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

Disabled & Elderly Health Programs Group

June 2, 2016

Mr. John McCarthy
Director
Ohio Department of Medicaid
50 West Town Street 4th Floor
Columbus, OH 43215

Dear Mr. McCarthy:

I am writing to inform you that CMS is granting the state of Ohio initial approval of its Statewide Transition Plan (STP) to bring settings into compliance with the federal home and community-based services (HCBS) regulations found at 42 CFR section 441.301(c)(4)(5) and section 441.710(a)(1)(2). Approval is granted because the state completed its systemic assessment, included the outcomes of this assessment in the STP, clearly outlined remediation strategies to rectify issues that the systemic assessment uncovered, such as legislative changes and changes to contracts, and is actively working on those remediation strategies. Additionally, the state submitted the March 2016 draft for a 30-day public comment period, made sure information regarding the public comment period was widely disseminated, and responded to and summarized the comments in the STP submitted to CMS.

After reviewing the March 2016 draft submitted by the state, CMS provided additional feedback on May 4th, requesting that the state make several technical corrections in order to receive initial approval. These changes did not necessitate another public comment period. The state of Ohio subsequently addressed all issues, and resubmitted a final updated version on June 1, 2016. These changes are summarized in Attachment I of this letter. The state's responsiveness in addressing CMS' remaining concerns related to the state's systemic assessment and remediation expedited the initial approval of its STP.

In order to receive final approval of Ohio's STP, the state will need to complete the following remaining steps and submit an updated STP with this information included:

- Complete a thorough, comprehensive site-specific assessment of all HCBS settings, implement necessary strategies for validating the assessment results, and include the outcomes of this assessment within the STP;
- Draft remediation strategies and a corresponding timeline that will resolve issues that the site-specific settings assessment process and subsequent validation strategies uncovered by the end of the HCBS rule transition period (March 17, 2019);

- Outline a detailed plan for identifying settings that are presumed to have institutional characteristics, including qualities that isolate HCBS beneficiaries, as well as the proposed process for evaluating these settings and preparing for submission to CMS for review under heightened scrutiny;
- Develop a process for communicating with beneficiaries that are currently receiving services in settings that the state has determined cannot or will not come into compliance with the HCBS settings rule by March 17, 2019; and
- Establish ongoing monitoring and quality assurance processes that will ensure all settings providing HCBS continue to remain fully compliant with the rule in the future.

While the state of Ohio has made much progress toward completing each of these remaining components, there are several technical issues that have been outlined in Attachment II of this letter and that must be resolved to CMS' satisfaction before the state can receive final approval of its STP. Upon review of this detailed feedback, CMS requests that the state please contact George Failla or Michelle Beasley at your earliest convenience to confirm the date that Ohio plans to resubmit an updated STP for CMS review and consideration of final approval.

It is important to note that CMS' initial or final approval of a STP solely addresses the state's compliance with the applicable Medicaid authorities. CMS' approval does not address the state's independent and separate obligations under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act or the Supreme Court's Olmstead decision. Guidance from the Department of Justice concerning compliance with the Americans with Disabilities Act and the *Olmstead* decision is available at http://www.ada.gov/olmstead/q&a_olmstead.htm.

I want to personally thank the state for its efforts thus far on the HCBS statewide transition plan. CMS appreciates the state's completion of the systemic review and corresponding remediation plan with fidelity, and looks forward to the next iteration of the STP that addresses the remaining technical feedback provided in the attachment.

Sincerely,

Ralph F. Lollar, Director Division of Long Term Services and Supports

ATTACHMENT I.

SUMMARY OF TECHNICAL CHANGES MADE BY STATE OF OHIO TO ITS SYSTEMIC ASSESSMENT & REMEDIATION STRATEGY AT REQUEST OF CMS IN UPDATED HCBS STATEWIDE TRANSITION PLAN DATED 5-17-2016

Systemic Assessment

In order to provide initial approval of the STP as it relates to the systemic assessment, the state of Ohio completed the following changes based on requests made by CMS on May 4, 2016:

1. The state included more specific details in its description of anticipated changes to rules and waiver documents that the state will make to comply with the federal requirements. Additionally, the state provided more detail in how it plans to remediate instances of non-compliance and silence with regard to the federal requirements in the ICF/IID and NF Level of Care System Remediation Grids.
2. In the System Remediation Grids, various state standards are listed under the "Areas of Compliance" column for each federal requirement. The state provided greater clarity within the grids as to whether the state believes the listed state standard complies, does not comply, partially complies or is silent as relevant to each federal requirement, and also included a detailed explanation of the state's determination for each standard's level of compliance.
3. The state provided links to all documents listed under the column "Areas of Compliance" in the System Remediation Grids, including but not limited to:
    a. Existing county board accreditation and provider compliance review processes (located throughout, see page 79 for an example)
    b. Annual review of the rights of individuals with developmental disabilities (located throughout, see page 75)
    c. PASSPORT Bill of Rights (page 97)
    d. OHCW/TCOW Consumer Handbook (page 97)

CMS identified a number of areas where the state needed to provide a more detailed remediation strategy, as the state code and other documents provided to demonstrate compliance with the federal requirements needed clarification. Many of the examples below were silent to the relevant federal requirements and silence can and should be remediated with policy and/or sub-regulatory guidance, as appropriate. CMS also asked the state to explain how the state plans to remediate the following issues within the ICF/IID and NF Level of Care System Remediation Grids.

4. The state provided Section 5123.62 of the Ohio Revised Code, which specifies the rights for individuals with developmental disabilities, as an area of compliance for several of the federal requirements in the ICF/IID Level of Care Waivers System Remediation Grid. The state has now included additional information regarding how it will address areas of silence/non-compliance within Section 5123.62 under the column "Remediation Required," including:

a. Upholding the requirement that individuals have privacy in their sleeping or living units in provider owned or controlled residential settings either in the code or sub-regulatory state policy, specifying that: 1) Each individual has privacy in their sleeping or living unit; 2) Units have entrance doors lockable by the individual; and 3) Only appropriate staff have keys to doors.
b. Updating the STP on page 87 to reflect Section 5123:2-3-02 (C) (2) and other requirements that address the need for all areas of the setting to be physically accessible to individuals.
c. Adding language to Section 5123.62 of the Ohio Revised Code or in another state standard that individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement for provider owned or controlled residential settings.
d. Assuring in Section 5123.62 of the Ohio Revised Code or an alternative state standard that individuals have access to food at any time.
e. Clarifying in Section 5123.62 of the Ohio Revised Code or an alternative state standard that individuals have the right to have visitors of their choosing at any time.

5. The state has enhanced the relevant existing state standards to ensure an individual's essential rights of privacy, dignity, respect, and freedom from coercion and restraint.
6. The state included language within the state standards that affirms that all HCBS beneficiaries should have choice among multiple HCBS setting options, including non-disability specific settings.
7. The state clarified several areas within its state standards around Assisted Living settings, including that:
    a. individual privacy is assured for beneficiaries in Assisted Living settings;
    b. individuals exercise choice regarding services and supports and who provides them;
    c. individuals have a choice of roommate;
    d. individuals have the right to privacy and that units have lockable doors, with only appropriate staff having keys to doors; and
    e. Individuals have access to visitors at any time.
8. The state provided greater description as to how it will ensure that each individual has an option for a non-disability specific setting for both the ICF/IID and NF Level of Care Waivers.
9. The state corrected the systemic assessment to clarify that access to food or visitors at any time is applicable to Adult Day Health Service settings, as well as all residential and non-residential settings receiving HCBS funding.
10. The STP includes information as to how the state will ensure that settings are physically accessible to all individuals.

Public Engagement

CMS appreciates the inclusion of additional details around the state's efforts to actively engage stakeholders throughout the process. During the May 4th call between CMS and the state of Ohio, CMS encouraged the state to consider a number of additional strategies to increase the meaningful engagement of external stakeholders in the HCBS rule implementation process. These strategies included continuation of the advisory groups that included public representation, revisiting the proportionality of representation across stakeholders in these advisory groups to facilitate a balance of perspective, and enhancing the state's ongoing communications strategies to keep the public informed as the state continues to roll out specific areas of implementation around the rule. The state provided the following additional details of its ongoing activities to engage the public in meaningful ways in the HCBS implementation process.

1. The Ohio Department of Developmental Disabilities (DODD) Strategic Planning Leadership Group, which is comprised of 9 advocacy organizations, provides input on the implementation of the STP.
2. The DODD regularly seeks input from the Family Advisory Council and will begin meeting with Advocacy United, a newly-formed organization of self-advocates to obtain input on the STP.
3. People with developmental disabilities, family members, advocates, providers and county boards are also represented on workgroups to develop and implement HCBS.
4. A NF-Level of Care based waiver advisory group, comprised of representatives from 13 advocacy groups, has contributed to the draft STP.
5. Case managers were instructed to advise individuals served on Medicaid waivers, their family members and any other interested individuals of the opportunity to provide public comment on the STP.
6. A broad representation of stakeholders on the HCBS Rules Workgroup was tasked with drafting the new NF Level of Care HCB settings rules that codify the federal requirements ensuring meaningful engagement and a balance of perspectives on this topic. This group consists of individuals, caregivers, advocacy organizations, and other stakeholders.
7. The state has presented the STP to the Ohio Olmstead Task Force and will offer regular updates at monthly meetings to ensure continued engagement.

ATTACHMENT II.

ADDITIONAL CMS FEEDBACK ON AREAS WHERE IMPROVEMENT IS NEEDED IN ORDER FOR OHIO TO RECEIVE FINAL APPROVAL OF THE STATEWIDE TRANSITION PLAN

PUBLIC ENGAGEMENT:

CMS notes the state includes several suggestions for public outreach that are worth expanding. One is the communication plan developed with the LTC Ombudsman to educate individuals on the community nature of a setting and on how to lodge complaints about their setting (at 105). Another is the suggested possibility of a public service announcement on the community integration regulation.

SYSTEMIC REMEDIATION:

Please update the systemic assessment remediation section of the STP with any additional actions that have been completed.

SITE-SPECIFIC SETTING ASSESSMENT, VALIDATION & REMEDIATION:

- ***Individual, Private Homes:*** In a situation where the state presumes any category of setting that receives HCBS funding to be automatically in full compliance with the rule, the state must outline how it came to this determination and how compliance of each of these categories will be monitored over time.
- ***Group Settings:*** As a reminder, all settings that group or cluster individuals for the purposes of receiving HCBS must be assessed by the state for compliance with the rule. This includes all group residential and non-residential settings, including but not limited to group supported employment and group day habilitation activities.

ICF/IDD Level of Care-Based Waivers:

- ***Non-Disability Specific Settings:*** The systemic assessment does not mention ensuring that each individual has an option for a non-disability specific setting. The assessment discusses an overarching rule in development (at p. 13). Please provide more specific details demonstrating how the state assures beneficiary access to non-disability specific settings in the provision of residential and non-residential services. This additional information should include how the state is strategically investing to build capacity across the state to assure non-disability specific options.

- ***Residential Settings:***
  - ***Site Specific Assessment Process:*** Please provide the state process for validating site specific provider assessments (see below). The STP does not include response rates for the survey, and there is a discrepancy between the estimate of 2500 residential settings and the actual survey responses of 2163 settings (pg. 9). The STP is not clear how non-responders, if any, will be evaluated. The survey referenced 75 settings that are likely to have the effect of isolating individuals that are not co-located with institutions where on-site reviews will be conducted. Please provide more detail on these settings.
  - ***Validation Process:*** Please clarify the validation process for the residential assessment and indicate how the state will select a representative sample of provider responses to evaluate the accuracy of the provider self-assessment. Please clarify how DD county boards will validate residential assessments and what entity will validate day service settings. CMS notes strengthening direct feedback from participants is often an effective approach in validating provider self-assessments.

- ***Non-Residential Settings in ICF/IDD:***
  - The STP provides inconsistent numbers for settings and number of providers. On page 10, the STP states that 464 provider responses were received from non-residential settings covering 25,000 individuals, but on page 69 it says that 20,149 individuals across a total of 865 providers within ICF-IID LOC receive adult day services. Please provide further clarification.
  - DODD suggests that the non-residential provider survey responses are likely unrealistically positive (page 12). It is not clear what DODD will use to validate this survey, or if the system redesign for adult day and employment services will require a whole new method of evaluating setting compliance (page 7). Without validation, this survey is not a sufficient basis for the compliance assessment. Please describe the state's process for validation.
  - The suggested dates for identifying non-residential settings presumed to have institutional characteristics occur late in the process (Jan. 2018, submitted July 2018) (page 91). Please consider moving up completion of these steps.
  - In addition, Ohio appropriately questions the accuracy of its provider self-assessments, which identified 50 percent of IDD adult day settings as being 100 percent compliant with the rule, but does not propose an effective method to validate the results other than through triennial monitoring which will not allow for the time necessary to be fully compliant by March of 2019. Please indicate how the state will supplement these monitoring efforts.
  - CMS requests additional details regarding the training state employees who are conducting onsite assessments and/or reviewing provider self-assessment data and other supplemental information are receiving to assure strong quality in the review process.
  - CMS notes that states cannot comply with the rule simply by bringing individuals without disabilities from the community into a setting. Compliance requires a plan to integrate beneficiaries into the broader community. Reverse integration, or a model of intentionally inviting individuals not receiving HCBS into a facility-

based setting to participate in activities with HCBS beneficiaries in the facility-based setting is not considered by CMS in itself to be a sufficient strategy for complying with the community integration requirements outlined in the HCBS settings rule.

- Under the rule, with respect to non-residential settings providing day activities, the setting should ensure that individuals have the opportunity to interact with the broader community of non-HCBS recipients and provide opportunities to participate in activities that are not solely designed for people with disabilities or elders, but rather for the broader community. Settings cannot comply with the community integration requirements of the rule simply by hiring, recruiting, or inviting individuals who are not HCBS recipients into the setting to participate in activities that a non-HCBS individual would normally take part of in a typical community setting.

- ***Remediation:*** CMS requests the state provide additional details around the strategies it will implement to remediate any setting found to be in non-compliance with the HCBS settings rule. It appears that providers will develop their own plan (to be pre-approved by the state), but it is not clear how the state will verify that the provider's plan is sufficient or that proposed changes have been implemented. The timeline to have 50% of residential sites remediated prior to July 2016 seems unrealistic (page 83). The STP also suggests that planning for individuals receiving services in settings that will not comport will be complete by March 2017, but actual movement to settings that do comport will be complete by March 2019 (page 89). It is not clear why there is a two-year lag.

NF-LOC Waiver System

- ***Assisted Living:***
  - CMS is concerned about the low response rate of Assisted Living settings to the state's on-line ALF provider self-assessment process. From the description in the STP, the Aug. 2014 provider self-assessment had a 31% response rate (page 18). Please describe any validation or verification checks of the assessment findings, indicate how many provider respondents have Medicaid HCBS participants, and how the state evaluated settings that did not respond to the survey (pages 18; 112).
  - The state appears to have shifted a number of AL settings in CCRCs out of the presumed institutional category and into the "meets with modifications" category, but the justification for this shift is unclear (pages 21; 23) and CMS requests additional details from the state.
- ***Adult Day Providers:*** The on-line self-assessment for adult day providers has no reported response rate, no clear description of validation for the self-assessment or indication of how the state will evaluate non-responders. Please provide information on how the state will validate the responses.

- ***PASSPORT Administrative Agencies' Onsite Assessments:*** It is not clear from the STP that the annual PASSPORT Administrative Agencies' on-site assessments have been updated to cover all aspects of the federal HCBS settings regulations. Similarly, CMS requests the state further explain its approach to soliciting participant satisfaction feedback and clarify how the feedback process was cross-walked to the federal rules and linked to individual settings.
- ***Remediation:*** Remediation efforts appear to rely on licensing and general state standards, rather than a site-specific remediation plan (pg. 21, 23). The timelines for remediation are not clear. Please clarify how the state will enforce compliance with remediation plans, beyond "using existing processes" (pg. 110) or further explain the existing processes.

Monitoring of Settings:

Please provide more details on the monitoring process the state intends to use to ensure continued compliance of its settings with the federal requirements, as well as a timeframe for each specific monitoring step listed. This section should also include details of how the staff responsible for conducting the ongoing monitoring process of current compliance across settings will be trained or informed of any change in requirements necessitated by the federal regulation.

- Within the ICF/IDD section, CMS requests additional details within the STP on the state's plans to utilize Protection &Advocacy reports and establish a robust complaint process and participant survey (pg. 84). The current section on ongoing monitoring for ICF/IDD relies primarily on an HCBS setting evaluation tool, but this appears to only occur once every 3 years (pg. 64).
- The ODA plan for ongoing monitoring suggests compliance reviews every 3 years. The state should have other, more frequent mechanisms in place to reinforce periodic recertification (pg. 64). The ODA also suggests using the patient satisfaction survey, but does not lay out a plan to modify that survey to address all of the components of the federal HCBS settings regulation (pg. 70).

Heightened Scrutiny:

- Please describe in detail the processes the state used or will use to identify settings that fall under any of the three prongs of settings presumed to have institutional characteristics.

- Please differentiate which specific settings fall into each of these categories due to their location (i.e., settings located in a building that is also a publicly or privately operated facility providing inpatient institutional treatment, and settings located in a building on the grounds of, or immediately adjacent to, a public institution) and which specific settings meet the institutional presumption because they have the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

- Please provide additional detail describing the state process for review of a setting that falls under the institutional presumption to determine that it has the characteristics of a home and community-based setting and does not have institutional characteristics (including the steps the state is going to take to develop a robust evidentiary package on each setting).

- Please explain how the state employees completing the onsite assessments of settings that are presumed to have institutional characteristics will determine the setting overcomes the presumption. The state must ensure that the onsite assessment process is implemented in a consistent manner across the state with accurate results that reflect each setting's particular features.

- The time period for settings that are going through the heightened scrutiny process seems to occur too late (2018) in that it does not provide much opportunity for dialogue and site visits if necessary. CMS suggests the state introduce a staggered application process to CMS that includes presenting settings for heightened scrutiny on a quarterly basis.

Milestones:

CMS requests that the state resubmit an updated milestone chart reflecting anticipated milestones for completing systemic remediation, settings assessment and remediation, heightened scrutiny, communications with beneficiaries and ongoing monitoring of compliance. The milestone chart should be modeled on the most recent template supplied by CMS and also include timelines that address the feedback provided, no later than July 1, 2016.