

HSD Responses To Written Comments Concerning DDW Proposed Transition Plan

Comments Submitted By: Jason C. Gordon, Staff Attorney, Disability Rights New Mexico

Comment #1:

Under the transition plan proposed by HSD, the DD Waiver service standards will be revised to comply with CMS Rule. The state will train DD Waiver service providers on the use of these new service standards based largely upon self-assessment survey results completed by those providers. The state should take steps beyond analyzing self-assessments to ensure that providers are correctly utilizing the new service standards.

HSD Response:

New Mexico's Transition Plan includes many steps beyond the provider self-assessment process: (a.) A self-assessment to be completed by providers by 6/1/2015 will provide the state direction as to where training is needed. The self-assessment allows for provider buy-in and takes into account their input in this process. (b.) The State is currently revising the DD Waiver service standards which will be completed and distributed to providers 7/1/2015. (c.) On 2/1/2016 training documents will be distributed to providers. (d.) On 3/1/2016 the state will conduct statewide provider trainings including technical assistance to providers who request further assistance to come into compliance. (e.) On 7/1/2016 the state will conduct an on-site validity audit to ensure the answers providers submitted on the self-assessment were accurate. (f.) DHI will begin auditing providers on 1/1/2017. This DHI audit process includes a plan for additional technical assistance, guidance and intensive training by DDS in order for providers to come into compliance. (g.) On 1/1/2018 all providers should be in compliance with the new federal rule. The state is offering providers many opportunities and sufficient time to come into compliance with the new federal rule.

Comment #2:

The policies outlined in the current DD Waiver service standards and the regulations governing the waiver programs often comply with the law and CMS requirements. However, in practice, these policies are often incorrectly applied by service providers in the community. As a result, training and clear direction for service providers is vital to ensure compliance with present and future rules.

HSD Response:

The provider self-assessment and state on-site validity audit will confirm where providers are not in compliance with service standards and other written material requiring person centered planning and fully integrated community settings. All providers will be given intensive training and technical assistance as outlined in our transition plan.

Comment #3:

The state of New Mexico has adopted the Supports Intensity Scale ("SIS") for resource allocation within the DD Waiver system. HSD continues to use the SIS as the only factor to determine the base budget and ancillary services that will be available to each DD Waiver participant. HSD has assured CMS that it is committed to providing person centered planning for DD Waiver participants. However, a service plan driven by individual needs and preferences is not possible as long as the state continues to utilize the SIS as the sole factor used to determine the availability of DD Waiver services.

HSD Response:

As the comment is based on several false premises, including (i) that the SIS is not a "person centered" tool, (ii) that the SIS is the sole factor used to determine the availability of DDW services, and (iii) that the State fails to utilize an individual's IDT in the development of the individual service plan, the conclusion drawn is similarly faulty. In addition, the commenter cites the Title 7 NMAC regulations outside the context of the SIS assessment in misrepresenting the role of the IDT. CMS has repeatedly, both as to New Mexico and for other states, accepted the SIS as a person centered assessment tool. And as the commenter is fully aware, in addition to the SIS, the State uses other factors in determining the extent of DDW services available for each eligible recipient, including supplemental questions developed by the State of Oregon to identify those with extraordinary medical and behavioral needs. The IDT was - and remains - the primary source in the determination of a recipient's individualized services in the ISP. Regardless of group assignment, an array of services is available to each person from which they can choose. The State provides for opportunities for additional services through the Group H process.

Comment #4:

As part of the transition plan proposed by HSD, New Mexico has assured CMS that they are already in compliance with a majority of the policies dictated by the new rules. However, DRNM notes a number of ways in which our state is not in compliance with CMS requirements.

HSD Responses:

a. Access: DDS's Meaningful Day requirements outlined in the DDW Standards mean individual access for individuals with developmental disabilities to support their participation in activities and functions of community life that are desired and chosen by the general population. The term day does not exclusively denote activities that happen between 9 a.m. and 5 p.m. on weekdays. This is also a component of the ISP.

b. Cultural Considerations: 7.26.5.9 NMAC Guiding Principles No. 9, states that the planning process shall be tailored to each individual's culture, communication style, physical

requirements, learning style and personal preferences. The ISP identifies the individual's native language and whether an interpreter is needed. Also, Section B-8 of the CMS approved waiver states, "Informational materials are available in English and Spanish. Spanish-speaking individuals are available at the HSD/ISD offices and at HSD and DOH statewide toll-free numbers. Direct service waiver providers are required to communicate in the language that is functionally required by the participant. Interpreters and translators are available under contract with the DOH. Each DOH/DDSD Regional Office maintains designated bi-lingual staff including Navajo speakers in the northwest region of the state."

c. Risk Factors: The ISP process includes specific language regarding risk factors and how to plan for risks. In addition, Appendix D-1 of the approved CMS waiver states the following:
.....The case manager will explain the following:

- supports and services available in the waiver that are necessary to obtain the goals and outcomes;
- risk associated with the outcomes and services identified and possible options to mitigate the risks;
- Provides information and linkage for enhancing natural supports.....

d. Freedom from Coercion and Restraint: Appendix G-2 of the approved CMS waiver states that restraints are prohibited pursuant to the DDSD Aversive Intervention Prohibition Policy. In addition, the DOH has the following policies regarding freedom from coercion and restraints:

- 2010 Human Right Committee Requirement Policy – Section IV
- 2010 Aversive Intervention Prohibitions Policy
- 2010 Behavioral Crisis Intervention Plan Policy – Section III
- 2010 Psychotropic Medication Use Policy – Section IV

e. Compliance with 42 CFR § 441.301 (c)(4)(vi) (A-D), 42 CFR § 441.301 (c)(4)(vi)(F)(1-4), and 441.530(F):

The DDW Service Standards that are currently being revised to address:

- Access to food and visitors at any time
- A unit or dwelling or place that can be owned or rented by the individual through the use of a legally enforceable agreement

In addition, DOH is creating a new, specific policy regarding Least Restrictive Alternatives (LRA) and will revise the Aversive Prohibition and Human Rights Committee policies to align with the pending LRA policy.