

Responses to Comments Received on the Massachusetts Transition Plan

The Commonwealth of Massachusetts created its Statewide HCBS Transition Plan, which included as attachments, agency-specific HCBS Transition Plans for the Department of Developmental Services (DDS), the Massachusetts Rehabilitation Commission (MRC) and the Executive Office of Elder Affairs (EOEA). The state posted the Draft Statewide HCBS Transition Plan (Plan) on its website from October 15, 2014 until November 15, 2014. The state held two public hearings, on November 6 and 12, 2014, at which a total of 344 attendees signed in and 94 people provided oral comments on the Plan. In total, 323 individuals or agencies submitted comments in writing, through email, mail and written testimony, with nearly 100 people submitting comments through multiple formats. The vast majority of comments heard at the two public forums as well as those submitted to the state in writing related to the DDS Plan.

The input received and the state's response to input is summarized below. Please note in the state's responses below the new CMS rule for Home and Community Based Services (HCBS) waivers is referred to as the Community Rule.

Specific Settings and Choice

Comment: Several commenters pointed out that it is not the intent of the Community Rule to prohibit congregate settings from being considered home and community-based settings. Further, they interpret that it is the intent of CMS to promote and enable states to utilize an outcome based definition of home and community based settings, while they saw the DDS draft Transition Plan having the potential to focus disproportionately on location, geography, physical characteristics and size. One commenter noted that even group homes in the community may be challenged to meet the Community Rule.

Response: The state acknowledges that CMS, in its comments to the Community Rule, has indicated that "[i]t is not the intent of this rule to prohibit congregate settings from being considered home and community-based settings." The state further notes that the characteristics of any setting (location, geography, physical characteristic and size) are not necessarily determinative of whether a provider can achieve compliance with the Community Rule, but rather may create a rebuttal presumption which may be overcome through the process of heightened scrutiny. In response to the comments which suggest an overemphasis on "settings" over "outcomes," DDS, in particular, is in

the process of developing a tool for provider compliance that focuses primarily on outcomes. In identifying DDS providers that may not meet the Community Rule at this point in time, DDS drew heavily from the guidance issued by CMS, regarding settings that may have the effect of isolating individuals from the broader community. These settings include those that have limited interaction with the broader community, farmsteads or disability-specific farm community, gated or secured communities for people with disabilities, settings that are part of or adjacent to a residential school, multiple settings co-located and operationally-related that congregate a large number of people with disabilities for significant shared programming and staff and multiple settings on a single site or in close proximity. The state envisions that providers with these characteristics may be able to comply with the requirements of the Community Rule by March 2019, subject to possible heightened scrutiny review. DDS will work with all providers to enhance their ability to meet the requirements of the Community Rule, through the use of the compliance tool developed for verification, which will be distributed to all providers.

Comment: Several commenters challenged CMS' and DDS' right to determine what is right for their loved ones. Commenters stated that CMS and DDS should allow for a range of options and that to do otherwise would rob individuals and their representatives of their voices and choices (independence). One commenter argued that the plan limits choice in contradiction of the Real Lives Bill and DDS' own strategic planning goals.

Response: CMS has outlined the components of a community based setting including that services are provided in settings that are integrated and support full access to the greater community, that individuals or their legal representatives may choose a service setting from the available community options, that individual rights of privacy, dignity, respect, and freedom from coercion and restraint are protected, that autonomy and independence in making life choices are optimized and that there is facilitation of choice regarding services and who provides them. It is important to note that Medicaid services are available in a variety of settings. The Community Rule, however, does set forth the requirements that must be met for individuals to receive services under the Home and Community Based Waiver Program, and as such, providers of HCBS waiver services must adhere to the requirements of the Community Rule in order to continue to provide Medicaid HCBS waiver services. The state, in order for its HCBS waivers to receive funding, must comply with the Community Rule and its setting requirements.

Comment: Many individuals expressed concern about limiting the capacity of existing group homes to 5 or less. Commenters felt that there was nothing "magical" about the

number 5. Further, they interpreted the plan to mean that any home that had an existing capacity above 5 would be forced to close. Several self-advocates and families referenced a set of homes that had 9 individuals living in them and were quite satisfied with the arrangement.

Response: There is significant confusion and misunderstanding regarding the capacity of 5 referenced in the draft transition plan. The draft transition plan explains that DDS has proposed amendments to its existing regulations (115 CMR 7.05), which address the capacity of homes. The existing language in the DDS regulations regarding capacity limits the capacity to 4:

“[t]he capacity of each home in which residential supports are provided and of locations providing site-based respite shall be determined by the Department and may vary depending on the size, location, and other characteristics of the home; the ages, needs and preferences of the individuals; and the experience and capability of the provider, provided, however, that the capacity of the home shall not exceed four individuals. All such homes and site-based respite locations in existence and licensed as of December 1, 1995 shall be permitted to retain for the life of the original building the capacity in excess of four that was approved under the provider's license in effect as of that date, unless the Department determines that the additional individuals can no longer be accommodated in the home without detriment.”

The change in capacity to 5 is actually an increase in the allowable capacity (absent a waiver of capacity). Contrary to some of the comments, neither the proposed regulations nor the draft transition plan compel existing homes that currently have a capacity greater than 5 to reduce their capacity.

The current capacity limit of 4 and the proposed limit of 5 for new residential programs were developed in response to a federal fair housing complaint filed several years ago, which resulted in an agreement to exempt DDS group homes from the Special Use and Occupancy Codes while providing a mechanism for the protection of the health and safety of the individuals in the event of fire, i.e. compliance with the Federal Building Officials and Code Administrators (BOCA) code and the Massachusetts State Building Code. Regulations of the Massachusetts State Building Code limit capacity to 5. The adoption in regulation of a capacity limit of 5 thus complies with the State Building Code requirements and enables individuals with disabilities to access the range of housing that is available to the general public.

Finally, while some commenters expressed the opinion that imposing a capacity limitation went beyond the intent of the Community Rule, CMS comments indicate that, “experience with other Federal Departments and current research indicates that size

can play an important role in whether a setting has institutional qualities and may not be home and community-based.” Further, CMS has stated that “they respect a state’s right to establish state laws to implement such a requirement regarding size.”

Comment: Several commenters mentioned that either they or their sons and daughters resided in a home with 9 other adults on a cul-de-sac with 2 other similar homes. Commenters were very concerned that these particular homes would be forced to close if DDS implemented the transition plan.

Response: The Community Rule only applies to services funded under an HCBS Waiver Program. The homes referenced by these commenters are funded under the Medicaid State Plan Group Adult Foster Care (GAFC) Program and not under an HCBS Waiver Program. Therefore, they do not fall under the proposed draft Transition Plan.

Comment: Many of the individuals and families of individuals residing in the settings that currently may be presumed not to meet all of the requirements of the Community Rule commented on their disagreement with DDS’ determination that their settings may have to make some changes in order to comply with the Community Rule. Individuals and families testified to the fact that they or their family members had full, active lives thoroughly integrated into the community. There were many commentaries regarding how active individuals’ social lives were, how much freedom individuals had to move around, how much choice and control individuals had, and how much access they had to community activities. Commenters expressed the opinion that these settings did comply with the requirements of the Community Rule, and in fact, by virtue of their clustered setting, afforded individuals more freedom than they would have if they were in a small group home in the community.

Response: The state acknowledges that individuals in the settings identified may enjoy many of the outcomes identified in the Community Rule. However, it is also clear that these settings may, according to CMS’ guidance, be presumed not to meet all the components outlined in the Community Rule. These providers will need to demonstrate through the verification tool that outcomes for individuals are such that they are fully compliant with the requirements set forth in the Community Rule and therefore qualify as HCBS settings.

Comment: Several families commented that while they support the ideals expressed in the Community Rule, the outcomes did not apply to their family members due to the severity of their loved one's disability. Family members stated that their relatives were medically fragile and that they would lose needed nursing and medical oversight if they had to live in a more community-integrated setting. In addition, they noted that any change in setting would be traumatic for the individuals involved.

Response: The state recognizes that individuals with significant disabilities live in some settings that presumptively do not satisfy the Community Rule. It is not the intent of the state or DDS to force individuals to move from settings or to take away needed services and supports. It is our belief, however, that all individuals, regardless of their level of impairment, can benefit from integration and access to the community, as well as choice and control over their lives to the extent of their capabilities. The goal of the Community Rule is not to decrease the level or number of services that individuals may require, but to expand the opportunities available to them. DDS has developed many successful community based options for individuals with medical needs as substantive as individuals in some of the identified settings presumed not to meet the Community Rule.

Comment: Commenters noted that the Community Rule could have a negative effect on HCBS innovation in Massachusetts. One commenter argued that services cannot be set up as “one size fits all”. One commenter thought that we should promote affordability by allowing a range of options, including larger homes.

Response: It is not the state's intent to limit innovation nor do we believe that we are setting up a “one size” approach. We agree with CMS when it states, “It is not our intent to hinder innovative ideas for future development of HCBS. Rather, we believe that the requirements set forth in this regulation [the CMS Community Rule] are a result of many comments we received from stakeholders, including individuals receiving services. Thus, we believe that developers and states should use this as a foundation as they look at developing plans to provide long-term care services and supports in their communities. We believe that this could be a tool to assist states with adhering to the Olmstead mandate and the requirements of ADA.” Innovation can still occur and we expect that it will; any innovation and all choices will need to take the Community Rule and its setting requirements into consideration in order to receive CMS reimbursement under an HCBS waiver program.

The state will work with any provider with a new or innovative approach to the provision of HCBS waiver services, as long as that innovation is consistent with the Community Rule. However, the state, and DDS, in particular, has indicated through policy that it will not fund new settings that are noncompliant with the Community Rule. Again, DDS is

also committed to working with existing providers and settings that may be presumed not to meet the Community Rule to fully comply with the Community Rule through changes to physical settings, innovations and enhanced outcomes. This commitment is seen throughout the transition plan and the time offered for transition.

Comment: A few commenters “expected better” from Massachusetts and urged the state that it can do better. Specifically, one commenter noted that the language that limited choice for the disability community was exclusive. Another commenter requested that we make decisions carefully as these decisions will affect individuals with disabilities for the rest of their lives.

Response: The state believes that it has taken a reasoned approach to ensure compliance with the Community Rule. We have been collaborating with the providers that may be presumed not to meet the Community Rule since the Community Rule went into effect. We have worked with them in terms of self-assessment and will continue to work with them on their transition plans to assist providers to come into compliance by March 2019.

The Transition and Compliance Process

Comment: A few commenters mentioned that the process under which compliance will be determined is unclear and needs to be clarified so that providers have a reasonable opportunity to implement their compliance plans by March 2019. They requested that the transition plan be amended in order to provide clarity and transparency, as well as qualitative and quantitative measurements that would be applied to the providers who are challenged to meet the Community Rule at this time, and a defined process to determine if a program is compliant with the intent of the Community Rule. Another commenter urged DDS to visit the settings that were presumed not to meet the Community Rule.

Response: The state agrees with commenters’ points regarding clarity and transparency regarding the determination of whether a provider is compliant. Further, state staff regularly visit settings, and will continue to do so. The state has amended the Statewide HCBS Transition Plan, and agency-specific Transition Plans, as appropriate, to include a section that describes the process and criteria that will be used to determine compliance with the Community Rule. For example, DDS is currently developing a tool which will be employed to conduct an on-site verification of a

provider's compliance with the requirements of the Community Rule. Input is being solicited from both internal and external stakeholders regarding what indicators would be measured to determine the presence of certain outcomes in individuals' lives. In addition, DDS is reviewing indicators recognized and utilized by such national organizations as the Council on Quality Leadership (CQL) and the National Core Indicators (NCI) to measure outcomes for individuals. When finalized, the tool will be used by all DDS providers to evaluate settings, but initially and specifically will be used with the identified residential providers as a framework for their own plans and transition work. While providers have until March, 2019 to fully comply with the Community Rule, they may at any time prior to March 2019, request an on-site visit to verify the presence of the outcomes. The on-site review will include observation, interviews with individuals, family members and staff, and a review of documentation. The state expects that through this process, we will be able to determine and verify whether providers have met the requirements of the Community Rule. DDS has visited and will continue to work closely with providers with a setting that may be presumed not to meet the Community Rule.

Comment: A few commenters questioned why day/employment settings were not addressed more thoroughly in this draft transition plan. Another commenter recommended that providers be given written interim guidance regarding expectations for segregated day/employment settings.

Response: We agree that the Transition Plan does, in fact, focus on residential supports. CMS published additional guidance regarding non-residential support in mid-December. CMS has stated that the same requirements applicable to residential settings will also be true of day/employment settings. The state will be working with the CMS guidance and has begun the process of defining how day/employment sites will be reviewed to assure integration and access to the community. The state will utilize a process similar to that which was used to craft the current HCBS Transition Plan, including a robust public input process.

Comment: Several providers commented on the concern that there is insufficient time to adequately develop a compliance plan, and have requested a 3 month extension until December 30, 2015. These providers request that they be informed as to whether their compliance plan has been approved before they have to expend time and effort to implement it.

Response: The Transition Plan gives providers until September 30, 2015, a period of 11 months from the current time (November, 2014) to develop a strategic/compliance

plan. Regardless of when their compliance plan is due, the CMS date for full compliance, March, 2019 remains the same. In the spirit of collaboration and in recognition that some plans may take time to come into clarity for a provider, we have revised the timeline to December 31, 2015.

Comment: One commenter reflected on agreement with the spirit and intent of the Community Rule, but noted that such goals and outcomes would take years to achieve and require systemic change, which could extend past 2019. The commenter recommended a review of several systemic issues including consumer choice, the individual-supports planning process, barriers to integration, transportation services, expansion of shared living options, and staff competency.

Response: The state appreciates the comment. In the Community Rule, CMS noted, “In an effort to balance those comments that were concerned with the loss of a residential setting and the subsequent displacement of the service recipient based on the settings requirements and those comments that urged us to draw an immediate and clear demarcation for HCBS, our expectation is that the transition plan would facilitate a brief transition period wherever possible.” Thus, CMS created the 5 year transition period stating “We believe the changes to the final rule allow for the appropriate designation of HCBS settings and for sufficient transition time for states to comply.” The state believes that it can reach full compliance with CMS’ Community Rule and that we were already on our way with such initiatives as DDS’ Blueprint for Employment. The state believes that working collaboratively with individuals, families, providers and advocacy groups we can reach the goals of the Community Rule and support full and integrated lives for individuals with disabilities. The state, and DDS, in particular, will be working on many of the recommendations put forth by the commenter.

Comment: One commenter stated that the current licensure and certification process does not necessarily assure that providers meet all aspects of the HCBS Community Rule. Further, the commenter raised concern over the sufficiency of the existing quality management and oversight system.

Response: While the state is always looking for ways to enhance its HCBS waiver quality management and oversight systems, we respectfully disagree with the comment. For example, DDS has an extremely robust quality management system which assures a continual presence and oversight of its existing services. As part of its quality management and improvement system, DDS periodically reviews its licensure and certification system to assure that it is capturing the essential elements germane to health, safety, rights, integration, relationships, access, choice and control.

Comment: One commenter noted that it was their understanding that DDS had approximately 9,000 community residences in the Commonwealth, but that the DDS transition plan only covered 2,100, and as such was incomplete.

Response: There are approximately 9,000 individuals residing in DDS group homes, but only approximately 2,100 group homes.

Comment: One commenter stated that the process that DDS used to assess compliance with the Community Rule was not sufficient. The commenter noted that utilizing the DDS licensure and certification tool as the measure of adherence to the outcomes in the Community Rule, was not sufficient. The commenter further went on to say that DDS should have used the exploratory questions provided by CMS. In addition, the commenter noted that they are aware of many group homes in the community where the outcomes addressed in the Community Rule are not present for the individuals supported.

Response: DDS respectfully disagrees with the commenter's remarks. To conduct the preliminary assessment of compliance with the Community Rule, DDS used the CMS exploratory questions to identify settings that may be presumed not to meet the Community Rule. DDS' licensure and certification process does address the outcomes identified in the Community Rule and as such, is a constructive tool to use in assessing a provider's compliance with the Community Rule. The Community Rule applies to all providers and their settings, not just to the ones identified as being presumed not to meet the Community Rule. DDS will be working on an ongoing basis with all of its providers to assure that all are working towards continued enhancement of full access, integration, choice and control. In addition, MRC and EOEA will be working, on an ongoing basis, with all their HCBS waiver service providers to assure that all are in compliance with the Community Rule.

Comment: One commenter noted that it was not clear what would happen to individuals in situations where a setting cannot meet the CMS requirements, and what process would be used to identify new settings.

Response: The state will ensure waiver participants are informed of any Community Rule-related issues that will have an effect on their receipt of waiver services. The DDS Transition Plan, for example, states that "individuals in settings that cannot meet requirements will be notified by the DDS Waiver Unit that they will no longer be residing

in a setting on the HCBS Waiver.” Individuals will be informed of their right to request a move to another setting and of dis-enrollment from the HCBS Waiver should they choose to stay in current non-compliant setting. Individuals will also be notified of their right to appeal the decision to dis-enroll them from the Waiver. In supporting an individual to move to another setting, DDS will utilize the procedures it has in place to help them identify a setting of their choosing that meets their needs.

Comment: One commenter indicated that the state provided no process by which stakeholders could provide input regarding the compliance of particular settings.

Response: The state disagrees. The public forums as well as the receipt of hundreds of letters through regular mail and e-mail provided stakeholders with ample opportunity to provide input regarding any and all aspects of the Statewide HCBS Transition Plan, and the agency-specific Transition Plans. In addition, the state’s regulatory process will afford opportunities for input through public hearings and comment periods if and when regulatory changes are put forward related to ensuring compliance with the Community Rule. Further, ongoing input will be gathered through periodic meetings with stakeholder groups.

Comment: Several commenters questioned the reason why the state did not present a provider (typically, one of the providers that were presumed not to meet the Community Rule) to CMS for its heightened scrutiny process. These commenters believed that certain providers (“as is”, currently) would meet all requirements in such a process.

Response: When a DDS provider indicates to the state that it is compliant with the Community Rule, DDS will conduct an on-site verification of that provider’s compliance with the requirements of the Community Rule. At such time, the state may, if applicable, submit evidence of a provider’s compliance with the Community Rule to the Secretary of the federal Department of Health and Human Services for heightened scrutiny.

Autism Concerns

Comment: Several commenters, specifically family members of individuals with autism, raised concern about the state’s intent to preclude the development of farmsteads. Commenters asserted that individuals with autism have different needs and require settings that allow for socialization with other individuals with autism who

are more accepting of their issues, that society is not ready to accept the behavior of individuals with autism, that integration in the community can be very stressful for individuals with autism, and that individuals require a setting that is less stimulating than the general community might be. Commenters referenced a specific proposed model of congregate living with 4 houses for 16 residents and a “commons” building that would be used for social, recreational, educational and training opportunities. The proposal, according to commenters, would address the isolation that individuals with autism currently face in family or group homes that often feel quarantined in obscure neighborhoods with limited connection to the wider community or to their peers with autism.

Response: DDS will work with providers and families to develop approaches to address individuals’ unique needs. CMS and the state believe that all individuals, regardless of their level of disability, can benefit from access to and integration in the community. Concerns about socialization, stimulation and stress can be effectively dealt with through the person-centered planning process and in smaller settings that are integrated into the community. DDS will continue to work to assure that smaller settings support the ability of individuals to have an environment that supports their unique needs for socialization, stress reduction and integration.

Comment: Several commenters raised concerns about safety for individuals with disabilities, notably individuals with Autism, should the Community Rule prohibit restrictive interventions and supervision. Commenters also felt that the ability to lock bedroom doors was an extreme safety risk for these individuals and should not be allowed under any circumstances.

Response: The state appreciates these commenters’ concerns and certainly shares concerns related to the safety of the individuals we serve. While the HCBS requirements include lockable bedroom doors, choice and control, the requirements also allow for modifications of the setting requirements for any individual should it be supported by an assessed need. Through the person-centered planning process for each individual, which includes periodic reviews to determine ongoing necessity of an intervention or modification, informed consent, and assurance that the modification will not cause the individual harm, necessary modifications for safety will be implemented and maintained. The state believes these processes can provide the greatest freedom with the least restriction, but should a restriction be assessed as necessary, the Community Rule specifically allows for such a modification on an individual basis.

Comment: Several commenters emphasized the unique challenges that individuals with Autism face, especially as it relates to being integrated in the community. Issues mentioned included sensory sensitivities, behavioral difficulties, sleep disorders, anxiety, self-injury, property destruction, and aggression. These commenters felt that these concerns were not addressed in the plan nor even considered.

Response: HCBS settings, in which individuals reside, must adhere to the requirements of the Community Rule in order to continue to receive Waiver funding; however, modifications needed to address safety may be implemented and maintained, supported by an assessed need, through the person-centered planning process. The person-centered planning document must demonstrate that less intrusive methods were attempted, data related to the effectiveness of the intervention were collected, time limits and periodic reviews to determine the ongoing necessity of any modification were established, and informed consent and assurances that the intervention or modification will not cause the individual harm were documented. The state believes these processes can provide the greatest freedom with the least restriction, but should a restriction be assessed as necessary, the Community Rule specifically allows for such a modification on an individual, planned basis.

Education

Comment: A few commenters noted that outreach and education about the Community Rule were needed to ensure that people, organizations and the disability community at large understand the implications of the Community Rule. Commenters also requested that an advisory board be created to assist and monitor the transition.

Response: We agree that education and correct information need to be available to all stakeholders regarding the Community Rule. The state has posted links to the Community Rule and other useful educational information concerning the Community Rule at: <http://www.mass.gov/eohhs/gov/departments/masshealth/federal-rules-for-home-and-community-based-waivers.html>

In addition, DDS currently has a website with many useful documents and educational links; the address is:

<http://www.mass.gov/eohhs/consumer/disability-services/living-supports/independent-living/home-and-community/hbcs-community-rule/> .

This web page is prominently linked on the DDS home page under key initiatives. The state will be posting additional materials in accessible formats to continue this

educational activity. We have made revisions to the transition plan to clarify information contained in the draft transition plan and in these responses, we have provided information to correct some inaccurate assumptions that became evident as we reviewed the comments. DDS has and will continue to visit and meet with providers as well as groups of families to explain our approach, answer questions and collaborate on plans; we will continue to be available throughout the transition period for any groups of stakeholders wishing to learn more.

As noted in the revised transition plan, DDS will be providing periodic updates with stakeholders to gather continued feedback and keep stakeholders apprised of progress toward implementation of the plan. Stakeholders will include but not be limited to Arc/Massachusetts, Massachusetts Advocates Standing Strong, Massachusetts Families Organizing for Change, the Massachusetts Developmental Disabilities Council, the Disability Law Center, the Brain Injury Association of Massachusetts and the Association of Developmental Disability Providers. In addition, periodic updates will be shared with DDS' Statewide Advisory Council and the Statewide Quality Council.

Person-Centered Planning

Comment: One commenter noted that the Community Rule and Massachusetts' transition plan cannot trump the ISP (Individual Support Plan). This commenter wanted assurance and reassurance that the ISP would carry the most weight. Another commenter, however, noted that the person-centered planning process should not be used as a way to inappropriately modify or circumvent the HCBS requirements for expanded community access, choice and optimizing independence.

Response: The state appreciates the feedback. Regarding the first comment, we note that it certainly aligns with CMS's requirements related to person-centered planning (which, in Massachusetts, is documented in the ISP) and HCBS settings. There are many requirements (not subject to a transition plan) to ensure that person-centered planning maintains primacy. While CMS specifically stated that the person-centered planning process should not be included in the transition plan, the state, and DDS in particular, will assure that the ISP process contains all the required elements of a person-centered planning process.

Day Habilitation

Comment: Several commenters supported Day Habilitation and other center-based day programs as a service for their individual with a disability (often, autism). They were concerned that Day Habilitation would no longer be available to their family member.

Response: This transition plan is primarily focused on residential settings and services. As noted in the plan, Massachusetts will amend its Statewide HCBS Transition plan in the near future after completing a transition planning process on these types of services. This process will include another public input opportunity. The state will consider the comments received to date, made in support of Day Habilitation and other day programs, during that planning process. In Massachusetts day habilitation programs are state plan services, not HCBS waiver services, and as such are not subject to the Community Rule.

Comment: One commenter noted that elders are able to move into clustered models (i.e., Continuing Care Retirement Communities, CCRCs) so as not to be isolated and have shared activities. This commenter argued that younger people with disabilities should have the same option.

Response: The state appreciates the commenter's thoughtful analysis. CMS makes a distinction about CCRCs in its materials related to settings that isolate. It notes, "In CMS' experience, most Continuing Care Retirement Communities (CCRCs), which are designed to allow aging couples with different levels of need to remain together or close by, do not raise the same concerns around isolation as the examples above, particularly since CCRCs typically include residents who live independently in addition to those who receive HCBS." All HCBS settings will comply with the Community Rule by March 2019 through a transition process focused on outcomes and the physical setting itself.

Support for Plan

Comment: One commenter was pleased with the plan and the fact that all people will have real choice and access and be integrated. This Community Rule continues the progress and the evolution from larger institutions to small institutions to the community. Similarly, even commenters with pointed or specific criticisms or proposed revisions to the plan also noted their support for the outcomes required in the Community Rule and the transition plan. Another commenter was concerned about the criticism of the state and DDS in particular for including campuses, farms and other congregate settings as

being “challenged” to meet the requirements of the Community Rule as these settings were plainly mandated for review by any fair-minded reading of the regulations.

Response: The state appreciates the comment and agrees that this Community Rule will continue the progress for Community First for all. We also agree that some settings may be more likely to be presumed not to meet the Community Rule; however, as indicated above, DDS will be working with all settings to ensure compliance with the Community Rule by March 2019.

Comment: One commenter was pleased with the CMS new Community Rule. They have a son in a small DDS group home who has integration and access to the community. They think the CMS new Community Rule has some good ideas and they are firm believers in community integration.

Response: The state appreciates the feedback and will continue with goals of community integration for individuals in HCBS waivers.

Role of Staff

Comment: Several commenters highlighted the role that staff play in meeting the outcomes required for the Community Rule. These commenters noted that staff need to be hired, paid, and trained to fully reach these outcomes. Staff are necessary for some individuals to be a part of the community.

Response: The state agrees with the commenters regarding the importance of staff in reaching the outcomes of choice, control, access and community integration for the individuals we serve. The DDS verification process and tool, which relies on evidence gathered through not only interviews with individuals, but also with staff, documentation (completed by staff) and observations of staff and individual interactions, recognizes the important role staff play in achieving the outcomes required for the Community Rule.

Leases

Comment: One commenter, noting that DDS had referenced the Transfer Statute, G.L. ch. 123B, Section 3, as providing due process to individuals in the event of an involuntary transfer, stated that “[w]e do not agree that the existing transfer regulations provide sufficient due process protections, particularly in the context of an emergency transfer in which notice prior to the transfer is not required.” The commenters also noted that the regulations provide limited criteria as to what constitutes an emergency, and suggested “that there are only two viable options for complying with the rule and providing sufficient due process in connection with an “eviction”: either 1) reliance upon M.G.L. chapter 186 [determination of tenancies], and G.L. ch. 239 [summary process], or 2) the creation by statute of a process similar to G. L. c. 186, §17A [related to certain community residences licensed or funded by the department of mental health].

Response: For individuals who reside in a provider owned or controlled setting where landlord/tenant law does not apply, we believe that G.L. c. 123B “provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord tenant law.” G.L. c. 123B provides that prior to the “involuntary transfer” of an individual from one DDS facility to another, DDS is required to provide 45-day notice to the individual and his or guardian, if applicable; if an objection to the transfer is received, the department must file a request for an adjudicatory proceeding to the Division of Administrative Law Appeals, where the matter will be adjudicated and from whose decision there is a right of appeal pursuant to G.L. c. 30A. In the event of an emergency, the transfer may proceed, but notice must be given within eight hours, and all rights of appeal to DALA apply.

Although the statute does not explicitly define “emergency,” DDS regulations interpreting the statute define an “emergency” as “a serious or immediate threat to the health or safety of the individuals or others” or a circumstance where the department determines that a change in provider is required pursuant to state contracting law, and that the change requires that individuals be relocated from one home to another.