

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)

FINAL

ORDER

Medicaid 1915 Home and Community-Based Services Waiver Programs - Statewide Transition Plan

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) made available for public review and comment Delaware Medicaid's *Proposed Statewide Transition Plan for Home and Community-Based Services (HCBS) Settings*. The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the March 2015 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by March 31, 2015 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

This regulatory posting is to provide public notice and to receive public comments for consideration regarding Delaware Medicaid's *Proposed Statewide Transition Plan for Home and Community-Based Services (HCBS) Settings*. The purpose of the transition plan is to ensure Medicaid beneficiaries are receiving HCBS in settings that meet the quality requirements specified in the final rule and are appropriate based on the needs of the individual as indicated in their person-centered service plan.

Statutory Authority, Citations, and Other References

- Section 1915 of the Social Security Act, *Provisions respecting inapplicability and waiver of certain requirements of this title*
- 42 CFR §441.301, *Contents of request for a waiver*
- 42 CFR §441.710, *State plan home and community-based services under section 1915(i)(1) of the Act*

Background

The Centers for Medicare and Medicaid Services (CMS) published its final rule in the Federal Register on January 16, 2014 related to Home and Community Based Services (HCBS) for Medicaid-funded long term services and supports provided in residential and non-residential home and community-based settings. The final rule took effect March 17, 2014. States are required to submit transition plans to CMS within one year of the effective date indicating how they intend to comply with the new requirements within a reasonable time period. If states amend or renew any of their currently operating waivers or state plan amendments prior to the effective date, that action serves as a trigger for the state to submit a transition plan for all its waivers under 1915(c), as well as any state plan amendments under 1915(i) or 1915(k) within one hundred and twenty (120) days of the amendment/renewal submission.

These regulations require Delaware to submit a transition plan for the state's 1915(c) waiver, the 1915(i) HCBS state plan option and, the 1115 demonstration waiver programs. Because Delaware's 1115 Demonstration refers to the 1915(c) authority for HCBS services, the state must comply with these regulatory changes. Delaware does not have a 1915(k) waiver. The transition plan must describe the process by which the state will ensure that service settings used in each of its home and community-based waivers meet "community-like" expectations. The final rule provides for a five-year transition process that will allow states to implement this rule in a manner that supports continuity of services for Medicaid recipients and minimizes disruptions in service during implementation; as such, all such services must be in compliance with CMS requirements before March 2019.

For additional information about the CMS HCBS final rule, use the following link to the CMS website:

<http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>. The website includes links to the CMS rule, webinars, guidance and more.

Summary of Proposal

Purpose

Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) made available for public review and comment Delaware's Proposed Statewide Transition Plan for Home and Community-Based Services (HCBS) Settings. Comments on public notices and comments received at public hearings will be used to formulate Delaware's Final Statewide Transition Plan that was submitted to CMS by March 17, 2015. All comments were received prior to March 17, 2015 and were included in the submission.

Statewide HCBS Settings Transition Plan Summary

DHSS/DMMA initiated and completed a comprehensive review of HCBS waivers and related regulations, policy and procedures to assess and to identify changes necessary to comply and/or to demonstrate compliance with the new rule. This analysis identified areas where the new regulations are supported in Delaware as well as areas that will need to be strengthened in order to align Delaware's HCBS programs with the regulations.

Pursuant to 42 CFR 441.301(c)(6), Delaware's proposed Statewide HCBS Settings Transition Plan is composed of the following three main components: (1) Assessment Process: an assessment of regulations, standards, policies, licensing requirements, and other provider requirements to ensure settings comply with federal requirements, (2) Remedial Strategy: a description of the actions the state proposes to assure initial and ongoing compliance with the HCBS setting requirements, including timelines, milestones, and monitoring processes, and (3) Public Input, preferably from a wide range of stakeholders representing consumers, providers, advocates, families and others. Therefore, DHSS/DMMA is making the Statewide Transition Plan available for public review and comment.

Relevant Waivers/State Plan

Delaware's proposed Statewide Transition Plan for Home and Community Based Settings contains the actions the state will take to bring all Delaware waivers into compliance with requirements set forth in 42 CFR 441.301(c)(4-5) along with timelines and milestones for doing so. This plan covers the following three waivers and state plan currently operating in Delaware:

1. Diamond State Health Plan (DSHP) Section 1115 Demonstration Waiver (because the 1115 Demonstration refers to the 1915(c) authority for HCBS services);
2. Division of Developmental Disabilities Services 1915(c) Home and Community-Based Services Waiver; and,
3. 1915(i) Home and Community-Based Services State Plan Option.

Public Comment Submission Process

Under the provisions of 42 CFR §441.301(c)(6)(iii), DHSS/DMMA gave public notice and provided an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input to the Transition Plan. Comments were to be received by 4:30 p.m. on March 31, 2015.

Delaware also utilized two (2) prior public input procedures by 1) publishing the Transition Plan in two (2) major Delaware newspapers for a thirty-day public comment period on February 6, 2015: The News Journal and the Delaware State News; and, 2) holding two public hearings on February 23, 2015 and February 27, 2015 in New Castle County and Kent County.

Draft of Proposed Statewide 1915 HCBS Waiver Settings Transition Plan

The proposed Statewide Transition Plan offers the steps that DMMA will facilitate and then successfully execute the transition, with the engagement of the public. A draft of the plan is available for review and/or downloads on the Division of Medicaid and Medical Assistance (DMMA) website at: <http://dhss.delaware.gov/dmma/>.

Fiscal Impact Statement

There is no increase in cost on the General Fund. Demonstration waivers must be "budget neutral" over the life of the project, meaning that they cannot be expected to cost the Federal government more than it would cost without the waiver.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

In accordance with CMS guidance, Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) sought input from the public and a wide range of stakeholders regarding the proposed statewide transition plan. Stakeholders, including providers, parents, family members and friends of HCBS participants in Delaware, were notified of the opportunity to review the transition plan and provide input using DHSS/DMMA website postings and notification in two (2) statewide newspapers. Stakeholders were able to submit comments regarding the transition plan by focus groups, public hearings, e-mail, standard mail; and, feedback from a public survey.

Public comments were received from the following organizations and associations:

- Center for Disabilities Studies, University of Delaware
- CHIMES Delaware
- Delaware Association of Rehabilitation Facilities (DelARF)

- Delaware Developmental Disabilities Council (DDDC)
- Disabilities Law Program at the Delaware Community Legal Aid Society, Inc. (DECLASI)
- Easter Seals Delaware & Maryland's Eastern Shore
- Governor's Advisory Council for Exceptional Citizen (GACEC)
- National Association of Councils on Developmental Disabilities (NACDD)
- State Council for Persons with Disabilities (SCPD)
- University of Delaware, H. Rodney Sharp Professor of Human Services Policy and Leadership

To view the final transition plan, the summary chart of comments received from organizations, associations individuals and State response, where applicable, to issues identified, please visit the DMMA website at <http://dhss.delaware.gov/dhss/dmma/files/statewidetransitionplan.pdf>. The chart also notes the changes that were made to the statewide transition plan in response to the feedback.

Comments were also received via standard mail and e-mail from over forty (40) family members or representative of members receiving services in the state's HCBS programs and providers of the HCBS waiver services. The following five (5) comments represent their questions and concerns. The "Agency Response" follows the fifth comment.

Please Note: For purposes of confidentiality, the name of the commenter and the location of the facility are not identified.

Family Member/Representative/Provider #1

Hi, I would like to explain why the service my son receives from XXXX in XXXX center is the best thing for him. He has a social life with friends there; they plan a program for him to do while he is there, so that he can retain things in life that he needs to learn. Parents with disability children need to have a service like this so that they can work without worry and have a much needed time for themselves. My son is 39 years old and I have him and care for him the rest of my life. It is a very stressful life sometimes and he loves the center. He never wants to stay home; he gets upset if snow keeps him home. He loves his out trips they go on. I could not ever imagine what he would do without this service. Please consider what the impact would do to people with disabilities if the service they receive now would change.

Family Member/Representative/Provider #2

To Whom It May Concern,

My name is XXXX. I am a Program Manager at XXXX. [It] is my honor to work at XXXX, and [I] have been here for one year. I believe that ALL people should be fully integrated into the community. I realize that those we serve will be able to be fully integrated into the community without a lot more financial support than what is currently available. I realize that providers in Delaware are currently are UNDER funded by \$32 million. Where are the additional financial resources going to come from? I also realize that to move people to the community will take a lot more Transportation resources, which means more money. I believe that if we try to put everyone in the community without the proper resources, which means money, the safety of the people we serve will be compromised, and the safety of the public in some cases will also be put at risk. I also know that many of the people we serve and their families do not want to receive services in the community. I believe our State should provide more choices, not eliminate choices. I also know that other states have affirmed that they are keeping facility-based services as a service option. Delaware has NOT done that. We would like to see our State affirm that facility-based programs will remain in our state for those who would choose it as an option and for those who need it to build skills to move to a community-based program. The people we serve are unable to advocate for themselves, and we have a responsibility to make sure their voices and concerns are heard

Family Member/Representative/Provider #3

My wife and I are the parents of XXXX, a twenty six year old man. XXXX has moderate to severe autism, but fortunately, few behavioral issues. Because of this, the least restrictive most appropriate work environment for XXXX is in the community and we are fortunate to have found for XXXX a 20 hour a week job in the XXXX at XXXX. XXXX is supported in this job and could not work without supports which supports are provided for him through state funding. XXXX continues to live at home but would like to be living more independently. Achieving this goal will not be easy as XXXX's has limited life skills. His present happiness and satisfaction with his life and planning for his future when we are gone weighs heavily on both of us. Where will he live? Who will watch out for his welfare?

We appreciate the great work done by disability advocates to push for inclusion and community-based services that has brought us to this point. However, we are deeply concerned that the pendulum has swung too far to full inclusion without consideration for each individual's level of disability. The saying "One size does not fit all" certainly applies in this situation. Additionally, we are concerned all disabilities are being looked at in aggregate. Our son with an intellectual disability cannot truly speak for himself and has limited critical thinking and life skills. His inclusion scenario is very different from that of someone with a physical disability who has the intellectual capacity to understand when they are in danger, go to college, manage a bank account, etc. We cannot dismiss this fact as we shape our policies on inclusion.

We strongly support regulations for Home and Community Based Services that would be flexible and would allow for all types of residential and employment options for persons with all types of disabilities. Limiting who one can live or work with or where one can work does not seem consistent with the ideals of this nation. Sometimes quality of life might be living

quietly with one or two other people, and sometimes it might mean having a larger group in a few close-set apartments or houses. We feel that having these kinds of flexible options and outcome-based regulations will further advance possibilities for happy lives for all of our loved ones with disabilities.

We see great benefit in creating intentional communities for groups of people who can and want to live together and we think this would be an excellent living choice for our son, XXXX and would best meet his needs. This environment would give him needed supports for daily living and would provide a social environment that in our estimation over these many years as his primary care givers, he seems to prefer.

We appreciate the opportunity to address our concerns and thank you in advance for helping us gain some security regarding our son's future.

Family Member/Representative/Provider #4

Regarding Delaware's Division of Medicaid and Medical Assistance (DDMMA) being required to submit a Statewide Transition Plan to Centers for Medicare & Medicaid Services (CMS) about the Community Rule for all programs offering Home & Community Based Services (HCBS) in the State: In principle we are supportive of the "Community Rule" guidelines to offer "opportunities to access community services in the most integrated settings." This would not only benefit recipients but also the public at large, for when the public gets to know individuals with disabilities, they become the best advocacy source. We ALL would benefit.

Our concern, however, is when changes like this are made; there is always the risk that vulnerable people will fall through the cracks. Since some disabled people require a more restrictive, sheltered environment; that is their best chance to thrive, to be safe, to work and have dignity and self-worth. Therefore it is imperative that these individuals maintain and function in a sheltered work and living environment. Some of these folk have lived in this environment for decades, and are now over 50 years old. They are most unlikely to "gain employment" just like other older individuals are finding it hard to secure work. Implementation of the Community Rule must not disrupt their lives and the lives of their caretakers.

As this process proceeds during the next four years, the committee must communicate with the people in the state of Delaware in language that is understandable by the lay public. {See our first paragraph, for example - is that generally understandable? If it generally is, then we are all in trouble!}

This committee shall also have many evening public meetings in all three counties, to encourage and facilitate public input. The locations shall have seating enough for the public, working sound and media equipment, and enough handouts for all. Hopefully the committee composition should include representation from affected agencies, professional, recipient, caregivers, and the public at large. Communicating what the transition means is so important, because misunderstandings and threats of closures stop us from listening to each other. People are getting scared that their loved ones will not have benefits or facilities that are so much needed for certain persons of disabilities. Yet, the integration into the community can still occur in the sheltered workplaces in very creative ways. Please allow for these creative opportunities, without threatening the funding.

Flexibility is absolutely necessary in this process; the plan must be subject to change during this process. It must never be seen as a "done deal" effective 17 March, 2015! The collective wisdom of the people of Delaware must be sought after. Then Delaware's Plan will be first.

Family Member/Representative/Provider #5

My name is XXXX. I reside @ XXXX... I'm writing as an advocate for my daughter XXXX who was born with Down Syndrome. After she graduated from the Vocational Special Education Program in the XXXX School District she has been gainfully employed at the Support Services Division of XXXX. Throughout the educational process and thereafter I have been a strong proponent of gaining access for XXXX to enable her to function as independently and successfully as she can given her abilities & limitations. Fortunately for us and her she has managed to learn, adjust & adapt to maintaining a fairly self-guided lifestyle with minimal supervision. Right now she resides with me and my husband at our home. However, since we are getting older we are anxious to find alternate means of living and assistance for her for the eventuality that she will definitely outlive us since she is a healthy, young woman.

In light of the new federal HSBS rules & regulations that are right now being considered as a guide for the state of Delaware's transition plan being developed I feel compelled to bring forth my concerns and views to you as you embark on this process.

1. In determining what constitutes the least restrictive environment practicalities should be a major determining factor. In an ideal and theoretical format each such individual would have all the support and freedom to reside & function in a fully integrated system with one-on-one assistance. However, by the very nature of the fact that such individuals as my daughter need supervision and guidance on a regular basis and learn as well as work more comfortably in an environment that is structured to their needs as well as one that gives them the safety and comfort to function it is not only realistic but imperative that this be given serious weight when considering whether the entity and place providing the service fulfills the guidelines. To be sure we do not want to go back to the days of warehousing such individuals in massive enclaves where they are cutoff from the rest of the world and exist in isolation. But from a practical and economical view it is only reasonable to have a limited number of such individuals who choose of their own to reside and work together as part of a larger whole community. It is akin to like-minded professionals or ethnic communities who congregate in order to satisfy

mutual goals and needs. So long as the individuals who choose to do so do it of their own volition why should there be an arbitrary number assigned that would limit their ability to choose such options. If using stringent specifications denies individuals like my daughter the privilege of being able to grow, live and function to their fullest potential then that totally defeats the purpose of helping such individuals and instead restricts the opportunities available to them thus relegating them to a life of isolation, with nothing to keep them active and productive, ensuring their decline. I believe that in applying the criteria of least restrictive environment the barometer to judge and temper it should be the benefit or lack thereof to each individual's needs and conditions. A universally applied and fixed number without consideration of the individuals needs severely handicaps their ability to achieve their full potential and removes viable options that would work for that individual.

2. Over the past several years the shortfall of state funds for XXXX have been seriously neglected and thus are now well below the level necessary to serve the needs of this population. A concerted effort needs to be made by our state governing bodies to ascertain that there is a steady stream of revenue allocated for that purpose.

In ending, I respectfully offer my input as a constant and strong supporter of my daughter to be a productive and active member of society so that she can contribute to the greater good, participate fully and live a fulfilling life, in spite of the limitations she was born with.

Agency Response: Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) appreciates your sincere and thoughtful comments. We acknowledge your questions and concerns and would like to offer the following information:

The federal regulation related to Home and Community-Based Services (HCBS) Transition Settings aims to improve the quality of life for many individuals receiving HCBS. Further, the intent is to ensure that individual rights are not unduly restricted.

The State is mindful of the fact that the experience of the individual receiving HCBS is very important. We recognize that different people will make different choices, and the federal regulation attempts to optimize those choices.

DMMA thanks you for your comments and suggestions. Your comments have been considered in the preparation of the final statewide transition plan. The final transition plan including a summary of public comments received and the agency's response is available on the DMMA website at: <http://dhss.delaware.gov/dmma/>.

DMMA values your input and will continue to engage stakeholders and solicit feedback during the transition process, including review of the assessment tool, remediation strategy, and changes to Medicaid policies that are created as part of the transition process.

Thank you for sharing information relating to your family member and the services they receive.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the March 2015 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to make available for public review and comment Delaware Medicaid's Proposed Statewide Transition Plan for Home and Community-Based Services (HCBS) Settings, is adopted and shall be final effective June 10, 2015.

Rita M. Landgraf, Secretary, DHSS

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