

March 4, 2015

Nicholas Warner
Agency for Health Care Administration
Attention: HCBS Waivers
2727 Mahan Dr., MS #20
Tallahassee, FL 32308

delivered via email to: FLMedicaidWaivers@ahca.myflorida.com

Re: Comments on Florida's Draft Long Term Care Waiver Transition Plan

Dear Mr. Warner:

These comments are submitted on behalf of Florida Legal Services, Inc. (FLS) and Justice in Aging. FLS is a statewide public interest law firm representing low income Floridians on a broad range of poverty law issues, including access to health care. Justice in Aging (formerly the National Senior Citizens Law Center) is a national organization that uses the power of law to fight senior poverty including a focus on securing access to affordable health care.

General concerns—need for greater consumer involvement

The new Medicaid Home and Community Based Services (HCBS) regulations mark a sea change for HCBS settings. An adequate transition plan (“the plan”) must first take full account of how current HCB residents and consumers experience community inclusion and freedom of choice, in order to plan for the regulatory changes and implementation strategies needed for compliance with the new rules. ***The single best source of consumer experience is the consumer.*** Yet Florida’s draft transition plan fails to include consumers and consumer advocacy groups at the heart of this process.

We urge the agency to take a step back and implement new strategies for meaningfully engaging consumers in a process which truly gauges how well Florida’s HCBS settings are meeting the goals of community inclusion and freedom of choice. Specific processes for robust consumer involvement, including individual and group interviews and focus groups, must be included, as well as consumer self-assessment of their living arrangements and day programs. We recognize that the plan calls for “resident/recipient questions as appropriate.” (p. 3). We respectfully suggest, however, that resident/recipient questions are *always* appropriate and necessary. We ask that the agency work closely with consumers and consumer advocacy organizations to envision a new roadmap forward on developing and finalizing Florida’s HCBS transition plan.

The initial residential setting assessment is inadequate to determine whether settings are truly in compliance with the HCBS settings rule

It appears that the agency performed an initial August 25, 2014 assessment without stakeholder involvement or onsite validation. The plan states that the agency “analyzed the past year’s data” but says nothing more about how the analysis was conducted and we are not aware of any

stakeholder involvement. This is unacceptable. We are outraged that the state “assessed” less than a third of facilities (415 out of 1,763) and determined compliance based on what seems to be a paper review. Based on that assessment “the Agency does not anticipate that any of the residential facilities will be unable to meet the federal requirements.” (p. 3). It is premature and concerning that Florida's plan assumes *all* residential facilities will meet the federal requirements without the completion of a robust assessment, including strong avenues for consumer involvement as specified above. We do not accept the results of this assessment and we ask that the residential settings be reassessed with stakeholder involvement and onsite validation.

The plan fails to identify settings that isolate which must be subject to a heightened scrutiny analysis under the rule

Under the HCBS rule, settings with “the effect of isolating” individuals are presumed institutional and subject to heightened scrutiny. 42 C.F.R. 441.301(c)(5). The transition plan does not mention how settings that isolate will be identified or the process for undergoing heightened scrutiny. For instance, in some settings people have limited, if any, interaction with the broader community because of lack of access to transportation. In practice, this means that people have very limited access to the broader community, even though they may be technically allowed to leave at any time. The agency should prioritize individual assessments of programs and facilities that are identified as presumptively institutional. This will allow the agency to take speedy steps to come into compliance with the HCBS regulations. A plan for compliance must provide for opportunities for stakeholder input and must focus on participant experience and access to the community. This would include evaluating individual placement in such settings pursuant to the person-centered planning process, and making any appropriate adjustments toward increasing community integration. A robust process must incorporate elements including the individual’s wishes and goals, medical opinion, and a review of HCBS options.

The plan should include a process for consumers who may need to transition to different services

The plan specifies that the Agency will “develop a transition to relocate residents to a compliant facility.” (p. 4). First, consumers should be given non-facility options. Second, the agency must identify a timeline for developing a process to help consumers who may need to transition to different services. This timeline must coincide with provider review such that consumers are not losing service providers before a process is available to help them smoothly transition to new services or providers. The transition plan for HCBS must ensure stability for individual consumers and not decrease their community interaction.

The results of the residential setting assessment and other assessment processes must be transparent

The plan identifies the number of residential settings that have been determined compliant and non-compliant with the HCBS settings requirements, (p. 3), but gives no information on how the public can obtain facility specific information. The results of these facility assessments must be transparent so that stakeholders can give meaningful input into the plan. Specifically, we urge the agency to publicly post these facility specific assessments on their website.

The plan also references in Attachment I four parts to the "assessment plan": Waiver Assessment, Regulatory Assessment, Provider Assessment and Programmatic Preliminary Assessment. We urge the agency to make full copies of these assessments easily available to the public by posting them on their website.

The non-residential assessment tool should be developed with stakeholder input, and conducted by an independent third party

The Agency has not yet developed the non-residential assessment. (p. 4). Stakeholders must be involved in the development and implementation of the assessment process, including active and meaningful participation by consumers. As with the residential assessment, the assessment process for non-residential settings should be comprehensive. The on-site evaluation process is a critical component of a comprehensive assessment, and should not be administered only on a representative random sampling basis. This assessment process should be completed by an independent third party. If it is not completed by a third party, the process must include a system to verify the assessment tool and a sampling process that will test the veracity of the assessment process. Assessments must rely on information from participants and family members. Assessments that rely solely on providers will not be reliable. As the Illinois statewide transition plan recognizes, “[providers] may be inclined, for example, to give the response that they think will make them look good, rather than the one that accurately represents their situation.”¹ The assessments must focus on the experience of the residents/participants. Any independent sampling process must be driven by, and include, input from consumers and stakeholders.

Continued compliance must include a robust compliance system

The plan specifies that waiver case managers will ensure recipients do not receive services in non-compliant settings, but it does not include a process for consumers to submit complaints or concerns. (p. 4). The plan should include identification, revision, and creation of necessary policies and procedures to address monitoring and compliance during and after the transition period. Consumers must be able to submit complaints regarding settings, have those complaints investigated, and receive resolution of the issue where there is evidence of fundamental systemic or individual violations such as a lack of choice in roommates, access to food, schedules, visitors, or means of effective communication.

The plan needs a rigorous assessment of state rules and regulations that goes beyond a mere conflict check

Attachment II details that every relevant state regulatory requirement has “no conflict” with the federal rule and no remedial action is needed. (p. 9). This analysis is extremely thin and does not reflect the crucial changes that are needed to bring state regulations in line with the federal rule.

¹ Illinois Statewide Transition Plan to Comply with the Department of Health and Human Services Centers for Medicare and Medicaid (CMS) 2249-F and 2296-F Regarding Home and Community-Based Services (HCBS) Settings Rules in Illinois’ 1915c Waivers, 56 *available at* <http://www2.illinois.gov/hfs/SiteCollectionDocuments/TransitionPlanforCompliance.pdf>.

A more rigorous review is essential to identify not only whether there is conflict, but also areas where regulatory requirements should be amended to provide more robust protections consistent with the rule. (*See e.g.*, section below on lease and eviction protections.)

Additionally, the Agency should review provider policies, including enrollment and applications. All sources of standards for providers of HCBS must be evaluated for necessary changes to enforce compliance with HCBS standards. This would include administrative rules, policies, credentialing, licensing policies, required trainings, enrollment forms, compliance processes and reviews, and other provider resources. This identification process and subsequent changes should involve stakeholders.

The plan fails to ensure that consumers will have a choice of non-disability specific settings

The plan does not address how the state will ensure, as is required by the regulation, that individuals will have a choice of setting, including a non-disability specific setting. 42 CFR 441.301(c)(4)(ii). This information must be addressed in the transition plan before it is submitted to CMS.

We are aware of recent troubling cases where managed care plans are pushing enrollees into adult day care programs instead of providing a sufficient amount of companion or personal care in the enrollee's own home, in accordance with the enrollee's preferences to remain in a non-disability specific setting. Similarly, at least one managed care company is taking the position that personal care services cannot be provided to an enrollee outside of the home. It is unclear whether these are limitations specific to particular managed care companies or whether they reflect broader systemic problems with state policies. This is all the more reason why the critically important element of choice of a non-disability specific setting must be addressed in Florida's transition plan.

The plan fails to address lease and eviction protections for persons living in provider-owned or controlled residential settings

The HCBS rule requires that an individual receiving HCBS services in a provider owned or controlled residential setting must have protections from eviction which are at least comparable to consumer protections under state landlord tenant law. 42 C.F.R. 441.301(c)(4)(vi)(A). Florida's landlord tenant act does not apply "when residence or detention is incidental to the provision of medical, geriatric, . . . or similar services." § 83.42, Fla. Stat. Florida's statutory authority for assisted living and other community residential facilities does not provide for eviction protections comparable to those in the state landlord tenant act. (Chapter 83, Florida Statutes).

For years, FLS has heard about the dire circumstances residents of assisted living facilities and other community residential facilities face when they are involuntarily discharged from their homes without the due process protections afforded under the state landlord tenant act. In past years, Florida's Long Term Care Ombudsman has collected information about these problems and advocated for legislative changes to afford these residents more consumer protections.

Florida's transition plan completely fails to address this issue. In fact, it summarily and incorrectly asserts that there is no conflict with federal requirements. Before it is submitted to CMS, Florida's plan must include detailed strategies for implementing the lease and eviction protections for HCBS enrollees in all residential settings.

Conclusion

We strongly urge bringing consumers and consumer advocacy groups "to the table" for further dialogue with the Agency and input for improving Florida's draft transition plan before a final plan is developed and submitted to CMS. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anne Swerlick".

Anne Swerlick
Deputy Director of Advocacy
Florida Legal Services

Eric Carlson
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Justice in Aging

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