

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-14-26
Baltimore, Maryland 21244-1850



Medicaid Benefits and Health Programs Group

December 19, 2023

Amir Bassiri
Medicaid Director, Deputy Commissioner
New York Department of Health
Empire State Plaza, Corning Tower, Room 1466
Albany, NY 12237

Dear Director Bassiri:

This letter and accompanying attachment represent the Centers for Medicare & Medicaid Services (CMS) approved corrective action plan (CAP) for the State of New York to bring settings into compliance with the federal home and community-based services (HCBS) regulations found at 42 CFR §§441.301(c)(4)-(5) and 441.710(a)(1). The CAP is effective March 17, 2023.

The CAP provides the state with additional time to bring settings into compliance with the regulatory criteria directly impacted by the COVID-19 public health emergency. For remaining HCBS settings regulations not subject to the CAP, the state and all settings are expected to be fully compliant by the end of the transition period on March 17, 2023.

The state will report to CMS on progress with activities, milestones, and timeframes outlined in the attachment. Full compliance is achieved when all Medicaid-funded HCBS is rendered in a compliant setting. Closure of the CAP will be granted after the state completes the activities described in the attachment, at which point the state will be in full compliance with all HCBS settings provisions of the regulation.

It is important to note that CMS approval of a CAP 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 v. LC* 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.

Thank you for your efforts in establishing a CAP and completing this work to ensure all settings are in compliance with the federal HCBS regulations. If you have questions or need further assistance, please contact Ondrea Richardson at ondrea.richardson@cms.hhs.gov or 410-786-4606.

Sincerely,

Curtis Cunningham, Director
Division of Long-Term Services and Supports

Attachment

cc: George Failla, Director, Division of HCBS Operations and Oversight, CMCS, CMS

MEDICAID HOME AND COMMUNITY-BASED SERVICES SETTINGS REGULATIONS
CORRECTIVE ACTION PLAN FOR THE STATE OF NEW YORK

Medicaid authorities subject to the CAP

1915(c) HCBS Waivers:

- Nursing Home Transition and Diversion Waiver, NY.0444;
- Traumatic Brain Injury Waiver, NY.0269;
- Children’s Waiver, NY.4125; and
- Office for People with Developmental Disabilities (OPWDD) Waiver, NY.0238.

1115 Demonstration:

- NY Medicaid Redesign Team, 11-W-00114/2.

Regulatory criteria subject to the CAP

All settings:

- 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, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS at 42 CFR §441.301(c)(4)(i) (entire criterion except for “control personal resources”),
- The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual’s needs, preferences, and for residential settings, resources available for room and board at 42 CFR §441.301(c)(4)(ii),
- Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact at 42 CFR §441.301(c)(4)(iv), and
- Facilitates individual choice regarding services and supports, and who provides them at 42 CFR §441.301(c)(4)(v).

Provider-owned or controlled residential settings:

- Individuals sharing units have a choice of roommate in that setting at 42 CFR §441.301(c)(4)(vi)(B)(2), and
- Individuals have the freedom and support to control their own schedules and activities at 42 CFR §441.301(c)(4)(vi)(C) (entire criterion except for “have access to food at any time”).

The applicable regulatory criteria at 42 CFR §441.710(a)(1) are also subject to the CAP.

State milestones and timeframes under the CAP

| Milestone | Begin Date | Completion Date |
|--|-------------------|------------------------|
| Statewide Transition Plan | | |
| Complete the state’s final Statewide Transition Plan and receive approval from CMS. | November 16, 2018 | October 23, 2023 |
| Policy Guidance Activities | | |
| Department of Health Adult Living Program (ALP)/ Adult Care Facilities (ACF): Revise Adult Care Facility and Assisted Living regulations. | July 19, 2022 | November 15, 2023 |
| ACFs – Implementation of newly promulgated ACF regulation to support efforts to address the barriers to full community integration. (These proposed regulations amend 18 NYCRR sections 485.14, 486.5, 487.5, 487.7, 487.11, 488.5, 488.7, 488.11, 490.5, 490.7, and 490.11, which pertain to resident rights and services in all adult care facilities (Part 485), including Adult Homes (Part 487), Enriched Housing Programs (Part 488), and Residences for Adults (Part 490).) | July 19, 2022 | November 15, 2023 |
| Complete modifying rules and regulations, including provider manuals, inspection manuals, procedures, laws, qualification criteria, etc. statewide. | July 19, 2022 | November 15, 2023 |
| Assessment, Remediation, or Validation Activities | | |
| <i>Department of Health (DOH)</i> | | |
| Social Adult Day Care program (SADC) settings – Complete validation of 309 settings. | November 18, 2022 | February 29, 2024 |
| <i>DOH- Non-Residential Settings (Including SADC Settings)</i> | | |
| Complete remaining nonresidential provider remediation statewide–50%. | February 29, 2024 | March 31, 2024 |
| Complete remaining nonresidential provider remediation statewide–75%. | March 31, 2024 | April 30, 2024 |
| Complete remaining nonresidential provider remediation statewide– | April 30, 2024 | May 31, 2024 |

| | | |
|---|-------------------|-------------------|
| 100%. | | |
| <i>DOH-ACF Settings With Assisted Living program (AL) Certification</i> | | |
| Complete remediation and validation activities to address access to the broader community/community integration (transportation)– 25%. | November 18, 2022 | February 29, 2024 |
| Complete remediation and validation activities to address access to the broader community/community integration (transportation)– 50%. | February 29, 2024 | March 31, 2024 |
| Complete remediation and validation activities to address access to the broader community/community integration (transportation)– 75%. | March 31, 2024 | April 30, 2024 |
| Complete remediation and validation activities to address access to the broader community/community integration (transportation)– 100%. | April 30, 2024 | May 31, 2024 |
| <i>DOH-ACF Settings Without Assisted Living program (AL) Certification</i> | | |
| Complete remediation and validation activities to address access to the broader community (transportation)– 25%. | November 18, 2022 | February 29, 2024 |
| Complete remediation and validation activities to address access to the broader community (transportation)– 50%. | February 29, 2024 | March 31, 2024 |
| Complete remediation and validation activities to address access to the broader community (transportation)– 75%. | March 31, 2024 | April 30, 2024 |
| Complete remediation and validation activities to address access to the broader community (transportation)– 100%. | April 30, 2024 | May 31, 2024 |
| <i>DOH-Adult Day Health Care program (ADHCP) Settings</i> | | |
| Complete remediation and validation activities to address access to the broader community (transportation)– 25%. | November 18, 2022 | February 29, 2024 |
| Complete remediation and validation activities to address access to the broader community (transportation)– 50%. | February 29, 2024 | March 31, 2024 |

| | | |
|--|-------------------|-------------------|
| Complete remediation and validation activities to address access to the broader community (transportation)– 75%. | March 31, 2024 | April 30, 2024 |
| Complete remediation and validation activities to address access to the broader community (transportation)– 100%. | April 30, 2024 | May 31, 2024 |
| <i>DOH- Non-Compliant Settings</i> | | |
| Identification of settings that will not remain in the HCBS system-DOH/ADHCP – Complete site level transition plan to arrange for transfer of individuals who reside or receive services in non-compliant settings that cannot achieve compliance; assurances that services will continue and that recipients are offered placement in compliant settings. | February 29, 2024 | July 1, 2024 |
| <i>All Programs- Non-Compliant Settings</i> | | |
| Identification of settings that will not remain in the HCBS system statewide– 100% complete. | February 29, 2024 | July 1, 2024 |
| <i>Office for People with Developmental Disabilities (OPWDD)</i> | | |
| Complete remediation and validation activities to address access to the broader community and opportunities for employment– 25%. | November 18, 2022 | February 29, 2024 |
| Complete remediation and validation activities to address access to the broader community and opportunities for employment–50%. | February 29, 2024 | March 31, 2024 |
| Complete remediation and validation activities to address access to the broader community and opportunities for employment–75%. | March 31, 2024 | April 30, 2024 |
| Complete remediation and validation activities to address access to the broader community and opportunities for employment– 100%. | April 30, 2024 | May 31, 2024 |
| <i>Beneficiary Resolution</i> | | |
| <i>Notifications</i> | | |
| Complete notifying members, guardians, case managers, facility support staff and any other identified responsible parties that the setting is not in compliance with HCBS settings requirements, and that resolution or alternate funding sources need to be considered: | February 29, 2024 | March 31, 2024 |

| | | |
|---|----------------|----------------|
| ACF, ADHCP, AIDS ADHCP, Children’s Waiver (CW), Nursing Home Transition and Diversion (NHTD)/Traumatic Brain Injury (TBI), Office of Addiction Services and Supports (OASAS), OPWDD, SADCP, and statewide– 25%. | | |
| Complete notifying members, guardians, case managers, facility support staff and any other identified responsible parties that the setting is not in compliance with HCBS settings requirements, and that resolution or alternate funding sources need to be considered: ACF, ADHCP, AIDS ADHCP, CW, NHTD/TBI, OASAS, OPWDD, SADCP, and statewide– 50%. | March 31, 2024 | April 30, 2024 |
| Complete notifying members, guardians, case managers, facility support staff and any other identified responsible parties that the setting is not in compliance with HCBS settings requirements, and that resolution or alternate funding sources need to be considered: ACF, ADHCP, AIDS ADHCP, CW, NHTD/ TBI, OASAS, OPWDD, SADCP, and statewide– 75 %. | April 30, 2024 | May 31, 2024 |
| Complete notifying members, guardians, case managers, facility support staff and any other identified responsible parties that the setting is not in compliance with HCBS settings requirements, and that resolution or alternate funding sources need to be considered: ACF, ADHCP, AIDS ADHCP, CW, NHTD/ TBI, OASAS, OPWDD, SADCP, and statewide– 100%. | May 31, 2024 | June 15, 2024 |
| <i>Relocation or Alternate Funding</i> | | |
| Complete beneficiary resolution: ACF, ADHCP, AIDS ADHCP, CW, NHTD/TBI, OASAS, OPWDD, SADCP– 25%. | March 31, 2024 | April 15, 2024 |
| Complete beneficiary resolution: ACF, ADHCP, AIDS ADHCP, CW, NHTD/TBI, OASAS, OPWDD, SADCP– 50%. | April 15, 2024 | May 15, 2024 |
| Complete beneficiary resolution: ACF, ADHCP, AIDS ADHCP, CW, NHTD/TBI, OASAS, OPWDD, SADCP– 75%. | May 15, 2024 | June 15, 2024 |
| Complete beneficiary resolution: ACF, ADHCP, AIDS ADHCP, CW, NHTD/TBI, OASAS, OPWDD, SADCP– 100%. | June 15, 2024 | July 1, 2024 |

| | | |
|--|---|---|
| Complete beneficiary resolution statewide– 100%. | — | July 1, 2024 |
| Heightened Scrutiny Activities | | |
| Submit the list of settings identified by settings type and category of institutional presumption to CMS. | — | April 27, 2023 |
| Complete submission of Heightened Scrutiny information to CMS for review– AIDS ADHCP and CW. | — | September 13, 2023 |
| Complete submission of Heightened Scrutiny information to CMS for review– ACF, ADHCP, NHTD/TBI, OASAS, OPWDD, and SADC programs. | — | July 1, 2024 |
| Submit information to CMS on presumptively institutional settings selected by CMS for a sampled heightened scrutiny review. | Date CMS pulls the appropriate list of settings and sends the list of settings to the state | Within 30 days of receipt of the listing from CMS |
| Address heightened scrutiny findings related to CMS’ heightened scrutiny review including, as applicable, remediation of all similarly situated settings that utilize a similar service delivery model and, as applicable, any overall assessment processes of all providers of HCBS in the state to ensure that all providers are being assessed appropriately against the regulatory settings criteria. | Date CMS issues findings to the state | 12 months after the date CMS issues findings to the state |
| Heightened Scrutiny Activities – Site Visit | | |
| Provide a written response to the CMS Heightened Scrutiny onsite visit report describing how the state will remediate findings and apply feedback to the state’s HCBS delivery system. | October 16, 2023 | November 16, 2023 |
| Address findings related to CMS heightened scrutiny site visit including, as applicable, needed remediation required to ensure compliance of the settings visited, remediation of all similarly situated settings that utilize a similar service delivery model, systemic findings related to the absence of an organizational structure and processes for the development and ongoing monitoring of the person-centered service plan, and application of site visit | November 16, 2023 | November 16, 2024 |

| | | |
|---|----------|--|
| <p>feedback to the overall assessment process of all providers of HCBS in the state to ensure that all providers are being assessed appropriately against the regulatory settings criteria.</p> | | |
| <p>Statewide Compliance</p> | | |
| <p>Final compliance statewide with HCBS settings rule.</p> | <p>—</p> | <p>The later of November 16, 2024, or 12 months after the date CMS issues heightened scrutiny findings to the state.</p> |