

State Transition Plans for New Medicaid HCBS Regulations: Four Tips for Consumer Advocates

States now are beginning to release their transition plans to bring their Medicaid HCBS systems into compliance with the new federal regulations on community-based settings. It is essential that consumers and their representatives be prepared to evaluate those plans and advocate for improvements.

Tip #1: Don't Confuse a Work Plan with a Transition Plan.

Federal law requires each state to submit a transition plan that “sets forth the actions the State will take to bring the specific waiver into compliance with” the new regulations. As a CMS official has confirmed, this means that a transition plan must include the substance of how a state’s HCBS programs will change.

Currently, several states — including Iowa, Pennsylvania, and Wyoming, — have submitted “transition plans” that, in whole or in part, are work plans rather than substantive transition plans. In these states, in general, the state is putting out these work plans for a 30-day comment period and giving the impression in many cases that this comment period will satisfy the federal law’s public comment requirement.

On a recent webinar, a CMS official confirmed that any comment period for a transition work plan, or for an interim transition plan, does not lessen a state’s obligation to solicit and accept public comment on a final substantive transition plan. Following this reasoning, Kansas has developed a transition plan that is clearly labeled as a “draft,” and that seems to recognize that the state will consider additional public comment before submitting the final transition plan to CMS. The transition plan for Florida similarly identifies itself as “preliminary,” referencing a fuller transition plan to “be developed and noticed at a later date.” North Dakota also explicitly references this distinction, seeking comment on a “provisional” transition plan with the explanation that a “statewide Transition Plan that applies to all North Dakota 1915(c) waivers will be released for public comment and submitted to CMS at a later date.”

The bottom line is that the public comment rules require an opportunity to comment on the substance of a state’s plans. Advocates and other stakeholders should take advantage of opportunities to comment on work plans or interim transition plans, while being clear that they must be able to comment on the final substantive transition plan and would like to work closely with the state through the entire process.

Tip #2: Don't Accept a State's Unsupported Claims of Compliance

Several states have claimed, with little or no evidence, that significant portions of their programs already are in compliance with the new federal regulations. Oregon, for example, has made an "initial determination that services authorized in four of the State's Medicaid 1915(c) waivers for individuals with Developmental/Intellectual Disabilities are community-based and have the qualities described" in the new federal regulations. Admittedly, Oregon (and all other states) are waiting on CMS guidance on the application of the federal regulations to non-residential settings, but the absence of that guidance does not excuse the state's broad, unsupported conclusion that its programs comply with the new regulations.

Similar problems are seen in other states' plans. According to Pennsylvania's plan, the state "has determined that all services offered in these three waivers [Aging, Attendant Care, and Independence waivers] comply with the new federal rule." In Florida, an assumption of compliance is not stated explicitly, but is implied by the state's work plan. First, the state has stated that it intends to complete its analysis of waiver weaknesses by August 2014, which provides very little time to examine the settings in which waiver recipients currently live. Second, the state has listed its intended amendments to seven separate HCBS waivers, and for each waiver the suggested amendments are very limited.

Advocates should demand a more thorough evaluation of a state's existing HCBS programs. The new HCBS regulations are wide-ranging, requiring among other things that a setting support consumers' full access to the greater community, and optimize individual autonomy and independence. As a practical matter, states and stakeholders will require both time and careful thought to ensure that a system is in compliance. A state should not immediately be assuming compliance: making such assumptions will short-circuit important conversations, which in turn will limit the opportunity to improve the system.

Tip #3: Don't Accept Inordinate Reliance on Providers' Self-Reported Data

Most states do not know how current HCBS settings comply, or fail to comply, with the new HCBS regulations. This presents a problem for states, both for developing a transition plan and, in the future, for monitoring a setting's compliance.

To gather data, in many cases, a state's path of least resistance may be surveying service providers, but relying on such data creates problems. First, service providers are not objective, because they generally will benefit from a determination of compliance. Second, service providers are not necessarily in a good position to make judgments about whether and how a consumer has access to the community and can exercise rights.

Kansas, for example, is surveying all providers that own, operate or control settings; the survey results "will provide the basis for identifying settings in compliance with the rule, settings requiring heightening scrutiny, and settings no longer qualifying for HCBS." For a broad range

of requirements, the survey asks the provider to indicate whether the setting “completely meets expectations,” “partially meets expectations,” or “doesn’t meet expectations,” or whether the requirement is not applicable. The requirements include many items that, as a practical matter, likely are not knowable by the provider. For example, the provider is asked whether the consumer “expresses satisfaction with services being received,” or whether the consumer “is comfortable discussing concerns with provider.”

Other states, to their credit, will utilize additional tools, according to their work plans. Iowa, for example, along with provider-submitted data, also will consider survey data gathered from consumers through the Iowa Participant Experience Survey, and information gathered by state case managers and the Department of Inspections and Appeals. Wyoming similarly will survey, a limited number of providers and consumers, and review individual settings. And, it should be noted, the Kansas draft transition plan calls for the state to use additional tools in future assessments: “attestations, policy and record review, beneficiary and provider interviews, observations, and other tools.”

It is too early to say whether the plans of Kansas, Iowa, and Wyoming are sufficient. But it is assuredly *not* too early to say that a state should not rely inordinately on self-reported data from providers. Both in evaluating settings now, and in evaluating compliance in the future, the state and stakeholders deserve more reliable and insightful data.

Tip #4: Compliance Should Not Be Seen as a One-Time Event

In Kansas¹ and other states, transition plans focus heavily on settings coming into compliance, with the implicit assumption that once a setting comes into compliance, it always will be compliant. This assumption should be rejected.

Compliance in many cases depends upon the actions or inaction of service providers. As a result, a setting might be compliant in one month and become noncompliant in a subsequent month. Also, a setting may violate regulatory standards in various ways on an on-going basis.

In order to properly protect consumers, a state’s HCBS system should have the capacity to evaluate compliance on an on-going basis — for example, to investigate complaints and require remedies when individual consumers are being injured. Thus, transition plans must provide for meaningful ongoing enforcement, and should not be exclusively focused on initial determinations of compliance.

¹ Kansas is discussed several times in this alert because its transition plan is more detailed than most, and thus illustrates multiple issues.