



Disability Rights WASHINGTON

Washington's protection and advocacy system

VIA EMAIL AND FIRST CLASS MAIL

February 6, 2015

Barb Hanneman
Medicaid Unit Manager
Aging & Long-Term Support Administration
PO Box 45600
Olympia, WA 98504

Dear Ms. Hanneman,

Thank you for the opportunity to provide comments to the December 11, 2014 draft of the Washington State Transition Plan for the federal Home and Community Based Services (HCBS) rules that were promulgated by the Center for Medicaid and Medicare Services (CMS) last year.

As the designated protection and advocacy system for the state of Washington, Disability Rights Washington (DRW) has a unique role to advocate, monitor, and investigate issues regarding people with disabilities. This federally mandated role combined with our constituent-driven priorities are perhaps some of the reasons why CMS suggests that states engage their protection and advocacy systems, as well as long-term care ombudsman, in the process of assessing the state's compliance with the new federal HCBS regulations. See <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/statewide-transition-plan-toolkit.pdf>.

In recent years, DRW has used its access authority and resources to conduct statewide monitoring of various HCBS services. In addition, between 2006 and 2012, DRW was responsible as class counsel for monitoring the state's compliance with a settlement agreement in *Boyle v. Dreyfus*, a federal lawsuit regarding the administration of HCBS waivers for individuals with developmental disabilities. As such, we have an informed perspective on how HCBS services in Washington are aligning with the HCBS requirements, and we are pleased to provide you with our feedback.

General Comments

We are first and foremost very happy to note that this draft transition plan expresses Washington's full support of the intent for the HCBS regulations. These regulations were promulgated to implement the main purpose of the Medicaid HCBS waiver program - to provide a true alternative to an institutional lifestyle and maximize opportunities for participants to access the benefits of community living. Ensuring that this waiver funding is

used to meaningfully support integration is key for states to leverage Medicaid as a tool for complying with the *Olmstead* mandate of the Americans with Disabilities Act to provide services in the most integrated settings appropriate to individuals' needs. See *Olmstead v. L.C.*, 527 U.S. 581 (1999).

We are providing you with some highly detailed comments and suggestions for how this transition plan could be revised to better support integration and choice for HCBS waiver participants in Washington State. In sum, we urge the state to take a closer, comprehensive and open-minded look at many of its currently funded HCBS services before concluding that most of the current HCBS services are already in compliance with the new federal regulations.

As currently drafted, Washington's transition plan glosses over the realities of its HCBS waiver service participants and includes proposals for minimal changes that will not adequately redress current isolating and disempowering HCBS provider practices. By way of illustration, virtually the sole deficiency in HCBS waiver-funded settings identified in the plan is the failure to assure sleeping units can be locked by the resident. While having locks on sleeping units is an important and concrete requirement that Washington needs to fulfill, this alone will not do anything to help individuals fully engage in their broader communities or better support individual choices, other than the choice to be simply left alone. This is a choice that individuals should have the right to exercise, but is far from the only limitation on waiver participant decision-making. DRW has encountered numerous HCBS waiver participants across the state who need and desire active and affirmative supports to get out more, and to work and participate in integrated community activities alongside individuals without disabilities. Unfortunately, we also have observed far too numerous interactions with HCBS provider staff that evinced a lack of respect, dignity, and support for individuals to make their own choices about everything from where they live and who they live with, to what and when they could eat or drink.

This transition plan should include proposed changes that will better equip the state to improve the level and quality of supports available to HCBS participants that promote full access to the benefits of the community. In Attachment 1, we have set forth comments along with suggested modifications to the December 11, 2014 draft plan which we believe could address some of the concerns we raise. We also identified state policies, rules, and statutes that we would recommend for further analysis, as well as the observations we have made over the past few years through our monitoring and outreach. While some of our comments make specific recommendations for proposed changes, others highlight the need for further assessment and consultation.

Proposed Changes for Supported Living and Supported Employment

Many of DRW's comments highlight observations that have been documented over the recent years in reports regarding HCBS services delivered through the Developmental Disabilities Administration (DDA). In 2012, DRW released *Too Little Too Late*, a report documenting

concerns about state oversight of supported living providers. The following year, DRW released *Empowering Choice*, a report of DRW's monitoring observations gathered during visits to supported living clients. A few months ago, DRW issued *Hours that Count*, a report about employment supports and prevocational services. We believe that these reports, which we are including as Attachments 2 , 3, and 4, should raise the state's awareness of the real limitations on choice and integration currently experienced by waiver participants.

We are very supportive of the state's plan to phase out prevocational services. As noted in *Hours that Count*, we strongly agree that prevocational services are not integrated and that the termination of funding for these services should be deliberately planned over the course of a few years. We firmly support this policy decision and commend the state for taking this important step. In addition, we hope that the state will consider incorporating a number of other recommendations from these reports, which we are highlighting in the comments submitted in Attachment 1.

Other Settings Recommended for Additional Review

For other settings where DRW has not monitored as extensively, we recommend the state more actively engage key stakeholders, such as the Long Term Care Ombudsman (LTCO) and HCBS recipients, as well as HCBS providers and case managers, to assess whether the settings need any regulatory, policy, or oversight changes to consistently ensure the required HCBS qualities.

For some settings that allow for large groupings of clients, we recommend a much more robust review. In reviewing the publication of the final rule, we read CMS's response to concerns about whether such places should or should not be considered to have HCBS qualities to emphasize the need for a targeted review of particular facilities:

"Given the variability within and between types of housing arrangements, CMS cannot determine simply by the type of group housing, whether it complies with HCBS characteristics. As a result, particular settings, beyond those specifically excluded in the regulation text, will not automatically be included or excluded, but rather will be evaluated using the heightened scrutiny approach described in the regulation."

79 FR 3013.

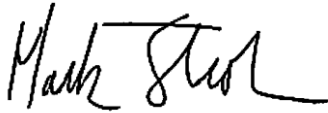
We were very pleased to note that the state reviewed facilities that are physically attached to institutional facilities as well as a facility identified by stakeholders. Considering the greater risk of having institutional qualities for larger group settings, we urge the state to conduct similar reviews for other facilities that group large numbers of clients together, as well as any facilities the LTCO would identify as having the "effect of isolating" individuals.

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If necessary, DRW would support a request for more time to ensure the state's assessment and transition plan is sufficiently rigorous. If you would like to meet to discuss these comments or recommendations, we would be pleased to set aside a time for this. You can reach DRW's Director of Legal Advocacy, David Carlson, at 206-324-1521, or davidc@dr-wa.org if you have questions or would like to schedule a conversation.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Stroh". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mark Stroh
Executive Director