



COMMONWEALTH OF VIRGINIA
Virginia Board for People with Disabilities

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April 4, 2016

TO: Teri Morgan
Department of Medical Assistance Services (DMAS)
HCBSComments@dmass.virginia.gov

FROM: Heidi L. Lawyer

A handwritten signature in blue ink, appearing to read "Heidi L. Lawyer".

RE: Comment on the Commonwealth of Virginia REVISED Statewide Transition Plan for Compliance with the Home and Community Based Services (HCBS) Final Regulation's Settings Requirements.

Dear Ms. Morgan:

I am writing on behalf of the Virginia Board for People with Disabilities (the Board) to comment on Virginia's Revised Statewide Transition Plan (Revised STP). The Board appreciates this opportunity to comment on this important matter. The final Home- and Community-Based Services (HCBS) settings requirements emphasize choice, independence, self-determination, and community integration and these are values that have long guided the work of the Board and other advocates in Virginia and around the country. We are excited to work with the Department of Behavioral Health and Developmental Services (DBHDS) and the Department of Medical Assistance Services (DMAS) to ensure not only that Virginia complies with the letter of the HCBS settings requirements, but that it achieves their ultimate purpose and vision.

The Revised STP contains a number of important provisions. The Board especially supports the involvement of stakeholders in the Commonwealth's compliance and monitoring process; the inclusion of provider capacity goals in the STP; the Commonwealth's efforts to solicit stakeholder feedback via a dedicated "My Life, My Community" email address; and the expanded detail in the Commonwealth's plan to relocate individuals from noncompliant settings. The Board believes that the recommendations offered below will make Virginia's STP even stronger and help ensure that the Commonwealth achieves the purpose of the HCBS settings regulations. Our comments are organized according to the requests for additional

information contained in the Centers for Medicare and Medicaid Services' (CMS') August 20, 2015 letter to the Commonwealth.

Summary of Recommendations:

1. Provide additional detail within the STP about how the Commonwealth determined that all services provided in an individual's own home or apartment or the home of an individual's family member necessarily comply with the HCBS settings rule;
2. Include services provided in an individual's own home or apartment or in the home of an individual's family member in the Commonwealth's ongoing compliance monitoring activities;
3. Reevaluate the Commonwealth's conclusions about the compliance status of Adult Day Health Centers (ADHC's) and ensure that these settings are included in the Commonwealth's ongoing monitoring activities;
4. Clarify apparent discrepancies in the Commonwealth's provider self-assessment data;
5. Provide information in the STP about the percentage of providers in Virginia represented in the self-assessment data, and the percentage of all sites in Virginia represented by the DBHDS licensing staff site assessment data.
6. Provide information in the STP about the training that DBHDS licensing staff received prior to completing site assessments, including the number of hours and the content of the training that they received;
7. Present provider self-assessment data and DBHDS licensing staff assessment data in a manner that allows for comparisons between the two, including comparisons between corresponding assessments when both self-assessments and licensing staff assessments are available for the same providers;
8. Disaggregate data in order to allow for comparisons between types of settings, such as day support versus residential settings, and comparisons between different sized residential settings;
9. Designate a single responsible party with the authority and responsibility to receive complaints and reports of noncompliance, promptly investigate alleged violations, and remedy violations that occur with prompt corrective action;
10. Allow individuals and families to directly submit HCBS-related complaints directly to the responsible party;
11. Conduct ongoing assessment and monitoring activities in an open and transparent manner, making data about the Commonwealth's progress towards compliance available and accessible to the public;
12. Require remediation plans from all noncompliant settings that include milestones and a reasonable timeline for achieving full compliance;
13. Require newly enrolled providers to demonstrate compliance prior to enrollment beginning immediately;
14. Include additional provider capacity development strategies in the STP and address which of the existing planned activities are intended to address provider capacity;

15. Update the STP to clarify whether the planned Institute for Community Inclusion is still a planned activity despite the failure of budget language related to this Institute.

Systemic Assessment:

CMS Requested additional information about how determinations about whether or not classes of settings necessarily comply with the requirements of the final regulations.

The Board applauds the Commonwealth for its work to identify state regulations that bear on various settings' compliance with the HCBS final regulations, and to crosswalk those state regulations to specific elements of the HCBS final regulations. We are concerned, however, about some of the broad generalizations made by the Commonwealth about the compliance status of some settings.

The Commonwealth has determined that services provided in an individual's own home or apartment and services provided in the home of a family member are necessarily compliant with HCBS regulations. Each such setting, according to the Revised STP:

- Is integrated in and supports full access to the greater community;
- Is selected by the individual;
- Ensures an individual's right to privacy, dignity, respect and freedom from coercion and restraint;
- Optimizes individual initiative, autonomy and independence; and
- Facilitates individual's choice regarding services and supports and who provides them.

These broad conclusions are not supported by evidence in the STP; and the Board is concerned that there may be some circumstances where not all of these conclusions hold true. **We encourage the Commonwealth to provide additional details within the Revised STP about how it came to these conclusions. We also recommend that the Commonwealth include these settings in its ongoing assessment and monitoring activities** to ensure that services provided in these settings are and remain compliant with the settings regulations.

The Commonwealth also determined that Adult Day Health Centers (ADHCs) comply with the HCBS settings regulations. ADHC settings offer, according to the plan:

- Freedom of choice of service provider;
- Reasonable accommodations of individuals [sic] needs and preferences;
- Assistance with community access as needed and desired;
- The provider to protect and promote the rights of each individual [sic]; and that,

- Services and supplies are provided in the same quality and in the same mode of delivery as are provided to the general public.

The Commonwealth came to these conclusions based on a review of state regulations that apply to ADHCs. The Board appreciates the thorough review of these regulations and the crosswalk provided in Appendix A of the STP between the relevant state regulations and the corresponding HCBS regulations. **We encourage the Commonwealth to look more closely at the actual practices of ADHCs as part of its ongoing assessment and monitoring activities to ensure that the interpretation and application of state regulations at these facilities is truly consistent with HCBS settings regulations.** The Board notes that while these settings are designed primarily to serve elderly populations, many young adults with disabilities are served in these settings as well. It is imperative that these individuals have meaningful opportunities for full community engagement.

Site-specific assessment:

CMS requested more detailed information about the outcomes of Virginia's site-specific assessment activities, including information about how the state determined that the provider samples from which it acquired information are statistically significant.

The Board recognizes the value of the detailed information provided by the Commonwealth about its site-specific assessment activities in the Revised STP, especially the inclusion of samples of providers' narrative responses to survey questions. The Board believes, however, that the Commonwealth could vastly improve the usefulness of provider compliance data by clarifying some **apparent discrepancies in the data** and presenting the data in a manner that allows for **comparisons between provider self-assessments and assessments conducted by DBHDS Licensing Staff**. The Board also encourages the Commonwealth to **provide information about the training that DBHDS Licensing Staff received prior to conducting site assessments**.

There are several apparent discrepancies in the Self-Assessment data contained in the Revised STP. The plan states, for instance that 321 surveys were initially received from providers, with an additional 84 received in recent months. The percentages provided in Figure 2.1, however, are consistent with a survey response total of 316 surveys. Additionally, the total numbers of surveys received from providers of each type of service are not consistent between Figure 2.1 and Table 2.1. Some, but not all of these discrepancies may be accounted for by the inclusion of incomplete surveys in some of the data and excluding them from other data. **These apparent discrepancies should be either explained or corrected in the Revised STP.**

The Revised STP provides ambiguous information about the total number of self-assessments included in the data, and it does not provide sufficient information to determine the sufficiency of the sample size of the DBHDS Licensing Staff site visits. The plan states that incomplete surveys are excluded from the self-assessment data, but it does not indicate how many of the

received surveys were incomplete. In addition to its ambiguity, the data are at times contradictory as to the total number of results included within. Additionally, while the total number of site visits conducted by DBHDS licensing staff is cited in the STP (217), the percentage of total sites within the state that this number represents is not cited. This information is necessary to determine the sufficiency of the sample sizes used to gather this data. **The Board recommends citing the percentage of providers in Virginia represented in the self-assessment data and the percentage of all sites in Virginia included in the DBHDS licensing staff site visits.**

Having copies of the identical checklists that were distributed to providers for self-assessment (Appendix B.3) and to DBHDS licensing staff for use during site visits (Appendix B.4) was helpful. The use of identical checklists for these purposes allows for comparison of the data obtained from providers and the data obtained from licensing staff. **Such comparison is essential to drawing meaningful conclusions about the accuracy both of self-assessments and licensing staff conclusions.** Unfortunately, however, such comparisons are not included in the Revised STP. Additionally, the data gathered from these two assessment methods are presented in such a way as to prevent meaningful comparisons. **The Board encourages the Commonwealth to remedy this by compiling and presenting data from self-assessments and site visits in the same or a comparable format, and by comparing individual self-assessments with corresponding DBHDS licensing staff assessments when both are available for the same sites.**

The data obtained from the DBHDS licensing staff findings are only presented as an aggregated whole. This makes comparisons between types of settings impossible. **The Board recommends disaggregating these data in order to allow for comparisons between, for instance, day support settings and residential settings, as well as between different sized residential settings.** Such comparisons would allow for more targeted remediation strategies.

Monitoring of Settings:

CMS requested additional information about "Virginia's process for the initial monitoring process and how that monitoring process will continue beyond the period of the transition plan."

The Revised STP contains a number of commendable compliance monitoring provisions. The Board especially appreciates the inclusion of stakeholders on the compliance monitoring team, the development of a database for identifying settings and tracking compliance, and the inclusion of provisions for reporting suspected violations to DBHDS for investigation. The Board is concerned, however, that **many of the elements of the Commonwealth's compliance monitoring plan appear to lack a unifying principle.** The disjointed nature of the Commonwealth's activities will blunt their effectiveness.

The Revised STP designates multiple entities with various compliance monitoring responsibilities: DMAS Quality Management Review (QMR) staff and DBHDS licensing staff are

each tasked with conducting onsite inspections and issuing corrective action plans; Community Services Board (CSB) staff, human rights advocates, and DBHDS licensing staff are all tasked with receiving complaints and reporting suspected violations; DMAS QMR staff and unidentified DBHDS staff are each tasked with investigating complaints of noncompliance. This is a large number of entities participating in the compliance monitoring process with often overlapping responsibilities; therefore, it is essential that these activities are planned, directed and monitored by a single entity with the authority and responsibility to do so. A common complaint levied by providers stems from perceived inconsistencies in the interpretation and application of regulations between DBHDS licensing staff and DMAS QMR staff. It is important that all entities tasked with implementing the Commonwealth's compliance monitoring system operate in accordance with a common understanding and deliver a single, unified message to providers.

It is not entirely clear from the Revised STP itself which individual or entity bears the ultimate responsibility and authority to plan, direct, oversee and carry out all of the Commonwealth's proposed compliance monitoring activities. A single responsible oversight party is essential to ensuring consistency in the interpretation and application of standards, avoiding duplication of efforts, and ensuring that activities conform to a single coherent compliance monitoring strategy. **The designated responsible party must be a permanent independent entity with the authority and responsibility to receive complaints and reports, promptly investigate alleged regulatory violations, and remedy violations that occur with corrective actions.**

The compliance monitoring provisions of the plan do not sufficiently address opportunities for individuals and families to report violations. The Board is pleased that DBHDS has developed a designated "My Life, My Community" email address; however, it is unclear how reports from individuals and families submitted via this address will be handled. Who will receive the emails submitted to this address and how will individuals and families be made aware of its existence? The only other avenues provided in the plan for individuals and families to report noncompliance are to go through the case manager/support coordinator or to file a complaint through the DBHDS Human Rights complaint process. Neither of these options, however, is an ideal solution; both can pose conflict of interest problems at times if, for example, the case manager and the service provider are both CSB employees. **Individuals and Families should be able to submit HCBS related complaints directly to whichever entity it is that is designated as the single responsible party for monitoring and investigating compliance.** Information about how to do so must be readily available.

The Commonwealth should ensure that its ongoing compliance assessment and monitoring activities are conducted in an open and transparent manner. The Board commends the Commonwealth for creating a database to collect and track information about provider compliance. The information contained in this database, as well as information about complaints received and investigated should be made public to the greatest extent possible. Ideally, this information would be presented via an accessible dashboard that will allow

individuals to stay apprised of the Commonwealth's progress towards achieving compliance and the efforts expended towards achieving that goal.

Remedial Actions-State Standards and Settings:

CMS requested additional information about how the state will address compliance issues identified in the STP.

The site-specific assessments conducted by the Commonwealth uncovered a number of compliance issues at a variety of sites around the Commonwealth. The measures in the STP to address noncompliance at individual sites lack the detail necessary to evaluate their effectiveness. The Revised STP calls for requesting remediation plans from providers when they are determined necessary; but it does not provide any detail about when such remediation plans will be determined necessary or what such plans should include. **The Board encourages the Commonwealth to require remediation plans from all providers with identified compliance issues. These remediation plans should include milestones and a reasonable timeline for achieving full compliance.** This will ensure that providers make measurable and steady progress towards achieving compliance ahead of CMS deadlines and avoid unnecessary provider disenrollment due to a failure to adequately plan for necessary transition activities.

Newly enrolled providers should be required to demonstrate compliance prior to enrollment beginning immediately. The Revised STP calls for the identification of settings prior to enrollment to ensure compliance with HCBS rules by March 2017. The identification of noncomplying new applicants for enrollment should begin immediately, and only compliant providers should be allowed to enroll. The Board understands the need to allow existing providers time to come into compliance with HCBS regulations. The rationale for granting this transition time, however, does not apply to newly enrolled providers. Allowing noncompliant providers to enroll until March 2017 will move Virginia in the wrong direction and hamper the transition process.

Relocation of Beneficiaries:

CMS asked the Commonwealth to "give an estimated number of beneficiaries potentially affected [by relocation] and clarify in the STP that such individuals will be given the information and supports to make informed choices about alternative settings, and that critical services and supports will be in place at the time of relocation."

The Revised STP does not include an estimate of the number of individuals expected to be affected by relocation. It also does not provide sufficient details about how the Commonwealth will ensure that services and supports will be in place for individuals who must be relocated from noncompliant settings.

In its list of provider self-assessment findings, the Commonwealth noted: "The development of a strategy to promote and enhance future provider capacity is needed." The Commonwealth's revised STP includes an assurance that "efforts occurring within the state to increase provider capacity will continue throughout the transition period." It is positive that provider capacity development has been included in the Revised STP. **The Board encourages the Commonwealth, however, to include additional capacity development strategies in the STP and to explicitly address which of the planned activities already contained in the STP are specifically intended to address provider capacity.**

The action item contained in the Revised STP that is most directly connected to provider development is the proposed joint study group to establish an Institute of Community Inclusion. The purpose of the Institute of Community Inclusion would be to furnish providers of segregated services with training and technical assistance that they need to transition from segregated to community based services. This action item is connected to a proposed budget amendment that failed to pass in the 2016 Virginia General Assembly. The Board believes that DBHDS has the authority to convene a study group without a specific budget amendment, and we recommend that it does so. In any event, **the STP should be updated to reflect the failure of the budget amendment to pass the General Assembly and to indicate whether the planned action item will still occur and if so, in what manner.**

The Board appreciates the work that has gone into developing the Commonwealth's Revised STP, and we are grateful for the opportunity to offer recommendations for improving it. We look forward to continuing to work with DBHDS, DMAS, and stakeholders as the Commonwealth moves towards compliance with the HCBS settings regulations to ensure that the transition is smooth and successful. As always, we would appreciate being included in any interagency workgroups, stakeholder groups, or any other groups developed for the purpose of implementing or monitoring the Commonwealth's compliance with the settings regulations.