

## HCBS Final Rule – Public Workshop

Draft Transition Plan  
November 10, 2014  
9:00 – 11:00 am

Health Division, 4150 Technology Way, Room 303  
Carson City, NV

Video-Conference Locations:  
DHCFP Las Vegas District Office  
1210 S Valley View Blvd., Room 104  
Las Vegas, NV

DHCFP Elko District Office  
1010 Ruby Vista Dr., Room 103  
Elko, NV

Teleconference Access via 877-873-8018, Password 3362244

LESLIE BITTLESTON, [Division of Health Care Financing and Policy (DHCFP)]: Welcome to the Public Workshop on Home and Community Based Services (HCBS) Rule Changes. This is the third Public Workshop the State has held for this purpose.

The Centers for Medicare and Medicaid Services (CMS) has published this new rule establishing requirements for home and community based settings in Medicaid HCBS programs operated under the 1915(c) and 1915(i) which allows for reimbursement for services under the Medicaid program.

In essence, the rule creates a more outcome oriented home and community integrations, rather than a setting based solely on location and physical characteristics. The goal of this rule is to provide individuals who receive services under HCBS programs have access to community living and receive services in the most integrated setting which provides alternatives to institutions.

The final rule includes a provision requiring states offering HBCS services to develop a transition plan to ensure HCBS settings will meet the new requirements. For currently approved 1915(c) waivers and 1915(i) state plans, states must evaluate the settings currently available and determine if there are settings that do not meet the new rule and work with Providers and CMS to develop a plan to bring them into compliance.

Nevada has until March 17, 2015 to submit the transition plan to CMS for approval. CMS expects the transition to full compliance to be as brief as possible and that substantial progress is demonstrated during the transition period. However, States have a maximum of five years from the date the rule was published to achieve compliance. This final deadline is *Month 2019*.

The draft Transition Plan was posted to the DHCFP website on October 15<sup>th</sup> for a 30 day public comment period. This draft Plan is the result of work done by State Staff and various stakeholders. The work included:

- The communication of the new rule to stakeholders at various public meetings such as the Tribal Consultation Meeting, the Medicaid Advisory Council Meeting and the Nevada Commission on Aging.
- The creation of a Steering Committee to oversee the steps needed to develop the Transition Plan.
- The creation of a Regulatory Sub-Committee which reviewed various Nevada Revised Statutes (NRS) and Nevada Administrative Codes (NAC) for any conflicts between current regulations and the new rule.
- The development and distribution of two Provider self-assessment surveys.

Are there any comments or questions about the Draft Transition Plan as presented?

ROSEMARY MELARKEY, [Aging and Disability Services Division (ADSD)]: The Aging and Disability Services Division has submitted updated NAC language for Supported Living Arrangements (SLA). It has been approved and is in the final editorial process. We do not anticipate there will be any conflicts between the new NAC and CMS' New Rule. The Jobs and Day Training (JDT) regulations were changed in the NRS four years ago; the NAC for these organizations are currently being revised. The information on page 10 of the Draft Transition Plan regarding JDT is not the revised language. CMS has not created a tool for evaluating non-Residential settings such as JDT and Adult Day Health Care (ADHC), but has stated these settings must also be in compliance. Page 11 of the Draft Transition Plan states that there is potential conflict between State regulations and the concept of "aging in place," yet indicates that changes in Medicaid Service Manual (MSM) language will be used

to correct these conflicts. Some NAC changes will also be required and this statement should be added to that section.

GRADY TARBUTTON, [Washoe County Senior Services]: Regarding those individuals with cognitive issues who are not incompetent but who remain at risk for safety or exploitation, these factors should be taken into account.

BETSY AIELLO, [DHCFFP]: There has been a work group on Person Centered Planning (PCP) and training has been developed by the Regional Centers and has begun to be implemented. Training for PCP should be a part of the Implementation section of the Transition Plan.

LESLIE BITTLESTON: Training for PCP has been taken out of the Transition Plan because CMS expects States to be doing this already. Training has been scheduled for State staff, and will continue to be done using a “Train the Trainers” model so that as many people can be trained as quickly as possible, but this will not be a part of the formal Transition Plan submitted to CMS.

DANIEL MATHIS, [Nevada Health Care Association (NVHCA)]: I support the overall matrix of medical regulations on pages 11 and 12, but would stress that some changes to NRS may need to be made.

ED GUTHRIE, [Opportunity Village (OV)]: Page 3 identifies ADHC as a potential problem area if individuals receiving HCBS are isolated from the larger community even though the setting itself may not be isolated.

ROSIE MELARKEY: Many work centers meet the New Rule. We can re-word this section and we will review the Providers on an individual basis if there is any apprehension that the setting will not be in compliance. I have concerns about both ADHC and JDT and the risks to individuals who utilize these services.

ED GUTHRIE: We are considering creating a space that will combine ADHC services on one side with JDT on the other side and in between shared space for dance studios and other activities. Do you think this would meet the criteria? Or does this violate the requirement on page 7 that “a facility must not be operated in combination with any other medical facility or facility for the dependent unless it is licensed separately?”

BETSY AIELLO: We would like to have the specific scenario in writing so we can ask CMS. It has been my experience that CMS will not answer hypothetical questions, but will often make decisions about specific proposals. My first thought is that it is not a viable proposal unless the shared space was also available to the general populace. But, it also might be perfectly acceptable.

JEFFREY KLEIN, [Nevada Senior Services (NSS)]: I would like to echo Ed Guthrie regarding ADHC. I would also like to emphasize that timeliness is important. Between 2008 and now, 50 licenses were granted for ADHC sites; there are only 18 currently operating. ADHC licenses are pending. Before granting licenses, you should ensure they will meet the New Rule requirements. There is a disconnect between the New Rule and the Affordable Care Act (ACA) which encourages co-location.

BETSY AIELLO: Please write up scenarios as quickly as possible so we may present them to CMS. Also, licensure is not the same as Medicaid enrollment. Some Providers obtain licenses and have no desire to enroll in Medicaid.

ROSIE MELARKEY: We are working with several national organizations, both Providers and Advocates, to address many of these issues with CMS.

LESLIE BITTLESTON: The next section is titled the Transition Plan for Compliance. It includes 4 Phases: Phase I (March 2014 – October 2014) includes stakeholder communication, a comprehensive assessment of all residential and non-residential settings that fall under 1915(c) and 1915(i) services. This phase includes a review

and analysis of existing State regulations and policies, as well as industry practices, to determine areas that are in direct conflict with the new rules.

ROSIE MELARKEY: We should move the non-residential setting assessments to Phase II.

BETSY AIELLO: We should also include a review of every facility in Phase II. We need to create a single tool that can be used to evaluate the various types of settings.

MARK OLSON

Thank you for the opportunity to provide public comment on the HCBS Transition Plan for the State of Nevada.

I am here today in several capacities:

- Most importantly I am the only parent and legal guardian of my 19yo daughter Lindsay who has autism and likely will not be able to live completely. (*sic*) She is currently a client of the Desert Regional Center.
- I am President & CEO of LTO Ventures, a 501(c)(3) Nevada nonprofit corporation that develops live/work/play residential communities for adults with autism.
- I also am an advocate at state and federal levels on matters related to housing options for adults with autism, and co-founder of the Coalition for Community Choice, a national grassroots collaboration of persons with disabilities, families, providers, professionals, educators and legislators.

I want to first state that I believe that adults with disabilities have the human and civil right to live, work, play, socialize, recreate, learn, love, and worship in the setting and manner of their own choosing, and with the support of their parents, families, friends and caregivers.

I have been actively involved with the last 3 rounds of 1915 rule-making by CMS and authored a white paper on what the *Olmstead* decision meant for housing choice for persons with disabilities.

Five times over six years up to March 2014, CMS has engaged in rule-making efforts that have provided useful clarifications of certain issues encountered by the individuals served by the 1915 regulations, but each time also have included attempts by CMS to overreach the letter and spirit of the ADA and *Olmstead* and insert language that unnecessarily segregates specific types of residential settings from Medicaid eligibility. Five times through the public review process these attempts have been rejected by the very individuals served by these regulations and their families and caregivers.

The Final Rule, also known as CMS-2249-F and CMS-2296-F, issued on March 17, 2014, was as significant for what it did not include as for what it (*sic*) changes it did include. What the Final Rule did not include was specific settings types that would not be allowed. What it did include was an emphasis on outcomes and experiences. It also specifically identified the Person-Centered Plan as the single most important document guiding individual choice. For individuals served by these regulations and their families and caregivers this was a reasonable opportunity to educate and inform CMS and state agencies about how the waiver program should be implemented going forward.

That relief lasted 3 days. On March 20, 2014, Centers for Medicare & Medicaid Services (CMS) issued an Informational Bulletin (Bulletin) entitled "Home and Community-Based Service (HCBS) 1915(c) Waiver and 1915(i) State Plan Amendment (SPA) Settings' Requirements Compliance Toolkit". In this Bulletin, there is a two-page section entitled "Guidance on Settings That Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community."

In the Bulletin, CMS clearly seeks to continue litigating specific language rejected through the public review process.

I have four points I want to make about the Transition Plan draft proposed today.

### **Non-compliance with US Administrative Procedures Act**

The Coalition for Community Choice believes CMS has exceeded the scope of its authority with the Guidance,

and key elements of the Guideline exceed the scope of the Final Rule, and therefore are non-compliant with the US Administrative Procedures Act of 1946 and a violation of federal law and the Medicare Act.

To the extent that the State of Nevada develops and implements its HCBS Waiver Transition Plan and codifies waiver changes based on specific language in the Guidance that is not expressly contained in the Final Rule, the State may find any such policy and language subject to legal challenge. I propose here that the State adhere strictly to the language of the Final Rule and ignore the Informational Bulletin and Guidance to avoid any delays or complications with its waiver programs now or in the future.

### **State Must Seek Out and Include Input from its Most Important Stakeholders - Recipients**

I am deeply concerned, as the only parent and legal guardian of an adult Nevada resident with disabilities who presently is a client of services through the regional center and may one day require supports and services paid for through this waiver, that the State seems to have forgotten who its most important customer is.

On p. 1 of the Transition Plan document, DHCFF states that it held “two public workshops in which all members of the public were invited to learn about the new regulations and provide comments.” On p. 13, it states “the turnout was excellent and comprised a mix of providers, recipients, regulators, advocates, and state staff.” A review of the sign in sheets from both those meetings tells a different story. It shows 106 total attendees with considerable duplication of attendees between the two workshops. All the attendees, with one or two possible exceptions (it is not clear from the sign in sheets) are state agency and provider representatives.

The fact that this is the third workshop on this issue and DHCFF still has virtually no recipient input from waiver funding recipients and/or their parents and family members is unacceptable. Moreover, it fails to fulfill CMS’ directive that “States will describe their process for receiving public input and ensure that it is sufficient to provide meaningful opportunities for input from individuals served or who are eligible to be served, based on the scope of the proposed changes.”

While DHCFF may feel it has fulfilled its statutory obligation to provide notice to the public under Nevada Open Meeting law, I find it entirely unacceptable to hide behind that pathetic public notice practice for input on programs concerning the funding safety net for thousands of Nevadans with disabilities. A three-business-day advance notice posted in 19 libraries and two government buildings that would require persons to travel to those locations every day to check bulletin boards is an unacceptable burden.

Further, the DHCFF website where the agenda and plan draft was posted requires a greater than average knowledge of website navigation to find them, and again places the burden on recipients and their families to check this website daily for notices that provide only 3 business day advance notification.

Even in the Transition Plan draft 2 we are commenting on today, the State and DHCFF fail to provide for sufficient recipient and prospective recipient input. On p. 17, the Action Item “Recipient Education and Notification” is completely inadequate. The Plan states “recipients are crucial in providing information on the services they receive, so a random sample of recipients will be selected...”

The Plan should provide a process for nothing less than outreach to 100% of current and eligible recipients of waiver-funded services and DHCFF and the State should set a goal of 100% feedback as it did with the provider Self Assessment Surveys.

Therefore, I propose that DHCFF and the State do the following:

1. DHCFF take no action on the Transition Plan until it can demonstrate that it has reached 100% of Nevadans presently served by the waivers, and 100% of Nevadans currently eligible to be served by the waivers, with information in plain language that:
  - a. Informs them through which waiver they receive funding or are eligible to receive funding
  - b. Describes what changes are being evaluated because of the Final Rule
  - c. Explains what the Final Rule is
  - d. Explains what the changes could mean to them
  - e. Invites them to provide public input including what actions they should take if they want to provide public input and exactly how they can do it

- f. Informs them how to be put on a list to get all future notices in a way that does not require them to go to a library or government building
2. Deliver the notices via US Mail and through their case managers
3. Deliver the notices to all current Regional Center clients 18+ because they may become eligible for waiver-funded services in the next five years and these proposed changes

### **Must Emphasize the Central Role of Person-Centered Planning**

CMS states in the Q&A about the Final Rule: "The expectations set forth in this final rule emphasize that individuals are most knowledgeable about their services needs and the optimal manner in which services are delivered."

Nothing in the Nevada Transition Plan or the changes Nevada proposes to its waivers should interfere with the person-centered plan of any recipient taking precedent over all other considerations, and must make it a matter of policy to honor those person-centered plans without unduly influencing recipients to a particular conclusion

Moreover, DHCPS must make it a priority to:

- Inform and educate current and future recipients and their parents and families about exactly what a person-centered plan is and how to create one
- Explain the basis in CMS regulations for person-centered plans and their authority in the waiver-funded services process
- Provide resources about how to create an optimal person-centered plan and a list of private vendors who can help these individuals prepare proper person-centered plans

### **Definition Must be as Broad as Possible and Reflect the Progressive and Independent Nature of Nevada**

CMS states "We expect states electing to provide benefits under section 1915(k), 1915(i), and/or 1915(c) to include a definition of home and community-based setting..."

In the Olmstead decision, the court used the terms "home" seven times and "community" 80 times, but never defined those terms. The Supreme Court did not define those terms because it intended individuals served by those terms to decide for themselves what home and community mean to them.

Sally Burton-Hoyle, one the nation's most respected authorities on person-centered planning says "community is defined by the individual."

We know that the setting is not the issue. It is the design and management of those settings that is the key. Individual experiences and outcomes can be just as successful in large, well-designed settings as they can in individual homes and apartments, and conversely we know that outcomes and experiences can be just as undesirable in individual homes and apartments as in larger settings. In fact, this is supported by data from research documented in the National Core Indicators that indicates that individuals in congregate settings report feeling lonely less than those in other settings.

Therefore, I encourage the State of Nevada to adhere to the specific language of the Final Rule and avoid including any specific setting types in any definitions or Plan language and to adhere strictly to the language in the Final Rule.

ED GUTHRIE: On page 18, in the sections regarding NAC and MSM revisions, will there be provisions for Public Comment?

LESLIE BITTLESTON: Yes, all changes to MSM require Public Hearings.

BETSY AIELLO: There are Public Hearings scheduled every month throughout the year, and 30-day notice of agenda items are required.

MARK OLSON: My daughter has a case manager who makes monthly contacts. This could be a way to communicate with recipients.

COLLEEN LARKS [United Cerebral Palsy of Nevada (UCPNV)]: May I have a copy of Mark Olson's statement?

LESLIE BITTLESTON: We will post all Public Comments to the website.

BARRY GOLD [American Association of Retired Persons Nevada (AARP Nevada)]:

My name is Barry Gold and I am the Director of Government Relations for AARP Nevada. AARP Nevada is a nonprofit, nonpartisan organization, with a membership of more than 300,000 in the state, working to help Nevadans 50+ live life to the fullest and ensure that all Nevadans have independence and choice as they age.

AARP appreciates the opportunity to review and comment on Nevada's Draft HCBS Transition Plan and we recognize the efforts of the Division of Health Care Financing and Policy in putting this plan together in such a short timeframe. The new HCBS rules hold great promise for improving the Medicaid HCBS system in Nevada and giving consumers and their families more choice and control over the services that enable them to live in their homes and communities. Nevada's transition plan puts forward a solid outline of how Nevada plans to come into compliance with the new HCBS rule, but there are a number of areas where we believe the state can further strengthen the plan or add more detail so that the plan can function as intended and protect consumers of HCBS.

Overall, the plan seems to rely primarily on self-assessment from the providers in determining compliance. Information from providers is crucial, but consumer input should be a stronger influence here. Although there is mention of a recipient survey (p.17), it's not clear how the results will inform the determinations of compliance. Underscoring the need for additional consumer input is the provider self-assessment survey itself (Appendix A), in which providers are surveyed about certain things that are really only answerable by the clients. For example:

- Is the client free from coercion? (Question 14)
- If the client has concerns, is she comfortable discussing them? (Question 15)
- Do clients know how to relocate and request new housing? (Question 42)

These are important questions, but a provider's response is only one side of the story. The state should pull in all of the tools and sources of information it can to make these determinations. We note that Iowa's proposed transition plan, for example, plans to use provider-submitted data, consumer survey data from the Iowa Participant Experience Survey, and information gathered by state case managers and the Department of Inspections and Appeals. Although taking a more comprehensive approach in determining compliance is not an easy task, it better capitalizes on this opportunity to review and improve Nevada's HCBS system.

In addition, there are a number of areas in the plan that were unclear in our review, or that we believe would benefit from additional detail:

- We understand that half of the 1915(c) self-assessment surveys were not completed and returned, so the state is re-sending them with additional explanations and hoping for a better response rate. Will the state release the results and analysis once additional responses are received?
- The plan identifies certain problem areas based on survey responses and in-person assessments. For example, the plan notes that sheltered workshops or work centers and provider owned and/or controlled day settings as currently operated, are presumed to be settings that isolate individuals receiving HCBS from the broader community. Does the state plan on working with these providers to bring them into compliance, or instead contesting this issue with CMS and trying to overcome this presumption of non-compliance?

- Will on-site assessments (p.17) be conducted for all providers or just those that did not complete a self-assessment survey? We note the state's intent to visit 50% of all providers by June 2015, but when will the others get visited?
- The provider compliance monitoring (p. 19) seems to focus primarily on the initial task of getting providers into compliance but does not address ongoing enforcement. We believe the plan should better describe the state's capacity and plan to evaluate compliance on an ongoing basis, even for those providers initially determined compliant.
- The description of plans and protections for individuals who must be transitioned to settings that meet HCBS requirements (p.20) needs more detail. The state should more fully describe the proper notice and due process, the choices offered to the individual, the content of the person-centered planning process, and the protections to ensure that there is no break in services.

Thank you for this opportunity to comment on the state's Draft HCBS Transition Plan. We look forward to working with the state to ensure that these rules are implemented and monitored in a way that continues to shape our HCBS system for the better.

JEFFREY KLEIN: Better connections with consumers and the public can be achieved. Some examples are:

- Using the ADSD Resource Center listservs
- Nevada Lifespan Respite Centers
- Engagement through Bureau of Health Care Quality and Compliance (HCQC) Advisory Councils
- ADSD grantees who are Community Partners could host public meetings at their facilities to get recipient participation

BETSY AIELLO: Would a newsletter or flyer mailed to recipients be a good tool?

JEFFREY KLEIN: I think the best answer is "all of the above." Do everything you can think of to reach recipients and families. A newsletter could work if it is simple and direct.

SARINA GUSKY [Humboldt Human Development Services (HHDS)]: The Rurals have not been included. Families, guardians and recipients do not understand either PCP or the New Rules. Education about what PCP is and does is necessary for all participants.

BETSY AIELLO: We agree that we need to be working on PCP – and we are. But CMS has told us not to include it in the Transition Plan.

MARK OLSON: The second section on page 17 outlines Recipient Education and Notification. You must know where your recipients are to send them letters and surveys. Newsletters are not a good vehicle. My daughter's case manager is not very effective, but she does contact her on a regular basis. The Coalition for Community Choice has been working with Ralph Lawlor at CMS. We are being told that CMS is pushing the decision making regarding the New Rule to the States.

ED GUTHRIE: We have Public Meeting Facilities. We would be happy to coordinate and/or host a meeting. Of the population we serve, 50% are on HCBS Waivers; the rest are either private pay or general fund paid. All potential recipients should be notified, not just those currently receiving Medicaid funded services. The Clark County School District has approximately 400 children who may need HCBS graduating every year. They and their families should be notified of the potential impact.

BETSY AIELLO: It is not that services to recipients will be disallowed, but that certain Providers may not meet requirements and may not be able to receive Medicaid payments. Regarding CMS stating that it is not up to them to make the decisions, the Transition Plan and the decisions the State makes must be approved by CMS.

MARK OLSON: Some of the Transition Plan is general.

BETSY AIELLO: The Plan is a work in progress.

ED GUTHRIE: As I understand it, the purpose of the New Rule is that those receiving HCBS have the same access to services and the community as other individuals. If that is true, then by default, Medicaid recipients at day programs meet that definition since they only make up about 15% of that population.

BETSY AIELLO: I am not as concerned with ADHC. CMS has stated they will allow senior living environments. I am concerned about sheltered workshop settings and adult disability communities.

JEFFERY KLEIN: What about PACE? If any program is at risk they are.

BETSY AIELLO: PACE is a managed care plan for the elderly CMS has approved. The funding for all of their services is under the Managed Care authority and not through HCBS.

LESLIE BITTLESTON: The document as posted on the internet and made available here at this meeting is a Draft. We are requesting your input and specific language to make it more understandable as well as to better meet the needs of Providers and Recipients in Nevada. Please email any further questions or comments to [HCBS@dncfp.nv.gov](mailto:HCBS@dncfp.nv.gov).