrutiny, but needs to clearly lay out a more comprehensive 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 institutional presumption will stand and the state must describe the process for informing and transitioning the individuals living in or receiving services in these settings to either compliant settings or settings receiving non-HCBS funding.

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.

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

It is unclear if the state has identified any settings with the effect of isolating individuals. Provide the methodology for identifying such settings and the results from this review. As a reminder to the state, CMS' *Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community* states that the following two characteristics alone might have the effect of isolating individuals:

- The setting is designed specifically for people with disabilities, or for people with a certain type of disability.
- Individuals in the setting are primarily or exclusively people with disabilities and the on-site staff that provides services to them.

State's Response:

The Heightened Scrutiny process and language in the STP have been updated. Please see Phase V of the STP starting on page 57 of the STP.

Submission of Heightened Scrutiny Evidentiary Packages: To assist states in developing an evidentiary package in support of each setting submitted to CMS for heightened scrutiny review, please refer to Frequently Asked Questions published by CMS in 2015¹.

Caution regarding Submitting Non-Compliant Settings under Heightened Scrutiny: CMS reminds the state that only settings the state believes successfully meet all of the requirements of the federal HCBS rule and have overcome any institutional qualities or characteristics should be submitted under heightened scrutiny. Any setting that falls under one of the three prongs identified as presumed institutional that do not comply with requirements of the HCBS rule should not be moved forward under heightened scrutiny unless or until all of these issues are addressed.

State's Response:

The state acknowledges the recommendation and reminder and thanks CMS. Please see the attached Heightened Scrutiny evidence packages accompanying this submission.

Communication and Assistance for Beneficiaries Receiving Services from Providers Unable to Achieve Compliance

¹ <https://www.medicaid.gov/medicaid/hcbs/downloads/home-and-community-based-setting-requirements.pdf>

Per CMS' request, please provide more information around the communications with beneficiaries, including the estimated number of HCBS beneficiaries who may need assistance to locate and transition to compliant settings or other funding streams.

Transition Time Period: The state anticipates notifying recipients in non-compliant settings by October 15, 2018 that they need to transition to another setting, and then individuals will have until February 28, 2019 to transition to "available compliant settings." (pg. 35). CMS is concerned that this leaves only 4 ½ months for an individual to transition, assuming that sufficient compliant settings exist to meet demand. The state should start the transition process earlier for any settings it knows cannot comply.

Process for Communicating and Providing Support to Impacted Beneficiaries: The tight timeframe also necessitates that the state has a well-developed plan for communicating to beneficiaries and their families regarding the need to transition to compliant settings. As such, CMS requests the state provide more details on this process, including:

- A detailed process with timelines and who will be responsible for executing each step of the process;
- A description of how all beneficiaries receiving services from providers not able to achieve compliance will receive reasonable notice and due process, including a minimum timeframe for that notice;
- A description of how the state will ensure that beneficiaries are given the opportunity, the information, and the supports to make an informed choice of an alternate setting that aligns with the federal requirements; and
- A description of how the state will ensure that all critical services and supports are in place in advance of each individual's transition.

State's Response:

Please see Phase V of the STP starting on page 81.

Milestones

- A milestone template will be supplied by CMS. Please resubmit the chart with any updates no later than 30 days after receiving this communication and the template. The chart should reflect anticipated milestones for completing systemic remediation, settings assessment and remediation, heightened scrutiny, communications with beneficiaries, and ongoing monitoring of compliance. It should also include timelines that address the feedback provided in this letter.

State's Response:

Please see the attached completed milestone template accompanying this submission.

- The dates for completion of the PSAT and IEA listed on p. 28 do not align with those identified in the timeline of action items (p. 39). Please correct.

State's Response:

Dates have been revised throughout STP.