



COLORADO

**Department of Health Care
Policy & Financing**

Department of Health Care Policy & Financing
1570 Grant Street
Denver, CO 80203

December 16, 2016

Susie Cummins
Centers for Medicare & Medicaid Services
Office of the Regional Administrator
701 Fifth Avenue, Suite 1600
Seattle, WA 98104

RE: Statewide Transition Plan (STP) and Systemic Assessment Crosswalk

Dear Ms. Cummins:

The Colorado Department of Health Care Policy & Financing submits the following information in response to the questions and comments received from the Centers for Medicare & Medicaid Services (CMS) on August 30, 2016 regarding Colorado's revised Statewide Transition Plan (STP).

CMS's questions and comments (underlined), and the Department's responses (in italics), are as follows:

Public Notice and Comment

The state put the current version of the STP out for public notice and comment from 5/6/16 through 6/9/16, and included a summary of the public comments received in its STP submission on 6/30/16. CMS would like the state to respond to the following concerns:

- Page 9 of the summary of public comments states that "the Department considered all concerns expressed by commenters and determined that changes to the existing STP and Systemic Assessment Crosswalk are not needed." CMS is concerned that the state has chosen not to make any changes to the STP based on the 97 comments received, especially since the state did not provide a detailed response to all comments, and in many cases responded that the issue in question required additional work or clarification. The state should reconsider whether changes to the STP are warranted based on the public's comments.

Response: The Department has reviewed all comments in more detail and has reconsidered whether changes to the STP and crosswalk are warranted based on the public's comments. Where warranted, the Department's changes to the STP and

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crosswalk based on public comments are included in the revised STP and crosswalk being submitted with this letter. Where changes to the STP and crosswalk are not warranted, the Department will provide information explaining why. The Department will complete a more comprehensive summary of the comments received and its responses to such comments and will post the summary online by March 16, 2017.

To clarify, only six entities submitted comments. After dividing each comment into the various issues it addressed, the Department treated these submissions as 97 separate comments for purposes of the internal listening log it prepared.

- CMS requests additional details regarding how the state is addressing the following comments:
- Further details on the state's strategy for how it will assure a strong assessment and validation of providers that have not responded to the self-assessment surveys:

Response: The Department is requiring that Provider Transition Plans (PTPs) be completed by all HCBS providers for all settings at which they provide HCB Services, except for private homes belonging to clients or their families, professional provider offices, clinics, and Supported Employment – Individual settings (unless anyone seeks to rebut the presumption of compliance as to a particular setting). The PTP requirement applies even to settings that did not complete the prior self-assessment surveys and to settings not selected for a site visit. (See STP Action Item 15.) In order to complete the PTP, the provider must identify compliance issues (or lack thereof) vis-à-vis each component of the federal rule, set out a remediation plan for each compliance issue, and submit supporting documentation (e.g., current policies and procedures, leases, relevant photographs). The provider must submit an updated PTP, with updated supporting documentation (e.g., revised leases), every three months until it is told by the Department that it can stop. (See STP Action Item 16.) The Department will not tell a provider that it can stop submitting updates until the Department is satisfied, based on the review of the PTP and supporting documentation by its partner (currently the Colorado Department of Public Health and Environment (CDPHE) and formerly Telligen), or its own review, that the setting is in compliance with the federal rule. This process assures a strong assessment and validation of all providers and settings, regardless of whether they responded to the self-assessment surveys and regardless of whether they receive a site visit.

In addition, during the fall of 2016, CDPHE focused its site visits (within the set of randomly selected providers) on providers that did not respond to the self-assessment surveys. Hence, if a provider selected for a site visit did not complete its self-assessments, it had an increased chance of receiving a visit relatively early in the process and having extra time to receive guidance and conduct its remediation.



(Providers that did not complete their self-assessments will also be included in later batches of site visits, if randomly selected.)

Finally, the Department has reserved the possibility of adding site visits (beyond the randomly selected ones) in order to provide additional assessment and validation where it believes a particular provider may be out of compliance. For example, if the Department develops concerns based on the provider self-assessment survey responses, any responses to the Individual and Family Survey that are identifiable to a particular setting, or public input, it could decide that it would be worthwhile to visit the setting in question (even if the setting is not part of the randomly selected settings). (See STP Action Items 14-16.)

- Additional information regarding how the state is going to use the information from the provider scorecards to inform the state's remediation activities;

Response: Information from the provider scorecards has informed the Department's remediation activities at the statewide level as well as the site-specific level.

At the statewide level, the provider scorecards gave the Department a preliminary sense of compliance issues by waiver, by setting type, and by geographic area. This information informed the Department's remediation activities by allowing the Department to determine which trainings to offer and what additional guidance it could provide to particular categories of providers.

At the site-specific level, information from a particular setting's scorecard/self-assessment answers is used to flag areas that the provider, the Department, and CDPHE should focus on—while being careful not to look only at these areas. Specifically, before the initial round of site visits, the cover letter to each provider accompanying the PTP set out compliance areas under the federal rule (e.g., community integration) and identified self-assessment survey questions/item numbers that indicated that the provider might have a compliance issue in that area. Each provider was given blank copies of the original self-assessment surveys, allowing the provider to look up the identified questions and consider their relevance to particular compliance categories. The PTP User Manual also stated:

Within the Areas for Growth section of the PTP, there are tabs focused on the main compliance categories identified by CMS. These are:

B) Rights/Autonomy; C) Informed Choice; D) Community Integration; and E) Institutional Characteristics.

You should review all of these tabs thoroughly, even if the cover letter you received does not identify problems in all of these areas. The cover letter only draws on your answers to the Initial and/or Secondary Self-



Assessment Survey(s) to help you see where you had certain problems in the past, at the time you completed the Survey(s). But your setting is unique and evolving, and it may have problems that it did not have before or that were not considered in the Survey(s). Now is the time to investigate in detail.

* * *

Providers should check the boxes for compliance issues that were identified during the self-assessment survey submission(s). . . . Additionally, providers should independently evaluate whether additional compliance issues, not already identified through the self-assessment survey process, exist. If so, include those additional compliance issues in the PTP.

For the site visits currently being conducted by CDPHE, the Department has not had the resources to identify in each cover letter all the self-assessment survey questions/item numbers indicating that the provider may have certain compliance issues.

- Questions related to how the survey for individuals receiving services and family members, including suggestions that the surveys should not be distributed by case managers or providers in order to avoid a conflict of interest; and

Response: The Department is distributing the Individual/Family/Advocate (IFA) Survey through the following means:

- *Via the STP (see Action Item 12), which provides links to the English and Spanish versions of the survey for online completion, as well as information about how to obtain and submit a hard copy version of the survey. The Department publicly noticed the STP through various methods that ensured that it reached the public and stakeholders (see Action Item 6).*
- *On the Department's website (<https://www.colorado.gov/pacific/hcpf/home-and-community-based-services-settings-final-rule>), which provides links to the English and Spanish versions of the survey for online completion, as well as information about how to obtain and submit a hard copy version of the survey.*
- *By directly informing stakeholders of the IFA Survey at stakeholder meetings and on webinars.*
- *By asking providers to circulate the IFA Survey to their clients and family members when they begin working on the PTP for a given setting. The*



completed survey is submitted to the Department directly by the person who completes the survey, either electronically or via US mail. Site visit teams will confirm that providers circulated the survey and will directly interview individuals and their family members at settings selected for a site visit.

The Department will keep the IFA Survey open for individuals and their families/advocates to take as often as they like, through at least the end of the five-year transition period. (See STP Action Item 12.) The Department will continue to periodically remind stakeholders of the IFA Survey using the means identified above. In addition, the Department plans to use the following additional means through the end of the transition period:

- Issuing quarterly reminders to stakeholders at stakeholder meetings and in notices sent to the Division for Intellectual and Developmental Disabilities (DIDD) Communication Brief recipient list, the Division for Long-Term Services and Supports (LTSS) notice recipient list, and the list of stakeholders that have been participating in the conflict-free case management project.*
- Asking case managers to inform their clients about how to take the IFA Survey.*

Regarding the conflict of interest concern, the Department notes that providers are only one of many channels through which the IFA Survey is distributed, and that while poor survey results could lead to more intense scrutiny of a particular setting, good results will not lead to relaxed scrutiny. Even if a setting is identifiable from completed surveys (respondents may elect to keep themselves and their setting anonymous), and even if it receives good ratings, the setting's compliance will still need to be verified through a completed PTP and, if randomly selected, a site visit. This process allows the Department to address potential compliance issues raised by individuals and their families, while mitigating the concern that any lack of such issues in survey results could have been caused by provider pressure on respondents.

- Comments regarding how the state will continue to adequately communicate with stakeholders throughout the STP process and adequate education of participants.*

Response: The Department has implemented a robust plan for communicating with stakeholders throughout the STP process. As summarized in the Department's June 30, 2016 submission to CMS, the Department publicly noticed the STP and systemic assessment crosswalk through various means: emailing LTSS and DIDD stakeholder lists, provider lists, and Tribal Consultation recipients; posting a notice on its website; publishing notices in newspapers; and publishing a notice in the Colorado Register. The



Department plans to use a similarly comprehensive approach for future publication(s) of the STP for public comment. (See STP Action Item 6.)

To expand stakeholder opportunities for input, the Department also held monthly stakeholder workgroup meetings (at first in person and then by telephone) from November 2015 through March 2016. The workgroup included individuals/family members and advocates, as well as providers, and it discussed possible best practices for complying with the settings rule. (See STP Action Items 2, 7, & 29.)

In addition to the formal processes described above, the Department is in regular communication with its stakeholders at periodic stakeholder meetings. Department staff are also available by phone and email to address stakeholder questions and concerns. Moreover, the Department has provided a number of webinar trainings on STP-related issues, and it posts training and other materials on its website. Most recently, the Department posted the PTP Templates on its website.

Going forward, the Department plans to enhance stakeholder involvement by improving the organization and availability of STP-related materials on its website. Improvements may include consolidating all STP-related materials on a single website (currently, materials open for public comment are on one site, while training and other materials are on another); ensuring that the link to this website is easy to find from elsewhere on the Department's website and within the STP; and adding materials such as the PTP User Manual and Site Visit/Heightened Scrutiny Protocol (to be posted after in-progress revisions are complete), and correspondence with CMS. The Department will also consider how to more broadly publicize regular stakeholder meetings at which STP-related issues are discussed; for example, it could list or link to the relevant information within the STP and/or on its improved STP-related website. The Department will also develop a more formal and effective communication plan by March 16, 2017.

The Department provides adequate education to HCBS waiver participants through the means described above. For example, waiver participants and numerous people and organizations representing such participants receive notice of the STP through emails and the Department's website; communicate with the Department about STP-related issues at stakeholder meetings; are invited to and do join webinar trainings; and participated in the stakeholder workgroup on best practices.

- Several of the state's responses indicate that the issue raised in the comment "require[s] additional attention during the work to implement the Final Rule" or that "the Department is seeking additional guidance from CMS." The state should provide more information to the public on the actions it is taking to address these issues, as well as when and how it will make further information available to the public.



Response: The Department's June 30, 2016 summary of public comments mentions five subjects that require additional attention or guidance:

1. *Use of restraints.* As far as the Department is aware, CMS has not issued any official guidance on the use of restraints in HCBS settings. In its August 30, 2016 spot-check of the Department's crosswalk, however, CMS stated several times that "CMS suggests that [regulatory] language be modified to indicate that individuals are free from restraint. If restraints are allowed, the state must ensure that the modification is based on an assessed need, documented in the person centered plan, and that the use of restraints is in compliance with 1915(c) policy," apparently referring to any applicable restraint policy set forth in an approved waiver. In addition, CMS recently stated that "settings should not restrict a participant within a setting, unless such restriction is documented in the person-centered plan, all less restrictive interventions have been exhausted, and such restriction is reassessed over time." CMS, "FAQs Concerning Medicaid Beneficiaries in Home and Community-Based Settings Who Exhibit Unsafe Wandering or Exit-Seeking Behavior," A2 (Dec. 15, 2016). The Department's regulatory changes will be consistent with the foregoing quotations. Specifically, the Department has added to proposed Rule AAA in the crosswalk a requirement that "if restraints are used with an individual, the use be based on an assessed need after all less restrictive interventions have been exhausted; be documented in the individual's person-centered plan as a modification of the generally applicable settings criteria, consistent with the standards in Rule BBB; be compliant with any applicable waiver; and be reassessed over time." When it publishes the updated summary of public comments with departmental responses (expected by March 16, 2017), the Department will inform the public of this planned regulatory language.
2. *Management of resident funds.* The Department described current state legal authorities relating to this issue in the crosswalk, on which it solicited public input. The Department has reviewed the public comments received on this issue and analyzed possible approaches. In the revised crosswalk, the Department states that it plans to require by regulation (in new Rule AAA) that if an individual requests that a provider hold his/her funds, their signed person-centered plan must document this request, the reasons for the request, and the parties' agreement on how the provider should handle the funds (including acknowledgement of the provider's obligations under C.R.S. 25.5-10-227 and the Social Security Administration's (SSA's) requirements for representative payees, if applicable or if the parties so elect) and what they define as "reasonable amounts" under C.R.S. 25.5-10-227 (if applicable or if the parties so elect). In the updated summary of public comments and its responses, the Department will so state.



3. *Legally enforceable resident agreements. This federal requirement will be difficult to apply, and will at a minimum require more detailed guidance from CMS and/or the Department, because of questions like the following: If the relationship between an individual and a host home provider breaks down, does the host home provider have to allow the individual to keep living in the home until the eviction process can be completed in court? Does the host home provider have to allow another provider into their home to ensure continuous HCB services to the individual? Does the requirement of a lease/residency agreement apply to children who are being served under the CHRP waiver? In the absence of guidance from CMS on these and other issues, which the Department hereby invites, the Department is currently drafting a Q&A describing its position. The Department will publish this Q&A once it has been finished and cleared. The Department will inform the public of its planned Q&A and the foregoing invitation to CMS in the updated summary of public comments and its responses.*

4. *Restrictive egress. The Department has added to proposed Rule AAA in the crosswalk a requirement that any restrictive or controlled egress measures must be consistent with the following criteria:*
 - *the measures are implemented on an individualized (not setting-wide) basis;*
 - *the measures make accommodations for individuals who are not at risk of wandering or exit-seeking behaviors;*
 - *the measures are documented in the individual's person-centered plan as a modification of the generally applicable settings criteria, consistent with the standards in Rule BBB;*
 - *the plan documents an assessment of the individual's wandering or exit-seeking behaviors (and the underlying conditions, diseases, or disorders relating to such behaviors) and the need for safety measures; options that were explored before any modifications occurred to the person-centered plan; the individual's understanding of the setting's safety features, including any controlled-egress; the individual's choices for prevention of unsafe wandering or exit-seeking; the individual's and their caregivers'/representatives' consent to controlled-egress goals for care; the individual's preferences for engagement within the setting's community and within the broader community; and the opportunities, services, supports, and environmental design that will enable the individual to participate in desired activities and support their mobility; and*



- *the measures are not developed or used for non-person-centered purposes, such as punishment or staff convenience.*

See CMS, "FAQs Concerning Medicaid Beneficiaries in Home and Community-Based Settings Who Exhibit Unsafe Wandering or Exit-Seeking Behavior" (Dec. 15, 2016). When it publishes the updated summary of public comments with its responses (expected by March 16, 2017), the Department plans to inform the public of these proposed regulatory changes.

5. *Co-located settings. This comment sought confirmation that Adult Day Service Centers co-located on the grounds of an institution are not prohibited, but are subject to heightened scrutiny. The Department agrees with this comment's apparent paraphrasing of the federal rule, under which HCBS settings are not prohibited from co-location with institutions, but are subject to heightened scrutiny if they are located in a building that provides inpatient institutional treatment, or if they are located on the grounds of, or immediately adjacent to, a public institution. The Department will inform the public of this position in the updated summary of public comments with responses.*

- Additionally, in response to certain comments in the "Summary of Public Notice and Comment" document, the state offered information that is not included in the STP. For example, in response to the comment about providers who did not respond to self-assessment surveys, the state clarified that the survey is now closed and that these providers' compliance will be validated through Provider Transition Plans (PTPs) and/or site visits. This information, along with other information offered in response to comments, should be added to the relevant section of the STP.

Response: The Department considered the STP to be complete. Nevertheless, the nature of the public comment process allows for new issues to be raised and for new details to become relevant. The Department has reviewed the public comments, its summary responses, and its planned updated responses, and where it is now in a position to provide updated information, it has done so in the enclosed revised STP.

Regarding the example cited above, the Department does not view its responses as adding new information. The fact that the provider self-assessment surveys are now closed was indicated in the multiple references in STP Action Items 10 and 11 to these action items' being "Completed." The STP that was publicly noticed and submitted to CMS also stated that PTPs "will be completed with all providers" (Action Item 15) and that "[a] statistically significant number of randomly selected site visits will be completed" (Action Item 14), and it did not indicate that providers that did not complete self-assessment surveys will be exempt from these processes. In the



enclosed revised STP, the Department has recapped this information in Action Items 11, 14, and 15.

Waivers and Settings Included in the STP

Thank you for adding a list of affected waivers and covered settings to the STP on pp. 1-2. For some settings, such as day treatment facilities, the state clarifies which waiver or waivers cover the setting. CMS requests that the state add this information for all settings in order to clarify which settings are relevant to which waiver(s).

Response: The systemic assessment crosswalk, which was published simultaneously with and incorporated in the STP, identifies which waivers cover particular settings. For example, Table 1, Row 1 in the crosswalk analyzes the BI Waiver, EBD Waiver, SCI Waiver, and CMHS Waiver in connection with adult day service centers. In the enclosed revised STP, the Department has added this information to the Executive Summary.

Systemic Assessment & Remediation

Comment (not in response to a particular CMS request): Because Colorado's statutes, regulations, and waivers are always being revised and renumbered to some extent, the Department plans to update the crosswalk by the end of 2017 and the end of 2018 to ensure that it cites and analyzes the current versions of the relevant authorities. As part of this annual update process, the Department plans to ask CDPHE and CDHS whether these agencies have made any changes to their regulations that should be reflected in the crosswalk. The Department has added this plan to the STP at Action Item 32.

In order to provide initial approval of the STP as it relates to the systemic assessment, CMS requests the state complete the following as it works to finalize its systemic assessment. To help inform the state's work, we are attaching examples of two strong state cross-walks for your review and consideration. The following guidelines will help ensure a thorough assessment.

- Within the crosswalk, for each state statute, regulation, and waiver identified, provide the title and code; a general description of the policy and its relevance to the home and community-based settings rule; and an active web link to the current version of the policy.

Response: The Department disagrees with this request as written, but agrees to implement the modified approach discussed on the October 5, 2016 call with CMS and NORC.

The only requirements that CMS has published for crosswalks state that the crosswalk should include three things:

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–Each specific setting criterion

–Each related state standard identified by specific citation(s) and the type of setting it applies to

–An analysis of whether the relevant state standards are compliant, conflict with, or are silent with respect to the federal regulation

CMS, HCBS Requirements: Systemic and Site-Specific Assessments and Remediation, 20 (Dec. 9, 2015) (slide deck from SOTA call). The Department's crosswalk includes these elements and provides a useful roadmap for the changes to be implemented going forward.

Regarding the details of CMS's request:

- Title and code: the parties did not discuss this particular request on the October 5, 2016 call, but CMS and NORC indicated on the call that the crosswalk generally has enough detail already. In light of this discussion and the following points, the Department does not plan to add more citation details. The citation for each statute and regulation identified in the crosswalk contains complete information regarding the title and code in which each authority may be found. Duplicating the same information in narrative or textual format would serve no purpose, would be burdensome, and would make the crosswalk bigger and more difficult to navigate. Moreover, the approved crosswalks prepared by Tennessee (which CMS presented to States in April 2016 as a good example) and Kentucky (which CMS sent to the Department in August 2016 as a good example) contain only short-form citations.*
- General description of policy: The crosswalk already paraphrases or quotes the relevant part of each statute, regulation, and waiver as it relates to the federal HCBS settings rule. Moreover, the approved crosswalks prepared by Tennessee, Kentucky, and Ohio do not summarize each cited authority. Nevertheless, in light of CMS's request on the October 5 call for more summary information, the Department has added general descriptions of all cited authorities. This information appears in the leftmost cell in each row of the crosswalk, and it provides context for the more detailed analyses in the other cells within the row.*
- Web links: As agreed on the October 5 call with CMS and NORC, the Department has added general links at the beginning of the crosswalk to direct readers to Colorado's statutes, regulations, and waivers. These links and the citations for individual authorities in the crosswalk allow the public to locate and review each authority in its entirety. As discussed on the call, the Department may not have the ability to add links to each individual authority, given that*



Colorado's statutes are in LexisNexis, its regulations are compiled online in large pdfs (as opposed to individual websites for each regulation), and its waivers are also available online in large pdfs (such that finding the individual sections cited in the crosswalk requires navigation within the pdf). Moreover, the approved crosswalk prepared by Kentucky contains no links, and that prepared by Tennessee contains no links to most of the cited authorities.

- For each statute, regulation, and waiver identified, clearly indicate the state's determination of whether it is in compliance, partially in compliance, out of compliance, or silent with regard to the particular federal requirement.

Response: CMS clarified on the October 5, 2016 call that this request relates only to the cells in which the Department stated that "input is invited" from the public, and that the remainder of the crosswalk provides sufficient detail about the Department's determinations. The Department has modified the "input is invited" cells to more clearly state its determination regarding the status of the authorities at issue.

- For standards that the state determined to be in compliance with the federal requirements, please include a detailed justification for how the state came to that determination, including but not limited to citing language from the state standard that supports the state's determination.

Response: Our understanding from the October 5, 2016 call is that this request relates only to the cells in which the Department stated that "input is invited" from the public, and that the remainder of the crosswalk provides sufficient detail about the Department's reasoning. The Department has modified the "input is invited" cells to explain why it has determined that some of the authorities at issue are in compliance with the federal requirements.

- For each state standard that is partially in compliance, out of compliance, or silent with regard to one or more federal requirements, clearly state the remedial action the state plans to take to bring the standard into full compliance.

Response: CMS clarified on the October 5, 2016 call that this request relates only to the cells in which the Department stated that "input is invited" from the public, and that the remainder of the crosswalk provides sufficient detail about the Department's remedial action plans. The Department has modified the "input is invited" cells to clarify the remedial action it plans to take with respect to the authorities at issue that it has determined need to be changed.

A spot check of the state standards that are included in the state's crosswalk has been completed, and CMS has concerns with several of the state's determinations regarding



compliance with the federal requirements, as described below (and in the attached additional examples). Please note that these examples are not exhaustive; therefore, in addition to addressing the points below, CMS requests 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.

Response: The Department has reviewed the crosswalk as a whole to ensure that its determinations are accurate with regard to each component of each federal requirement.

- According to the crosswalk, the state is planning to exclude respite as well as palliative/support services provided to children outside the home from the new regulations it is drafting to implement the federal settings requirements. Please provide more detail on these services and why the state has determined that the federal settings requirements do not apply.
 - For respite, the Brain Injury and Supported Living Services waivers do not specify a maximum amount of days allowed per year. Please describe how the state ensures that this service is a time-limited service.

Response: the Department reads the federal settings rule as providing that the rule's requirements for HCBS settings do not apply to respite. See 79 Fed. Reg. 2948, 3011 (Jan. 16, 2014). The rule does not provide that respite must be time-limited.¹ On the October 5, 2016 call, CMS's Michele MacKenzie said that respite may only be provided for 30 days or less, and she said that she would provide the citation for this limitation. We look forward to seeing this citation and how it relates to Section 1915(c) of the Social Security Act (SSA), which states that "[e]xcept as provided under paragraph (2)(D), the Secretary may not restrict the number of hours or days of respite care in any period which a State may provide under a waiver under this subsection." SSA § 1915(c)(4), 42 U.S.C. § 1396n(c)(4).

In any event, respite is a temporary service that is accessed only intermittently under the two waivers identified above:

- *Under the Brain Injury (BI) Waiver, respite is defined as "[s]ervices provided to individuals unable to care for themselves; furnished on a short-term basis because of the absence or need for relief of those persons normally providing the care." BI Waiver, App. C. The BI Waiver regulations state that "Respite Care*

¹ A separate federal rule allows States to make advance determinations that nursing facility services are necessary for "[v]ery brief and finite stays of up to a fixed number of days to provide respite to in-home caregivers to whom [an] individual with [mental illness or intellectual or developmental disabilities] is expected to return following the brief NF stay." 42 C.F.R. § 483.130(d). But this rule does not set a 30-day cap, nor does it apply to other populations receiving HCBS.



means services as defined at Section 8.516.70.” 10 CCR 2505-10 8.515.2. The cited regulation, in turn, states that “[a]n individual client shall be authorized for no more than a cumulative total of thirty (30) days of respite care in each certification period unless otherwise authorized by the Department.” Id. 8.516.70. The Department will propose to add this modifiable 30-day limit to the waiver.

- *The Supported Living Services (SLS) Waiver states that “[r]espice services [are] provided on a short-term basis, because of the absence or need for relief to those persons who normally provide care for the participant.” SLS Waiver, App. C. In addition, SLS waiver participants can obtain only a limited amount of respite, because they are subject to a Service Plan Authorization Limit (SPAL), that is, “an annual upper payment limit of total funds available to purchase services to meet the client’s ongoing needs.” Id. 8.500.90. The Department will propose to add a modifiable 30-day limit, similar to the one in the BI Waiver regulations, to the SLS Waiver.*
 - For palliative/support services for children, please describe the settings and situations in which this service is provided outside of the home.

Response: Clients and their families have a choice of where Palliative/Supportive Care services under the Children with Life-Limiting Illness (CLLI) Waiver are provided. Most often, they choose to receive these services in their homes. Sometimes, they elect to receive services in another convenient location, such as a provider’s office or clinic. As stated in the crosswalk, homes, provider’s offices, and clinics will be covered by new Rule AAA, and the Department presumes that they are already compliant with the federal requirements that will be incorporated in that rule.

Infrequently, clients receive Palliative/Supportive Care services under the CLLI Waiver in hospices or hospitals. The Department determined that these services are similar to respite because they are generally provided in settings other than the child’s home only on a temporary, intermittent basis. In addition, children receiving services in hospices or hospitals typically receive them on an outpatient basis, are free to come and go as they please, and are not segregated from other patients. CMS’s approval in March 2016 of the renewal of the CLLI Waiver included review for compliance with the HCBS Settings Final Rule, and the Department understood this action as including approval of the settings in which Palliative/Supportive Care services are provided.

- The state determined that C.R.S. 25.5-6-313(1.5), regarding “Adult Day Services Centers,” is compliant with the federal requirement that the setting is integrated in and supports full access to the community. This regulation allows the use of restrictive egress alert devices to alert staff when certain individuals leave the building. Please explain how these devices are being used and how the state



plans to ensure that the use of such devices does not limit an individual's access to the community.

Response: Some of Colorado's Adult Day centers currently use delayed egress devices in their facilities. These devices are often used on exit doors that lead out to areas that are not on the grounds of the centers. In some cases, these devices rely on loud alarms. The Adult Day centers are moving toward adoption of more person-centered technologies, such as silent alarms on exit doors and/or pendants on clients who are wander risks. These newer technologies are more individualized and discreet, and they are less embarrassing and upsetting to people at the centers.

The Department plans to ensure that the use of restrictive egress alert devices complies with the federal settings rule by adding to new Rule AAA a requirement that any restrictive egress measures be consistent with the following criteria:

- the measures are implemented on an individualized (not setting-wide) basis;*
- the measures make accommodations for individuals who are not at risk of wandering or exit-seeking behaviors;*
- the measures are documented in the individual's person-centered plan as a modification of the generally applicable settings criteria, consistent with the standards in Rule BBB;*
- the plan documents an assessment of the individual's wandering or exit-seeking behaviors (and the underlying conditions, diseases, or disorders relating to such behaviors) and the need for safety measures; options that were explored before any modifications occurred to the person-centered plan; the individual's understanding of the setting's safety features, including any controlled-egress; the individual's choices for prevention of unsafe wandering or exit-seeking; the individual's and their caregivers'/representatives' consent to controlled-egress goals for care; the individual's preferences for engagement within the setting's community and within the broader community; and the opportunities, services, supports, and environmental design that will enable the individual to participate in desired activities and support their mobility; and*
- the measures are not developed or used for non-person-centered purposes, such as punishment or staff convenience.*

This provision and the other aspects of Rule AAA will be incorporated into the site surveys that establish that a provider is qualified to deliver services.

- The state determined that 10 CCR 2505-10 8.495.4, pertaining to ACFs/Assisted living residences, is compliant with the federal requirement that units have*



entrance doors lockable by the individual, with only appropriate staff having keys to doors. However, the regulation states that “Clients and their roommates determined capable to control access to private personal quarters, shall be allowed to lock their doors and control access to their quarters.” This conflicts with the federal rule for two reasons:

- It implies that only those individuals “determined capable to control access to private personal quarters” may have lockable doors, and
- It does not state that only appropriate staff may have keys.

Response: The Department plans to add a reference to new Rule BBB within its ACF regulation; Rule BBB will require, among other things, that units have entrance doors lockable by the individual, with only appropriate staff having keys to doors. In addition, the Department has revised the crosswalk to state that it plans to change 10 CCR 2505-10 8.495.4.G to provide that “individuals shall have personal quarters with entrance doors lockable by the individual and shall control access to their quarters, unless otherwise specified in their person-centered care plan. Only appropriate staff shall have keys to private quarter doors, as specified in the person’s plan.”

- Additionally, CMS is concerned with the state’s determination that the regulations for Child Residential Habilitation settings are in compliance with the federal requirement that a setting ensures an individual’s rights of privacy, dignity and respect, and freedom from coercion and restraint. One of these regulations does not explicitly require settings to ensure the right to respect (10 CCR 2505-10 8.604.1), and others are not consistent with the state’s restraints policy in the Children’s Habilitation Residential Program waiver (10 CCR 2505-10 8.608.3 through 8.608, 12 CCR 2509-8 7.714.53, and 6 CCR 1011-1 Chapter 02 Part 8).

Response: the Department has adjusted the crosswalk to state that it plans to add a reference to new Rule AAA in the Department’s CHRP-specific regulations (10 CCR 2505-10 8.508). Rule AAA will, among other things, require settings to ensure an individual’s rights of privacy, dignity and respect, and freedom from coercion and restraint. The Department has also adjusted the crosswalk to state that it plans to propose redlines to 10 CCR 2505-10 8.508.180 to more explicitly ensure children’s rights of privacy, dignity and respect, and freedom from coercion and restraint, and to ensure that any use of restraints is based on an assessed need after all less restrictive interventions have been exhausted; is documented in the child’s person-centered plan as a modification of the generally applicable settings criteria, consistent with the standards in Rule BBB; is compliant with the CHRP waiver; and is reassessed over time.



Additional detail is needed on the revisions the state plans to make to bring its statutes, regulations, and waivers into full compliance with the federal requirements.

- Provide more detailed timelines for the remediation of state standards, including interim milestones with due dates. The state's deadline for finalizing revised state regulations, statutes, and waivers is listed as 3/15/19. CMS is concerned that this deadline does not allow enough time for the state and CMS to ensure that the revised standards are in place and effective, and that all settings are in compliance with those revised standards, before the end of the transition period.

Response: the Department has added more detailed timelines for the following processes:

- *Transitioning individuals from noncompliant settings, as requested by CMS on the October 5, 2016 call (Action Items 20-28);*
- *Determining and responding to cost impacts (Action Items 35-36);*
- *Requesting any necessary budget or statutory changes (Action Items 37-42);*
- *Making substantive amendments to waivers (Action Items 43-50);*
- *Changing rate methodology in waivers, if necessary (Action Items 51-58);*
- *Changing regulations (Action Items 59-72); and*
- *Implementing procedures so that the Department does not pay for HCBS services rendered at noncompliant settings (Action Item 77).*

These more detailed timelines—along with the site-specific remediation process that is already underway—will ensure that any revised standards are in place and effective, and that all settings are in compliance with the federal standards, before the end of the transition period.

- Ensure and confirm that the state is addressing all components of each federal requirement.
 - For example, in the "integrated" category (Column A in the crosswalk), the crosswalk only mentions whether the state standard addresses integration broadly. It is unclear whether the state assessed each state standard to ensure opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS.



- Additionally, CMS requests that the state assess the state standards governing all types of settings) with regards to the federal requirements that individuals have the freedom and support to control their own schedules and activities, and have access to food at any time; that individuals are able to have visitors of their choosing at any time; and that the setting is physically accessible to the individual. These are important details that can help the state and CMS to ensure all settings are integrated in and support full access to the community, and optimize but do not regiment individual initiative, autonomy, and independence in making life choices.

Response: The Department assessed all components of each federal requirement. As stated in the crosswalk, each table “summarizes existing state [authorities], stating whether they are consistent with, silent with respect to, or in conflict with each federal criterion.” The headers at the top of each table are abbreviations or paraphrases of the federal criteria, intended to improve readability of the crosswalk. In Table 1, the header “Integrated” refers to the federal criterion “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, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.” In Table 2, the headers “Freedom over schedule and access to food,” “Visitors at any time,” and “Physically accessible” refer to the federal requirements that “Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time,” “Individuals are able to have visitors of their choosing at any time,” and “The setting is physically accessible to the individual.” As demonstrated by the detailed analyses within each cell in the tables, the Department analyzed its existing state authorities vis-à-vis the full federal standards, not just the abbreviations or paraphrases at the top of the tables.

- Clarify the state’s approach to regulations and statutes that are silent on one or more federal requirement, since the STP appears to include conflicting statements on this matter. According to p. 1 of the state’s crosswalk document, “The Department plans to seek changes to statutes and waivers only where necessary to mitigate possible conflicts with federal requirements, and not to address mere silence in a statute or waiver vis-à-vis federal requirements (which will be addressed via regulatory amendments). Working with CMS, the Department may eventually seek to amend its waivers so that similar requirements are addressed with similar language, and so services that are provided under multiple waivers are described in a consistent way.” However, on p. 7 of the state’s summary of public comments, it states; “any areas of the Systemic Assessment Crosswalk that reference ‘silence’ in Rules, Waivers, or



Statute implies the intention to change that portion of the Rule, Waiver or Statute. The Crosswalk will be updated to reflect that information on its next submission."

Response: The first quotation above, from the crosswalk, accurately describes the Department's planned approach. The second quotation above, from the summary of public comments, is inaccurate to the extent that it describes a different approach.

- It is important to note that in statutes the state finds to be silent or partially compliant on the federal regulation, remediation in a waiver document alone may not be appropriate. The waiver document is an agreement between the state and CMS and may not provide an enforceable strategy between the state and providers.

Response: The Department does not plan to rely only on changes to waiver documents. As described above and in the crosswalk, the Department plans to ensure that its regulations require compliance with the federal settings rule.

- In several places, the crosswalk states that "input is invited" or "input is requested" on a particular state standard and the changes needed to bring it into compliance. Please clarify of whom the state is requesting input; whether the state expects this input to be received through the public comment process on the STP or through another process; and what other mechanisms the state is using to solicit input on the systemic remediation process.

Response: Where the crosswalk invited input on particular issues, it invited input from the public through the public comment process on the STP and crosswalk. The public so understood, as demonstrated by the public comments that specifically addressed these issues. The Department is also soliciting input on the systemic remediation process through (a) all of the means of public and stakeholder communication described in the STP at Action Items 2 through 7 and 12 and in this letter at pages 4 through 9; (b) the stakeholder workgroups that are working on revisions to certain rules (e.g., the rules for ACFs); and (c) the public comment process for changes to regulations and waivers, as described in the STP at Action Items 43 through 72. To the extent that statutory changes are sought, the General Assembly will seek public input through its typical processes. See, e.g., General Assembly, "Bills, Resolutions, & Memorials," at <http://leg.colorado.gov/bills> (providing information on bills and their status).

According to the STP, the state is in the early stages of developing revised state standards, and aimed to put the revised language out for public notice by 7/31/17. Please provide CMS with a timeline for when the state's systemic assessment results (i.e., final compliance determinations for each state standard and a decision as to



whether and how each will be remediated) will be completed and updated in the STP. CMS also requests that the state make the updates suggested above and resubmit the STP in order to move towards initial approval.

Response: The Department has made final compliance determinations for each standard and a decision as to whether and how each will be remediated. The revised STP and crosswalk are being submitted to CMS with this letter. The STP and crosswalk have been revised in some ways that go beyond CMS's requests for changes (e.g., to provide updates on the Department's planned site visit methodology). To provide transparency about all of these changes, the Department is attaching redlines that show all changes made since the STP and crosswalk were last publicly noticed and submitted to CMS (in May-June 2016). The Department plans to conduct a formal public notice and comment period on the updated STP and crosswalk shortly.

* * *

CMS's August 30, 2016 feedback included a spot-check of our systemic assessment crosswalk. The spot-check is reproduced below, with our responses in a new column on the right.



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
1	The setting is integrated in and supports full access to community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving HCBS.	Adult Day Services Centers	<ul style="list-style-type: none"> • C.R.S. 25.5-6-303(1) <i>Silent</i> • C.R.S. 25.5-6-313(1.5) <i>Compliant (implied)</i> • 10 CCR 2505-10 8.491 <i>Silent</i> • 10 CCR 2505-10 8.515.70 <i>Silent</i> 	<p>Statute: C.R.S. 25.5-6-303(1) generally requires that all federal requirements be met, but does not specifically list integration, etc. C.R.S. 25.5-6-313(1.5) requires the Medical Services Board to regulate restricted environments and restrictive egress alert devices at adult day care centers.</p> <p>Regulations: 10 CCR 2505-10 8.491 and 8.515.70 do not specifically require integration, etc. The Department plans to propose redlines to accomplish this, in addition to adding a reference to new Rule AAA. For this particular setting and federal requirement (integration), the Department also plans to propose redlines that specify concrete, desired outcomes. The Department also plans to propose a rule under C.R.S. 25.5-6-</p>	<p>CMS agrees that C.R.S. 25.5-6-303(1) is silent.</p> <p>CMS does not agree that C.R.S. 25.5-6-313(1.5) is compliant. The state determined that C.R.S. 25.5-6-313(1.5), regarding "Adult Day Services Centers," is compliant with the federal requirement and that the setting is integrated in and supports full access to the community. This regulation allows the use of restrictive egress alert devices to alert staff when certain individuals leave the building. The state will need to explain how these devices are being used, including how they are an individual modification and not setting-wide, and how the state plans to ensure that the use of such devices does not limit an individual's access to the community.</p> <p>CMS agrees that 10 CCR 2505-10 8.491 and 8.515.70 are silent. The state proposes to remediate the silence by amending the regulations to require integration, add a reference to the new rule, and specify concrete, desired outcomes).</p>	<p><i>The Department has modified the crosswalk to state that new Rule AAA will provide that any restrictive or controlled egress measures must be consistent with the following criteria:</i></p> <ul style="list-style-type: none"> • <i>the measures are implemented on an individualized (not setting-wide) basis;</i> • <i>the measures make accommodations for individuals who are not at risk of wandering or exit-seeking behaviors;</i> • <i>the measures are documented in the individual's person-centered plan as a modification of the generally applicable settings criteria, consistent with the standards in Rule BBB;</i> • <i>the plan documents an assessment of the individual's wandering or exit-seeking behaviors (and the underlying conditions, diseases, or disorders relating to such behaviors) and the need for safety measures; options that were explored before any</i>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
				<p>313(1.5) to regulate restricted environments and egress alert devices in a manner consistent with the federal HCBS Settings Rule.</p> <p>Waiver: BI Waiver, EBD Waiver, SCI Waiver, and CMHS Waiver are silent with respect to integration, etc.</p>		<p><i>modifications occurred to the person-centered plan; the individual's understanding of the setting's safety features, including any controlled-egress; the individual's choices for prevention of unsafe wandering or exit-seeking; the individual's and their caregivers'/representatives' consent to controlled-egress goals for care; the individual's preferences for engagement within the setting's community and within the broader community; and the opportunities, services, supports, and environmental design that will enable the individual to participate in desired activities and support their mobility; and</i></p> <ul style="list-style-type: none"> <i>the measures are not developed or used for non-person-centered purposes, such as punishment or staff convenience.</i> <p><i>In Table 1, Cell A-1 of the crosswalk, the Department states</i></p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
						<p>that it will add a reference to new Rule AAA within its Adult Day regulations.</p> <p>Global note: in some instances, CMS's spot-check characterizes the crosswalk's determinations in more detail or differently than the crosswalk's text (for example, at left, CMS states that the crosswalk makes an "implied" determination that a statute is compliant). The Department is not expressly agreeing or disagreeing with most of these characterizations. As discussed on the October 5, 2016 call, the distinctions among "silent," "partially compliant," and "compliant" authorities are generally moot in light of the Department's plans to require compliance with the federal criteria through its regulations.</p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
2	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.	Alternative Care Facilities (ACFs)/ Assisted living residences (ALF)	<ul style="list-style-type: none"> C.R.S. 25-27-104 <i>Silent</i> C.R.S. 25.5-6-303(3) <i>Silent</i> 10 CCR 2505-10 8.495.2.B <i>Silent</i> 10 CCR 2505-10 8.495.4.A(1) <i>Partially compliant</i> Waiver: EBD Waiver and CMHS Waiver at App. B-7 and App. D-1, items b & c 	<p>Statute: See Column A (C C.R.S. 25-27-104 and C.R.S. 25.5-6-303(3) are silent)</p> <p>Regulations: Client chooses to live in an ACF, per 10 CCR 2505-10 8.495.2.B and 8.495.4.A(1). Otherwise silent; the Department plans to propose redlines.</p> <p>Waiver: EBD Waiver and CMHS Waiver at App. B-7 and App. D-1, items b & c confirm that people are informed of feasible service alternatives provided by the waiver and the choices of either institutional or home and community-based services, and that the case manager provides a choice of providers.</p>	<p>CMS agrees that C C.R.S. 25-27-104 and C.R.S. 25.5-6-303(3) are silent. Remediation could be conducted through state policies and guidance.</p> <p>CMS agrees 10 CCR 2505-10 8.495.2.B is silent.</p> <p>CMS agrees that 10 CCR 2505-10 8.495.4.A(1) is partially compliant. Although the regulation provides that the individual can choose to live in an ACF, it does not require that the individual be given a choice from among settings options, including non-disability specific settings.</p> <p>The state has proposed amending the regulations, but does not describe the content of the amendments.</p>	<p><i>Global note: statements in the crosswalk that the Department plans to propose redlines mean that the Department plans to propose redlines to require compliance with the federal requirement at issue. The Department is not adding this clarification to the crosswalk, given CMS's statement on the October 5 call that its request for more detailed remedial action plans relates only to the cells in which the Department stated that "input is invited" from the public, and that the remainder of the crosswalk provides sufficient detail about the Department's remedial action plans.</i></p>
3	Ensures an individual's rights of	Child Residential	<ul style="list-style-type: none"> C.R.S. 25.5-10-216 through -240 	Statute: C.R.S. 25.5-10-216 through -240 protect the rights of individuals	High level summary of CMS's findings:	<i>The Department has adjusted Table 1, Cell C-3 of the crosswalk to state that it plans add a</i>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
	privacy, dignity and respect, and freedom from coercion and restraint	Habilitation settings	<p><i>Compliant (implied)</i></p> <ul style="list-style-type: none"> • C.R.S. 26-6-106(2)(g) and (2)(k) <i>Silent</i> • C.R.S. 26-20-103 <i>Compliant (implied)</i> • 10 CCR 2505-10 8.604.1 <i>Silent</i> • 10 CCR 2505-10 8.604.2 <i>Compliant (implied)</i> • 10 CCR 2505-10 8.608.3 thru 8.608.5 <i>Compliant (implied)</i> • 10 CCR 2505-10 8.500.15, 8.500.105, and 8.503.150 <i>Silent</i> 	<p>with IDD in general (-218), and in particular with respect to privacy (-223) and freedom from coercion and restraint (-221). Dignity and respect are protected through C.R.S. 25.5-10-201 and -216 through -240 as a whole.</p> <p>C.R.S. 26-6-106(2)(g) authorizes child care facility licensing rules to "safeguard the legal rights of children served," but does not specify which rights. C.R.S. 26-6-106(2)(k) authorizes rules to set standards for short-term confinement of children.</p> <p>C.R.S. 26-20-103 limits the use of restraints by state agencies as well as public or private entities that contract with or are licensed/certified by state agencies.</p> <p>Regulations: The Department plans to work with CDHS to propose</p>	<p>The state requires settings to ensure the rights of dignity and privacy for individuals, but with one exception (12 CCR 2509.8 7.714.33B), does not explicitly require settings to ensure the right to respect (only self-respect) in either its statutes or regulations. However, as the state notes, the right to respect is implied in various standards. Therefore, remediation could be conducted through state policies and guidance. Three of the state's regulations are not consistent with the state's restraints policy set forth in section G-2 (Safeguards Concerning Restraints and Restrictive Interventions) of its Children's Habilitation Residential Program waiver.</p> <p>CMS agrees that C.R.S. 25.5-10-201 and C.R.S. 25.5-10-233 ensure the individual the right to privacy, and C.R.S. 25.5-10-201 ensures the right to dignity. However, CMS does not agree that C.R.S. 25.5-10 ensures the right to respect, only self-respect. CMS suggests that the existing</p>	<p><i>reference to new Rule AAA, which will explicitly protect an individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint, to the Department's CHRP-specific regulations (10 CCR 2505-10 8.508). In addition, the Department plans to propose redlines to 10 CCR 2505-10 8.508.180 to more explicitly ensure children's rights of privacy, dignity and respect, and freedom from coercion and restraint, and to ensure that any use of restraints be based on an assessed need after all less restrictive interventions have been exhausted; be documented in the child's person-centered plan as a modification of the generally applicable settings criteria, consistent with the standards in Rule BBB; be compliant with the CHRP waiver; and be reassessed over time. In light of these proposed regulatory changes, the additional statutory and regulatory changes requested by CMS at left are not necessary.</i></p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
			<ul style="list-style-type: none"> 12 CCR 2509-8 7.708.33 thru -.37 (for foster care) and 7.714.31 thru 7.714.4 & 7.714.52 <i>Compliant (implied)</i> 	<p>redlines to clarify points below.</p> <p>10 CCR 2505-10 8.604.1 (relating to people with IDD) reiterates that people receiving services have the same rights as others; 8.604.2 requires providers to protect rights in C.R.S. 25.5-10-218 through -231 (input requested on whether this should be C.R.S. 25.5-10-216 through -240); and 8.608.3 thru 8.608.5 limit the use of restraints.</p> <p>In 10 CCR 2505-10 8.500.15, 8.500.105, and 8.503.150, add reference to C.R.S. 25.5-10-216 through -240.</p> <p>10 CCR 2505-10 8.508.180 seeks to protect privacy, dignity, and other rights, and makes rights in CDHS Social Services Staff Manual, Section 7.714.50, "CHILDREN'S RIGHTS" (12 CCR 2509-8) applicable.</p>	<p>language be modified to ensure an individual's right to respect.</p> <p>CMS agrees that C.R.S. 26-6-106(2)(g) and C.R.S. 26-6-106(2)(k) are silent. Remediation could be conducted by incorporating the state's template language on this topic in one or more state policies and guidance.</p> <p>CMS agrees that C.R.S. 26-20-103 is consistent with section G-2 of the state's Children's Habilitation Residential Program waiver.</p> <p>CMS does not agree that 10 CCR 2505-10 8.608.3 thru 8.608 ensures an individual's freedom from coercion and restraint. CMS suggests that the language be modified to indicate that individuals are free from restraint. If restraints are allowed, the state must ensure that the modification is based on an assessed need, documented in the person centered plan, and that the use of restraints is in compliance with 1915(c) policy. For example, 10 CCR 2505-10 8.608.3 thru 8.608 permits mechanical restraints,</p>	



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
				<p>This cross-reference should be updated.</p> <p>12 CCR 2509-8 7.708.33 thru -.37 (for foster care) and 7.714.31 thru 7.714.4 & 7.714.52 (for SGFs and RCCFs) explicitly protect privacy, implicitly protect dignity and respect, and limit coercion & restraint.</p> <p>6 CCR 1011-1 Chapter 02 Part 8 limits the use of restraints in all licensed health care facilities. Also, 12 CCR 2509-8 7.714.53 et seq. sets out conditions under which restraints are allowed in foster care, SGFs, and RCCFs.</p> <p>Waiver: CHRP waiver, App. C-2, refers to CDHS's rules for group homes, including rights protections as described above. CHRP waiver is silent with respect to rights in other CHRP settings.</p>	<p>does not prohibit restraints used for punitive form of discipline, and does not address de-escalation or staff training or approval. CMS agrees that 10 CCR 2505-10 8.604.1 is silent with respect to the rights ensured under the federal regulation. CMS does not agree that 10 CCR 2505-10 8.604.2 is compliant; it is partially compliant. CMS requests that the state modify existing language regarding the right to self-respect to ensure the individual's right to respect.</p> <p>CMS does not agree with the state's proposed plan to remediate 10 CCR 2505-10 8.500.15, 8.500.105, and 8.503.150, which are silent, by adding a reference to C.R.S. 25.5-10-216 through -240. The statutory provisions the state plans to reference do not include language that ensures the rights of respect and dignity. CMS suggests state review the above-mentioned reference for accuracy in what the state intended to cite.</p> <p>CMS agrees that 10 CCR 2505-10 8.508.180 ensures the rights</p>	



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
					<p>to protect privacy and dignity, However, CMS does not agree that this regulation ensures the right to respect. It is silent with regard to the right to respect. The state must propose a remediation plan to add the right of respect to its standards.</p> <p>CMS agrees that 12 CCR 2509-8 7.714.31 ensures the right to privacy.</p> <p>CMS agrees that 12 CCR 2509-8 7.708.33 thru -.37 (for foster care) and 7.714.31 thru 7.714.4 & 7.714.52 (for SGFs and RCCFs) explicitly protect privacy, and implicitly protect dignity and respect. However, CMS does not agree that 12 CCR 2509-8 7.714 is compliant. CMS suggests that the language be modified to indicate that individuals are free from restraint. If restraints are allowed, the state must ensure that the modification is based on an assessed need, documented in the person centered plan, and that the use of restraints is in compliance with 1915(c) policy. For example, 12 CCR 2509-8 7.714.53 permits mechanical</p>	



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
					<p>restraints and does not prohibit restraints used for punitive form of discipline. The waiver states: Personal restraint must never be used as a punitive form of discipline, as a form of treatment or therapy, or as a threat to control or gain compliance of a child's behavior. The state must remediate 12 CCR 2509-8 7.714.53.</p> <p>CMS agrees that 6 CCR 1011-1 Chapter 02 Part 8 mentions restraints (requires documentation of use of restraints). However, CMS does not agree that 6 CCR 1011-1 Chapter 02 Part 8 or 12 CCR 2509-8 7.714.53 is compliant. CMS suggests that the language be modified to indicate that individuals are free from restraint. If restraints are allowed, the state must ensure that the modification is based on an assessed need, documented in the person centered plan, and that the use of restraints is in compliance with 1915(c) policy. For example, 6 CCR 1011-1 Chapter 02 Part 8 permits chemical restraints and fails to include most of the</p>	



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
					<p>safeguards in the state's waiver program. The state must remediate 6 CCR 1011-1 Chapter 02 Part 8 and 12 CCR 2509-8 7.714.53.</p> <p>The state indicates that it intends to "propose redlines to address the points below" and "ensure federal criteria are met." Without additional information about what "points" the state will address or what amendments the state will make to the regulations listed, CMS cannot evaluate whether the state's remediation actions will be sufficient.</p>	
4	Facilitates individual choice regarding services and supports, and who provides them	Day Habilitation/ treatment centers for individuals with IDD – Specialized Habilitation Centers	<ul style="list-style-type: none"> • C.R.S. 25.5-6-409.3 <i>Compliant</i> • Day habilitation regulations <i>Silent</i> 	<p>Statute: C.R.S. 25.5-6-409.3 requires new consolidated adult IDD waiver to provide support to organize resources and achieve key service outcomes." (N/A to children.)</p> <p>Regulations: Day habilitation regulations are silent with respect to this regulation. The Department plans to propose redlines to</p>	<p>CMS agrees that C.R.S. 25.5-6-409.3 is compliant. It is partially compliant. Section 6-409.3 requires the setting to "utilize existing community-based services programs to the maximum extent possible and shall coordinate all available forms of assistance for the eligible person."</p>	<p><i>The Department does not read CMS's comments as requiring any changes beyond those proposed in the crosswalk.</i></p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
				conform to federal rule and state statute.		
5	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.	Group Residential Services and Supports (GRSS) community residential homes for four to eight people	<ul style="list-style-type: none"> C.R.S. 25.5-10-214 <i>Silent</i> C.R.S. 13-21-117.5(7) <i>Non-compliant</i> C.R.S. 13-21-117.5(1) <i>Non-compliant</i> 6 CCR 1011-1 Chap 08 Section 9.1(B) and (C) and 18.3 10 <i>Silent</i> 10 CCR 2505-10 8.609.5(B)(8) <i>Silent</i> 10 CCR 2505-10 8.500.9(A)(4) <i>Non-compliant (implied)</i> 	<p>Statute: C.R.S. 25.5-10-214 is silent with respect to landlord/tenant rights, etc.</p> <p>The Department plans to propose redlines to or deletion of C.R.S. 13-21-117.5(7) in order to conform to federal rule (currently provides that "[i]n any civil action brought against a provider, a person with [IDD] who is served in a residential setting owned or leased by a provider shall not be considered a tenant of the provider and statutes regarding landlord-tenant relationships shall not apply. . . . No real property rights shall accrue to a person with [IDD] by virtue of placement in a residential setting."). The Department seeks input on whether and how to propose modifications to C.R.S. 13-21-117.5(1)</p>	<p>CMS agrees that C.R.S. 25.5-10-214 is silent with respect to the requirements of the federal rule.</p> <p>CMS agrees that C.R.S. 13-21-117.5(7) and C.R.S. 13-21-117.5(1) are non-compliant based on the language quoted by the state in the crosswalk (see column to left).</p> <p>CMS does not agree that 6 CCR 1011-1 Chap 08 Section 9.1(B) and (C) and 18.3 are silent with respect to landlord/tenant rights, etc. They are non-compliant because they establish procedures for discharge that are may be inconsistent with landlord/tenant law.</p> <p>CMS does not agree that 10 CCR 2505-10 8.609.5(B)(8) is silent. Please demonstrate that the language establishes a procedure for discharge that ensures the same responsibilities and protections afforded under local landlord/tenant law.</p>	<p><i>The Department plans to add a reference to new Rule BBB to one or more of its regulations regarding GRSS settings (10 CCR 2505-10 8.500.1, 8.500.5.A(5), 8.609.5, and 8.609.8). Under 10 CCR 2505-10 8.500.9(A)(4), a provider under the DD waiver may discontinue services only after documented efforts to resolve the situation. The Department plans to add "and only in compliance with any eviction and appeals processes required under Rule BBB." Under 8.604.3(B)(5) (relating to people with IDD), services may not be suspended if doing so would put person at risk of loss of abode. The Department plans to add "or would be in violation of any eviction and appeals processes required under Rule BBB." 8.609.5(B)(8) establishes notice requirements relating to changes in residential placements. The Department plans to add a new paragraph at the end of this subsection, stating that in</i></p>



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			<ul style="list-style-type: none"> 10 CCR 2505-10 8.604.3(B)(5) <i>Non-compliant (implied)</i> 	<p>(providing that CCBs and service agencies may remove a person with IDD from a residential setting if they believe that the person "may be at risk of exploitation, or other harm in such setting," and limiting liability for such removals).</p> <p>Regulations: The Department plans to work with CDPHE to propose redlines to address the points below, and to add a reference to new Rule BBB.</p> <p>6 CCR 1011-1 Chap 08 Section 9.1(B) and (C) and 18.3 relating to resident transfers and 10 CCR 2505-10 8.609.5(B)(8) are silent with respect to landlord/tenant rights, etc. The Department plans to work with CDPHE to propose redlines to ensure federal criteria are met.</p> <p>Note that under 10 CCR 2505-10 8.500.9(A)(4),</p>	<p>Although the state did not explicitly state that 10 CCR 2505-10 8.500.9(A)(4) are non-compliant, CMS requests clarification that individuals have the same responsibilities, and rights in a legally enforceable agreement, afforded under local landlord tenant law. 10 CCR 2505-10 8.500.9(A)(4) states that a setting may discontinue services only after documented efforts to resolve the situation.</p> <p>Although the state did not explicitly state that 10 CCR 2505-10 8.604.3(B)(5) is non-compliant, CMS believes that it is. 10 CCR 2505-10 8.604.3(B)(5) states that services may not be suspended if doing so would put person at risk of loss of abode. This implies that an individual can be evicted strictly on the basis of a loss of services and should be remediated to align with the federal rule.</p> <p>The state indicates that it intends to "propose redlines to address the points below" and "ensure federal criteria are met." Without additional information about</p>	<p><i>addition to and notwithstanding the foregoing requirements, changes to residential placements must be in compliance with any eviction and appeals processes required under Rule BBB. In light of all the foregoing changes, similar changes would be duplicative, and are not necessary, for 6 CCR 1011-1 Chap 08 Section 9.1(B) and (C) and 18.3, relating to resident transfers and terminations.</i></p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
				<p>a provider under DD waiver may discontinue services only after documented efforts to resolve the situation. And under 10 CCR 2505-10 8.604.3(B)(5) (relating to people with IDD), services may not be suspended if doing so would put person at risk of loss of abode.</p> <p>Waiver: DD Waiver is silent with respect to landlord/tenant rights, etc.</p>	<p>what "points" the state will address or what amendments the state will make to the regulations listed, CMS cannot evaluate whether the state's remediation actions will be sufficient.</p>	
6	Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors	Alternative Care Facilities (ACFs)/ Assisted living residences (ALF)	<ul style="list-style-type: none"> • C.R.S. 25-27-104 and 25-27-104.5 <i>Silent</i> • 10 CCR 2505-10 8.495.4 <i>Compliant</i> • 10 CCR 2505-10 8.495.6.H <i>Compliant</i> 	<p>Statute: C.R.S. 25-27-104 and 25-27-104.5 are silent with respect to privacy in unit.</p> <p>Regs: No redlines needed. Under 10 CCR 2505-10 8.495.4, the ACF must allow capable clients to lock their doors and control access to their quarters, accommodate roommate choices within reason, and allow clients to decorate and use personal furnishings in their bedrooms. Note that under 10 CCR 2505-10</p>	<p>CMS agrees that C.R.S. 25-27-104 and 25-27-104.5 are silent with respect to lockable resident unit doors.</p> <p>CMS does not agree that 10 CCR 2505-10 8.495.4 is compliant. It is non-compliant. 10 CCR 2505-10 8.495.4.G states, "Clients and their roommates determined capable to control access to private personal quarters, shall be allowed to lock their doors and control access to their quarters." This conflicts with the federal rule because (1) it implies that only those individuals "determined capable to control</p>	<p><i>The Department has updated Table 2, Cell B-2 of the crosswalk to state that it plans to add a reference to new Rule BBB within its ACF regulation. The Department also plans to change 10 CCR 2505-10 8.495.4.G and 8.495.6.H(3) to provide that "individuals shall have personal quarters with entrance doors lockable by the individual and shall control access to their quarters, unless otherwise specified in their person-centered care plan. Only appropriate staff shall have keys to private quarter doors, as specified in the person's plan."</i></p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
				<p>8.495.6.H, doors to bedrooms in secured ACFs shall not be locked unless the resident is able to manage the key independently.</p> <p>Waiver: EBD Waiver at App. G-2, item b requires ACF to be homelike and provide privacy. CMHS Waiver at App. G-2, item b-i refers to regulatory protections for privacy in general (see Table 1, cell C-2 above).</p>	<p>access to private personal quarters" may have lockable doors and (2) it does not state that only appropriate staff may have keys. A modification of an individual's right to have a lockable unit door is permitted only if the provider has complied with the requirements under 42 CFR 441.301(c)(4)(vi)(F).</p> <p>CMS does not agree that 10 CCR 2505-10 8.495.6.H is compliant. It is non-compliant. 10 CCR 2505-10 8.495.6.H states, "Doors to bedrooms shall not be locked unless the resident is able to manage the key independently." A modification of an individual's right to have a lockable unit door is permitted only if the provider has complied with the requirements under 42 CFR 441.301(c)(4)(vi)(F).</p>	
7	Individuals sharing units have a choice of roommates in that setting.	Individual Residential Services and Supports (IRSS) homes for up to three people	<ul style="list-style-type: none"> CRS 25-5-10-214 <i>Silent</i> 10 CCR 2505-10 8.609.5(B)(8) <i>Silent</i> 	<p>Statute: Statute is silent with respect to privacy in sleeping/living unit, etc.</p> <p>Regulations: See Column A; the Department plans to propose redlines.</p>	<p>CMS agrees that the statute, CRS 25-5-10-214, is silent.</p> <p>CMS agrees that the regulations referenced by the state - 10 CCR 2505-10 8.609.5(B)(8), 10 CCR 2505-10 8.500.9(A)(4), and 10 CCR 2505-10 8.604.3(B)(5) - are silent. The state has proposed</p>	<p><i>The Department does not read CMS's comments as requiring any changes beyond those proposed in the crosswalk.</i></p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
			<ul style="list-style-type: none"> 10 CCR 2505-10 8.500.9(A)(4) <i>Silent</i> 10 CCR 2505-10 8.604.3(B)(5) <i>Silent</i> 	Waiver: DD Waiver is silent with respect to privacy in sleeping/living unit.	redlines to its regulations to remediate the silence.	
8	Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.	Supported Living Program (SLP) facilities under BI waiver (note that SLP providers must be licensed as an ALR (see Row 2 above) or a Home Care Agency (HCA) Class A (see 6 CCR 1011-1, Ch. 26), but the latter option is being	<ul style="list-style-type: none"> CRS 25.5-6-703(9) <i>Silent</i> 10 CCR 2505-10 8.515.85.F <i>Compliant</i> 	<p>Statute: Silent</p> <p>Regulations: No redlines needed. Under 10 CCR 2505-10 8.515.85.F, SLP must ensure privacy in the client's unit including lockable doors, choice of roommates, and freedom to furnish or decorate the unit.</p> <p>Waiver: BI Waiver at App. C-2, item c(ii) requires SLP facility to be homelike and provide privacy.</p>	<p>CMS agrees that the statute, CRS 25.5-6-703(9), is silent.</p> <p>CMS agrees that 10 CCR 2505-10 8.515.85.F is compliant. 10 CCR 2505-10 8.515.85.F.1.g states that the setting must, "Ensure privacy in the client's unit including lockable doors, choice of roommates, and freedom to furnish or decorate the unit."</p>	<i>The Department does not read CMS's comments as requiring any changes beyond those proposed in the crosswalk.</i>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
		removed from the regulation)				
9	Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time	Transitional Living Program (TLP) facilities under BI waiver (note that TLP providers must be licensed as an ALR (see Row 2 above))	<ul style="list-style-type: none"> C.R.S. 25.5-6-703(10) <i>Silent</i> 10 CCR 2505-10 8.516.30 <i>Silent</i> 	<p>Statute: C.R.S. 25.5-6-703(10) is silent.</p> <p>Regulations: 10 CCR 2505-10 8.516.30 is silent. See Column A; the Department plans to propose redlines.</p> <p>Waiver: BI Waiver at App. C-2, item c(ii) requires TLP facility to be homelike and provide access to food and kitchen facilities.</p>	<p>CMS agrees that the statute, CRS 25.5-6-703(10) is silent.</p> <p>CMS agrees that the regulation, 10 CCR 2505-10 8.516.30, is silent concerning the requirements in this federal regulation. The state has proposed remediation, but has not described how it will amend the regulation.</p>	<p><i>As stated above, statements in the crosswalk that the Department plans to propose redlines mean that the Department plans to propose redlines to require compliance with the federal requirement at issue. The Department is not adding this clarification to the crosswalk, given CMS's statement on the October 5 call that its request for more detailed remedial action plans relates only to the cells in which the Department stated that "input is invited" from the public, and that the remainder of the crosswalk provides sufficient detail about the Department's remedial action plans.</i></p>
10	Individuals are able to have visitors of their choosing at any time	Group Residential Services and Supports (GRSS) community residential	<ul style="list-style-type: none"> C.R.S. 25.5-10-223 <i>Compliant</i> 6 CCR 1011-1 <i>Silent (implied)</i> 	<p>Statute: Under C.R.S. 25.5-10-223, person has right to reasonable and frequent (but not unlimited) opportunities to meet with visitors.</p>	<p>CMS believes C.R.S. 25.5-10-223 is partially compliant. C.R.S. 25.5-10-223 states, "Each person receiving services has the right to communicate freely and privately with others of the person's own choosing" and "All service agencies shall ensure that persons</p>	<p><i>The Department plans to add a reference to new Rule BBB to one or more of its regulations regarding GRSS settings (10 CCR 2505-10 8.500.1, 8.500.5.A(5), 8.609.5, and 8.609.8). Similar changes to CDPHE's regulations</i></p>



#	HCB Setting Regulation	State Waiver Program	State's Standards and Findings	State's Rationale for Findings and/or Proposed Remediation	Findings	<u>Department's Response</u>
		homes for four to eight people		<p>Regulations: See Column B (6 CCR 1011-1 Chapter 8); the Department plans to work with CDPHE to propose redlines.</p> <p>Waiver: DD Waiver is silent with respect to right to visitors at any time.</p>	<p>receiving services have suitable opportunities for interaction with persons of their choice." This language demonstrates compliance with the requirement that individuals be able to have visitors of their choosing. However, the statute is silent as to the requirement that individuals be able to have visitors at any time.</p> <p>CMS agrees 6 CCR 1011-1 Chapter 8 is silent and should be amended. The state should specify how it will amend the regulation.</p>	<p><i>would be duplicative and are not necessary.</i></p>



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Please direct your comments and questions to Leah Pogoriler, Strategic Policy Advisor, at 303-866-6470 or leah.pogoriler@state.co.us.

Sincerely,

Jed Ziegenhagen
Director
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