March 4, 2014

Utah Department of Health
Division of Medicaid and Health Financing
Attn: HCBS Transition Planning Comments
PO Box 143112
Salt Lake City, Utah 84114-3112

To whom it may concern:

Thank you for the opportunity to comment on Utah’s Draft HCBS Setting Transition Plan and the initial HCBS Transition Compliance Report. The Disability Law Center (DLC) appreciates the changes that were incorporated into the draft plan since its release in October. We believe these changes have strengthened the plan and will improve the overall transition process. However, upon review of the updated plan, the DLC still has concerns that the plan is predominantly a proposal for the future development of a full draft plan and we urge the State to incorporate a more detailed description of its proposed actions in order to make sure the public has a meaningful opportunity to provide input as required by the final rule.

We would also like to emphasize that the new settings rule is intended to improve the quality of the HCBS service system and ensure that consumers have full access to the benefits of community living.¹ We urge the State to take advantage of the opportunities available through the transition process to provide individuals with disabilities and those who are aging with the support they need to live where they want, do the work they like, and make decisions about their lives. We hope these comments will serve to assist the State in the development of a plan that complies with the new HCBS settings regulations and encourages transparency in the transition process.

1. The Draft Transition Plan Should Include the Level of Detail Provided in the Initial HCBS Compliance Report

Guidance from the Centers for Medicare and Medicaid Services (CMS) provides that a transition plan should include a detailed description of the assessment and remedial measures proposed by a state.² The initial HCBS Compliance Report meets this standard by describing the process by which the Department of Health queried providers, the standards used to assess providers, and an explanation of the Department’s analysis.

While we are pleased that the State provided a detailed explanation of its approach to the initial provider review, this same level of detail is lacking from the transition plan. The transition plan contains a list of future steps but does not describe how these steps will be taken. For example, the transition plan
states that it will utilize a provider self-assessment and modified state evaluation tools to assess those sites that are not yet compliant. Yet, it is ambiguous if all providers who are not yet compliant will undergo a provider self-assessment and a subsequent evaluation using the modified evaluation tools, or if this subsequent review will be limited to providers who do not meet a minimum standard under the self-assessment. Also, the transition plan states that providers who have failed to implement the remediation plan will be disenrolled. It is uncertain from the text of the plan if consumers receiving services with a disenrolled provider will be offered a choice of, and transitioned to, an alternative setting that complies with the settings rule. In order for the public to understand how the State will take these important steps and provide feedback, there must be more substantive information regarding the State’s proposed actions. Therefore, the DLC strongly encourages the State to update the transition plan to include the level of detail that was provided in the initial compliance report.

We also encourage the State to utilize a process that maximizes transparency and opportunities for timely comments. While we appreciate the level of detail provided in the compliance report, this information was not made public until after the State conducted its initial settings review. We cannot envision a meaningful public comment period whereby the State provides a detailed description of its actions after they have already occurred. For this reason, the DLC expects there will be additional comment periods as the State fully develops the substance of the transition plan and that this material will be made available before the State implements the proposed actions. This process will allow the public to provide input before the State takes any significant action and will assure compliance with the final settings rule, which requires the full transition plan to be made available for public comment.³

2. The State Should Develop Multiple Strategies to Engage HCBS Consumers in the Transition Process

As previously noted in our last comments, the new settings rule seeks to define HCBS settings by the nature and quality of an individual’s experience—meaning a state cannot achieve full compliance without developing a robust process to understand the consumer experience.⁴ While we are pleased to see that HCBS clients will be included in the transition plan work group and that the work group will assist constituencies to participate in public comment opportunities, we do not feel these measures fully take advantage of this unique opportunity to actively engage consumers. We strongly encourage the State to incorporate more substantive opportunities for consumer involvement in the planning process, including the assessment and remediation measures.

Fortunately, there are several states that have already included such measures in their transition plans. This will afford the State the opportunity to explore and adopt those practices that have been successful in other states. For example, the Georgia transition plan includes on-site evaluations conducted by a survey team that will be partially comprised of service recipients and their family members.⁵ Similarly, the Idaho plan includes informational WebEx meetings to educate consumers on the new regulations and to solicit feedback and questions.⁶ Several states also plan to gather feedback through individual surveys as part of the assessment process.⁷ Creating multiple opportunities to educate and engage consumers will also strengthen the assessment process by validating the results of the provider self-assessments or, conversely, by demonstrating a need for additional review. Further, the final rule makes significant changes to the person-centered planning process, including new responsibilities for consumers. CMS has clearly stated there is an expectation that the individual will lead the planning process where possible.⁸ In order for consumers to fulfill their obligations under the final rule, they should be involved at all stages of the transition process and have multiple opportunities to learn about the changes imposed by the new settings requirements.
3. The Transition Plan Should Include an Assessment of the State’s Standards, Rules, and Regulations for Compliance with the New Settings Rule

The DLC is concerned that the transition plan does not include an internal assessment of the State’s service delivery system. In the Toolkit for Alignment with the HCBS Settings Requirements, CMS specifically provides that a state must first determine its current level of compliance and provide a written description to CMS. In this description, “should be the state’s assessment of the extent to which its standards, rules, regulations, or other requirements comply with the Federal HCBS settings requirements.” We believe this is a critical step in the assessment process. Over the coming years providers will be required to implement changes to comply with the new settings requirements. Foregoing an internal state assessment will place the burden of achieving compliance on providers without creating an administrative framework that incentivizes and supports modifications to the HCBS service delivery system. As previously addressed in our last comments, many states have included an internal review as an action item, which we believe demonstrates that this step is not only necessary, but also a best practice in the transition process.

4. The State Should Not Presume that Support Coordination and Case Management Agencies are Compliant with the New Settings Rule

The preliminary HCBS transition planning compliance report categorizes support coordination and case management agencies as “presumed compliant” because the services these agencies provide are not dependent on a setting. Support coordinators and case managers play a significant role in the service delivery system because they help individuals to develop plans as well as identify and select providers. Support coordinators and case managers must also develop a working knowledge of an individual’s needs and wishes in order to help them choose a setting that best fits their desired outcomes. These responsibilities mean that support coordinators and case managers are central to the State’s ability to fulfill its obligations under the new settings rule, including the person-centered planning process.

The final rule requires the person-centered planning process to be driven by the consumer and reflect his or her preferences. Additionally, under the new rule an HCBS setting should be one that is selected by the individual from among options that include non-disability specific settings. Support coordinators and case managers are integral to ensuring consumers choose a setting in a manner that complies with these requirements. For instance, a support coordinator or case manager who does not facilitate a client’s independent decision-making would not be compliant with the new rule. Nor would a support coordinator or case manager who only presents their client with disability-specific setting options. A support coordinator’s and case manager’s services may not be dependent on a setting however, these agencies can greatly influence how a consumer chooses a setting. We therefore recommend the State re-categorize these providers as “requiring additional review” to ensure these agencies deliver services in a manner that is consistent with the new rule.

Additionally, support coordinators and case managers will need to develop an understanding of the final rule in order to become familiar with their responsibilities under the rule and educate the consumers they work with about the settings requirements. Because the final rule makes comprehensive changes to the service delivery system, we recommend the State provide support coordinators and case managers with training on the new requirements for HCBS settings and the person-centered planning process. This will provide support coordinators and case managers with the support they need to understand their new obligations under the final rule and provide them with the relevant background they will need to communicate to consumers.
5. Conclusion

The DLC appreciates the opportunity to review and provide comments on the changes that have been made to the draft transition plan. While the changes that were incorporated will improve the overall transition process, we strongly encourage the State to adopt the above recommendations. We realize several of these recommendations were included in our previous comments. However, we feel the State is at a critical stage in the transition process and these recommendations would lead to a transition plan that not only allows the State to achieve full compliance with the final rule but also improves the overall quality of the service delivery system. To summarize, the DLC recommends the State:

- Include a more detailed description of its proposed actions in the transition plan
- Proactively engage consumers at all stages of the transition process
- Conduct an internal review of the service delivery system to ensure providers receive the support they need to come into compliance with the settings rule, and
- Categorize support coordination and case management agencies as “requiring additional review.”

Thank you for your time and consideration of our recommendations, and please let us know how the Disability Law Center may be of assistance to the State through this process.

Cc: Centers for Medicare and Medicaid Services

7 For example Montana, Colorado, Nevada, Wisconsin, and Georgia all include action items to capture consumer feedback through tools such as surveys and individual interviews as part of their transition plan.
9 Supra note 2.
10 Id.
11 For example Idaho, Colorado, Montana, Indiana, Georgia, Florida, and Iowa all include action items to review and address state code, regulations, and other relevant policies to ensure they are compliant with the new rule.
13 42 C.F.R. § 441.301(4)(ii).