

Disability Rights Nebraska

Protection and Advocacy for People with Disabilities

Public Comment on State Transition Plan for Home and Community-Based Service waivers

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Disability Rights Nebraska provides the following comments on the proposed State Transition Plan to implement the Settings Requirement for Home and Community-Based Services (HCBS) Waivers.

Overall, the portion of the plan dedicated to spelling out the process and implementation of Continuous Improvement and Ongoing Monitoring could be clearer, more specific, and expanded. The portion of the 49-page narrative dedicated to monitoring and actions to ensure compliance totals 2.5 pages. Within those 2.5 pages there is a significant lack of specificity regarding activities that will occur. For example, at the Provider level (page 46), the plan states that the two compliance strategies are “Ongoing licensing inspections and certification reviews” and “Ongoing HCBS setting compliance monitoring”. However, the plan should specify the frequency of “ongoing” (e.g., twice a year, quarterly, or monthly). The plan also needs to specify what types of inspection activities will be employed in “compliance monitoring”. We would suggest that the compliance monitoring activities need to be more involved than a simple records review or email/phone calls to providers—to be sure that parties are working consistent with the HCBS rules there must be more intensive examination such as on-site reviews so that inspectors can probe and accurately assess the extent to which providers are compliant, especially given the nature of many of the provider non-compliance issues identified earlier in the report. Additionally, there is no discussion about what happens when a compliant provider might slip and become non-compliant or how the State will help providers return to compliance.

We urge the state to work with providers to ensure that the provider non-compliance issues identified in the report are fixed before March 2022. We note some particularly concerning non-compliance issues identified in the report:

- one site did not have a policy requiring the individual and/or representative grant informed consent prior to the use of restraints or restrictive interventions and document these in the person-centered plan
- six sites did not provide or post individual rights
- three sites did not support individuals engaging in age-appropriate activities
- three sites did not support individuals engaging in age-appropriate activities such as voting
- one site did not allow individuals the freedom to move about inside and outside the setting
- four sites were not physically accessible and/or there were no adaptations to ameliorate the obstructions
- five sites did not afford a variety of meaningful activities that are responsive to the wants/needs of the individuals and/or the physical environment did not support a variety of individuals goals and needs
- two sites did not afford the individuals the opportunity to choose with whom to do activities and/or individuals were assigned to only be with a certain group
- forty-seven sites did not allow for the filing of an anonymous complaint
- two sites did not assure that information about participants was kept private
- three sites did not have a process to ensure that each individual's supports and plans to address identified needs are specific to the individual and/or not restrictive to all individuals receiving support in the setting

We believe that the March 2022 timeframe is too lax for these and other issues. First, the nature of some of the issues is of grave concern and should not be allowed to continue for another month, let alone another 2-3 years. Second, the nature of many of the provider non-compliance issues seem to require tweaks of existing process and/or policy and as such should not require a lengthy timeframe; yet the providers are granted until March 2022 to come into compliance for all issues identified. We recognize that it may take some time to make some changes, such as changing a building's physical, structural, or physical accessibility. However, we are not convinced that it should take 3 years to post/educate individuals about their individual rights, allow them to exercise their voting rights, have policies in place requiring consent before using restraints,

provide supports and activities that are either specific to the individual or age-appropriate, or provide the residents with leases. Third, the number of providers that need to make modifications so they come into compliance is relatively small. We fail to understand why 3 years should be allowed for 29 sites to allow individuals to close and lock the bathroom door, one site to allow an individual access to his/her financial assets, 81 sites to provide a locking bedroom door, or 58 sites to offer a secure place to store belongings. Yet for **every** remediation required by providers, the plan gives them until March 2022.

Page 45 of the report states that “Providers must be in full compliance with the regulations by September 17, 2021”. The time period between September 17, 2021 and March 2022 is a period so that the Medicaid and the Developmental Disability Divisions “will have adequate time to provide notification of the requirement to relocate. This will give individuals ample time and opportunities to learn about the variety of compliant settings, disability and non-disability specific, that are available.” But the list of identified compliance issues providers are currently experiencing (see pages 39-41) says **compliance** by March 2022 for each issue—not notification. Furthermore, language on page 45 of the proposed transition plan says that Medicaid agreements for non-compliant providers will be terminated no later than March 17, 2022 — six months after providers should have been fully compliant (inferring that there is six further months of non-compliant services delivery, such as non-lockable bathroom doors or the freedom from restraints).

Moreover, given the severity of some of the identified non-compliance issues, a simple desk record review or checking items off a check list will be insufficient. For example, how does an investigator know if and how well providers are sticking to the person-centered plans, or if people have been adequately informed of their rights? Just because there is a policy about consent before use of restraints, how will the state know that the plan is being followed? The proposed State Transition Plan must include more on-site visits and interviews to be included as a central, key component of compliance monitoring.

Which poses another overarching question: how did these issues arise and continue in the first place? This begs for an even more robust, intensive, frequent, and consistent compliance monitoring system and process than what was in place.

We also suggest that the language be changed regarding follow up to complaints about violations of NAC 404 violations. Given the serious issues that are covered by NAC 404 (especially in Chapter 4), we do not believe that follow-up on-site visits should be permissive. We recommend changing the language in the State Transition Plan to read (see page 47):

“On-site visits ~~may~~ shall be conducted for follow up to complaints against providers regarding potential violation of Nebraska Administrative Code 404 rules. Further follow-up activities, in addition to the required on-site visits shall include but not be limited to ~~Follow-up may be conducted through~~ additional on-site visits, document reviews, telephone, and/or email”.

If there is a situation or compliance check that can be performed through means other than a site visit, these should be spelled out specifically in the transition plan.

The HCBS rules require that in all settings, “the setting is selected by the individual from options that include non-disability specific settings and options for privacy in residential settings (i.e. a private room or unit.) Individuals must have choice of providers, services, and settings and that choice must be documented in a person-centered plan” (see page 17 of the State Transition Plan). We recommend that there be stronger language on page 32 to ensure accurate reflection of this HCBS rule. We suggest the following language:

“Individuals ~~should~~ shall be afforded the opportunity to select from non-disability specific settings and select roommates if applicable.”

Thank you for the opportunity to comment on the proposed State Transition Plan for HCBS waiver implementation. If there are any questions or comments on our input, we would be happy to discuss any of our comments further.

Sincerely,

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