

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

March 31, 2017

Calder Lynch
Director, Division of Medicaid & Long-Term Care
State of Nebraska, Department of Health and Human Services
301 Centennial Mall South, 3rd Floor
PO Box 95026
Lincoln, NE 68509-5026

Dear Mr. Lynch,

This letter is to inform you that CMS is granting Nebraska **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 May 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 May 2016 draft submitted by the state, CMS provided additional feedback on July 20, 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 March 10, 2017. 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 spot check of 50% 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 Nebraska'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, 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 information for submission to CMS for those settings identified by the state to 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 Nebraska has made much progress toward 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. Additionally, prior to resubmitting an updated version of the STP for consideration of final approval, the state will need to issue the updated STP out 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 Amanda Hill (410-786-2457 or Amanda.Hill@cms.hhs.gov) at your earliest convenience to confirm the date that Nebraska 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 that is forthcoming.

Sincerely,



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

ATTACHMENT I

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF NEBRASKA TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 3/10/17

Additional Details about the State’s Proposed Overarching Regulation: CMS requested that the state add information to the STP describing Title 480, the overarching regulation that is being promulgated in greater detail. CMS asked the state to either provide draft language or describe how the language of Title 480 will mirror the federal settings rule.

State’s Response: The state added the following language to page 19 of the STP: “...both titles [404 and 480] will be amended to include more specific language for the requirements of the rule...”

The state added the following language to page 20 of the STP: “Licensure regulations address minimum requirements to become licensed in the State of Nebraska. Titles 404 and 480 will address additional requirements that must be met in order to be eligible to be a Waiver provider.”

Per a follow-up email, the state further clarified that three titles will be revised to come into compliance with the regulation: Titles 403 and 404 for waivers serving participants with developmental disabilities, and Title 480 for waivers serving participants who are aged or disabled. The state has committed that these titles will mirror the language of the federal regulation.

Additional Comment: The state agreed to clarify its plans to promulgate an overarching regulation for DD waiver settings in Titles 403 and 404, as the state indicated on p. 41 of the revised STP that it plans to promulgate revisions to Title 403 but did not mention Title 404. In addition, throughout the DD waiver section of the crosswalk (Attachment 4), the state indicated that its proposed remediation of DD waiver regulations will be through a new overarching regulation in Title 403 but did not mention Title 404; the state agreed to add information about Title 404 to the DD waiver section of the crosswalk.

Additional Details about the State’s Proposed Overarching Regulation: CMS requested that the state clarify that Title 480 will be a requirement for all licensed entities, will hold these entities to a higher standard than the standards outlined in licensing requirements, and how Title 480 will apply to all entities providing HCBS services in the state, including those that fall under other titles in the state.

State’s Response: The state added the following language to page 20 of the STP: “Licensure regulations address minimum requirements to become licensed in the State of Nebraska. Titles 404 and 480 will address additional requirements that must be met in order to be eligible to be a Waiver provider.”

Per a follow-up email, the state further clarified that three titles will be revised to come into compliance with the regulation: Titles 403 and 404 for waivers serving participants with developmental disabilities, and Title 480 for waivers serving participants who are

aged or disabled. The state has committed that waiver providers will be held to these standards in addition to any other licensure standards relevant to their setting; this will be clarified in the STP.

Note to Nebraska: *In addition to the concerns above that were communicated to the state in the July feedback letter, many of which the state has addressed, CMS identified the following additional concerns through our recent Content Review and 50% spot check. The full spot check results were submitted in a separate document.*

A spot check of the state standards that are included in the state's crosswalk was completed, and CMS had concerns with many of the state's determinations regarding compliance with the federal requirements, as described below. Please note that these examples are not exhaustive; therefore, in addition to addressing the points below, CMS requested that the state revisit its systemic assessment as a whole and ensure that each determination is accurate with regard to each component of each federal requirement.

- NRS § 83-1202, DD Services Act (community integration and access): The language in this regulation conflicts with the federal requirement that the setting support full access to the community. Under this regulation, a setting's obligation to ensure access to the community is more restrictive than what is permitted by the federal regulation by limiting it to "the maximum extent possible."
- Title 175, 4-006.04(12) (access to visitors): This regulation permits settings to restrict the individual's right to have visitors if it would infringe on the rights and safety of other residents in the facility. This conflicts with the federal requirement that an individual have the right to visitors of their choosing at any time.
- Title 175, 4-006.04(15) (freedom to furnish and decorate one's sleeping unit): This regulation is in conflict with the federal requirement because it limits the individual's right to furnish and decorate his/her sleeping/living unit to when it does not infringe upon the rights and safety of other residents. The regulation is also silent on the individual's right to decorate his/her unit.

State's Response: The state has committed to CMS that the language of Titles 403, 404 and 480 will be verbatim to the language used in the federal rule and that all waiver providers will be held to the higher standards under the revised titles. Any modifications will be based on a specific, individual assessed need and will be documented in the person-centered plan. The state advised that other licensure standards, for example Title 175, will not change for providers who are not providing Medicaid HCBS.