

## Attachment N

### PUBLIC COMMENT AND RESPONSE

#### Responses to Comments on New Hampshire Statewide Transition Plan *May 2, 2016, Amended and Updated June 28, 2016*

##### Transparency and Stakeholder Engagement

**Comment 1:** Several commenters identified that the 30 day period for public notice and comment (February 5, 2016 – March 5, 2016) was not long enough to review the Draft Statewide Transition Plan (STP) and that the Advisory Task Force had insufficient time to review the draft STP prior to the opening of the public comment period.

**Response 1:** The State was sensitive to this concern and extended the public notice and comment period for an additional 25 days, so that the period ran from February 5, 2016 until March 30, 2016. The State held an additional public hearing during that extended time period, bringing the total public hearings regarding the draft statewide transition plan to 5.

**Comment 2:** Several commenters asserted that the Advisory Task Force should have included parents and/or family members of participants receiving services through Home and Community Based Care Services (HCBS) funding. One commenter wanted more consideration regarding the interpretation and implementation of the STP to be given to parents and family and people with special needs and people living with people with special needs, where appropriate and reasonable.

**Response 2:** The State recognizes the need for consumer representation in the Advisory Task Force and included consumers and family members as members of the Advisory Task Force from its beginning in mid-2015. In fact, consumers were provided a stipend to ensure their participation on the Advisory Taskforce.

**Comment 3:** Several commenters asked whether there would be opportunities to give public input into requests for Heightened Scrutiny, even if the state becomes aware that it may need to request Heightened Scrutiny for a site or set of sites after the close of the STP public notice and comment period.

**Response 3: Yes.** Consistent with the Heightened Scrutiny process outlined by the Centers for Medicare and Medicaid Services (CMS), the State will seek public comment for any setting for which it requests Heightened Scrutiny.

**Comment 4:** Commenters expressed dissatisfaction that feedback of some of the providers on the Advisory Task Force had not been accepted into the first draft Statewide Transition Plan and one commenter expressed concern that Advisory Task Force members had been asked to hold the first draft of the STP as confidential until the beginning of the public notice and comment period.

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**Response 4:** The State takes its obligations to solicit public comment and the opportunity to gather stakeholder engagement seriously. It created an Advisory Task Force to advise state personnel on the development of the Statewide Transition Plan throughout the last year to ensure that it heard from stakeholders. A collaborative process does not, however, dictate a consensus outcome on every matter. The request of advisory taskforce members to treat the draft STP as embargoed until the beginning of the public notice and comment period was meant to give the advisory task force a preview of what had been put forward to DHHS prior to the opening of public comment.

#### Requirements and Broad Application of 42 CFR 441.301(c)(4)

**Comment 5:** Several commenters asserted that the state should not apply the federal settings requirements to HCBC services. Commenters described the federal regulations as impractical, overly prescriptive, and inappropriate [to meet the needs of people receiving such services.] Commenters asserted that the rules are inflexible and a “one size fits all” approach will not produce the desired result. Moreover, numerous commenters asserted that broad application of the regulations will be: unfeasible, will produce settings that are unsafe for participants, will limit choice of available residential settings rather than improving it, will impose additional financial burden on providers, and the additional administrative cost and burden will drive providers out of business. Several commenters observed that application of these requirements would have unintended consequences that frustrate the purpose of residential care; and that moreover the regulations will result in increased bureaucracy that interferes with the high-quality care currently provided.

**Response 5:** New Hampshire seeks to ensure that it preserves Medicaid funding for Home and Community Based Services to the greatest extent possible by complying with the federal settings requirements. To that end, New Hampshire seeks to work with providers and participants to educate them further about the general requirements found at 42 CFR 441.301(c)(4) and, where practicable, find mutually agreeable approaches to satisfying those requirements. The state also notes that the 42 CFR 441.301(c)(4) requirements are bounded by “the needs of the individual as indicated in their person-centered service plan.” That qualification provides some flexibility to ensure a balance between safety and well-being of the individual and the requirements outlined in the regulation. Modifications to the requirements in provider-owned or controlled settings are permissible if those modifications are sufficiently supported and justified through the participant’s person-centered service plan, through the modification process described at 42 CFR 441.301(c)(4)(vi)(F).

**Comment 6:** Several commenters expressed concerns that the requirements of 42 CFR 441.301(c)(4) should only apply to the developmentally disabled. Many commenters expressed the concern that the settings requirements are not appropriate for those with acquired brain disorders or senior citizens with dementia, other cognitive impairments or physical limitations

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because the safety and acuity needs of the elderly and/or physically disabled are too distinct from the developmentally disabled to require providers to provide services under the same expectations as those who provide service to the developmentally disabled.

**Response 6:** It is New Hampshire's understanding that 42 CFR 441.301(c)(4) applies to those Home and Community Based settings that are funded through Medicaid, regardless of the characteristics of the participants who receive them. To the extent that the settings requirements are not appropriate for a participant, modifications to the requirements in provider-owned or controlled settings are permissible, if those modifications are sufficiently supported and justified through the participant's person-centered service plan as described at 42 CFR 441.301(c)(4)(vi)(F). Finally, New Hampshire seeks to ensure that it preserves Medicaid funding for Home and Community Based Services to the greatest extent possible by complying with the federal settings requirements. To that end, New Hampshire seeks to work with providers and participants to educate them further about the general requirements found at 42 CFR 441.301(c)(4) and, where practicable, find mutually agreeable approaches to satisfying those requirements.

**Comment 7:** Commenters opposed the proposed regulatory amendment to the licensing regulations of all New Hampshire Assisted Living Facilities and New Hampshire Supported Residential Health Care Facilities – regardless of whether they accepted Medicaid HCBC funded participants or not - to reflect the settings requirements that were not already addressed. Those commenters requested that the language be applied only to beds serving CFI waiver participants and not to all facilities.

**Response 7:** In response to this set of concerns, the state modified its proposal and proposes incorporating the federal HCBS settings standards that are absent from existing regulation into He-E 801, the regulation that governs the Choices For Independence (CFI) waiver rather than in the regulations that govern Assisted Living Residence Facilities (He-P 804) and/or Supported Residential Health Care Facilities (He-P 805).

**Comment 8:** In response to this amendment to the draft proposal, additional commenters expressed concern that targeting the settings requirements to the CFI waiver recipient beds only and not applying them broadly to all institutions will result in fewer providers choosing to accept Medicaid-funded participants.

**Response 8:** The state is sensitive to this concern but will pursue the proposed regulatory change as determined.

**Comment 9:** Commenters expressed concern that New Hampshire's continuum of care for long-term supports and services would be lost as a result of compliance with the settings requirements and that participants would be forced to leave assisted living facilities and end up in nursing homes.

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**Response 9:** New Hampshire seeks to avoid unintended consequences of moving people into more restrictive environments.

**Comment 10:** Commenters expressed concern that a program being run on the grounds of a public institution would automatically be terminated.

**Response 10:** Heightened Scrutiny requested for programs run in particular settings is a process to allow for settings that could be construed as institutional to be evaluated on the merits of the setting and not evaluated on its proximity to a particular public setting.

**Comment 11:** Commenters expressed great desire for flexibility to depart from the settings requirements.

**Response 11:** Modifications from the settings requirements in provider owned and controlled settings are possible, per the process outlined at 42 CFR 441.301(c)(4)(vi)(F).

**Comment 12:** Commenters expressed desire for guidance about integrating practical safety considerations for affording participants who have criminal backgrounds, histories of violence, and/or are registered as sex offenders, the ability to choose who provides services, where services are provided and where one resides.

**Response 12:** The state is sensitive to these concerns and will work closely with providers to appropriately address these complex issues.

#### Lockable Doors

**Comment 13:** Numerous commenters expressed the concern that requiring lockable doors for all people receiving waived services in a provider-controlled or owned setting was fundamentally unsafe for those participants. Commenters stressed that they felt this puts participants' wellbeing at risk, reduces ability of staff to do safety checks in the usual course of business, and compromises the ability of the staff to evacuate the premises in the event of an emergency, such as a fire. Finally, commenters expressed the concern that this requirement would be extremely expensive to implement.

**Response 13:** To the extent that the settings requirements are not appropriate for a participant, modifications to the requirements in provider-owned or controlled settings are permissible if those modifications are sufficiently supported and justified through the participant's person-centered service plan as described at 42 CFR 441.301(c)(4)(vi)(F). Moreover, the state acknowledges that the safety of participants is of paramount importance and that their safety needs, as well as existing regulations, need to be considered during implementation of this requirement. Please see proposed Amendment to He-E 801.24 after c:

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“(d) Any facility that provides residential services to Choices for Independence (CFI) Waiver recipients shall develop and adopt a policy relative to CFI Waiver recipients’...

(i) right to have a lockable door, as provided for under 42 CFR 441.301(c)(4)(vi)(B), for those CFI Waiver recipients who do not have a modification of this requirement in their person centered plan and consistent with New Hampshire fire safety regulations.”

The state acknowledges the potential expense to providers and will explore whether providing lockable doors could be construed as an environmental modifications that could be reimbursed in part under the waivers.

#### Access to Food at Any Time

**Comment 14:** Numerous commenters expressed the concern that the settings requirements appears to demand that all participants have full and unfettered access to all kitchens (and their respective cooking utensils and heating elements) and that requiring facilities to make kitchens fully accessible to all participants is fundamentally unsafe and prohibitively expensive. Moreover, commenters expressed the concern that for many participants, giving them access to food at any time was in opposition to their needs and would be harmful to the participant. Finally, many commenters expressed that this requirement, if carried out to allow participants to order any meal at any time day or night, was impractical and expensive.

**Response 14:** New Hampshire approaches this requirement in a balanced and reasonable way. To the extent that the settings requirements are not appropriate for a participant’s particular needs, modifications to requirements in provider-owned or controlled settings - including the lockable door requirement - are allowed if those modifications are sufficiently supported and justified through the participant’s person-centered service plan as described at 42 CFR 441.301(c)(4)(vi)(F). Moreover, the state’s proposed regulatory solution for access to food provides a balanced approach for facilities to develop policies that ensure this right. See proposed Amendment to He-E 801.24 after (c):

“(d) Any facility that provides residential services to Choices for Independence (CFI) Waiver recipients shall develop and adopt a policy relative to CFI Waiver recipients’...

(ii) access to food, as provided for under 42 CFR 441.301(c)(4)(vi)(C). The policy shall describe the process by which a CFI recipient may: have a meal at a time and place different from when scheduled meals are provided, including the option to eat privately or in a seat that is not assigned; and request an alternative meal from the meal that is served during scheduled meals.”

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#### Visitors of Their Choosing at Any Time

**Comment 15:** Numerous commenters expressed the concern that the element of the settings requirement that requires that participants be allowed visitors of the participant's choosing at any time would result in a cascade of unintended consequences: it would permit visitors to come in the middle of the night, would encourage unwanted business solicitation or unwanted family interactions at the site, and would encourage illicit behavior to take place at the site, related to drug use or intimate activities.

**Response 15:** The state has proposed a balanced approach to the implementation of this requirement, as noted below, to foster both common courtesy in its implementation and underscore the participant's role in managing visitors who are of their choosing:

“(d) Any facility that provides residential services to Choices for Independence (CFI) Waiver recipients shall develop and adopt a policy relative to CFI Waiver recipients’...

(iii) access to visitors of their choosing, as provided for under 42 CFR 441.301(c)(4)(vi)(D). The policy shall describe the process by which a CFI recipient has: access to visitors of their choosing at any time particularly when visitors come during quiet hours or outside of regular business hours, and how this is managed without infringing on the rights or quiet enjoyment of other residents.”

#### Choice of Roommate

**Comment 16:** Commenters expressed concern that providing a choice of housemate is extremely difficult in settings with large numbers of residents. Concern was raised about the scenario in which a hospital calls and asks if there is a bed available and the participant appears to be a good match – how would the provider ensure choice of housemate?

**Response 16:** The choice of roommate provision is meant to provide the participants with a choice of roommate, not housemate, in the event a room is shared. If there is only one bed available, the participants needs to decide if that one bed is acceptable or if he or she needs to consider another setting.

#### Settings Requirement Limits Choice of People Living with Disabilities

**Comment 17:** Several commenters expressed concern that the federal settings regulations will limit or remove the choice of participants who choose to live with other people who also have disabilities, or socialize in disability specific settings, or to live in settings that meet the safety needs of participants.

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**Response 17:** Guidance from CMS indicates that the rule is not meant to prohibit peers from being served together but rather to ensure that opportunities for housing and services, beyond those that are disability specific, are offered to the participant. In particular: “ a non-disability-specific setting, in the context of this regulation means that *among the options available*, the *individual must have the option to select* a setting that is not limited to people with the same or similar types of disabilities. This could include services based out of a private home or a provider-controlled setting that includes people with and without disabilities. People may receive services with other people who have either the same or similar disabilities, *but must have the option* to be served in a setting that is not exclusive to people with the same or similar disabilities.”

Moreover, the state is sensitive to the concern that the scope of what is available will be narrowed even further by overly broad interpretations of this rule and confusion with billing practices for community participation services and will work with vendors to clarify the distinctions between the two.

**Comment 18:** Some commenters expressed concern that the settings requirements will force people with disabilities into the community against their will or force them to be more isolated because disability specific settings are prohibited.

**Response 18:** Disability-specific settings are not prohibited, they need to not be the only option available to the participant.

#### State Resources to Monitor and Enforce Compliance

**Comment 19:** Commenters expressed concern that the state would not have sufficient resources in the Office of Program Support to monitor and enforce compliance with the regulations as proposed in the Statewide Transition Plan.

**Response 19:** The State is aware of the need for resources in OPS to carry out these compliance activities. There is an awareness of the need for OPS to increase its capacity.

**Comment 20:** Commenters inquired whether waiver services could be funded by another source that exempted them from the settings requirements.

**Response 20:** The state is open to exploring this option.

**Comment 21:** Several commenters commended the STP for identifying that the low rates paid to CFI providers needed to be reviewed, in the context of giving providers sufficient resources to meet the settings requirements identified at 42 CFR 441.301(c)(4). Many commenters

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expressly pointed out that the daily rate for a recipient of CFI waiver services is significantly lower than the daily rate for DD/ABD waiver recipients.

**Response 21:** The State is aware that additional resources are desirable and is open to looking at options available to support the needs of those on the CFI waivers.

**Comment 22:** One commenter suggested that an analysis of the cost burden of implementing the settings requirements should become part of the STP; and that if CMS approves the plan, that the Department educate state lawmakers about the potential cost and support a request to increase appropriations to defray the costs on providers

**Response 22:** Developing cost analysis of the impact on private market providers is complex. However, the State is aware of the desire for additional resources to defray potential implementation costs for providers and is open to further discussions regarding resources.

**Comment 23:** Commenters expressed concern that any increase in rates should be paid to direct care staff.

**Response 23:** The state recognizes how important direct staff care is and is aware that additional resources are needed.

#### Substantive Comments on the STP

**Comment 24:** A commenter asked whether the questions in the provider self-assessments and participants' surveys will be revised from the original assessments conducted.

**Response 24:** Yes, Short-Term Monitoring Goal, on pages 117 and 118 for the DD/ABD waiver pages 125-126 for the CFI waiver identifies that the assessment tools will be revised.

**Comment 25:** Commenters expressed concern that the State Wide Transition Plan relied too much on self-assessment by providers and there needed to be additional input from participants.

**Response 25:** The STP relied on both provider self-assessments and participant surveys, the results of which were validated by more than 400 on-site field visits.

**Comment 26:** Commenters expressed concern that the "concern form" identified in Regulatory Goal #1 should not be implemented before any regulatory changes occurred because it would be holding providers to expectations that were not yet enacted at the state level. Commenters also expressed that the concern form results should not be made public. Still more concerns

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were raised about whether the “concern form” would be used for all providers, even those who do not accept Medicaid reimbursement.

**Response 26:** The State modified its proposal to use the concern form and will now use an educational tool to assist the State in educating providers about the settings regulations. The use of the education tool will not foster corrective action plans from providers at this time. The education tools will provide the state with information about relative compliance of providers. Once the regulatory changes are enacted through the JLCAR process, the HCBS expectations will be part of the standardized certification and licensing tools will be utilized to track status of compliance. None of the results gleaned from the education tool will be made public. Finally, this education tool will be used only with those providers who have CFI-funded beds.

**Comment 27:** Commenters expressed concern that provisions of the STP would be implemented prior to State rule changes or approval by CMS.

**Response 27:** The state will wait to implement provisions of the STP until it receives CMS approval. New Hampshire will pursue regulatory changes through the traditional Joint Legislative Committee on Administrative Rules (JLCAR) process.

**Comment 28:** Commenters asked whether settings would be identified as isolating by 2018 and whether there was enough time to assess and make changes to setting prior to the re-evaluation of sites planned in the STP in 2018. Commenters also questioned whether there was sufficient time between the approval of the STP and the re-assessment planned for 2018, whether each provider will have received education about the issues in their facilities that need to be addressed? Commenters expressed desire to see more detail about how to ensure compliance by 2019.

**Response 28:** Trainings, tool kits and small workgroups will be available to providers very shortly after the approval of the STP by CMS. The State will work to ensure providers have sufficient information from licensing and certification to address the issues in their facilities. In late 2017 a re-assessment of sites will be conducted to identify the state’s compliance.

**Comment 29:** Commenters expressed concern that a legal analysis relating to landlord tenant law had not been completed.

**Response 29:** Topic area goal #15 for the DD/ABD waivers and Topic area goal #16 for the CFI waiver include timeframes for the completion of this goal. Given the sensitivity of this issue and its potential impact on current funding mechanisms, the state is looking to work with providers to try, where practicable, to reach a mutually agreeable approach to this issue.

**Comment 30:** Commenters expressed concern that He-P 804 and He-P 818 regulations had not been included in the regulatory review.

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**Response 30:** The State has revised the STP and included reviews of both of these regulations.

**Comment 31:** Commenters expressed concern that the Heightened Scrutiny process the State plans to use does not include gathering information from stakeholders with relevant information about a particular setting.

**Response 31:** The State recognizes the importance of public stakeholder input. In response to this concern, the Isolation Monitoring process has been revised to include ad hoc committees for both the CFI and DD/ABD waivers to give feedback for the Isolation Monitoring/Heightened Scrutiny Process the state will pursue in late 2017. Moreover, any Heightened Scrutiny requests will be subject to public notice and comment.

**Comment 32:** Commenters expressed concern that some of the tasks do not contain a corresponding timeline for completion, including regulatory changes, monitoring of isolation process (Heightened Scrutiny requests), timeline for reviewing statewide complaint data, or relocation process.

**Response 32:** The regulatory process lacks timeframes because the state must follow the JLCAR process and the state cannot control the timeframes of legislative matters. The statewide complaint data will be reviewed every six months as identified in DD/ABD ongoing goal #9 and CFI ongoing goal #9. The relocation process must be individualized for each participant and the timeline will be determined by the participant's needs as well as his or her support team. Heightened Scrutiny requests and whether they are granted are ultimately up to CMS. The state cannot put a timeframe on the completion of the monitoring of isolation process as a result.

**Comment 33:** Commenters expressed concern that the STP does not ensure participants will be provided sufficient notice, appeals rights and appropriate discharge planning.

**Response 33:** The Relocation Process outlines the steps to be taken for participants to be transitioned to an alternate setting if the site is unable to come into compliance by the deadline. Notification and discharge planning development is part of the Relocation Process.

**Comment 34:** Concern was expressed that the STP places responsibility for relocation primarily on the participant's service coordinator and that the state may want to consider involving other agencies.

**Response 34:** The state will follow a relocation process that is individualized for each participant.

**Comment 35:** Concern was raised that the STP does not provide training to participants about remediation or how to file a complaint and use of the concern form (now called the education

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tool). Further, commenters stressed that participants should be educated about what constitutes an appropriate level of community integration and what the implications of staying in a non-compliant setting will mean.

**Response 35:** Topic Area Goal #7 (CFI) and Topic Area Goal #6 (DD/AD) specifically address education of participants regarding rights and the settings requirement. Existing regulations already require that participants are made aware of their rights and how to file a complaint. The state will not prioritize remediation training for participants at this time as providers are responsible for remediation, not participants. The appropriate level of community integration will be specific to each participant and will be reflected by their needs and desires. The Relocation Process has been revised to include a fact sheet including information about implications of remaining in a non-compliant setting.

**Comment 36:** Several commenters suggested standardized forms for CFI providers should be a component of the STP.

**Response 36:** The STP was revised to include the development of standardized forms for CFI Providers.

**Comment 37:** Some commenters indicated that the proposal to adopt the use of Human Rights Committees for CFI waiver recipients wasn't necessary, noting that the Ombudsman office in particular would be providing duplicative services if the Human Rights Committee provision was employed.

**Response 37:** In response to these comments, the state revised the STP to remove the Human Rights Committee function for CFI waiver recipients.

**Comment 38:** One commenter inquired how the educational components of the STP would be provided and suggested that the toolkit should be available online to alleviate cost, and that the information should include information about how to file complaints. Another commented suggested that the STP should include a goal around formalizing the CFI complaint process.

**Response 38:** The Statewide Transition Plan relies heavily on workgroups to develop systems that would support providers to receive the educational information they need. Toolkits will be available online to make accessing the information easier for staff. Additionally, in response to these comments, the state revised the STP to include a goal around formalizing the CFI complaint process. Moreover, the toolkits will include information sheets relative to how to file complaints under either waiver.

**Comment 39:** One commenter indicated that the STP should include a comprehensive assessment of the service and settings gaps for those who are eligible to receive waiver services, specifically: gaps indicated by those CFI recipients who felt they did not had a choice

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of setting – which may signal a lack of housing options; gaps around lack of transportation and provider access to facilitate community integration; and guardian participation that may have presented a barrier to further community integration.

**Response 39:** The state will be looking at all options to assist providers with access to community for the participants they support. Moreover, the STP has a training identified in the plan to educate guardians on the authority legally granted to them and other options that may be helpful to the guardians in supporting participants to have a greater voice in their care. The most common reason participants felt they lacked a choice about their options were as a result of being unable to make the choice or that the participant’s guardian made the choice for them.

**Comment 40:** Commenters asked for clarity about the role of licensing in monitoring compliance with the federal settings requirements.

**Response 40:** The Office of Program Support, (OPS) through licensing and certification staff, will be instrumental in ensuring New Hampshire reaches compliance with the settings requirement. The State is aware that additional resources within OPS have been identified as a source of concern. The STP also identifies additional ways in which the state will be monitoring its progress toward full compliance.

**Comment 41:** Commenters questioned how participants were selected for on-site interviews, how they were offered privacy and protection from retaliation, or how the participants who were assisted by case managers in filling out their surveys actually filled out the surveys.

**Response 41:** More than 400 on-site validation visits were performed to ensure the state received genuine participant feedback. The state did not have knowledge about how participants’ surveys were handled. A description of the on-site validation process is in Section 4 of the STP, which includes information about how participants were selected at each site.

**Comment 42:** Concern about the plan indicating that participants may have understood questions were raised by commenters.

**Response 42:** The questions about being in proximity to a public institution may have generally been misunderstood – the state received many responses that settings were in proximity to a public institution, but the public institution was a public school or post office. The STP has been revised to clarify the issue.

**Comment 43:** Concern was raised that the STP does not have a list of providers in compliance.

**Response 43:** New Hampshire’s methodology for ascertaining compliance was to complete evaluations of a significant percentage of impacted settings in order to obtain the necessary information to complete the STP, which was an option provided for by CMS. In late 2017 the

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state will do a re-assessment of all settings and level of compliance at that time, after the STP provisions have been put into effect.

**Comment 44:** A commenter wanted to know whether the Community Support Network was supportive of the plan.

**Response 44:** CSNI has been on the Advisory Task Force; it submitted a letter with comments. It is posted with these comments and should be read.

**Comment 45:** Multiple comments expressed the need for assistance when a CFI participant's needs increase and alternatives are needed. Many questioned whether case managers should be part of this process.

**Response 45:** The State is sensitive to this issue and will work with appropriate parties to address this.

**Comment 46:** Several commenters expressed concern about how the implementation of a lease or residency agreement would impact the funding of the most common service model used for providing services under the DD and ABD waivers.

**Response 46:** The state will work collaboratively with stakeholders to try to create a mechanism for meeting the lease/tenancy provisions of the settings requirements while maintaining the current funding mechanism.

**Comment 47:** Commenters questioned why the In-Home Supports waiver services are described as home-based?

**Response 47:** IHS services are based out of the participant's private home, regardless of the type of service that is being provided.

**Comment 48:** Commenters wanted clarification about what the settings expectations around employment are.

**Response 48:** The settings requirements anticipate participants are provided the opportunity to seek competitive employment if they would like that opportunity.

**Comment 49:** Commenters expressed interest in knowing how ten assisted living sites on the grounds of nursing homes would be evaluated.

**Response 49:** The presumption of institutionality is triggered by proximity to a public institution. A privately owned facility is not a public institution. As a result, those assisted living sites would not be presumed institutional.

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**Comment 50:** Commenters expressed concern about educational components in the STP being provided to in language that is easily understandable by participants and offered to assist with fulfilling this.

**Response 50:** The state will make every effort to ensure that toolkit items are accessible and understandable to all users.

#### Miscellaneous

**Comment 51:** One commenter expressed concern that the community-based support system for individuals with disabilities would be replaced by a managed care organization that is a for-profit entity.

**Response 51:** The settings requirements at 42 CFR 441.301(c)(4) are expected to be responded to in any health care delivery system, whether it is fee-for-service, full-risk capitated arrangements, or other alternative payment models.

**Comment 52:** Commenters asked whether the settings regulation applies only to residential settings.

**Response 52:** The settings regulations include day services under the state's 1915(c) waivers.

**Comment 53:** Several commenters expressed concern over LNAs not being able to take their children out into the community.

**Response 53:** Effective July 1, CMS has determined that LNAs will be able to provide care out in the community as well as in a residential setting.

#### Heightened Scrutiny

**Comment 54:** A commenter asserted that nine settings for which the state had requested heightened scrutiny because the sites had been identified as presumed institutional because they were located on the grounds of an institution had been incorrectly identified for Heightened Scrutiny. The settings were not in fact located adjacent to a public institution, but rather a private one.

**Response 54:** The state acknowledges that the settings did not meet the criteria for heightened scrutiny due to location and that those requests were unnecessary. As a result, the STP has been revised to withdraw those requests. If, during the transition process, however,

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any setting meets other criteria outlined by CMS identifying a setting as being non- HCBS, the state will initiate Heightened Scrutiny processes.

**Comment 55:** One commenter inquired what would happen if both the state and CMS approve a site through the heightened scrutiny process, what happens when managed care comes online and the MCO “changes their mind”?

**Response 55:** Only the state can request Heightened Scrutiny, and only CMS makes determinations regarding whether a site passes the Heightened Scrutiny process.

**Comment 56:** A commenter expressed concern that when additional sites are identified for heightened scrutiny review due to tendency to isolate, that there is no provision for public comment, nor is there provision for public comment if the state should significantly change assessment or monitoring tools.

**Response 56:** The state will follow the Heightened Scrutiny process outlined at Step #8, which follows the CMS rules regarding Heightened Scrutiny and public comment. CMS has not identified any requirement to reflect changes to assessment or monitoring tools through a public notice and comment period.

**Comment 57:** Several commenters expressed concern that the Statewide Transition Plan activities and the new settings requirements would deprive their children or family members of the supports within the LTSS delivery system they currently enjoy and which are effective for those individuals. Many expressed this concern in the context of worrying that the new regulations placed too much emphasis on independence and autonomy and insufficient emphasis on safety, security, and maintenance of services and/or settings in which residents or participants are thriving.

**Response 57:** The state appreciates the time and energy these family members took to comment on the STP process and are encouraged to hear that elements of the current LTSS delivery system are providing safe and effective supports for participants.

**Comment 58:** Commenters expressed concern that legal guardians did not have to give their consent for heightened scrutiny visits to occur in settings in which their family members were residents or participants.

**Response 58:** The State determined consent from guardians was not necessary to conduct the heightened scrutiny visits. However, the State did inform the legal guardians of each impacted resident that such a visit was taking place and provided each guardian the opportunity to speak with representatives of the state regarding these visits by providing a dedicated staff person’s direct email and direct phone number to address these concerns. The state received 3 phone calls from guardians related to the heightened scrutiny visits.

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**6/28/16: Amendment: public comment inadvertently omitted from initial document:**

**Comment 59:** Two commenters expressed concern that the decision to require compliance with the settings rule for only the Medicaid CFI waiver enrollees residing in Assisted Living Facilities was a violation of the state's Patient's Bill of Rights.

**Response 59:** While the state appreciates the feedback, this is an area of disagreement in legal interpretation.