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**

December 21, 2022

Stephanie Stephens
Chief Medicaid and CHIP Services Officer
P.O. Box 13247
4601 W Guadalupe St
Austin, TX. 78711-3247

Dear Director Stephens:

This letter is to inform you that the Centers for Medicare & Medicaid Services (CMS) is granting Texas **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). 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 is actively working on those remediation strategies. The state submitted to CMS on April 22, 2022 a draft of the STP that was posted for a 30-day public comment period on March 3, 2022, made sure information regarding the public comment period was widely disseminated, and responded to and summarized the comments in the STP. The state submitted a draft on August 17, 2022 which responded to the feedback provided by CMS on May 17, 2022. CMS sent the state feedback on September 7, 2022. Additionally, the state submitted a draft of the STP on October 11, 2022.

After reviewing the drafts submitted by the state, CMS provided additional feedback on October 19, 2022, requesting that the state make several technical corrections to receive initial approval. Texas subsequently addressed all issues and resubmitted an updated version of the STP on November 16, 2022. These changes are summarized in Attachment I to this letter. The state's responsiveness in addressing CMS' remaining concerns related to the state's systemic assessment and remediation resulted in the initial approval of its STP.

In order to receive final approval, all STPs must include:

- A comprehensive summary of completed site-specific assessments of all HCBS settings, validation of those assessment results, and inclusion of the aggregate outcomes of these activities;
- Draft remediation strategies and a corresponding timeline for resolving 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, 2023);
- A detailed plan for identifying settings presumed to have institutional characteristics, as well as the proposed process for evaluating these settings and preparing for submission to CMS for review under heightened scrutiny;
- A process for communicating with beneficiaries currently receiving services in settings that the state has determined cannot or will not come into compliance with the HCBS settings criteria by March 17, 2023; and

- A description of ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the federal settings criteria in the future.

While the state of Texas 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. Prior to resubmitting an updated version of the STP for consideration of final approval, the state will need to publish the updated STP for a minimum 30-day public comment period. It is critical to note that the transition period expires on March 17, 2023. In order to ensure continued funding for HCBS, states must have an approved final STP that effectively ensures the remediation by that date of any setting not yet fully compliant with the regulation.

Upon review of this detailed feedback, CMS requests that the state please contact Amanda Hill (Amanda.Hill@cms.hhs.gov) at your earliest convenience to confirm the date that Texas 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 Texas for its efforts thus far on the HCBS Statewide Transition Plan. CMS appreciates the state's completion of the systemic review and anticipates the implementation of the 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,

Ryan I. Shannahan -S

Digitally signed by Ryan I. Shannahan -S
Date: 2022.12.21 13:37:45 -05'00'

Ryan Shannahan, Deputy Director
Division of Long-Term Services and Supports

**Attachment I.**

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF TEXAS TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED AND SUBMITTED NOVEMBER 16, 2022

## Public Notice and Comment

The state posted the STP for public comment beginning March 3, 2022 for 30 days. The state's public comment period includes electronic and hard copy publication in the Texas Register, posting on the Texas Health and Human Services Commission, (HHSC) website, email alerts to people subscribed for updates, and posted notices at HHSC regional offices. A summary of public comments and the state's responses was included in Appendix E of the STP (pages 6-9).

## Systemic Crosswalks

- The state clarified that Employment Assistance and Supported Employment services were provided in community settings and that people are not grouped or clustered to receive services (Appendix A, page F-1 through F-10).
- The state updated the systemic assessment and planned remediation for the Support Family Services and Continued Family Services settings (Appendix A, pages F-1 through F-10).
- The state updated compliance findings and remediation language (Appendix A, page F-1 through F-2, page F-6, page F-11, pages F-15 through F-20, page F-24, F-26 through F-33, F-40 through F-43, F-47 through F-51 and page F-59).
- The state updated the chart on page 35 of the STP to included prevocational services and clarified prevocational services are individualized and provided in non-residential settings (Appendix A, pages F-3 through F-5).
- The state updated the systemic assessment and remediation language for provider owned and controlled residential settings to include missing regulatory criteria (Appendix A, pages F-5 through F-10).
- The state updated compliance findings to reflect accurate status and clarified that the planned updated Texas Administrative Code (TAC) language will supersede previous non-compliant language (Appendix A, page F-15).
- The state confirmed that Medicaid HCBS are not delivered by foster care providers (Appendix A, page F-61).
- The state updated the systemic crosswalk with a review of child welfare requirements (Appendix A, page F-61).
- For child welfare requirements that were Silent or Partially Compliant, the state included specific rule and policy language to be remediated to ensure that Medicaid HCBS delivered to participants in these settings meet the federal requirements (Appendix A, page F-63, page F-65, page F-66, pages F-68 through F-72, page F-74).
- The state confirmed that foster care settings will be incorporated into ongoing monitoring for HCBS compliance (STP, page 25).

## Systemic Remediation

- The state incorporated throughout their systemic crosswalk in Appendix A the specific language of new rules, contracts and handbooks for remediation of non-compliant language in each program.
- The state clarified the language: "Individuals are not permitted to self-administer medications in Assisted Living Facilities" has been removed from the TAC and updated to read: "Medications must be administered according to physician's orders. Residents who choose not to or cannot self-administer their medications must have their medications administered by a person who…".
- The state corrected the link for the Deaf Blind Multiple Disabilities Waiver (DBMD) Program Manual (Appendix A, page F-10).

- The state updated proposed language in TAC Title 26, Part 1, Chapter 259 to address missing regulatory criteria I (Appendix A, pages F-6 through F-10).
- The state clarified that new TAC language would supersede previous non-compliant language concerning participants' rights to visitors at any time (Appendix A, page F-15).
- The state updated DBMD compliance findings to reflect accurate status, added remediation language, and updated proposed language in TAC Title 26, Part 1, Chapter 260 (Appendix A, pages F-16 through F-20).
- The state amended findings and updated remediation language for STAR+PLUS that relied upon Unified Managed Care Contract (UMCC) citation to include: "HCBS STAR+PLUS Waiver services must be provided in home and community-based settings and comply with 42 C.F.R. § 441.301(c)(4)," (Appendix A, pages F-53 through F-61).
- The state confirmed that STAR+PLUS participants are offered a choice of settings, including non-disability specific options (Appendix A, page F-55).
- The state updated proposed language to TAC Title 26, Part 1, Chapter 262 for non-residential settings requirements (Appendix A, pages F-4 through F-51).
- The state updated proposed language in TAC Title 26, Part 1, Chapter 263 (Appendix A, Pages F-22, F-25 through F-33).

# ATTACHMENT II.

**Texas**

**ADDITIONAL CENTERS FOR MEDICARE AND MEDICAID SERVICES (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 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.***

**Date of STP Submission: April 22, 2022**

## Site-specific Assessments & Validation Process

***Site Specific Assessment Process:*** Appendix C outlines the external assessment process for providers of fee-for-service (FFS) Home and Community Based Services (HCBS). The state notes that for each FFS program, a representative sample of providers were identified to participate in the self-assessment. For the STAR+PLUS program the state indicates on page 25 of the HCBS Statewide Transition plan (STP), that the state evaluated 164 settings through a self-assessment survey and participant surveys. All settings where Medicaid HCBS are received must be assessed and validated for compliance with all of the HCB settings criteria. Please include a description of the methods used by the state to assess and validate each home and community-based setting for compliance. The description should include the following:

- The process by which the state assessed all HCB settings within the program delivery system,
- Each assessment method used, and for which settings,
- The entity responsible for completing the assessment,
- The timeline for completing assessments.

***Participant Surveys:*** Participant surveys were used for the DBMD and Home and Community-based Services (HCS) waivers. HHSC contracted with the External Quality Review Organization (EQRO) to survey a representative sample of individuals receiving licensed assisted living or adult foster care services in the STAR+PLUS HCBS program. Please confirm if the member survey responses were linked back to a specific setting. Please note that if the state uses member surveys to validate provider self-assessments, CMS requests the state to:

- Clarify all the HCB settings criteria was included in the consumer survey.
- Clarify all of the HCB settings were included in the consumer survey.
- If not all consumers were given an opportunity to take the survey, please describe how consumers were selected to receive the survey, and how the state ensured a representative sample from each setting was selected.
- Clarify that participant surveys were completed by individuals receiving services and when necessary with the assistance of family, case managers, or other support.
- Clarify that the surveys were sent directly to the consumers, and whether case managers or managed care service coordinators were trained in working with the consumers to complete the survey.
- Clarify how the state will reconcile any differences between consumer survey results and provider self-assessment results.
- Confirm that the consumers completed the survey outside the presence of the provider or paid staff.

- STAR+Plus Program, Attachment D, pg. 7 indicates when a resident objected to a proxy's final response it was recorded as a "no response" or "refusal." Please clarify why the state did not differentiate this as an objection to the response, and how the state then categorized such objection in their compliance findings.
- STAR+Plus Program, Attachment D, pg. 10 indicated records were excluded from analysis if information in the interviewer feedback section suggested that responses were biased due to coercion by others present during the interview. Please clarify how the state ensured all individuals were free from coercion, and how this finding of coercion was incorporated into the overall compliance findings of the setting.
- CMS has concerns with the approach taken by the state with participant surveys as outlined in attachment D of the STP in regards to the weighted outcomes; this approach will not result in a representative sample of participants in each setting. Please note compliance results should be particular to each setting, therefore one setting's participant survey responses should not have any bearing on another setting's participant survey responses, in terms of site-specific compliance status.

***Validation of Site Specific Assessments:*** States may use a combination of various strategies to assure that each setting is properly validated (including but not limited to state onsite visits; data collection on beneficiary experiences and consumer feedback; leveraging of existing case management, licensing & certification, and quality management review processes; partnerships with other federally-funded state entities, including but not limited to Developmental Disability and aging networks; and state review of data from operational entities, such as managed care organizations (MCOs) or regional boards/entities, provider policies, consumer surveys, and feedback from external stakeholders), so long as compliance with each individual setting is validated by at least one methodology beyond the provider self-assessment.

- The state indicated the Texas External Quality Review Organization (EQRO) and the Texas Health and Human Services Commission (HHSC) used a threshold of 86 percent to determine compliance on individual survey items, overall component results, and overall requirement results. Please note: There is no threshold for compliance with the HCB settings criteria and all settings must be in full compliance by the end of the transition period.
  - Please clarify what strategies Texas is using to validate provider assessments and assess and validate settings that did not receive a member survey in a manner that clarifies how all HCB settings were validated by the state for compliance with the all of the HCB settings criteria.
  - The state indicated on pg. 24 that, "external assessments were conducted only for programs that provide HCBS in both non-residential and residential settings: DBMD, HCS, STAR+Plus HCBS." Please clarify that this was for "either" non-residential or residential settings, and not only for those programs that provided both.

***Case Management Surveys:*** Please confirm if the Case Management survey responses were linked back to a specific setting. Please note that if the state uses Case Management to validate provider self-assessments, CMS requests the state to;

- Clarify all the HCB settings criteria was included in the survey and how the survey was setting-specific.
- Clarify how the state will reconcile any differences between participant survey results, Case Management Survey results, and provider self-assessments.
- Providers who deliver services in the Deaf Blind with Multiple Disabilities Waiver are the same providers who also deliver case management. Please clarify how the state validated those case management assessments.

***Aggregation/Reporting of Final Validation Results:*** Please update the initial findings of setting compliance across the respective programs with final results once all validation activities are completed. In this analysis, please delineate the compliance results across categories of settings for all programs in a manner that is easy for the public to review and understand. At a minimum, please make sure to confirm the number of settings in each category of HCBS that the state found to be:

- Fully compliant with the HCBS settings criteria;
- Could come into full compliance with modifications during the transition period;
- Cannot comply with the HCBS settings criteria; or
- Are presumptively institutional in nature.

Please separate the settings out by settings type and number of settings, under their category of compliance.

***Individual, Privately-Owned Homes:*** In the Texas STP, 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, 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. Note, 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.

***Group Settings:*** As a reminder, any setting in which individuals are clustered or grouped together for the purposes of receiving HCBS must be assessed and validated by the state for compliance with the rule. This includes all group residential and non-residential settings (including but not limited to prevocational services, group supported employment and group day habilitation activities). The state may presume that any setting where individualized services are being provided in typical community settings comport with the rule. Please confirm that the STP accurately includes all group residential and non-residential settings.

***Reverse Integration Strategies:*** CMS requests additional detail from the state as to how it will assure that non-residential settings comply with the various requirements of the HCBS rule, particularly around integration of HCBS beneficiaries to the broader community. States cannot comply with the rule simply by bringing individuals without disabilities from the community into a setting. Reverse integration, or a model of intentionally inviting individuals not receiving HCBS into the facility-based setting is not considered by CMS by itself to be a sufficient strategy for complying with the community integration criteria outlined in the regulation.

**Site-Specific Remedial Actions**

***Site-Specific Remediation:*** CMS requests the state provide the process for bringing site-specific settings into full compliance. Please clarify the following:

- The site-specific remediation plan the state will enact for each provider if any remediation is required.
- The process by which the state communicates their validation findings to providers about each specific setting.

- Updated timelines when site-specific remediation will be completed with sufficient timelines available for assisting participants receiving services from providers not able to come into full compliance.
- Verification that all settings will be evaluated for compliance with all HCBS regulatory criteria at the conclusion of the provider transition plan.

***Non-disability Specific Settings:*** The state does not outline any steps that are being taken to increase capacity of non-disability specific settings. Please provide 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. The STP should also indicate the steps the state is taking to build capacity among providers to increase non-disability specific setting options across home and community-based services.

***Timelines, Milestones and Description of Process:*** The state must outline their milestones and a timeline which reflects the dates actions are completed. For those items not yet completed the state should provide an estimated end date. Currently the timeline provided in Attachment F outlines those milestones as they related to the systemic policy changes. The state should include the milestones and dates for the provider self-assessments, participant surveys, case management surveys, validation activities, site-specific remediation, identification of presumptively institutional settings, ongoing monitoring, and communication with beneficiaries, particularly as it relates to notice of non-compliant settings.

***Communication with Beneficiaries:*** Please provide a detailed strategy for assisting participants receiving services from providers not willing or able to come into compliance by the end of the transition period. CMS asks the state include the following details of this process in the next installation of the STP:

- A description of the processes for assuring that beneficiaries, through the person-centered planning process, will be given the opportunity, the information and the supports necessary to make an informed choice among options for continued service provision, including in an alternate setting that aligns, or will align by the end of the transition period, with the HCB settings criteria.
- The entity responsible for assisting the individual with the process.
- The timeline by which individuals will be informed, if living in a setting that will not be able to comply with the settings criteria.
- Assurance that there will be no disruption of services during the transition period.
- An estimate of the number of individuals who may need assistance in this regard.

**Ongoing Monitoring of Settings:**

CMS requests that Texas provide details on the monitoring process the state intends to use to ensure continued compliance of its settings with the settings criteria, including a timeframe for each specific monitoring step listed. CMS also requests Texas:

- Clarify the process for each HCBS program's ongoing monitoring strategy, including the timelines under which settings are subject to monitoring, the frequency of the monitoring, and the specific entities responsible for monitoring.
- The process by which settings the state presumed to be in compliance, including individual/private homes, will be incorporated into the ongoing monitoring strategy.
- The process by which foster homes, support family service homes, and family service homes will be incorporated into the ongoing monitoring strategy.
- Confirm that all HCB settings will be monitored for all of the HCB settings criteria on an ongoing basis.

- Please Note: While National Core Indicator (NCI) surveys can be used to identify broader systemic concerns, they cannot be tied back to any particular setting, therefore they cannot be a key assessment method for ongoing monitoring of site-specific compliance.

**Heightened Scrutiny:**

The state must clearly lay out its 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 determining next steps for the individuals involved. Please only submit those settings under heightened scrutiny that the state believes will overcome any institutional characteristics and can comply with the federal settings criteria. Please include further details about the criteria or deciding factors that will be used consistently across reviewers to make a final determination regarding whether or not to move a setting forward to CMS for heightened scrutiny review. There are state examples of heightened scrutiny processes available upon request, as well as several tools and sub-regulatory guidance on this topic available online at http://www.medicaid.gov/HCBS.

- Please describe the processes the state used or will use to identify settings that fall under any of the three categories of settings presumed to have institutional characteristics.
- Please provide details regarding how the state intends to conduct reviews for settings presumed to be institutional.
- Please clearly articulate how the final decision will be made on whether or not to move a setting to CMS for heightened scrutiny review. Please clarify the threshold and determining factors that bring the state to a yes or no for moving the setting forward.
- Please provide updated timelines for the heightened scrutiny process in the next STP submission and an estimate on the number of settings that may fall under heightened scrutiny.
- Please clarify the three categories of settings that are presumed to have qualities of an institution requiring heightened scrutiny review on pg. 48 to align with the following definition:

    - Settings that are located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;
    - Settings that are in a building located on the grounds of, or immediately adjacent to, a public institution;
    - Any other settings that have the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

- The Assisted Living Facilities (ALFs) have been determined to have isolating characteristics by the state. Please clarify what characteristics were deemed isolating and how individual settings conducted site-specific remediation activities, and were then validated by the state.
- Describe the state's process for identifying settings that may be subject to heightened scrutiny given not all settings received a validation method for their compliance findings.
- Finally, in the next STP please include a timeline of milestones and specific dates for implementing a plan for completing the heightened scrutiny process by the state.

**Milestones**

A milestone template has been completed by CMS with timelines identified in the STP and was sent to the state for review on June 21, 2021. CMS requests that the state review the information in the template and send the updated document to CMS. The template should reflect anticipated milestones for completing systemic

remediation, settings assessment and remediation, heightened scrutiny, communication with beneficiaries and ongoing monitoring of compliance.