February 26, 2015

Lowell Arye, Deputy Commissioner  
NJ Department of Human Services  
P.O. Box 700  
Trenton, NJ 08625-0700

delivered via email to: mahs.hcbs@dhs.state.nj.us

Re: New Jersey’s Statewide Transition Plan for Medicaid HCBS

Dear Deputy Commissioner Arye:

Thank you for the opportunity to comment on New Jersey’s draft statewide transition plan for complying with the new Medicaid home and community-based services (HCBS) regulations.

For the past two years, the National Senior Citizens Law Center has worked closely with New Jersey’s advocacy network for low-income older adults. In particular, our efforts have focused on Medicaid consumer protections throughout the implementation of managed long-term services and supports. In that capacity, we have gained a deep understanding of many of the issues faced by low-income older adults as well as adults with disabilities living in New Jersey, especially those who rely on home and community-based services. As a national organization with this degree of New Jersey-specific knowledge, we have a unique perspective on the HCBS regulations and New Jersey’s draft statewide transition plan.

We believe strongly in the principles behind the regulations — that HCB settings are truly community based and participants enjoy respect and freedom of choice in HCBS programs. We are encouraged by the values evidenced in the statewide transition plan, including New Jersey’s commitment to ensure “access and integration” and “individual initiative, autonomy and independence in making life choices.” We commend the State for an approach that appears to be seizing this opportunity to move community integration forward.

In the remainder of this letter, we offer additional suggestions regarding particular aspects of the draft transition plan.

Need for Additional Outreach, Engagement, and Public Notice/Comment

We commend the State for dedication to providing ongoing opportunity for public comment. The draft transition plan recognizes that once site specific assessments are completed, the results will have to be incorporated in the statewide transition plan and presented for public comment. (p. 12-13) We strongly support the State’s commitment to ensuring stakeholders and consumers are engaged
throughout the process by posting any substantive changes to the statewide transition plan for public input with a 30-day public comment period. (p. 32) For consistency with CMS guidance in the Statewide Transition Plan Toolkit, the State should solicit public comment where “additional assessment has resulted in a change in the findings or where the state adds more specific remedial action and milestones” and “use public input in the assessment of the state’s progress on the milestones approved in the Statewide Transition Plan.”

We are concerned that there have been few forums and methods of accessing public hearings so stakeholders may comment on the draft plan. The first public forum was scheduled for the day following the release of the draft transition plan, which did not give stakeholders a reasonable amount of time to read the plan and respond. Furthermore, this forum was cancelled due to a snowstorm. Attendance at the second forum was very low, suggesting that the date was not well-publicized. While there were many stakeholders in attendance at the third forum (February 19th), perhaps as many as half of the attendees who asked to speak were not given an opportunity because time ran out.

We are particularly concerned that for all forums, individuals had to attend in-person in order to give comments on the draft transition plan, as there was no way to access the hearing via webinar or phone. CMS guidance states, “[t]he process for individuals to submit public comment should be convenient and accessible for all stakeholders, particularly individuals receiving services.” Providing more access to hearings would broaden the audience and is more inclusive than restricting commenting to in-person or written comment. The state should also accept comments during future comment periods via phone in addition to mail and email.

The State Must Determine Whether Some Settings for Older Adults Are Settings that Isolate

The draft transition plan states, “Based upon [review of CMS guidance on physical location], the state believes that the facilities cited in NJAC 8:36, applying to ALRs, CPCH and ALP, are in compliance with the HCBS settings rule.” (p. 15)

The HCBS rule presumes that settings are not home and community based if they have the effect of isolating individuals from the broader community of people not receiving Medicaid HCBS. The state relies heavily on the proposition that all assisted living facilities are sufficiently integrated with the community because “MLTSS members who are in an AL facility are part of the broader community of individuals who are living there” (p. 15). In concluding that facilities licensed under N.J.A.C. 8:36 comply with the HCBS rule, the draft transition plan fails to address the fact that in all likelihood those non-Medicaid residents are all receiving services as well.

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2 Id. at 6.
3 CMS, Guidance on Settings that Have the Effect of Isolating Individuals receiving HCBS from the Broader Community (March 2014), http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Downloads/Settings-that-isolate.pdf.
New Jersey should take a step back and carefully determine whether particular assisted living facilities are settings that have institutional qualities, including settings that have the effect of isolating individuals receiving Medicaid HCBS from the broader community, and so should be subject to heightened scrutiny. “Integration” with the community under the federal regulations does not mean only contact with other persons receiving comparable services, whether those persons’ services are paid through Medicaid or some other source.

Also, the Plan does not set forth an adequate response to the statement in the draft transition plan that nearly 80% of New Jersey’s licensed assisted living facilities have locked units for individuals with Alzheimer’s disease and dementia. We understand that the federal regulations allow for individual service plan modification based on dementia or other cognitive limitations, but individual services plans cannot compensate for the draft transition plan’s failure to address or correct how locked units have the effect of isolating individuals receiving Medicaid HCBS. (p. 15)

**Settings for Older Adults Must Be Properly Assessed for Compliance with the Rule**

Under the draft transition plan, settings will be given “self-assessment” surveys to demonstrate their level of compliance with the HCBS rule. (p. 11, 14, 28, 29). Self-assessment surveys by themselves are not sufficient to determine compliance with the HCBS rule. In order to determine whether facilities cited in N.J.A.C. 8:36 comply with the HCBS rule, New Jersey must survey consumers to get a full and accurate picture. Additionally, these provider self-assessment surveys should be developed with stakeholder input.

Surveying of consumers is vital. The plan explains that the self-assessments will be verified by the state either with a sampling or visits to all settings, but the plan does not include surveys of consumers beyond the NCI-AD initiative (p. 28). Consumer surveys are critically important because service providers are not objective and will benefit from a determination of compliance. Second, service providers are not necessarily in a good position to make judgments about whether and how a consumer has access to the community and can exercise rights. New Jersey should not rely inordinately on self-reported data from providers.

Furthermore, we are concerned about the planned reliance on random surveys for a percentage of assisted living settings but site specific evaluation of every licensed residential setting in the DDD system. We commend the state for planning to evaluate every licensed residential setting under DDD. Similar rigor would be appropriate for assisted living — random surveys for a percentage of Assisted Living settings will not ensure robust compliance with the rule. (p. 12)

**Need for Landlord-Tenant Protections in Assisted Living Settings**

The draft transition plan and companion documents use a cross-walk from N.J.A.C. 8:36-4.1(a)(10) and 8:36-5.14 to conclude that “individuals [are] protected from eviction and afforded appeal rights in the same manner as all persons in the state who are not receiving Medicaid home and community based services.” This conclusion is incorrect. Assisted living facilities regularly interpret N.J.A.C. 8:36-5.14 to require only a meeting with the facility administrator prior to involuntary discharge. As a result,
assisted living residents, regardless of payor source, are effectively not afforded the protections of New Jersey’s Eviction with Good Cause statute. (Nor are they given the due process protections, including the right to a fair hearing, afforded to nursing home residents facing involuntary discharge under the Nursing Home Reform Act and 42 C.F.R. §431, Subpart E.)

Under a plain language interpretation, the Eviction with Good Cause statute applies to assisted living residents. N.J.A.C. 8:36 should be amended to make this clear. Such amendment would be consistent with changes proposed by the draft transition plan with respect to DDD and TBI regulations.

**Adult Day Health Services Should Be Brought Into Compliance**

The Plan states that the HCBS rule does not apply to adult day health services because those are State plan services. However, this is at odds with the policy of the HCBS rule to ensure that Medicaid-funded HCBS settings are truly home and community based. For example, CMS is requiring California to modify its adult day health care program (called Community-Based Adult Services, or CBAS) to come into compliance with the HCBS regulations, even though the CBAS program is funded under a Medicaid demonstration waiver rather than through a program established through Sections 1915(c), 1915(i), or 1915(k).

New Jersey should ensure that all HCBS settings in the state are in compliance with the rule, regardless of the particular Medicaid funding mechanism. This is especially true because many seniors and people with disabilities received adult day health services through MLTSS service plans. Seniors and people with disabilities should not be denied the protections of the HCBS rule simply because a setting is a state plan service.

**Conclusion**

We appreciate the opportunity to comment on this plan and ask that the State seriously consider our analysis. We are available to discuss our concerns and proposals further and look forward to continuing to work with the State as the plan evolves to meet the needs of HCBS waiver participants.

Sincerely,

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