



DISABILITY RIGHTS CENTER-NH

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February 13, 2015

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 Transition Framework for Establishing Home and Community Based Services Residential Settings Compliance”

Dear Ms. Fournier,

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 and advocated for the rights of individuals with disabilities in a variety of forums including state and federal courts, administrative agencies and before the state legislature. In addition, DRC investigates alleged abuse and neglect of individuals with disabilities who receive services in various facilities throughout the state and participates in numerous committees, councils and task forces which focus on meeting the needs of New Hampshire’s residents with disabilities.

One of DRC’s long-standing priorities is to ensure that individuals with disabilities have access to necessary services, consistent with principles of choice, dignity and autonomy in the least restrictive, most integrated environment appropriate to each individual’s needs. Assuring New Hampshire’s compliance with the Centers for Medicaid and Medicare Services’ (“CMS”) new 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. For these reasons, DRC is eager to assist the New Hampshire Department of Health and Human Services (“DHHS”) in developing and implementing a high quality transition framework to accurately assess our current programs, policies and practices as well as to assist in the development and implementation of a transition plan to achieve compliance with the new settings rules for HCBS.

DRC is submitting these comments to supplement the testimony DRC provided at the public hearing held on February 10, 2015. Rather than address each and every aspect of the proposed transition framework, these comments address general areas of concern, with some specifics referenced by way of example. The absence of comments regarding any particular provisions of the draft transition framework does not reflect support for those provisions or DRC’s agreement

that they are 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 litigation.

As you are aware, the purpose of CMS' new rules defining "home and community-based settings" eligible for Medicaid waiver funding is to ensure that Medicaid home and community-based services programs (both residential and day programs) provide 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. These new rules and New Hampshire's eventual development of a plan to ensure that all of our HCBS waiver programs operate in compliance with them provide an excellent opportunity to ensure that individuals who are served by these programs are truly integrated into our communities, rather than isolated or segregated with other individuals with disabilities. Further, these rules and New Hampshire's transition to compliance afford individuals with disabilities opportunities for meaningful choices regarding how they want to live their day-to-day lives, including opportunities for competitive employment and meaningful engagement with individuals who do not have disabilities, and with necessary services to support their chosen goals.

New Hampshire is in the initial stages of developing its transition plan. Although the proposed transition framework is more of a "plan to plan" than a comprehensive and specific plan to bring New Hampshire's HCBS waiver programs into compliance with the CMS settings rule, the framework represents a necessary first step toward compliance. The draft transition framework illustrates a recognition that, before a plan may be finalized, New Hampshire must complete a thorough assessment of the relevant laws, rules, policies and standards currently in place as well as an assessment of the programs and settings that are currently funded through our Medicaid HCBS waiver programs. The proposed plan identifies three critical steps to complete this initial assessment – 1. Inventory -- Conducting an Inventory of current state rules, regulations, policies and standards to determine whether they comply with the HCBS Settings Rule. Identifying and establishing a list of NH's HCBS providers; 2. Assessment -- Developing tools to evaluate provider conformity with HCBS rules, assessing NH's standards for compliance with the Rules, Compete and validate assessments of provider conformity with the rules, including both provider and participant assessments; and 3. Remediation and Compliance – Based on assessment results, develop a comprehensive transition plan to bring New Hampshire's HCBS settings into compliance with the CMS settings rule.

While the draft transition framework includes basic elements necessary to complete the preliminary work to develop a comprehensive plan to transition to full compliance with the new HCBS settings rule, it lacks sufficient detail and leaves too many questions regarding its purpose, design and implementation. Additionally, the draft framework does not appear to provide sufficient opportunities for participation by program participants, advocacy organizations, direct service providers and the general public, either on an ongoing basis or at critical points during the completion of each task.

DRC recommends that DHHS include additional details regarding each action step. In addition, DRC recommends that DHHS assure that program participants, organizations that advocate for

program participants and direct support providers are provided with additional opportunities to actively engage at each level of the framework's completion, including through participation in the Advisory Taskforce. Some specific areas of concern, questions and suggestions follow:

- A. Lack of specificity. The Transition Framework does not include much detail. It is very general and only provides brief descriptions of "high-level strategies." For example, the Framework does not even identify the specific Medicaid waiver programs, or populations who receive services in those waiver programs, making it difficult for stakeholders to know if they are impacted. The lack of specificity makes it difficult for stakeholders (including program participants and their families, advocates, and providers) to provide substantive comments. The plan does not provide a comprehensive list of which government agencies, contractors or stakeholder organizations are, or will be, involved in the development of, and implementation of, the plan. For example, it is difficult to analyze how the state will ensure access to integrated, competitive employment settings. The plan does not indicate whether the division of vocational rehabilitation is involved in plan implementation or if stakeholders with integrated, competitive employment experience are involved. Furthermore, it is not clear whether the transition framework is designed to address all of the settings which are, or may be, funded through HCBS waivers. The title of plan only references "residential settings compliance;" however non-residential programs and services, including but not limited to day settings, transportation, and employment services, must also comply with the new rule. In addition, it is not clear to what extent DHHS plans to review family or home settings in which large numbers of waiver recipients currently receive HCBS programming.

- B. Reliance on third party contracts for review of state compliance without inclusion of participants and advocates most familiar with the laws, rules and standards under review. While having a third party contractor conduct a legal review to identify potential areas of non-compliance with the new HCBS rules may be helpful in ensuring that this assessment is completed by an unbiased entity, it is critical that this process include solicitation of the comments and opinions of advocates and stakeholders to ensure it is thorough and accurately reflects the full range of laws, rules, policies and practices that are impacted by the new HCBS rules.

- C. Limited stakeholder involvement. As currently drafted, the Transition Framework Team – made up entirely of DHHS personnel – is undertaking many of the activities which are central to the development of New Hampshire's transition to compliance with the HCBS rules without sufficient opportunities for stakeholder input. These activities include: identifying the relevant laws, rules and standards that should be revised, identifying HCBS providers and developing assessment tools. It is critical that the Transition Framework Team seek input from representatives of the various populations that are impacted by the new HCBS settings rule (i.e., individuals with developmental and/or physical disabilities, and aging communities) as well as advocacy organizations that are knowledgeable about New Hampshire's current settings and the individuals they serve.

Further, the anticipated membership of the Advisory Taskforce is not specified and its role is undefined.

If the participation of stakeholders is limited to the assessment process and public comment on transition plans, this level of stakeholder involvement is insufficient. Participants and their families/friends as well as advocates know what changes are needed to meet the obligations of the rules and should be included throughout the development of New Hampshire's plan to come into compliance with the HCBS rules. Although the recognition of the need for public comment and inclusion of stakeholders in the assessment process is positive, the lack of inclusion in such areas as policy development, rules changes, identification and designation of programs as conforming or not conforming with the HCBS settings rule is limiting and could be detrimental to the successful identification of issues.

DRC recommends that DHHS expand the role and responsibilities of the Advisory Taskforce to include participation in each step of the transition framework including, but not limited to, policy development, rules changes, and the identification and designation of programs as conforming or not conforming with the HCBS settings rule. In addition, DRC recommends that the Advisory Taskforce include representatives from the following organizations: DRC- NH, the New Hampshire Council on Developmental Disabilities, New Hampshire Legal Assistance, the NH Alliance for Direct Support Professionals, Granite State Independent Living, People First, and the Elder Rights Coalition as well as at least one or two individuals eligible for each waiver program. We suggest that DHHS ask the NH Council on Developmental Disabilities and the Elder Rights Coalition to recommend waiver-eligible individuals and family members for the Taskforce, and for DHHS to ensure that, if needed, program participant representatives are provided with any necessary services to support their full participation.

In addition, to ensure that DHHS, the Transition Framework Team and Advisory Taskforce do not miss critical information concerning New Hampshire's existing HCBS waiver programs, the experiences of program participants and relevant standards, DRC recommends that the draft transition framework be amended to include the issuance of preliminary reports and opportunities for public comment after the completion of each of the activities described in the transition frameworks; e.g., following the report of recommended changes to relevant regulations, standards and policies; following the identification of HCBS providers that meet, do not meet or could come into compliance with the HCBS settings rule.

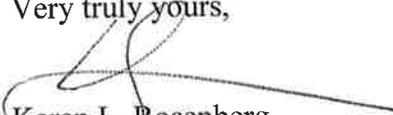
- D. Assessment process is vague. Although there are positive aspects to the assessment process, such as incorporating the tool into provider enrollment and application processes, surveying participants and recognition of the need for validation, there is insufficient detail to evaluate DHHS' proposed assessment process. For example: What will happen if the validation efforts show that the provider self-assessments are inaccurate? Also, the term "selected entities" is non-descriptive and does not indicate what percentage of assessments will be validated and who will validate those assessments. Will these entities be unbiased and willing to find facilities that do not

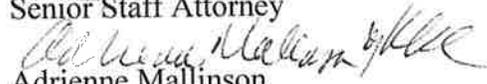
meet the standards? Will they have sufficient expertise in the rules and communicating with participants to determine that the facility meets the rules, including the intent of the rules? Will the Department include participants and advocates in the development of all participant survey instruments to ensure they are truly accessible protect against biased results and are administered by properly trained individuals? If multiple entities are validating assessments, will they be consistent in their evaluations? Finally, will the Department include participant assessment when a provider renews or expands HCBS program offerings? The assessment process is critical to identifying the non-compliant providers and should be described much more fully. The DRC would support a plan that would enlist independent entities to perform on-site assessments of *all* service providers, and has serious concerns that a "percentage validation" approach has the potential to overlook many compliance issues.

- E. Lack of identified participant protections. The "Remediation and Compliance" portion of the Transition Framework (pp. 4-5) does not mention any mechanisms to protect participants who may need to transition from providers who cannot meet the requirements of the rules to alternative programs or services. The plan also does not identify a way for participants to complain about their setting or the determination that a particular program or setting meets the requirements of the rules.
- F. Choice of settings. The HCBS 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 proposed plan gives no indication that part of the assessment process will be an evaluation of the array of settings currently available. People cannot be offered meaningful choices if there is not sufficient capacity. New Hampshire must evaluate its current level of non-disability specific settings and develop a plan to increase capacity as needed to fulfill this requirement. The lack of capacity is particularly acute for non-residential services, where the vast majority of settings are disability specific. With respect to the option of a private unit, the state must ensure that all of its waiver programs offer and have capacity for this option.

Thank you for your work on this important initiative and for the opportunity to provide our input. We urge the New Hampshire Department of Health and Human Services to fully consider our comments regarding the draft transition framework for establishing compliance with CMS' new settings rules for home and community based services waiver programs. Please do not hesitate to contact either of us if you have any questions regarding our comments. Thank you for your consideration.

Very truly yours,


Karen L. Rosenberg
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