To whom it may concern:

The Disability Law Center (DLC) appreciates the opportunity to comment on Utah’s draft setting transition plan for complying with the new Medicaid home and community based services (HCBS) regulations. The purpose of our comments is to assist the state in its challenging task of managing the forthcoming changes to the HCBS service system. We urge the state to view the transition process as a significant opportunity to achieve the promise of meaningful community integration for all HCBS recipients. Because the success of the transition process will necessarily depend on a thoughtful and robust transition plan, we encourage the state to utilize the next several months to actively engage stakeholders and consumers as the transition plan is completed. As the Protection and Advocacy agency for people with disabilities for the State of Utah, the DLC is uniquely suited to provide assistance and input into the transition process and we would welcome the opportunity to work closely with the state to improve the HCBS service system over the course of the transition.

1. The State Should View the Transition Process as an Opportunity to Achieve Full Community Integration for Waiver Recipients

The intent of the new HCBS rule extends far beyond redefining what qualifies as a HCBS setting. The Centers for Medicare and Medicaid Services (CMS) has elaborated that the rule seeks to improve the quality of HCBS, provide protections to HCBS recipients, and ensure that consumers have full access to the benefits of community living. At the heart of the rule change is a focus on community integration that acknowledges a state’s responsibilities under the Americans with Disabilities Act (ADA) and Olmstead. In Olmstead v. L.C. the Supreme Court affirmed a state’s obligation under Title II of the ADA to serve people with disabilities in the most integrated setting appropriate to their needs. In the preamble to the final rule, CMS recognizes the new settings requirements as a tool to assist states in fulfilling their obligation under the ADA, section 504 of the Rehabilitation Act, and Olmstead to serve individuals in integrated settings.

The changes made to the HCBS settings rule seek to maximize opportunities for consumers to access the benefits of community living and receive services in the most integrated setting. Specifically the final rule defines an HCBS setting as having the following qualities:

- The setting is integrated in and supports full access to the greater community, including opportunities to seek employment in competitive integrated settings, engage in community
life, control resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS

- The setting is selected by the individual from setting options including non-disability-specific settings
- The setting ensures individual rights of privacy, dignity, and respect and freedom from coercion and restraint
- The setting optimizes individual initiative, autonomy, and independence in life choices.\(^6\)

The plain language of the final rule and guidance from CMS illustrates that a state must do more than ensure a setting is home-like or community-like. To be compliant, a setting must support personal autonomy, choice, and full integration. To be effective, the transition plan must support the rule’s overarching goals of improving the quality of the HCBS service system and promoting community integration as envisioned by \textit{Olmstead} and the ADA. Furthermore, the state should consider the transition process and any proposed changes in light of its overall strategy to provide long-term care services and supports in integrated settings.

2. The State Should Maximize Opportunities for Transparency in the Transition Process

While the DLC appreciates the state’s efforts to release the draft plan well before the March 2015 submission deadline, we have concerns that the draft plan does not contain sufficient detail to constitute a full plan and therefore the public will not have a meaningful opportunity to provide input as required by the final rule. For example, according to guidance from CMS, a transition plan should include a “detailed description of the remedial actions the state will use to assure full compliance with the home and community based settings requirements[.].”\(^7\) The state’s draft transition plan includes a list of proposed remedial steps without providing a detailed description of these actions. Further, several of the remediation measures require plans and compliance tools that will not be developed until several months after the draft plan has been submitted with no opportunity for public input. Similarly, the assessment portion of the draft plan only lists future actions and fails to include opportunities for the public to comment on the assessment or learn the outcome of the assessment.

The DLC strongly encourages the state to hold additional notice and comment periods as more substantive detail is incorporated into the draft transition plan. Because the draft transition plan describes only the state’s process for developing assessment and remediation measures without detailing the standards to be used or specific compliance actions that will be taken, the public must have additional comment periods to provide meaningful feedback. Recent guidance from CMS would also support this recommendation. CMS has stated that substantive changes to a state’s transition plan requires public comment.\(^8\) Substantive changes include “when a state submits an amendment or modification to a Statewide Transition Plan where additional assessment has resulted in a change in the findings or where the state adds more specific remedial action and milestones.”\(^9\) We would also encourage the state to incorporate more opportunities for public input into the draft plan beyond the required notice and comment periods. For example, the Montana transition plan includes a process for gathering stakeholder, provider, and consumer feedback on assessment and remediation tools as they are developed.\(^10\) Likewise, Tennessee has already made their assessment tools publicly available for comment.\(^11\)

Finally, we expect the state’s quarterly updates to CMS will contain substantive changes that will require additional public comment periods. However, there are no mechanisms outlined in the draft transition plan to assure the public will be able to provide input as these changes are submitted. To ensure the transition process is transparent and maximizing opportunities for public input, we encourage the state to make the quarterly updates to CMS publicly available to document the state’s progress in the transition process.
3. The State Should Ensure all Claims of Compliance are Supported by Evidence

According to guidance from CMS, states must assess their current level of compliance with the new settings requirements before determining what remedial measures are needed. An assessment is a critical step in the transition process because the results of the assessment will direct the specific remedial measures a state must take. The state’s draft transition plan as written provides little detail as to how the state will take this important step.

One of the state’s first steps, as described in the draft plan, will be to conduct a preliminary screening to categorize settings that are likely to be “Fully Compliant, Not Yet Compliant, or Not Compliant with HCBS characteristics” over a short three month period. The transition plan does not describe how the state will conduct the preliminary screening and it appears that the state will make an initial categorization without conducting onsite reviews, provider self-assessments, or gathering other sources of information. This is concerning as the state will potentially determine that large portions of the HCBS service system are compliant with the new settings requirements without first gathering evidence to support this presumption. By not conducting a more thorough and evidence-based review of all providers, the state will significantly limit its opportunity to improve the HCBS system and expand opportunities for community living. The DLC therefore recommends the state revise the assessment process to include an individual analysis of every HCBS setting and facility to ensure that all claims of compliance are supported by evidence.

The DLC also has concerns that the assessment process will not include a review of the state’s standards, rules, and regulations. CMS guidance has stated that a compliance assessment should include the extent to which the state’s standards, rules, regulations, or other requirements comply with Federal HCBS settings requirements. Many state transition plans, such as Idaho, Colorado, Montana, Indiana, Georgia, and several others include specific action items to review state standards, rules, policies, and regulations for compliance with the new settings requirements. Utah’s draft transition plan does not indicate that such an assessment will take place. Without an internal review of how the state operates the HCBS service system, providers may be significantly constrained in their ability to come into compliance with the new settings requirements. Although the state may intend to evaluate applicable standards, rules, regulations, and other requirements for compliance with the settings requirements this is not clear from the draft transition plan. We encourage the state to specifically include this step in the assessment process to ensure Utah’s HCBS service system is brought into compliance in its entirety with the final rule.

4. The State Should Develop an Assessment Process to Identify Excluded Settings

The DLC is greatly concerned that the state’s assessment process will not include an analysis to identify settings that are presumed to have the qualities of an institution and therefore are not home and community-based settings. The state’s assessment process will categorize providers as Fully Compliant, Not Yet Compliant, or Not Compliant. However, these broad categorizations seemingly fail to account for settings that are presumed to have institutional qualities. Without more information from the state as to what constitutes a non-compliant setting, it initially appears that the state has presumed that all settings are home and community-based but may not be fully compliant with the settings rule. This presumption, however, does not account for settings that have institutional qualities and should not be funded using HCBS dollars.

Identifying excluded settings is a vital part of the assessment and it should not be presumed that Utah does not have any HCBS providers or settings with institutional qualities. Through our work as the state’s Protection and Advocacy agency for people with disabilities we have become familiar with assisted living facilities that share a building with nursing facilities. As many assisted living residents receive HCBS through waivers, these settings are potentially problematic. Under the new requirements, a
setting that shares a building with a facility providing inpatient institutional treatment, such as a nursing facility, cannot be considered a HCBS setting unless the state can show that the setting has HCBS qualities.\textsuperscript{14} This example highlights the need for the state to include a separate analysis to identify excluded settings as part of the assessment process.

We therefore encourage the state to develop a process to identify settings presumed to have the qualities of an institution, as well as detail how the state will determine if the setting should be subject to heightened scrutiny. We also note that the heightened scrutiny process does not allow the state to include settings with institutional qualities in its HCBS service system. Settings that have institutional qualities should not be funded using HCBS dollars. Rather, the heightened scrutiny process allows the state to demonstrate that the setting does in fact have the qualities of a home and community-based setting—meaning the setting does not isolate individuals from the broader community and supports full access to the community.

5. The State Should Proactively Engage HCBS Consumers in the Transition Process

The assessment and remediation steps outlined in the draft transition plan focus solely on providers and their level of compliance with the new settings requirements. While we believe it is essential for providers to bring their settings into compliance, the transition process should also be inclusive of consumers at all stages of the transition. CMS has explicitly stated that the final rule moves away from defining HCBS settings by what they are not, and toward defining them “by the nature and quality of individuals’ experiences.”\textsuperscript{15} This statement infers that in order for a state to determine a setting’s compliance, it must create an open dialogue with consumers and understand their experience in that setting. Although the DLC appreciates the inclusion of a work group in the draft transition plan, we believe this group alone will not be able to capture the broad input that is necessary to understand the consumer experience. To understand this perspective the state should actively engage the broad and diverse group of consumers currently receiving services.

We encourage the state to incorporate more substantive opportunities to involve consumers in the transition process. For example, Tennessee has incorporated an individual experience assessment into its transition plan. The proposed assessment tool developed by the state is intended to measure a consumer’s level of awareness of and access to rights, privacy requirements, and experience expectations in the HCBS rule.\textsuperscript{16} Other strategies could include developing family and consumer specific materials to educate consumers about the forthcoming changes and their rights under the new rules. Several state transition plans have already taken this approach and included multiple strategies for engaging consumers in their plans. For example, Montana’s transition plan includes member surveys, soliciting advocacy and consumer feedback on self-assessment tools as they are developed, the development of a member transition plan, and family and member educational outreach regarding the new rules.\textsuperscript{17}

We would also urge the state to develop a mechanism to enforce ongoing compliance that has the ability to investigate complaints from consumers. Although the state may initially determine that a setting is compliant, that setting may violate the regulations in the future. Consumers should have access to a system that can accept and investigate complaints, and ultimately remedy problems. Such a process would also benefit the state by creating an additional mechanism to capture and thereby understand the nature and quality of individual experiences.

6. The State Should Develop Assessment and Remediation Strategies that are Specific to Residential and Non-Residential Settings

The draft transition plan lays out a series of assessment and remediation steps that will be equally applied to all HCBS providers. However, residential and non-residential settings have marked differences
in how they provide services to consumers. The final rule acknowledges this difference by including additional standards for those settings that are provider-controlled residential settings.\textsuperscript{18} The rule’s additional safeguards protect against the increased risk that a residential facility may be overly institutional. These protections include landlord-tenant protections, lockable doors, choice of roommates, access to food, and visitors anytime.\textsuperscript{19} In order to determine a residential facility’s level of compliance with the settings requirements, the state will certainly require an assessment tool that accounts for these additional standards. While it is likely the state may already have plans to account for the differences between settings in the assessment process, this is not readily apparent from the draft plan as written. If the state has not done so already, we would encourage the state to develop assessment and remediation strategies that are specific to residential and non-residential settings, as well as ensure the transition plan reflects these strategies.

We would also encourage the state to begin planning for the potentially significant impact the new settings regulations will have on non-residential settings. CMS has been very clear that the new settings regulations apply to non-residential and residential settings alike. Moreover, states have only five years to bring their HCBS service systems into compliance. Given this time frame the state should begin to plan for the systemic changes that will need to be made to the way day programs and employment services are delivered. For example, through our work the DLC has visited numerous day programs, and although there are many programs that provide high quality services, we have also observed programs in which consumers were isolated, with little to no interaction with the community, and no opportunities for skill-building. Under the new settings requirements such a setting could potentially be presumed to have institutional qualities and not qualify as a home and community-based setting because the people in these settings have limited, if any interaction with the broader community.\textsuperscript{20} Without a proactive approach to remedying these settings, consumers will not be able to benefit from the changes to the settings requirements.

Similarly, there are many changes that must take place in the employment context for these settings to become compliant under the final rule. The standards for HCBS settings state that a setting must support full access to the greater community, “including opportunities to seek employment and work in competitive integrated settings[.]”\textsuperscript{21} However, data collected for the DLC’s recent transition report showed that the number of Division of Services for People with Disabilities (DSPD) clients in supported or competitive employment declined from 34\% to 27\% between 2004 to 2011.\textsuperscript{22} The report further showed that DSPD’s funding and service delivery structure provides little to no incentive for integrated and competitive employment, leaving recipients with limited alternatives beyond the acceptance of day or sheltered work programs.\textsuperscript{23} In order for the state to bring employment and day settings into compliance with the final rule, the state must take measures to reverse this trend and provide HCBS recipients with a range of service options in integrated settings, including non-disability-specific options. Additionally, based on our understanding of the final rule we cannot envision any sheltered workshop as presently constituted as a setting that should continue to receive HCBS funding. Because sheltered workshops rely on piece rates set by a prevailing wage, they inherently do not qualify as competitive employment. Further, these settings tend to isolate individuals from the broader community and thus should be presumed to be a setting that has the qualities of an institution.

7. Conclusion

The DLC appreciates the opportunity to provide feedback on the state’s draft transition plan. The changes to the settings requirements mark the opportunity for a systemic shift in the way HCBS services are provided, and we welcome the opportunity to work with the state through the transition process. While we understand the difficulties of developing and implementing a transition plan, we firmly believe the process will be greatly enhanced by providing the public with a greater level of detail in the transition
plan as well as maximizing opportunities for transparency and public input. In summary we recommend that the state:

- Include additional notice and comment periods as the state makes substantive modifications to the transition plan
- Make publicly available all quarterly updates submitted to CMS
- Individually analyze all HCBS settings and facilities for compliance with the new rule
- Include an internal review of the state’s standards, rules, regulations, or other requirements in the assessment process
- Develop a process to identify settings that are presumed to have the qualities of an institution and make the details of this process publicly available for input
- Develop more opportunities to engage consumers in the transition process, as well as develop a mechanism to enforce ongoing compliance that has the ability to accept and investigate complaints from consumers
- Develop assessment and remediation strategies that are specific to residential and nonresidential settings
- Take proactive steps to bring nonresidential settings, particularly employment and day programs, into compliance with the final rule.

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

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6 42 C.F.R. §§ 441.301(c)(4) (HCBS waivers), 441.530(a)(1) (Community First Choice option), 441.710(a)(1) (state-plane HCBS services).
8 Id.
9 Id.
12 Supra note 7.
13 Id.
14 See 42 C.F.R. §§ 441.301(c)(5)(v) (HCBS waivers), 441.530(a)(2)(v) (Community First Choice option), 441.710(a)(2)(v) (state-plan HCBS services).
15 Supra note 5.
17 Supra note 10.
18 See 42 C.F.R. §§ 441.301(c)(4)(vi) (HCBS waivers), 441.530(a)(1)(vi) (Community First Choice option), 441.710(a)(1)(vi) (state-plane HCBS services).
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Id.