



February 16, 2016

STAFF VIA ELECTRONIC MAIL

Jennifer R. Clarke  
*Executive Director*  
Caitlin Palmer  
Department of Human Services  
Office of the Secretary  
P.O. Box 2675  
Harrisburg, PA 17105-2675

Michael Churchill  
*Of Counsel*

RE: Comments on Pennsylvania’s HCBS CMS Final Rule Statewide Transition Plan

Julie Foster  
*Fellow*

Dear Ms. Palmer:

Benjamin D. Geffen  
*Staff Attorney*

This letter is sent on behalf of the Public Interest Law Center in formal response to ODP’s notice of request for comments on Pennsylvania’s HCBS Final Rule Statewide Transition Plan. We appreciate the opportunity to comment, again, on what is needed in this plan to come into compliance with the HCBS Final Regulations 42 CFR Part 441, and to dramatically improve services provided to Pennsylvanians with disabilities. As you know, the Public Interest Law Center has advocated for many years to assist Pennsylvanians with disabilities to live and work in the community.

Sonja D. Kerr  
*Director, Disabilities Rights Project*

Edwin D. Wolf  
*Executive Director*  
1974-1976

As a global comment, we are deeply concerned that Pennsylvania has stated that it has not identified a single regulation, policy bulletin or service definition that does not comply with the CMS Final Rule. The Pennsylvania system as a whole does not comply with the *Olmstead* desegregation mandate. ODP itself has found at least some noncompliance under 441.301(c)(4)(i)-(v), as described in Appendix I. For example, “There are currently no regulations or requirements that prohibit home and community-based settings from being located in a nursing facility, institution for mental disease, ICF/ID or hospital.” Appendix B Consolidated Waiver Transition Plan, at 3. To the contrary, Chapter 2380 specifically contemplates services be provided in such settings: “This chapter applies to adult training facilities operated on the grounds of or in a community residential rehabilitation mental health facility or a community home . . . [and] to adult training facilities operated on the grounds of or in a non-State operated intermediate care facility for the mentally retarded, unless it is medically necessary or in the individual’s best interest to remain at home.” 55 Pa. Code § 2380.2. Pennsylvania has already identified at least 169 providers operating in presumptively unallowable settings through its initial surveys.

Moreover, numerous service definitions *require* that prevocational and licensed day habilitation be provided in a licensed facility-based setting that isolates people with disabilities from the broader community. For example, the Pennsylvania Code defines an individual eligible for sheltered workshops as “an adult with disabilities . . . who has developmental needs which require assistance to meet personal needs and to perform basic daily activities.” 55 Pa. Code § 2380.3. This law limits who may be

served in licensed facilities to people with disabilities and their paid staff. CMS explicitly states the hallmarks of settings that isolate include settings specifically designed for people with disabilities and settings comprised primarily of people with disabilities and paid staff.

Pennsylvania regulations do not require a determination that a person cannot be served in the community before approving and providing services in segregated settings. Pennsylvania has not even promulgated guidance on what constitutes an integrated environment and a segregated setting. The result is that providers of services such as segregated adult day programs and sheltered workshops believe they can continue business as usual; some have stated a walk around the block, or a trip to McDonald's provides sufficient opportunity to engage in the community as people not on the Medicaid HCBS Waiver.

1. Now is the time to articulate what constitutes an integrated setting. ODP continues to procrastinate more than two years after the promulgation of the Final Rule, promising to "develop[e] further guidance on the topic of 'isolated settings'" at some unspecified time in the future. Appendix J. Yet under Appendix B, the Consolidated Waiver Transition Plan states that Pennsylvania will "Draft home and community based characteristics policy" by July 2015. The Consolidated Plan states this policy was to be published in December, 2015, and cites it at the guidepost to "[a]ssess whether there are any waiver providers that have the effect of isolating individuals per home community based characteristics policy." Yet, the Statewide Transition Plan makes no mention of any policy or guidance on what settings segregate people with disabilities and instead relies on revised waiver service definitions. We cannot have an acceptable transition plan without first defining the goal of the transition.

2. Pennsylvania cites new Chapter 6100 regulations as a panacea of change. These regulations do not require providers to change how they conduct business to provide services in the community. Individuals do not have a right to choose nondisabled people as roommates, or to come and go as they please. Indeed, an adult in a day program can be required to attend 5 days a week, or risk "losing their place." Incredibly, Chapter 6100 regulations as currently drafted allow segregated sheltered workshops to continue without limitation, and explicitly allows *more* segregated sheltered workshops to open in the future. There is no mandate to improve access to community-based services, or even a definition of what community-based means.

Finally, Chapter 6100 contains some concerning regulations. For example, § 6100.223. Content of the PSP requires a Person-Centered Support Plan to include "opportunities for new or continued community participation." All services should be provide in the community. That is the purpose of the Home and *Community* Based Services Waiver program. The Law Center will comment on the proposed Chapter 6100 regulations when they are published, but the regulations illustrate Pennsylvania's tepid approach to "compliance" without fundamentally changing how services are provided to give participants full access to the community to the same extent as a person not receiving HCBS waiver services.

3. The Plan does not articulate any significant change. In fact, Pennsylvania's FAQ on the Final Rule suggests that Pennsylvania does not want to make any changes to services, but risks

losing federal funding if it does not comply. The result is a plan entirely based on “compliance” without actually defining how modern services in Pennsylvania will support people with disabilities to live and work in the community.

4. The Consolidated Wavier Transition Plan repeatedly states that all individuals on the Waiver can be approved for supported employment services, which are provided in community settings. This does not address how all of the other day habilitation and prevocational services will be provided in a community setting. The “ODP Bulletin 00-03-05, Principles for the Mental Retardation System that put an emphasis on choice, contributing to the community and integration” falls well short of the CMS *mandate* that HCBS services be provided in an integrated setting. Instead, this reference to the one integrated day service available in Pennsylvania highlights the system’s overreliance on segregated facility-based services.

5. ODP’s provider compliance plan does not meet CMS requirements. First, Pennsylvania never defines when services are provided in integrated settings. As we have repeatedly recommended, an integrated setting should reflect the ratio of people with disabilities in the general community: no more than 20% of people with disabilities, excluding paid staff.

#### a. Assessment

Provider surveys are a good start to identify allowable settings. Unfortunately, the surveys ODP and OLTL asked providers to complete failed to request information essential to capturing the isolating effects of a setting. CMS has instructed states that settings that are designed to serve people with disabilities, where multiple services are provided, or where individuals in a setting are primarily people with disabilities and paid staff tend to isolate. Pennsylvania must start with these questions, and should follow with all of the exploratory questions provided by CMS to assess whether a setting has the effect of isolating people with disabilities. For example, the OLTL provider survey failed to ask essential questions such as whether participants can choose their own roommates. Both the OLTL and ODP surveys failed to ask about work, even though the Final Rule explicitly refers to competitive integrated employment as a touchstone of community integration. It is surprising that, despite Pennsylvania’s focus on compliance as a goal, it has not used these resources provided by CMS to support states in assessing compliance.

In addition, the questions that were posed were inadequate to capture an individuals’ experiences in the program. For example, ODP asked providers a yes or no question: “Does your setting encourage participants’ interaction with the general public?” Unsurprisingly 97% of ID waiver providers responded “yes.”<sup>1</sup> ODP failed to ask how many times members of the general public interact with participants, for how long, and whether these interactions result in lasting relationships. These are the qualities that demonstrate whether a person is in fact isolated or accessing the community as a person who is not receiving HCBS Waiver services.

The Plan has no provision for consumers, their families, self-advocates, service coordinators, administrative entities, and other providers to report services in settings that tend to isolate. CMS recommends states engage individuals receiving services, consumer advocacy

---

<sup>1</sup> ODP’s survey results did not reveal the descriptive response sought on how a program encourages community interaction.

entities and supports coordinators to evaluate settings. Self-reporting is limited by self interest. While ODP may have limited resources to audit each and every provider, ODP should use the individuals and organizations who regularly interact with the providers as a resource. We urge ODP to adopt a peer and consumer assessment system to more accurately capture settings that have the effects of institutionalization and to monitor completion of corrective action.

#### b. Monitoring

Pennsylvania's 2015 Revised Transition Plan proposed to use provider survey responses to prioritize enforcement action and to schedule on-site monitoring visits. This step was supposed to have been completed by June 2015. Instead, Pennsylvania has decided to only *review* 50% of the providers in the state. The CMS Final Rule mandates all services comply with integration requirements, not 50% of services in the state. This leaves providers to self-report compliance without accountability.

ODP should implement two components of OLTL's plan. First, engage recipients and families, supports coordinators, AEs and other providers in assessing settings and ongoing monitoring. Second, use site visits to validate survey results.

ODP already has survey results showing some HCBS services are provided in presumptively unallowable settings such as nursing homes and intermediate care facilities. Yet the plan states no action will be taken until another assessment is completed two years later, in the fall of 2017. Under this Plan, ODP will not identify any settings that are presumed to have institutional qualities until after it has received and analyzed the additional survey results, and conducted onsite monitoring. In contrast, OLTL has already begun on-site monitoring visits of providers to validate survey results and identify noncompliant settings. ODP's process will not be completed until the summer of 2018. This is far too long a timeline to meet the March 2019 compliance deadline. Pennsylvania has already obtained some information regarding presumptively unallowable settings and must take action while it continues to identify other settings that have the effect of isolating individuals with disabilities.

#### c. Enforcement

The Transition Plan says very little about transition itself. First, ODP must articulate to what Pennsylvania will transition. Transitioning to "compliance" is an empty goal that does not give providers, participants and families any direction on what their lives will look like in five years. We need to know where we are going before we can plan on how to get there.

Second, the Plan does not explain how current services will be relocated, redesigned and re-imagined to truly support individuals in the community. ODP's plan leaps from identifying "noncompliance" to publishing a list of unapproved providers. Paperwork alone cannot remedy the more significant problems that will require providers to move locations or transition from facility-based services to community-based services. This kind of corrective action will surely require more than 30 days.

Third, the Transition Plan fails to identify what constitutes corrective action. CMS explicitly requires state plans to include "a detailed description of the remedial actions the state will use to assure compliance . . ." CMS instructs states to include actions and associated time

frames for remediation in the Statewide Transition Plan. ODP has not articulated any remediation actions noncompliant providers will be expected to take. Indeed, ODP's provider monitoring plan does not even require all providers to submit documentation demonstrating corrective action was taken. Rather, the Plan merely states such actions will be determined at a later, unspecified, time.

The OLTL outlines a much more extensive monitoring and technical assistance process, including on-site follow up monitoring to ensure the steps in the corrective action plan were implemented. HCBS Waiver participants, their families, advocates, Administrative Entities and supports coordinators should also be part of this process. They work with the providers every day and understand how services are in fact being delivered. These individuals and entities are an important resource to expand ODP's monitoring and enforcement capacity without requiring additional personnel. Indeed, OLTL has already developed a Participant Review Tool for service coordinators to conduct face to face interviews with participants to assess provider compliance.

#### d. Provider cessation of services

ODP's Plan engages supports coordinators to communicate and identify alternative services to individuals served by a provider that cannot or will not become compliant. This is an excellent idea, as supports coordinators help individuals navigate services. ODP should also consider providing supports coordinators with technical assistance and training on identifying new service providers and communicating changes in providers to participants and families.

#### 6. Outreach and Engagement

The Plan provides for outreach to providers and stakeholders but not directly to recipients and families. While recipients and families may be stakeholders--OPD does not define the term--it is essential that ODP communicate clearly to the people who rely on its services what changes will happen and how they will be impacted. Individuals receiving Waiver services and their families are concerned, and ODP has not directly communicated with them about what will happen in the next three years. For example, OPD has stated it does not intend to shut down sheltered workshops, but has not said what it is going to do. This highlights the imperative to decisively define what settings Pennsylvania will consider home and community based. ODP must use the Administrative Entities to communicate directly with recipients on its implementation of the HCBS Final Rule.

#### 7. Data Collection and Training

The Consolidated and PF/DS Waiver Transition Plans commit to collecting employment data on the type of job, wages, benefits and length of employment. This is an essential first step to assess progress, and we applaud Pennsylvania's commitment to develop and implement this data collection system.

The technical support for supports coordinators and providers is another key step to increasing the number of Pennsylvanians with disabilities who can access competitive integrated employment opportunities. We praise ODP for engaging the SELN to provide technical support and training for supports coordinators, ODP staff, OVR counselors, employment providers and transition coordinators. Equally important is the Plans' commitment to use the Office of Disability Employment Policy's Employment First State Leadership Mentoring Program to

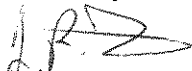
provide support to providers transitioning from facility-based services to focus on competitive integrated employment. However, Pennsylvania must mandate such training. The February SELN webinar training for supports coordinators had fewer than 50 participants from the entire country. This shows that without requirements to attend training, few employees complete it.

This section of the Consolidated Waiver Transition Plan is successful because it articulates a goal beyond compliance. This section of the plan specifies action, defines the resources and audience, and articulates a goal to increase competitive integrated employment. The entire Statewide Transition Plan should emulate this example.

## CONCLUSION

The state of this draft Transition Plan is deeply troubling, given that CMS has already rejected Pennsylvania's plan twice. Advocates have repeatedly exhorted ODP to issue guidance and definitions of "integrated setting." ODP has failed to define the most fundamental terms of the Final Rule. Without declaring what the goals are, there can be no plan to achieve those goals. It appears that ODP's only goal is to avoid losing federal funding by failing to comply with the CMS final rule. ODP must start from the beginning and articulate what it is that Pennsylvania hopes to achieve through this Plan.

Sincerely,



Julie Foster

Attorney

Public Interest Law Center

1709 Benjamin Franklin Parkway, Second Floor

Philadelphia, PA 19103

Phone: 267.546.1313

Fax: 215.627.3183

[jfoster@pubintl.org](mailto:jfoster@pubintl.org)