



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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**MEMORANDUM**

DATE: August 28, 2015

TO: Mr. Stephen Groff, Director  
Division of Medicaid & Medical Assistance

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: DMMA Statewide Transition Plan for Compliance with Home and Community-  
Based Setting Rule

I write on behalf of the State Council for Persons with Disabilities (SCPD) after review of the latest version of the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) *Statewide Transition Plan (Plan) for Compliance with Home and Community-Based Setting Rule*. The Plan was provided as a General Notice at page 144 in the August 1, 2015 Register of Regulations. SCPD previously commented on a proposed version of the Plan in the attached March 6, 2015 letter (minus attachments).

As you know, July 26, 2016 was the 25<sup>th</sup> Anniversary of American's with Disabilities Act (ADA). The ADA assures that equality, accessibility, reasonable accommodations and community integration are civil rights for people with disabilities. Title II's "Most Integrated Setting Mandate" was upheld in the 1999 Supreme Court decision - *Olmstead v. Lois Curtis and Elaine Wilson*. The CMS final rule 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 is "right in line" with assuring those civil rights for all people with disabilities. SCPD wants to ensure that these positive aspects are included in Delaware's Plan.

The General Notice in the Register of Regulations is confusing. The Transition Plan Update (page 144 of the Register of Regulations) states the following:

- The Department of Health and Social Services (DHSS) is updating the Delaware Statewide Transition Plan (the Plan) to reflect the current status of implementation activities as of July 2015. We direct you to new sections "July 2015 Updates to Delaware

Developmental Disabilities Services (DDDS) Waiver Assessment and Remediation Plan” and “July 2015 Updates to Diamond State Health Plan (DSHP) Demonstration and Remediation Plan” for new information since publication of the Plan in March 2015. We have updated the matrices on pages 17 and 33 to note, when appropriate revised tasks, dates and completion status. Moving forward, we plan to update the Plan as needed to reflect the status of implementation activities as they occur.

However, the following link provided in the Register of Regulations:

[http://dhss.delaware.gov/dhss/dmma/hcbs\\_trans\\_plan.html](http://dhss.delaware.gov/dhss/dmma/hcbs_trans_plan.html) provides a 139 page “updated” Plan in which changes are not prominently noted. It is very hard to determine if DMMA is soliciting comments on the entire Plan or just the aforementioned sections of the Plan which actually appear to start on pages 17 and 33 of the Plan, respectively. Given this uncertainty, please consider SCPDs following observations to be non-exhaustive.

First, we are pleased the State is committed to full compliance by 2019 and has a strong and ongoing engagement of stakeholders. However, consistent with previous comment, SCPD recommends that it be added to the list on the “oversight body”.

Second, DMMA’s responses to public comment regarding potential changes to address gaps in the Plan or possible non-compliance with the rule are very general with little substance or specifics regarding potential remedies and timelines.

Third, the “Governor’s Commission on Community Based Alternatives for Individuals with Disabilities (GCCBAID)” is listed as a key stakeholder in various aspects of the Plan. SCPD does not believe that, to date, the Governor’s Commission has actively participated in any aspects of the Plan. For example, page 43 of the Plan states DMMA launched a pilot of provider surveys on July 7 to test the validity of the surveys. The Plan also states that “(i)n order to ensure broad stakeholder engagement and feedback in the survey development process, the cross agency oversight body and GCCBAID are also providing review of the provider surveys and participant surveys.” The intent is to enable DMMA to make modifications to the provider and member surveys prior to statewide distribution which is targeted for Sep 1, 2015. SCPD is an active participant at Commission meetings and is unaware of this pilot process. Finally, page 29 of the Plan indicates DMMA will work with MCOs to design a survey instrument for MCOs to use to assess their own policies, procedures, agreements, etc. which is to be reviewed by the GCCBAID and others by July 2015. To date, SCPD is unaware of such a survey instrument.

Fourth, the “plan” contains numerous contradictions regarding which group or groups will be involved in the “look behinds” of provider self-assessments. In addition, SCPD participated in subcommittees of the Governor’s Advisory Council to DDDS to develop the *State of Delaware Provider Self-Assessment HCBS Residential Services* and the *Delaware HCBS Day Services Recommended Compliance Assessment*. These documents are critical to the overall Plan and should be included as attachments for public comment.

Fifth, CMS requires, consistent with the Landlord-Tenant Code, signed lease agreements between group homes and their tenants which appears not to have been addressed.

Sixth, SCPD is still unclear why the only “Stakeholder Resource” for the following action items at page 36 is the Delaware Healthcare Facilities Association (DHFA):

- Identify HUD Homes and any financial or other terms that impact compliance; and
- Conduct review of Delaware landlord/tenant code vis-a-vis the Rule.

Council agrees that the DHSS Housing Coordinator and Delaware State Housing Authority (DSHA) should be included as “State Resources”. However, it makes no sense to include DHFA, which represents providers of nursing facilities and institutions, as a stakeholder since those facilities certainly do not qualify as HCBS under the new CMS Rule. The SCPD/Governor’s Commission Housing Committee and or CLASIs Fair Housing Program are more appropriate Stakeholder Resources.

Seventh, page 22 of the Plan notes that DDDS identified settings that are presumed not to be community based on 4/30/2015. Identifying residences that are on the grounds of institutions such as Stockley is not difficult; however, identifying settings that otherwise “isolate people with disabilities from the greater community” may require more scrutiny. SCPD recommends that the settings which have been identified to date be listed, as well as the methods used to identify such settings.

Finally, SCPD supports the Plan’s “Response” on page 59 that states “(w)e are committed to developing a robust process, including standards” which appears to demonstrate that the State wholeheartedly embraces the underlying values in the CMS guidance. As Delaware moves forward in its efforts to comply with the CMS Rule, SCPD encourages the State to strictly follow the Olmstead guidance on integrated v. segregated settings and the CMS guidance on settings that have the effect of isolating individuals receiving HCBS from the broader community. An integrated, inclusive, broader community for all people with disabilities, regardless of diagnosis, is the only direction which the state should pursue, as segregation is not an option and separate is never equal.

Thank you for your consideration.



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**MEMORANDUM**

DATE: March 6, 2015

TO: Ms. Sharon L. Summers, DMMA  
Planning & Policy Development Unit

FROM: Daniese McMullin-Powell, <sup>DM-P/ps</sup> Chairperson  
State Council for Persons with Disabilities

RE: DMMA Proposed Statewide Transition Plan for Home and Community-Based Services (HCBS) Settings [18 DE Reg. 681 (3/1/15)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) proposed Statewide Transition Plan (Plan) for Home and Community-Based Services (HCBS) Settings. The Plan was published for review and comment as 18 DE Reg. 681 in the March 1, 2015 issue of the Register of Regulations.

The Plan is required to comply with the Centers for Medicare and Medicaid Services (CMS) final rule 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. SCPD endorses the enclosed February 10<sup>th</sup> and February 23<sup>rd</sup> letters regarding the Plan submitted by the Disabilities Law Program and the attached comments provided by the SCPD Chairperson at the February 23<sup>rd</sup> Public Hearing. In addition, SCPD has the following additional observations and concerns.

First, the State has committed to strong and ongoing engagement of stakeholders. In addition to taking and incorporating public comment into the creation of the Statewide Transition Plan (p.39-42), the plan specifically incorporates stakeholder groups, the Governor's Advisory Council (for the 1915(c) Waiver) and the Governor's Commission on Building Access to Community Based Services, as a steering committee for the implementation of the rule. However, consistent with the DLP commentary, SCPD recommends that it be added to the list on p. 8 and p. 31 regarding the "oversight body". SCPD staff noted its willingness to collaborate with the Governor's Commission regarding this issue at the Commission's recent February 20<sup>th</sup> meeting. These stakeholder groups will help develop assessment instruments and protocols

(p.10, 25). The state will continue to seek stakeholder input throughout implementation (p.7). The plan recognizes that it provides only “high level” review and that “[m]oving forward, the specific approach and details surrounding each program will be further defined and will reflect the input and guidance of the particular program's stakeholders.” (p. 7)

Second, the Plan uses multiple sources of information to assess compliance with the rule. In addition to using provider self-assessments (which will require documentation by providers, such as from written policies and training curricula), the state will also utilize NCI data (which includes participant interviews) as part of the analysis of settings in the DDDS 1915(c) Waiver and will incorporate feedback from participants receiving care. A sub-work group of the Governor’s Advisory Council will conduct “look behind” review of a sample of provider self-assessments to validate for the DDDS 1915(c) Waiver (p.12). In addition, if a provider self-assessment is normal, but NCI data raises concerns, the DDDS 1915(c) setting will be selected for a “look behind review” even if it was not part of the selected sample (p.13).

Third, the time line the state has established seems very extended. The time line estimates that remediation strategies will not be implemented until February and May of 2017, leaving barely two years for the actual implementation, including the relocation of any individuals from settings that prove unable to come into compliance. SCPD urges Delaware to move more quickly and give the HCBS service system more time to reach compliance by 2019.

Fourth, the Plan does not discuss a relocation process for individuals who are being provided services in settings that cannot come into compliance with the regulations. This is an important process to establish early.

Fifth, the Plan does not appear to verify compliance through on-site visits. It is unclear from the Plan if the look-behind reviews of a 20 percent sample of settings will include on-site visits as part of the assessment process, for either the 1915(c) Waiver or DSHP (SCPD assumes that DSHP will follow the 1915(c) Waiver plan and conduct look-behinds of a 20 percent sample but the plan should clarify this). On-site visits are an important part aspect of any analysis of setting compliance, and SCPD encourages the State to include conducting on-site visits of settings in this look-behind review.

Sixth, there is no discussion of how Delaware will ensure that individuals have a choice of “non-disability specific” setting and private units. The HCBS Rule requires that individuals receiving HCBS services have the choice of a non-disability specific setting (i.e., settings that are not comprised only or primarily of people with disabilities) and of a private room in residential settings. The Plan does not discuss how Delaware will ensure that individuals have that choice. This is a fundamentally important part of the rule and people cannot be offered that choice if there is not capacity. Delaware must evaluate its current capacity of non-disability specific settings and develop a plan to increase capacity as needed to fulfill this requirement. The lack of capacity of non-disability specific settings is particularly acute for non-residential services, where the majority of the state’s current settings are disability-specific.

Seventh, SCPD is unclear why the only stakeholder for the following action items at p. 32 is the Delaware Healthcare Facilities Association:

- Identify HUD Homes and any financial or other terms that impact compliance; and
- Conduct review of Delaware landlord/tenant code vis-a-vis the Rule.

At a minimum, the SCPD/Governor's Commission Housing Committee should be included as a stakeholder.

Ninth, there are multiple references to the "Governor's Commission on Community Based Alternatives for Individuals with Disabilities". The actual reference should be the "Governor's Commission on Building Access to Community Based Services".

Finally, as Delaware moves forward in its efforts to comply with the CMS Rule, SCPD encourages the State to strictly follow the Olmstead guidance on integrated v. segregated settings and the CMS guidance on settings that have the effect of isolating individuals receiving HCBS from the broader community (both attached). SCPD looks forward to collaborating with the State to implement the requirements of the CMS Rule, in which we believe the spirit is to create real community options for people with disabilities. In addition, during this time of transition, SCPD believes that the spirit of the Rule is not to "leave people on the streets", but to ensure smooth transitions for people with disabilities, families, providers and the State.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the Plan.

cc: Ms. Rita Landgraf  
Mr. Stephen Groff  
Ms. Jane Gallivan  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

P&L/18reg681 dmma-HCBS transition plan