

Health Advocate

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Home & Community-Based Services: State Transition Plans & Implementation One Year after New Regulations

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Key Resources

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[NHeLP Q&A: HCBS – Transition Plan Advocacy: Identifying the Issues](#)

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Medicaid-funded home and community-based services (HCBS) are critical to keeping people with disabilities and older adults within their communities. HCBS help individuals maintain their community life and social networks through services, such as personal care, and these programs also help states because they typically spend less on HCBS than they would on institutional care. Although HCBS have been used to support people in the community for years, until last year's federal regulations, there was little guidance about what "community-based" actually means.¹ The types of settings in which HCBS are provided vary greatly, and some of these settings have many institutional characteristics such as regulated schedules and isolation from the surrounding community, both physically and in terms of opportunities for individual participants to engage in broader community life. The 2014 regulations set standards for determining whether settings are community-based, focusing on the experience of the HCBS participant, and require states to assess their HCBS programs and create transition plans to bring them into compliance with the new requirements where necessary. These transition plans were to be submitted to the Centers for Medicare & Medicaid Services (CMS) by March 17, 2015. Since submission, some plans have been re-issued for public comment, and there will continue to be opportunities for advocacy over the transition plan implementation period, which may be up to five years.

The new regulations require HCBS settings to "support full access to the greater community," not just provide services in settings that are less obviously institutional and restrictive than state-run institutions. Accordingly, the transition plans are a window of opportunity for states to update and improve their HCBS programs to ensure they truly promote community integration rather than just keep people out of institutions.

Why Are the Transition Plans So Important?

The state transition plans should show how a state has or will assess its HCBS programs, including regulations, policies and provider requirements, and how the state proposes to implement any necessary changes to their HCBS programs, including the settings where services are provided. Many states' HCBS policies and requirements have not changed in years and do not reflect current concepts of community integration. For example, states'

¹ Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers, 79 Fed. Reg. 2948, 2988 (Jan. 16, 2014) (to be codified at 42 C.F.R. pts. 430, 431, 435, 436, 440, 441 & 447), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-01-16/pdf/2014-00487.pdf>.

long-standing regulations and policies may focus on protecting residents from abuse and neglect, but do not address the residents' rights that the federal registrations say are critical to community living, such as the right to privacy and visitors, control of schedule, and access to the community. Existing state requirements may also fail to ensure that the HCBS programs promote meaningful community integration activities as opposed to segregated (or isolating) activities that provide little interaction with the broader community.

The transition plan process is an important opportunity for states to evaluate their HCBS programs to ensure the programs are truly helping participants access and be involved in their communities, and to assess how well the programs are meeting the state's community integration obligations under the Americans with Disabilities Act (ADA) and the Supreme Court's decision in *Olmstead*.

One year after the regulations were issued, the range of submitted transition plans suggests that many states have not fully embraced the opportunity to update their approach. Instead, many seem to focus on maintaining the status quo as much as possible.

Themes in Transition Plans

In reviewing state transition plans, a few themes have emerged that show the different approaches by states. Although the following is not an exhaustive list, it highlights some of the areas that indicate a state's approach to implementing the HCBS regulations.

- **The standard by which state regulations, policies and procedures are judged.**
As mentioned above, not all states are evaluating their programs to see if their state regulations and policies support the specific requirements and intent of the federal regulations. Some states are only flagging existing state requirements that violate the regulations. Such an approach fails to recognize that some of the more specific protections in the new regulations affect areas that states may have previously addressed only generally and in a restrictive way. For example, there may be a state rule regarding the right of residents to have visitors, but the generalness of the state policies allows settings to limit this right by restricting visiting hours, requiring close supervision and limiting visitor lists. In addition, looking only for problems in a state's policies and regulations may fail to implement protections that current state requirements do not address. This lack of clarity and consistency may create significant enforcement issues. States should ensure their regulations, policies and procedures reflect the intent of the HCBS regulations and not merely follow the letter of the law.
- **The assessment process used to identify compliance issues in HCBS settings.**
A majority, if not all, states are using provider self-assessments as the primary mechanism to identify settings that may not be in compliance with the regulations. Some states have acknowledged the inherent conflict of interest such assessments may present and have developed processes to verify the information gained through such an assessment by also using participant surveys, data analysis, site visits or other sources of information. However, a few states propose to assess only a sample of providers, with some relying on voluntary provider self-assessments without any validation. This methodology is faulty in many ways, but at the very least will likely overestimate compliance because interested or compliant providers are more likely to respond.

Fundamentally, the new regulations emphasize the experience of HCBS participants. Any valid settings assessment should use multiple sources of data, and in particular a method to solicit unbiased information from program participants; objective criteria where possible; meaningful validation processes and opportunities for public input. Without such information, the state's transition plan is inherently flawed because the state may not identify all of the settings that are not HCB. If the state is not identifying all the

settings that have compliance issues, it is likely also not finding those settings that should be going through the heightened scrutiny process with CMS. Heightened scrutiny is the process whereby a state submits evidence to show CMS that a setting presumed to have institutional qualities does not have these qualities and instead meets the requirements for an HCB setting, thus allowing the state to keep this setting in its HCBS program. Some settings that are supposed to go through heightened scrutiny are easier to identify because of their connection to an institutional setting such as a nursing home or state institution. If a state has an insufficient process for identifying noncompliant settings, it is likely missing an important group of settings that should go through heightened scrutiny because they isolate individuals receiving Medicaid HCBS from the broader community.

- **Stakeholder involvement and education.**

HCBS programs involve a wide array of stakeholders, not only program participants and their families, but also advocacy organizations, providers and state agencies. All of these stakeholders have information and opinions that could inform a state's transition plan and who therefore should be engaged throughout the transition process. In particular, states should actively reach out to and educate HCBS program participants and their support networks about the new regulations and how they affect participants' services, rights and opportunities. Not only will this prompt individuals to share information of noncompliance, but it should help decrease misinformation and allay the anxiety that often occurs during change. Individuals who do not understand what they should expect from the changes cannot accurately respond to requests for comments or otherwise participate in ongoing enforcement efforts. Unfortunately, not all state transition plans show engagement with the full array of stakeholders, and many exclusively or predominantly focus on provider input. States that are not working with all relevant stakeholders may be failing to include the most important perspectives. This may result in a skewed comment process and a transition plan that does not fully address the state's compliance issues. By contrast, some states have created advisory committees with a balance of different types of stakeholders to foster communication with the state and to provide input on issues and decisions throughout implementation.

- **Timelines for Compliance and Ensuring a Full Array of Services.**

Although most transition plans have improved from initially skeletal drafts, many still lack clear milestones for meeting specific goals. This makes it difficult for stakeholders to follow the process and may lead to delayed or incomplete implementation. In addition, some states are postponing compliance to the end of the transition window. This practice increases the chance that the state may not have enough time to develop new settings after assessments and provider compliance reports indicate that a state does not have the full array of necessary services to ensure a participant has the choices required or that there are not sufficient options for participants who need to change settings. This scenario will likely also increase uncertainty, limit choice and transition time and create a shortage of necessary services, all of which could be detrimental to stability in the community.

Conclusion

Meaningful public input from the array of stakeholders is critically important both to developing a transition plan that identifies all of the issues and to meaningful implementation of that plan. Public input will be needed throughout the transition period to address assessment results; heightened scrutiny submissions; transition plan, state plan and waiver amendments; state regulatory changes; policy changes and other compliance mechanisms. In some states, it has been difficult to find information on transition plans or other changes, despite the fact that the federal regulations require transparency and opportunity for public comment. Advocates must stay engaged with this issue because not only do they have valuable information about what needs to change, but this is a rare opportunity to seize a moment of change and push the state to update programs. This advocacy will help ensure that participants will truly achieve community integration and no longer be segregated from their communities.

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. NHeLP advocates, educates and litigates at the federal and state level.

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