

Montana Department of Public Health and Human Services responses to public comment on the revised HCBS Statewide Transition Plan, and Validation Tool and Matrix

One commenter recommended that on-site reviews should be conducted on all residential providers regardless of whether or not they were identified as a “heightened scrutiny” facility. Additionally, we recommend that all on-site reviews be conducted by a third party or at least with the participation of a third party entity that serves as an advocacy organization for individuals with disabilities and older adults. All on-site reviews should also include an accessibility assessment utilizing the applicable accessibility standards as well as a member interview to gain their experience with accessibility and overall satisfaction with their living arrangement.

Response: All settings will be assessed through one of three processes. Onsite validations or reviews will be completed on a sample of the provider settings based on the provider self-assessment survey that was received by the Department. Based on the matrix that was provided for public comment, there are 481 providers who received self-assessment surveys. A sample of the self-assessments results in 95 settings that will receive an onsite validation, which includes the 33 providers who did not respond to the provider self-assessment survey. Section 2: Assessment of the statewide transition plan identifies this process for validation and remediation for this group of settings.

Based on provider self-assessment surveys, 13 of the 481 are considered heightened scrutiny. Heightened scrutiny is based on their responses related to being a setting that is located in a building that is publicly or privately operated and provides inpatient institutional treatment or is a setting that is located in a building on the grounds of, or immediately adjacent to a public institution. Section 5: Heightened Scrutiny identifies the process for Heightened Scrutiny.

For any other settings not selected for an onsite validation, the state will review the provider self-assessment and for any areas identified as non-compliant with the setting regulations those settings will require remediation. Section 2: Assessment of the statewide transition plan addresses this process.

Onsite validation reviews will be implemented with one modified FTE who will be housed in the Quality Assurance Division of the Montana Department of Public Health and Human Services, who will be trained in the validation process and validation tool, and will be familiar with the HCBS settings regulation requirements. This one FTE will insure uniform application of the tool and the process across all settings that are reviewed through this onsite process. Opportunity for members to provide feedback will be included as part of the onsite validation process in determining compliance with the settings requirements and the satisfaction with the setting.

Accessible Environment is addressed in Section G of the validation tool. The intent of these questions is to determine if members are able to freely access their home with available adaptations if needed.

One commenter recommended that instead of formalizing this entire process internally, that DPHHS should go beyond the public comment process and form partnerships with disability and aging advocacy organizations, consumers, and others, including assisted-living facilities, to help ensure that this important matter is addressed effectively, efficiently, and with all stakeholders at the same table. Over the past few years the partnerships that DPHHS has built all across the state have begun to erode due to the stance DPHHS has begun to take on treating everybody as mere contractors rather than as partners. It almost seems that DPHHS dreads working with anybody who is outside of the department and when they do, it seems that the input that comes in from outside of the department is not valued, taken seriously, or it is outright ignored based on what appears to be a mindset that the department knows better anyways.

Response: The State is undertaking a robust public input process related to the process for achieving compliance with HCBS requirements. Notice of public meetings and opportunities to comment on the statewide transition plan and other documents are provided through newspaper notices, as well as, direct mail outs to providers, members and other interested parties. The state has held 3 public meetings for the purpose of soliciting comments and feedback related to the statewide transition plan, the settings validation tool and process, the provider and the member self-assessment tools. Additionally, all documents are posted on the HCBS website. Each of the divisions' websites contains a link to the HCBS website. Links to the federal guidance and all documents related to the compliance with these settings requirements are also posted for review and comments. There is opportunity for disability and aging advocacy organizations, consumers, and others, including assisted living facilities, to participate in these meetings or to separately discuss with the Department the implementation of these HCB regulations. The timeline on the state wide transition plan speaks to this transition process being an ongoing process that will occur over several stages and timelines that will provide the opportunity to engage providers and members throughout the process all the way through 2019.

We disagree with the comment related to DPHHS not being accessible and willing to meet with and work with providers, members and advocacy groups. The process that is being undertaken is specifically to solicit input and feedback, and for the purpose of the Department taking under consideration any and all public comment and feedback that we receive. Those comments and concerns are evaluated and will be incorporated into the process of achieving compliance with the HCBS regulations.

One commenter asked going down the list of concerns listed in the CMS letter dated August 26, 2015 in regards to CMS' review of Montana's Statewide Transition Plan, how has DPHHS addressed each of those concerns and specifically where can the response/fix to each concern be found? Please provide details for each concern listed in the letter. They include:

Public Comment:

- **Determination about setting compliance**
- **Integration of public comments into the STP**

Identification of settings and waivers:

- **Settings analysis**
- **Impacted waivers and state plan amendments**

Assessments:

- **Systemic Assessment**
- **Site-specific assessment**
- **Estimates of the number of settings in compliance**

Heightened Scrutiny

Remedial Actions:

- **Systemic assessment changes**
- **Settings assessment changes**

Monitoring of settings

Relocation of beneficiaries

Response: Public comment has been integrated into the Statewide Transition Plan. Please see Section 1: Public Comment. Additionally, public comment is implemented throughout Section 2: Assessment. For public comment related specifically to determinations about setting compliance, see Section 2: Assessment, "public comment for 30 days on validation process".

Settings analysis can be found in Section 2: Assessment, specifically action item "assessment

of settings”. Impacted Waivers and state plan amendments can be found under Section 4A: Program Administration: Administrative Rules of Montana.

The results of the systemic assessment conducted by the state can be found in Section 4: Program Administration. A site-specific assessment was also conducted. See Section 2: Assessment, action item “assessment of settings”. For an estimate of the number of settings in compliance see the provider self-assessment matrix located at <http://dphhs.mt.gov/hcbs.aspx>

For all information related to heightened scrutiny, please see Section 5: Heightened Scrutiny.

For remedial actions related to systemic assessment changes, see Section 4A: Program Administration. For remedial actions related to settings assessment changes see Section 6: Remediation Plan.

Monitoring of Settings is addressed in Section 6: Remediation Plan, action item “Ongoing monitoring of compliance with HCBS settings requirements.”

The process for relocating beneficiaries can be found in Section 3: Member Transition Plan.

The Statewide Transition Plan can be found at <http://dphhs.mt.gov/hcbs.aspx>

One commenter asked how a group home or assisted living facility under heightened scrutiny will know if they are compliant.

Response: The heightened scrutiny process is outlined in Section 5: Heightened Scrutiny of the Statewide Transition Plan. When CMS has made a compliance decision about a setting and notifies the state, the state will notify the facility of the decision.

One commenter asked if a validator is going to conduct onsite of self-assessments beyond this first initial waive to meet HCBS compliance beyond 2019.

Response: The ongoing monitoring process is outlined in Section 6: Remediation Plan of the Statewide Transition Plan. The state will continue to monitor compliance through onsite visits or other monitoring processes for each specific setting type.

One commenter asked if facilities will have to outline undue hardships as to why they are not able to either fully comply or maximize compliance with HCBS settings rules.

Response: The regulation does not allow for partial compliance. Settings will have to comply with the regulations to continue receiving HCBS funding. The transition process is an ongoing process that will occur over several stages and timelines all the way through 2019.

One commenter asked multiple questions in regards to landlord tenant laws. “I

understand that landlord tenant and Fair Housing law apply to housing in Montana communities. Will the state of Montana incorporate landlord tenant rights and responsibilities into not only its licensing procedures, but leasing as well? [Organization] believes that the modernization of these setting requirements is a positive development, but if landlord tenant law applies will a member be penalized if the facility doesn't respond to communal issues or if a resident's or member's Medicaid eligibility changes? What is the legal remedy if situations arise?" "Landlord tenant law is based on an individual's ability to pay. I was wondering since Medicaid is often a primary funding source for group homes and assisted living centers how will we incorporate landlord tenant law if that truly is the model that is to be implemented. Will Montana draft landlord tenant laws specific to those settings?"

Response: The 42 CFR §441.530 (a)(1)(vi)(A) states: "The unit or dwelling is a specific physical place that can be owned, 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, city or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each participant and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law." Montana will not be drafting landlord tenant law for specific settings as the settings rules require that members have the same rights and responsibilities as a person not receiving HCB services.

Montana Department of Public Health and Human Services public meeting (held November 20, 2015) comments on the revised HCBS Statewide Transition Plan, and Validation Tool and Matrix

One commenter asked if a facility is triggered into Heightened Scrutiny category what does that mean for the facility.

Response: Heightened scrutiny requires the state to do a more thorough review of the setting and how services are delivered in that setting. Heightened scrutiny does not necessarily mean the setting is excluded from home and community based services. It does mean the setting has a different process for an assessment as to whether the service delivery model meets all of the other HCBS criteria. The state has to submit evidence to CMS that the setting meets all of the HCBS requirements even though they might have institutional characteristics or be attached to or on the grounds of an institution. The Secretary of the Department of Health and Human Services would make the final determination based on the evidence submitted by the state

One commenter wanted to know if Money Follows the Person (MFP) has the same setting requirement as the new HCBS setting regulation and if heightened scrutiny applies to MFP.

Response: The Money Follows the Person (MFP) program has different settings requirements than the waiver programs. Heightened scrutiny applies to the facility that is participating in Medicaid. The facility has to meet the home and community based setting criteria. The specific MFP issue in your setting may be resolved when an onsite assessment of your setting is completed. As a result, the state will have a separate conversation with the facility to discuss the specific discrepancies between MFP and waiver services.

One commenter appreciated the intent of the home and community based nature of the definition. However as occupancy in nursing facilities are declining the providers are looking for ways to modify and take other types of clients but that's not community based. Commenter stated that heightened scrutiny should be where provider took a skilled setting and tried to create a lesser care environment without doing significant retrofit. Commenter believes this is why the new rule exists, to prevent that exact situation.

Response: Thank you for your comment. For all information related to the heightened scrutiny process, please see Section 5: Heightened Scrutiny

One commenter asked in conjunction with the Provider Self-Assessment will the state look at other collateral information such as serious occurrence reports, licensing, case management team observations or consumer comments in determining compliance.

Response: The state has allowed for the consideration of additional information in the validation tool and process. This information will be obtained at the time of the validation reviews.

One commenter asked if the list of all of the facilities in each category is located on the state transition plan website.

Response: The list of facilities by category is not on the web site and there are no plans to post this information on the website. The matrix of each category and the percentage that will receive an onsite review is posted. Each facility will be notified by the state in writing as to the category their facility is in and whether they will receive an onsite review. Each facility will be required to submit a remediation plan as necessary to come into compliance with the home and community based setting regulation. The facilities that fall under heightened scrutiny will have a public process as described in Section 5: Heightened Scrutiny. This will be discussed with each of the 13 facilities that are in the heightened scrutiny category.

One commenter asked if the validation tool was a draft and if the state is soliciting comments on the tool.

Response: The provider self-assessment was finalized after the public comment period. The validation tool will be finalized after the comment period ends. The state encourages comments on the validation tool.

One commenter would like to know what previous licensure, if any, have the HCBS settings been licensed under. Commenter would consider that if the license was not institutional but community based license this should determine compliance with the settings regulations.

Response: The HCBS regulations are beyond the current licensure rules for Montana. Given the regulations the state cannot use this as the only evidence of compliance with the regulations.

One commenter would like the state to look at the amount of capital assets and resources that went into actually converting a facility to be more of a community based service center rather than just a licensure change.

Response: The regulations are specific in what is not considered a home and community based setting. The regulations and the process outlined in the statewide transition plan will be used in determining compliance with these settings requirements.

One commenter asked in relationship to ongoing compliance what will the state use to ensure ongoing compliance with the home and community based settings

Response: The state will use all of the information available to assist through the remediation process and ongoing compliance with the settings regulation. Monitoring of Settings is addressed in Section 6

One commenter wanted to know if the threshold of compliance is set at 100%, 90% or 70%.

Response: The state does not believe everybody is going to be 100% compliant in all the areas. However, there are areas that are required to be 100% compliant in the HCBS settings criteria. The state believes there will be a conversation with each of the provider settings throughout the remediation process. The state will assess the level of compliance. Every provider that completed a provider self-assessment will get a letter requesting clarification or additional information necessary to come into compliance. The state expects all providers that choose to continue serving Medicaid members to meet the compliance requirements of the settings criteria.

One commenter requested a boiler plate to be used as a lease agreement that would be compliant with the HCBS setting regulations. The commenter would like to have information on developing a lease agreement for group homes. The provider would like to know if the agreement needs to go through the consumer, provider, guardian, if appropriate and the plan of care team.

Response: The state will not provide a template. However, the state will assist the provider in reviewing the documents for compliance. The lease or written agreement is between the group home and member. The member can choose to involve the plan of care team. However, if the member has a guardian they would be the responsible party for signature for written agreement.

One commenter has two group homes on the same acre of land. Neither one of the group homes are a nursing home and independently staffed. Commenter would like to know if this would trigger heightened scrutiny.

Response: The state does not believe either one of those settings were triggered as heightened scrutiny settings based on the provider self-assessment. However, the provider might have some remediation in order to become compliant. The provider will receive a letter with areas of noncompliance identified.

One commenter wanted to know if providers that triggered in the heightened scrutiny category have been notified.

Response: At this time, the state has not notified any of the providers.

One commenter wanted to know if there were any facilities that triggered heightened scrutiny due to potential isolation.

Response: The state did not have any settings that triggered heightened scrutiny based on responses to the provider self-assessment on social isolation. The state will perform the onsite validations of the sample facilities and review all of the other provider's self-assessments to get clarifications on any of those areas where they would be out of compliance or require remediation.

One commenter wanted to know if facilities with shared rooms automatically trigger a visit because it does present many privacy issues during care.

Response: A shared room does not trigger anyone into a higher level of review than any of the other criteria; it is a combination of the answers to the provider self assessment survey questions as to where the provider is grouped into each of the categories.

One commenter wanted to know of those facilities that meet the validation tool requirements, will there be a process in place, where case management teams who are out in the field and going into these facilities can report any violation of the settings regulations.

Response: The state has an expectation that there will be an ongoing monitoring process, such as through licensing or other processes. The state has not completely established how this ongoing monitoring process will work. The state could provide licensing surveyors, that go onsite, with a checklist of some of the settings areas to make sure they are still in compliance with the remediation plan that was submitted. The state has some time to flesh out exactly what tools the state will use to assure ongoing compliance with the requirements. There is a federal requirement that we continue to monitor and assess, and definitely new providers coming in, will have to go through this process that they meet the settings criteria, but also ones that have been subject to remediation to make sure that they stay in compliance in those areas. Monitoring of Settings is addressed in Section 6 in more detail.

One commenter wanted to know if disenrollment of non-compliant settings could displace members.

Response: The state does believe that a provider may choose not to continue as a Medicaid provider or the state may determine a provider cannot come into compliance. Given these scenarios the member would be notified and a transition plan would be developed with the member to move to a setting that is compliant. The member will be actively involved in the development of this plan and in the selection of the new setting. The process for relocating beneficiaries can be found in Section 3: Member Transition Plan. The statewide transition plan has an extensive period of time for any setting to transition from a noncompliant to a compliant setting, which should lessen the need for members to have to be relocated.

One commenter would like the state to consider an individual voucher concept to allow members to finish out their stay in a noncompliant setting.

Response: The state cannot grandfather somebody in a noncompliant setting until that individual is no longer residing in that setting. This is not an option under federal waiver transition plan requirements. The state is hoping to identify early in the process, areas where we would have the potential to work through remediation with the setting to achieve compliance. The statewide transition plan has an extensive period of time for any setting to transition from a noncompliant to a compliant setting, which should lessen the need for members to have to be relocated.