

DISTRICT OF COLUMBIA
HOME AND COMMUNITY-BASED SETTINGS STATEWIDE TRANSITION PLAN
CMS Feedback (August 2016)

The following is a high level review of the District's Draft Statewide Transition Plan:

Waivers and Settings Included in the STP

CMS thanks D.C. for identifying all appropriate setting types for both of 1915 (c) waivers in its STP.

Systemic Assessment

CMS recognizes D.C. for including a description of its systemic assessment process, including the submission of additional documents analyzing applicable rules, regulations, licensing requirements, certification processes, policies, protocols, practices and contracts. The additional documents-- titled "Statewide Assessment Reporting Charts" also describe proposed changes to individual regulations for home and community-based settings.

In order to provide initial approval of the Statewide Transition Plan (STP) as it relates to the systemic assessment, CMS requests the District complete the following as it works to finalize its systemic assessment.

- CMS thanks D.C. for including a crosswalk of its policies and procedures for Mental Health Community Residence Facilities (MHCRFs), which are licensed by the Department of Behavioral Health and can provide non-Medicaid residential services to EPD waiver beneficiaries. CMS requests clarification as to whether there are any other types of Community Residential Facilities operating in D.C. which provide housing but not home and community-based services (HCBS) to waiver participants (who receive HCBS elsewhere in non-residential settings). In responses to public comment, pages 142-143 of the STP notes that the Department of Health has revised its Community Residential Facilities (CRF) regulations to “incorporate the principles of the settings rules.” However, the District did not describe those amendments in its systemic assessment. CMS requests that D.C. submit a crosswalk for their CRF standards.
- Please identify the specific regulations D.C. plans to amend to bring them into compliance with the federal home and community-based settings rule. For example, in the crosswalk for group homes for people with Intellectual and Developmental Disabilities (IDD) regulations, the document states that “Language has been added to revised rules” without identifying which section of the “revised rules” it was amending or describing the content of the amendment.
- The District references a regulation, § 7-1305.05, several times in its crosswalk of the IDD group home regulations. We could not locate this regulation in the D.C. Municipal Regulations. Please provide a working link to regulation § 7-1305.05 or correct this reference if it was a typo.
- CMS requests that D.C. clarify its statement in the crosswalk for the IDD policies and procedures, which states that, “The waiver regulations General Provisions require that any permissible deviation from HCBS Settings requirements is reviewed and approved as

a restriction by the Provider’s Human Rights Committee.” CMS notes that review by the Provider’s Human Rights Committee is not sufficient to meet the requirements of 42 CFR 441.301(c)(4)(vi)(F), which prescribes a process a setting must follow for modifications of provider-owned or controlled residential setting conditions. The District should propose remediation of its IDD waiver regulations to clarify that review by the Provider’s Human Rights Committee is in addition to the eight steps that must be completed under 42 CFR 441.301(c)(4)(vi)(F). CMS requests that D.C. describe how it will remediate this issue and ensure that the person-centered planning process is incorporated.

- CMS requests additional information about the content of the Elderly and Persons with Disabilities (EPD) revised regulations. In the crosswalk for EPD waiver regulations, D.C. notes that the updated regulations “list the 19 unique categories that CMS uses to measure compliance with CMS’ settings requirements, and mandate that all day settings and/or residential settings shall meet these requirements,” and they will be published in July or August 2016. Further, although the District indicates on p. 132 of its revised STP that it has policies and procedures for its EPD waiver, it did not include a crosswalk for those policies and procedures. If the District plans to update the EPD waiver policies and procedures after amending the EPD waiver regulations, please include a description of those updates in the STP and identify if the EPD policies and procedures are documented elsewhere. If so, CMS can provide guidance on incorporating this information into the STP.
- *Assisted Living Residences:* On page 6 of the District’s Governing Regulations for Assisted Living Residences, the District specifies that Assisted Living Residence Law does not specifically address the provision that, “the setting provides opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources.” The District specifies that, through the resident agreements, residents of an assisted living facility have control of their personal resources and community engagement but the law does not address the requirement that “the setting provides opportunities to seek employment and work in competitive integrated settings.” The District states that there are plans to draft Assisted Living Residence regulations and this requirement will be recommended to be included as a standard to address this requirement. How will the state remediate this requirement if this recommendation is not taken? On page 5, §44-105.04 is silent on the individual’s right to choose who provides supports and services. How does the state plan to remediate this requirement? On page 10, §44-106.03 is not clear that the resident is always provided opportunities to control personal resources. Instead, it specifies that the written resident agreement includes financial provisions which indicate “the obligation of the ALR, the resident, or the resident’s surrogate as to the performance of the handling of the finances of the resident,” etc. The District should address how it will remediate this requirement. CMS requests clarification on the statutory provision that the District identified as compliant, but which appear to conflict with governing authorities. D.C, Code § 44-106.08 permits a setting to discharge an individual from an assisted living residence

without complying with the eviction requirements of the District's landlord/tenant law. This conflicts with the federal setting regulation that requires a setting's agreement with an individual to provide protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord/tenant law (Page 12 of the Chart). On page 10, of the Assisted Living Residences Assessment Chart, §44-105.03 is only partially compliant with the HCB settings requirement that individuals have the freedom and support to control their own schedules and activities, and have access to food at any time. It is silent regarding access to food at any time. The District specifies that DOH will draft regulation to specifically include the language regarding the access to food at any time. The District should propose remediation to address the silence and non-compliance of this regulation. On page 17 of the Assessment Chart for Assisted Living Residences, §44-101.02 regarding provider-owned or controlled settings being physically accessible to the individual, the District specifies that the Code is compliant. However, it is silent regarding this requirement. The District needs to include its proposed remediation for this requirement.

- *Mental Health Community Residence Facilities (MHCRF)*: The District's standards for MHCRFs are silent to the HCB setting requirement that the setting facilitates individual choice regarding services and supports and who provides them. Requiring a provider to comply with federal regulations without explicitly describing the requirements of the federal setting rules is not sufficient. The District should propose its remediation plan for this requirement (Page 6 of the Statewide Assessment Mental Health Community Residence Facilities Chart). We are unclear regarding §3832.2 of Title 22-B DCMR Chapter 38, pertaining to MHCRFs optimizing individual initiative, autonomy, and independence in making choices. What is meant by "maintain as culturally normal routines and procedures as possible, providing for sleeping periods, meal times, social and recreational activities" and how is this consistent with this provision of the rule? (page 5 of the Chart) With respect to the requirement that individuals have the freedom and support to control their own schedules and activities, and have access to food at any time, title 22-B DCMR §3813.3 does not comport with the HCB settings requirement. Title 22-B DCMR §3813.3 requires the setting to provide "at least three meals and between meal snacks." This is silent in regard to the requirement in the federal rule that the setting provides the individual access to food at any time. The District needs to propose remediation to address the silence of this regulation. (Page 11 of the MHCRF Assessment Chart)
- *EPD Waiver and Mental Health Community Residence Facilities*: With respect to the requirement that individuals sharing units have a choice of roommates in that setting, the EPD waiver Assessment chart, page 8, specifies that DHCF updated its regulations governing the EPD waiver to address this requirement. Please include in the STP the specific language that will address this requirement. On page 10, of the MHCRF Assessment Chart, the state specifies that the current law and regulations are silent on this issue. The proposed amendment to these regulations does not comport with the federal regulation. The proposed amendment limits a choice of roommate to those situations when it is "feasible," which imposes a contingency that goes beyond the federal rule. A

setting may modify a condition, including the right to choose a roommate, only if it complies with the modification process set forth in 42 CFR 441.301(c)(4)(vi)(F). The District should revise its proposed amendment to indicate that individuals sharing a room must have a choice of roommates..

- *IDD Waiver/DD Group Homes:* The state specifies that it has revised §3521.7 of its rules pertaining to the setting providing opportunities to engage in community life. However, we were unable to locate this provision and, therefore, were unable to assess whether these revisions were made. Please provide the correct citation for the rule that pertains to this provision (page 5 of the Statewide Assessment Chapter 35 Regulations of Residential Settings Chart). The state specifies that it has added language to the revised rules pertaining to the provision that the setting is selected by the individual from among setting options including non-disability specific settings, etc. Please specify where this language will be added (Page 6 of the Chart).
- *IDD Waiver/All IDD Settings:* The state specifies that it has updated its General Provisions regulations pertaining to the HCB settings provision that ensures an individual’s rights of privacy, dignity and respect, and freedom from coercion and restraint. With respect to day habilitation and employment readiness settings, the state added the following language to its regulations, “All Day Habilitation and Employment Readiness settings must develop and adhere to policies which ensure that each person receiving services has the right to privacy for personal care, including when using the bathroom.” CMS believes that privacy needs to be generally applied in day habilitation and employment settings & not just when an individual is using the bathroom or receiving personal care (Page 1 of the Statewide Assessment Governing Regulations Chart). With respect to the HCB setting requirement that the unit or dwelling is a specific physical place that can be rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, or other entity, DCMR 29-1900 et seq. is silent. The District has not identified the specific regulation in DCMR 29-1900 et. seq. that it is amending to address the silence. The District has included its proposed language to address this requirement but should provide CMS with the exact location of this language in its state rules.
- *All Settings:* Regarding the provision that units have entrance doors with lockable by the individual, with only appropriate staff having keys to doors, the state rules are silent and the state specifies that DDS will update its Human Rights (2013-DDA-H&W-POL007) and Most Integrated Community Based Settings policies to address this requirement. The state should include in its STP the proposed modifications to address this requirement. (Page 8 of the Statewide Assessment Policies and Procedures Chart). All of the regulations regarding the HCB settings requirement that any modification of the additional conditions for provider owned or controlled residential settings must be supported by a specific assessed need and justified in the person-centered service plan, etc. are silent. However, the District did include the following statement in the crosswalk for the regulations about lockable doors: “The waiver regulations General Provisions

require that any permissible deviation from HCB Settings requirements is reviewed and approved as a restriction by the Provider’s Human Rights Committee, General Provisions, <http://www.dcregs.dc.gov/Gateway/Rule-Home.aspx?RuleNumber=29-1900>, Home and Community Based Settings Requirements.” Review by the Human Rights Committee is not sufficient to meet the requirements of 42 CFR 441.301(c)(4)(vi)(F), the provision that prescribes the process that a setting must follow for modifications of provider-owned or controlled residential setting conditions. The District needs to include its remediation plan for all of its waiver regulations to clarify that review by the Provider’s Human Rights Committee is in addition to the all of the steps that must be completed under 42 CFR 441.301(c)(4)(vi)(F).

- *EPD Waiver/All Settings*: The state specifies that it has revised but not yet published its EPD waiver regulations, DCMR 29-4200 regarding the provision that the setting is selected by the individual from among setting options including non-disability specific settings, etc. The state should provide to CMS the language that will be published so we can determine whether it comports with the setting requirement (page 5 of the Statewide Assessment Chart for the EPD HCBS Waiver).

Systemic Remediation

D.C.’s description of planned systemic remediation indicates an intention to make important changes to the District’s code and policy documents to comply with the federal requirements. However, CMS requests additional specificity to identify the specific regulations D.C. plans to amend to bring into compliance. For example, as noted above, in the crosswalk for group homes for people with IDD, the District wrote, “Language has been added to revised rules” without identifying which section of the revised rules it is amending or describing the content of the amendment. Additionally, CMS encourages D.C. to add concrete sub-steps and milestones within the larger actions the District intends to take. Although the STP clearly lays out the remediation steps, an executive summary of the changes with an overall timeline and appropriate sub-steps would be helpful for the District, CMS and the public to track progress.

CMS reminds the state that it can utilize a variety of strategies to remediate issues of non-compliance or silence, including but not limited to changes in the state’s regulations, the issuance of additional policy changes in key policy documents to the field (including but not limited to policy communications, provider manuals, licensing agreements, etc.), and/or the development of sub-regulatory guidance. While it is presumed that any changes to bring existing state standards into compliance will also be included in any future waiver amendments, the inclusion of such changes solely in a waiver document is not enough and must be included in an actual state standard beyond the waiver document (which is technically an agreement directly between the state’s Medicaid agency and CMS).

Additional Issues

Prior to its planned resubmission in September 2016, D.C. should consider the following changes to its STP.

- Ensure dates in the past are acknowledged as such and outdated information is removed or modified. For example, on page 95, the STP states “DHCF expects to file

the first update to the Transition Plan by March 1, 2016” and “This component of the transition plan will be completed by October 1, 2015.”

- Update the STP to include missing hyperlinks, for example on pages 92, 95, 96, 97, 98 and 132.
- Improve the overall organization of the STP so that it is more easily interpretable for CMS and the public. While the District has conducted a thorough analysis of rules, regulations, licensing requirements, certification processes, policies, protocols, practices and contracts and has completed the assessment as promised in the timely manner, the information presented is fragmented and some key information about EPD policies and procedures appears to be missing.