

New York State OPWDD Home and Community Based Settings Transition Plan Response to Public Comments

On May 3, 2014, OPWDD posted for public comment a description of the comprehensive Home and Community Based Services (HCBS) waiver renewal application which highlighted key changes to the application that will take effect October 1, 2014. The posting also described OPWDD's HCBS Settings Transition Plan as required by CMS's recently adopted rules that contain standards for home and community based settings and that require the State to submit a transition plan at the time of an HCBS waiver renewal. This transition plan is required to set forth the actions the State will take to bring the waiver into compliance with the regulatory standards. The OPWDD notice of public comment was distributed broadly and available on OPWDD's website for 30 days prior to OPWDD's submittal of the waiver application and transition plan to CMS. During the official comment period, OPWDD received five transmissions related to the HCBS Settings Transition Plan through 27 pages that outlined respondent concerns, issues and advice to OPWDD.

The document is organized by the topic areas raised by our respondents and OPWDD initial responses to these concerns received during this initial comment period. However, OPWDD will continue to accept input, comments and feedback related to the HCBS Settings Transition and Implementation Plan as transition and implementation planning moves forward. Additional written comments, input and feedback can be provided to OPWDD at any time through the following email address: quality@opwdd.ny.gov. Please include "HCBS Settings" in the subject line to expedite transmission to the appropriate OPWDD staff.

Stakeholder Involvement:

Several respondents advised that OPWDD should bring stakeholders into the process as early as possible and that recognizing that there are short time frames, OPWDD should utilize the Regulatory Reform Stakeholder subgroup that met last year to give OPWDD advice on the ADM submitted to CMS and to assist in planning and development of the OPWDD Transition Plan. It was also advised that OPWDD should assess work group composition to ensure that it is comprehensive and representative of all stakeholder groups.

A respondent advised that it is critical that providers are part of the States development of data element identification for necessary performance data and that the field knows what is being used in the development of any report cards; the process must involve provider representatives that understand the functions being monitored.

OPWDD agrees regarding transparency and full stakeholder involvement in transition planning and is reconvening the Regulatory Reform Stakeholder subgroup to provide additional advice and input relative to integrating the final CMS regulations into OPWDD's Draft ADM and to provide advice to OPWDD on its preliminary Transition Plan. OPWDD plans to reconvene this work group in mid July 2014 and will reassess the group to ensure full representation of all stakeholder groups.

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OPWDD also plans to post meeting summaries and materials to a new OPWDD HCBS Settings Transition Plan and Toolkit Webpage for full transparency and to invite ongoing stakeholder input and feedback which can also be submitted through the e-mail address quality@opwdd.ny.gov.

General Considerations

Several respondents feel that definitions of community integration and community settings may require transitions for individuals receiving services and that OPWDD must be open to allowing those in programs/services /settings that might not be deemed acceptable for new placements to be allowed to continue in their current program/setting if that is the person's choice. Presentation of options is all that should be required and that individual choice must be respected and honored.

It was noted by one respondent that while OPWDD has written requirements in place that address many of the topics of the final CMS regulations, these existing requirements are often not effectively enforced and that more "boots on the ground" are needed as well as modifications to staffing patterns and monitoring procedures.

It was noted that with respect to housing options, OPWDD has relied primarily on the preferences of residential subcontractors to determine availability of various housing options and that as a result, supportive apartments and other less restrictive housing, while readily available in some parts of the state are extremely scarce in others. This respondent advises OPWDD to remedy these disparities through addressing the financial disincentives inherent in supportive housing, family care, and smaller group homes; providing substantial technical assistance to providers; and requiring group home providers to offer other alternatives; and by other means.

All respondents stated that the final CMS HCBS settings regulations may have potential to have major implications on providers and cannot become another unfunded mandate on the part of the State and Federal governments. These respondents further noted that the regulations may result in the need for additional funding to ensure full compliance such as necessary settings modifications or relocations and that the State or Federal government should fund this.

Through OPWDD's transition plan, OPWDD intends to develop an HCBS Settings Assessment Tool based upon the final CMS regulations and CMS Exploratory Questions, to assess the level of adherence to the new HCBS regulations in order to provide baseline data in which to identify the major challenges and issues that the system will need to address for full compliance with the new rules. The information learned through administration of the HCBS Assessment Tool will be used by OPWDD to update its initial transition plan to CMS and to address any systemic issues identified.

Draft Administrative Memorandum Version 7, November 2013 and State Regulations

Several respondents advise that OPWDD should ultimately issue proposed State regulations in lieu of an ADM as these changes are too important and substantial to be issued through an ADM. A respondent stated that

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while CMS has issued some guidance, the regulatory language contains unequivocal statements that are not echoed in OPWDD's Draft ADM. This respondent further states that the regulatory language is a clear prescription while OPWDD's ADM uses softer language such as "encourage" and "try" and while the ADM references that serious consequences will result from non-compliance, OPWDD has always made such assertions but has not held providers accountable for these types of practices. It was further noted that the final regulations make clear that "to the same degree of access" is not the same as "in the same manner" and that OPWDD will need to ensure its ADM and implementation reflects this important principle and that HCBS services themselves do not get in the way of a person being able to engage in the community anywhere at any time.

OPWDD agrees that it needs to update its draft ADM to take into account the final HCBS regulations and that it will ultimately need to hold providers fully accountable for these requirements. OPWDD also agrees that New York State regulations must be developed and will do so after we have assessed our service system for baseline information on compliance; issued an ADM to the field based upon the final regulations; once NYS's overarching transition plan is finalized, and after CMS has issued all of its promised additional guidance. This strategy will ensure that OPWDD's regulations can take into account all requirements and guidelines as well as enable OPWDD to identify the areas that will need the most regulatory interpretation and review.

Person Centered Planning

Several respondents advise that OPWDD will need to be very clear about the role of Medicaid Service Coordination (MSC)/Service Coordinator with reference to the requirements in the final HCBS settings regulations. It was also noted that the regulations regarding conflict free case management would require a restructuring of OPWDD's service system. It was stated by at least one respondent that while OPWDD guidance documents require that individuals be empowered to direct their planning process and to choose who attends/participants in planning meetings, staff may not always respect and support these individual choices. It was also noted that real person centered planning takes a great deal of time and that the typical MSC caseload does not allow sufficient time to do person centered planning properly.

OPWDD agrees that there is a need to be clear about roles and responsibilities as we move forward with transition planning and implementation and to guard against potential conflicts of interest in the person centered planning and service delivery process. OPWDD's transition to a managed care infrastructure through DISCO's will enable OPWDD to fully address these regulatory provisions. In the meantime, OPWDD's existing Medicaid Service Coordination protocols review for conflicts of interest between the service coordination/person centered planning function and the service delivery function and OPWDD requires that there be separate reporting hierarchies and individual choice of service providers and evidence of such during these review processes.

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Certified Residential Settings

All provider affiliated respondents noted that in order for residential service providers to offer roommate choice and other personal choices in certified settings and for housing opportunities to be maximized, OPWDD must reexamine its existing processes for filling residential vacancies, including prioritization and referrals, to allow both prospective individuals and individuals who live in the homes to fully participate in decision making on roommates/housemates in order to comply with the CMS regulations.

A respondent advises OPWDD that the new regulations do not allow for a blanket prohibition on overnight visitors and that OPWDD must provide clarity on this point.

It was stated that group homes often are unable to support people to have individualized choice and control of their schedules due to staff shortages and other reasons. The respondent states that support for the person to control their own schedule is a condition for continued qualification as an allowable HCBS setting. This respondent also feels that it is not unusual for individual access to visitors, food, privacy, telephones and intimate relationships to be restricted based upon blanket facility rules. The respondent advises OPWDD to increase its staffing ratios at homes to meet CMS requirements for individualized choice and control of schedules, to significantly increase monitoring by means of unannounced visits and interviews with individuals, and to spell out in clear terms that non-compliance is impermissible.

OPWDD agrees that the federal rules require that people have freedom to control schedules and activities and that providers support the person to do so. Providers must be flexible to allow people to remain in their home on days when they do not want to attend other services, or are not able to do so because of an illness. If a person is not satisfied with their supports, the person, his or her service coordinator and advocates should review the ISP and assess whether alternate services would be preferred. OPWDD is working to promote self-direction, which would give individuals the opportunity and flexibility to pursue possible options that would increase the likelihood they would want to participate in activities in their community. The federal regulations are clear that people need to be fully engaged and at the center of the planning process for home and community based services. OPWDD also agrees that any blanket facility policies that restrict individual rights will not be permissible.

As OPWDD goes forward with the multi-year planning process for this transition we will assess our operational policies and practices, including vacancy management in certified residences from the perspective of both individuals looking for residential opportunities and individuals already residing in the residence where a vacancy occurs, to ensure that the rights established in the HCBS Waiver Settings Final Rules are addressed.

Health and Safety, Rights, and Rights Modifications

One respondent expressed concerns about the right of “access to food at any time”. It was noted that while the Draft ADM addresses issues of safety consideration, it does not address the issue of health concerns such

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as obesity and other related health concerns and that guidance in regard to selection of appropriate foods, portion size, and frequency of consumption are paramount to maintaining good health. The respondent recommends perhaps inserting language around these topics in guidance documents and power points.

Another respondent advises OPWDD to say that no modifications of the qualities/conditions for provider controlled/operated housing be permitted unless and until less intrusive and more positive efforts to address the need have been attempted in good faith, over a period of time sufficient to demonstrate their likelihood of success, and have failed after good faith effort to correct causes of failure without modifying relevant conditions, in which case such efforts must be documented. This respondent advises OPWDD that considerable attention will need to be devoted to ensure that providers are retrained to understand that safety does not trump individual rights to autonomy, freedom of choice and action and that “minimize” does not mean eliminate.

One respondent notes that they are pleased with OPWDD’s approach to statements of health and safety considerations being addressed in the context of the person’s interests and preferences and are not to be considered the absolute priority to limit a person’s access to community life or personal resources. This respondent further states that CMS has now formalized this requirement through its regulations specifying very narrow circumstances upon which access to community life to the same degree of access as others can be limited.

OPWDD agrees that there are circumstances where ‘modifications’ to a person’s rights are necessary for health and safety reasons but should not be imposed without following the process and requirements outlined including trying positive approaches first. The rules further specify that any modifications to these rights must be addressed in the person centered plan, and that the person is fully engaged in the development of the plan. The modifications must be specific, tied to a particular need, time-limited and routinely evaluated to ensure the continued need for the limitation. The service planning process should continually explore options that assist the person to gain the skills needed to have full expression of these rights. Limits cannot be placed on a person’s rights without the person being engaged in decision making, and restrictions must be addressed in the person centered planning process on an on-going basis with the desired outcome of the person living with optimum independence and full access to community life.