



DISABILITY RIGHTS CENTER-NH

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February 26, 2016

Via Electronic Mail to HCBCtransitionplan@dhhs.state.nh.us

Deborah Fournier
NH Department of Health and Human Services
129 Pleasant Street
Brown Building
Concord, NH 03301

RE: Disability Rights Center – NH’s comments in response to the New Hampshire Department of Health and Human Services’ Draft Statewide Transition Plan

Dear Ms. Fournier,

The Disability Rights Center – NH (“DRC”) is New Hampshire’s federally designated protection and advocacy system (“P&A”) for individuals with disabilities. For more than thirty years, DRC has represented individuals with disabilities and advocated for their full inclusion and integration into our communities. Assuring New Hampshire’s compliance with the Centers for Medicaid and Medicare Services’ (“CMS”) settings rules for home and community-based services (“HCBS”) waiver programs is in keeping with DRC’s purpose, expertise and priorities and is critical for New Hampshire residents who are, or will in the future, participate in our HCBS programs.

The HCBS settings rules require that, by March 17, 2019, all settings that receive Medicaid HCBS funding must, among other requirements, be integrated in, and facilitate full access to, the greater community, optimize autonomy and independence in making life choices, be chosen by the individual from an array of residential and day program options, including settings that are not disability-specific, ensure rights to privacy and dignity, and provide opportunities to seek competitive employment. 42 CFR §441.301(c)(4). In short, participants who receive Medicaid-funded HCBS services must be afforded full access to the benefits of community living, including services in the most integrated settings, and increased opportunities to live, work and participate in community life to the same extent available to individuals without disabilities.

New Hampshire’s proposed Statewide Transition Plan (“the Plan”) includes many of the elements necessary to bring NH’s HCBS programs into compliance with the HCBS settings rules. In developing the Plan New Hampshire Department of Health and Human Services (“Department”) involved stakeholders, including the DRC, through the creation of, and invitation to participate in, an Advisory Task force. Additionally, the Department arranged for surveys and visits to a sampling of sites that currently receive HCBS funding. The Department’s personnel assigned to develop this Plan have consistently expressed their willingness to work through challenges HCBS providers have identified with the Department’s efforts to bring New Hampshire’s HCBS programs into compliance with the settings rules, while at the same

expressing a commitment to ensure that New Hampshire's HCBS programs reach full compliance with the settings rules within the prescribed timeframe. There are, however, some areas in which the proposed Plan lacks details or appears incomplete. The comments that follow detail aspects of the Plan which DRC has identified as potentially impeding New Hampshire's ability to reach timely compliance with the HCBS settings rules.

These comments do not address each and every aspect of the proposed Statewide Transition Plan. Rather, they are intended to raise questions and concerns regarding the proposed Plan and provide information concerning how certain aspects of the Plan, as currently drafted, may adversely impact individuals with disabilities who are eligible for Medicaid funded HCBS. The absence of comments regarding any particular provisions of the draft Statewide Transition Plan does not reflect support for those provisions or DRC's agreement that they are satisfactory or lawful. Further, DRC represents individuals with disabilities in civil cases, including cases involving Medicaid funded home and community based services. These comments should not in any way be construed to limit the positions of any current or future clients of DRC in current or future matters.

1. Opportunities for Public Input into the Proposed Statewide Plan and Any Modifications.

a. Accessibility.

Federal regulations require that the State "ensure the full transition plan(s) is available to the public for public comment." 42 CFR § 441.710(a)(3)(iii)(B). DRC received a report that the plan and appendices posted on the Department's website for public comment are not accessible to individuals with visual impairments. Currently we have a blind volunteer working at our office. She attempted to review both the Statewide Plan and Appendices, using her screen reader, and was unable to do so. When she attempted to review the plan itself, all that came through her screen reader was the title page of the document. For subsequent pages, the only information available to her was the date "March 31, 2016." She was unable to review any part of the appendices. According to her screen reader, this entire document was an "empty document." Our volunteer has informed me that she is using state-of-the art technology, with all of the latest software. The Department's failure to ensure that the plan and appendices posted on its website are fully accessible has denied individuals with visual impairments the opportunity fully participate in, and provide input into, the development of the State's plan to comply with the HCBS Transition Regulations.

b. Provisions for Additional Public Comment Periods.

i. Programs Identified in the Future for Heightened Scrutiny Review. The Draft Statewide Transition Plan indicates that the Department will be conducting additional reviews of HCBS settings to determine whether settings, in addition to those already included this plan that receive HCBS funding, have the qualities of an institution and should be submitted for a

heightened scrutiny review. To date, the Department's assessments to determine whether a site has the qualities of an institution have focused solely on the location of the site, e.g. in a building on the grounds of, or immediately adjacent to, a public institution. The Department has not yet assessed whether current settings that operate with HCBS funding should be identified for a heightened scrutiny review based on a determination that the setting "has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS." 42 CFR §441.530(a)(2)(v). DRC expects that when isolation is included in the Department's assessment of New Hampshire's HCBS settings, additional sites will be identified for heightened scrutiny review. However, the plan does not include any provision for additional public comments regarding the results of future assessments of New Hampshire's HCBS-funded settings. Nor does the plan call for public comment should the Department make significant changes to the assessment and monitoring tools.

- ii. Portions of the Draft Statewide Plan are incomplete and/or are likely to need to be revised. The remediation and transition portions of the plan lack detail and timeframes. The legal analysis regarding protections afforded under New Hampshire's landlord and tenant laws has not been completed. The plan does not include provisions for additional opportunities for public comment when these or other details are developed.

2. Compliance Assessment Process and Analysis.

- a. Review of standards for HCB settings, including statutes regulations, policies and provider contracts.

The Department has conducted a review, using both internal resources as well as via contracting with a legal consultant. However, it appears that the standards review is not complete. For example, it appears that the Department has not assessed whether any modifications are required for He-P 804 (Licensing rules for Assisted Living Residences) or He-P 818 (Licensing rules regarding the operation of Adult Day Programs). In addition, the Department has not completed a legal review to determine what amendments may be necessary to New Hampshire statutes or rules to comply with the requirement that individuals who reside in HCBS-funded dwellings have the same protections that tenants have under the State's landlord/tenant law.

- b. Assessment of Settings.

- i. **Provider Self-Assessments and Participant Surveys.** Although the Department made a good effort to secure input from Stakeholders, including members of the Advisory Task Force, in developing the two surveys that were used to secure information from HCBS providers and participants, the responses and Department's analysis indicate that respondents may not have understood the

survey questions and/or that the survey questions may not have been adequate to elicit the type of information necessary to determine whether particular settings conform with the HCBS settings requirements. Some of the provider questions seemed to merely approximate the general regulatory language rather than attempt to secure the type of details which would paint an accurate portrait of life for individuals in a particular setting. For example, providers were asked “Are individuals provided the opportunity for tasks and activities matched to individuals’ abilities and desires” (Plan, p. 34), rather than asked to describe how they determine what opportunities, tasks and activities they will provide to individuals. Recipients were asked “Are you supported when you want to do something that’s not scheduled” (*Id.*), a question that may not have been understood. The Plan itself indicates that participants may have misunderstood questions. For example, the Department reported that participant questions related to the location of the setting and whether it is integrated in the community “may have been generally misunderstood.” (Plan, p. 43). Finally, it does not appear that the Department made any modifications to the results of the assessment results to account for its finding that respondents may not have understood the survey questions.

Regarding methodology, the plan does not explain how participants who were identified as having received assistance from a case manager were actually interviewed on the survey questions or how these individuals were offered privacy or protection from fear of retaliation if a review was negative. Nor does the Plan explain how residents were selected for the on-site surveys.

- ii. The Plan does not detail the process by which the Department will ensure that all HCBS settings will be assessed in sufficient time to ensure all settings are compliant with the settings rules by the March 2019 deadline. The Department’s experience with the use of a voluntary self-assessment survey indicates that reliance on provider self-assessments is not sufficient. The Plan indicates that responses to the provider self-assessment “were general at best” and “not as helpful due to the volume of unanswered questions.” (Plan, p. 23). It is not clear what, if any, efforts the Department made to reach providers that failed to complete and return the self-assessment.
- iii. The Department has committed to complete site visits to 59% of the settings selected based on certain criteria and recommendations by the Advisory Task Force. The Plan does not explain how the Department will timely assess 100% of the sites that receive HCBS funding. One practical concern is that currently New Hampshire’s licensing and certification rules permit sites that have been deemed compliant to skip the following year’s on-site monitoring visit. As a result, certain sites that have secured the “skip-a-year” benefit will not be scheduled for on-site Licensing/Certification monitoring visits before the timeframe to reach compliance with the HCBS settings rules.

- iv. As indicated above, the Department has not yet assessed New Hampshire's HCBS settings to determine whether their participants are being isolated from the broader community. Appendices I and J provide a description of the Department's Plan to accomplish an "isolation monitoring process." It appears that, contrary to CMS's guidance and recommendations regarding heightened scrutiny (issued June 26, 2015), the Department's plan does not include gathering information from stakeholders with relevant information about the particular setting. Individuals who could provide vital information for the determination of whether a particular setting has the qualities of an institution include prior participants, their families and guardians, the DRC, New Hampshire Legal Assistance, the New Hampshire Council on Developmental Disabilities, the NH Alliance for Direct Support Professionals, Granite State Independent Living, People First, and the Elder Rights Coalition.

3. Timeframes

- a. Some of the tasks listed in the plan and appendices do not contain a corresponding timeline for completion. For example, the timeline for the Department to update certification/licensing tools to correspond with HCBS expectations and regulatory revisions, identify the implementation date and update policies related to the transition process are all "contingent on regulatory changes." (Plan, p. 20). Regarding the proposed process to monitor isolation, there is no timeline for the Department to review statewide complaint data. (Appendix, Attachment I). There are no timeframes provided regarding the development of a process to relocate participants, if necessary. (Plan, p. 135). The lack of even an estimated date makes it difficult for individuals with disabilities and other stakeholders to assess the Department's compliance with the Plan.
- b. Relocation. With regard to the relocation of beneficiaries, it appears that the Plan does not ensure that there will be sufficient time for a robust transition planning process for each individual who may be impacted by a determination that his or her setting does not comply with the settings requirements, including sufficient time for completion of an appeals process. CMS identified this concern in a letter dated October 1, 2015 which it provided to the Department in response to the Transition Framework submitted to CMS in March 2015.

4. Remediation, Monitoring and Transition Process.

- a. The remediation and relocation portions of the Plan lack details. It is not possible to determine when the heightened scrutiny requests are expected to be resolved. Nor does the Plan describe procedures for ensuring that participants will be provided sufficient notice, appeal rights and appropriate discharge planning. It is unclear whether the Plan provides sufficient resources to meet the need to facilitate the

transition of participants from non-compliant settings to settings that meet the HCBS requirements. It appears that the proposed plan is to place responsibility for relocation primarily upon the participant's service coordinator. The Department may wish to consider involving other agencies in this process. Personnel charged with assisting individuals needing to transition to alternative programs will need to be trained in person-centered planning as well as be knowledgeable about available programs and services that comply with the rules.

- b. Achieving full compliance with the HCBS settings rules will likely require additional resources and attention from a broad array of state and local agencies in addition to the Department of Health and Human Services. For example, the New Hampshire Department of Education's personnel could be trained on the rule and corresponding need for incentives to train and recruit personal care assistants and other community-based providers for which there is a current shortage. The New Hampshire Housing Finance Authority could be trained on the rule and corresponding need for incentives to develop community-based homes that are non-disability specific, designed for resident privacy, and which provide access to all areas of the home. New Hampshire's ability to bring HCBS settings into compliance with the rule could be enhanced by providing the New Hampshire Department of Transportation with training on the rule and the corresponding need for increased transportation options for persons with disabilities.
- c. The Plan indicates that only providers will receive training on remediation and that only providers will be given training on how to file a complaint and use the concern form. The only mention of training for participants is through an annual rights training. This may not be sufficient for non-residential participants, since 21% surveyed said they do not know how to file a complaint. Specific topics for participant training include: the requirements of the HCBS settings rule; the remediation process; what constitutes an appropriate level of community integration in their HCBS programs; and the implications of staying in a non-compliant setting, including whether they will lose other services and whether there is funding to allow them to continue to receive services in their current setting. It is not clear whether the Plan provides sufficient resources to ensure that the individuals charged with facilitating transition are familiar with the unique needs of individuals who are elderly and/or who have disabilities.

5. Resources.

- a. Office of Program Support, Bureau of Licensing and Certification. The Plan provides for much of the monitoring and oversight activities to be completed by this Bureau. Yet, there does not appear to be any provision for additional resources to ensure there are sufficient numbers of staff, trained on the HCBS settings rule requirements, to undertake reviews of the new HCBS settings requirements. DRC is concerned that this Bureau is challenged to satisfactorily complete the oversight and monitoring activities for which it is currently responsible and that, without additional resources,

the Bureau will not be able to fulfill the responsibilities assigned in the plan. The primary basis for DRC's concerns follows.

Following the DRC's release of two reports (one involving the death of a resident) describing abuse, neglect and substandard treatment at Lakeview Neurorehabilitation Center¹, a residential treatment facility licensed by the State of New Hampshire, Governor Maggie Hassan called for an independent review of the quality of the monitoring and oversight of this facility by state agencies, including the Bureau of Licensing and Certification. The review was conducted by Kathryn duPree, MPS, President of Crosswinds Consulting. Ms. duPree's findings and recommendations were published in a report dated April 2, 2015². Among her findings, Ms. duPree determined that the Bureau did not have a sufficient number of surveyors to complete annual inspections of the more than 400 licensed facilities that receive annual inspections and address complaints on a timely basis. Further, Ms. duPree found that training surveyors received was "minimal at best" and that supervision of surveyors was lacking as well. (Kathryn duPree, "Review of the State of New Hampshire's Oversight and Monitoring of the Services Provided by Lakeview Neurorehabilitation Center Prepared for Governor Hassan, April 2, 2015, p. 8). Ms. duPree concluded that Lakeview "has been able to operate its program at an unacceptable level in large part because . . . the inspections have not been rigorous. Additionally there appears to be a lack of commitment to quality and thorough review of a facility such as Lakeview by DHHS' Licensing Unit." (*Id.* at p. 10). Ms. duPree's findings, taken together with a proposed plan that calls for a substantial increased personnel commitment from this Bureau without any apparent increase in resources, raises serious concerns regarding the Bureau's capacity to complete the deliverables outlined in the Plan and, as a result, calls into question the likelihood that the Plan, as written, will result in bringing New Hampshire's HCBS programs into compliance with the settings rules by March 2019.

- b. The HCBS settings rule requires that individuals be provided a choice of settings, including a choice of non-disability specific settings and, in residential settings, a choice of a private unit. The Plan does not include a comprehensive assessment of the service and settings gaps for individuals who are eligible for HCBS waiver services. The completion of a comprehensive assessment of these gaps, including recommendations and a time frame to address them, is essential to ensure that there are sufficient HCBS settings, providers and services to comply with the settings rule by March 2019. Some of the service and infrastructure gaps can already be identified from the survey analysis and steps could be immediately added to the Plan to address these gaps. For example:

¹ *Investigation into the Circumstances Leading to the Death of J.D., a Resident of Lakeview NeuroRehabilitation Center* (2014), *Isolated, Segregated and Vulnerable: A Report and Call to Action Concerning Lakeview NeuroRehabilitation Center* (2014), both available at www.drcnh.org/Lakeview.html.

² duPree, *Review of the State of New Hampshire's Oversight and Monitoring of the Services Provided by Lakeview Neurorehabilitation Center Prepared for Governor Hassan*, (April 2, 2015), available at <http://governor.nh.gov/media/news/2015/documents/pr-2015-04-13-dhhs-final-report.pdf>.

- i. Few CFI participants felt they had a choice of housemate or were given a choice of setting. This may signal a lack of housing options and perhaps a lack of choice of non-disability-specific housing, as required by the rule. It might also signal that those involved in the process of planning and offering residential services are either insufficiently knowledgeable about what is available or, for other reasons, fail to inform participants of the options available to them.
- ii. Lack of transportation and provider access to facilitate community integration.
- iii. Guardians are sometimes a barrier to full community integration. For example, a low number of CFI survey respondents said they were given information on community living options. The survey analysis indicated that this is in part because many participants have guardians who made the choice for them. The plan identifies that training will be provided to guardians but only in the area of guardianship alternatives. This training could be expanded to cover training to address guardian concerns with resident transition, such as information on community options and resources available, and options for discharge planning, such as site visits prior to placement. Additionally, trainings should not be limited to guardians as individuals under guardianship would also benefit from such training opportunities and should be fully informed of the options available to them.

Thank you for your work on New Hampshire's Statewide Transition Plan and for the opportunity to participate as a member of the Advisory Task Force and to provide input on behalf of the DRC. Please do not hesitate to contact me if you have any questions regarding these comments. Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Karen L. Rosenberg', with a long horizontal flourish extending to the right.

Karen L. Rosenberg
Senior Staff Attorney