

TECHNICAL CHANGES THAT MUST BE MADE BY THE STATE OF COLORADO BEFORE RESUBMITTING TO CMS FOR INITIAL APPROVAL

PLEASE NOTE: Resubmission of the STP with these Changes can be made without the state conducting another public comment period.

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.
- 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;
 - Additional information regarding how the state is going to use the information from the provider scorecards to inform the state’s remediation activities;
 - 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
 - Comments regarding how the state will continue to adequately communicate with stakeholders throughout the STP process and adequate education of participants.
 - 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.
 - 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.

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).

Systemic Assessment & Remediation

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.
- 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.
 - 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.
 - 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.

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.

- 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.
 - For palliative/support services for children, please describe the settings and situations in which this service is provided outside of the home.
- 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.

- 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.
- 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).

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.
- 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.

- 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.”
- 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.
- 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.

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.