

STATE OF NEW MEXICO
DEVELOPMENTAL DISABILITIES
WAIVER:
HOME & COMMUNITY BASED SETTINGS
TRANSITION PLAN

State of New Mexico Developmental
Disabilities Waiver NM.0173

Human Services Department, Medical Assistance Division

FINAL DRAFT

Submitted to CMS on December 30, 2014 for review and approval

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Purpose:

HSD and the Department of Health (DOH) are seeking public comment on its transition plan to meet Final Rule (2249-F/2296-F)'s requirements. HSD will use guidance from CMS, the data collected during its assessments, and public comments to influence the activities to ensure full compliance with Final Rule (2249-F/2296-F).

Public Input Process:

HSD will provide CMS with its Transition Plan for preliminary review. HSD will release its Transition Plan for public comment for no less than 30 calendar days using at least two methods of distribution. Public comments will be reviewed by HSD and it will modify the plan as necessary. HSD will provide a summary of comments received during the public input period and provide feedback as to why comments were not adopted and include modifications to its Transition Plan based upon comments. HSD will analyze any additional guidance from CMS and provide feedback or modify the plan as determined necessary. HSD will submit the DDW Amendment in January 2015 with a proposed April 2015 effective date.

Residential & Non-Residential Settings

CMS GUIDANCE ON RESIDENTIAL SETTINGS REQUIREMENTS AS DESCRIBED IN §441.301:

“(4) Home and Community-Based Settings. Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:

- (i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.
- (ii) The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.
- (iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.
- (iv) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.
- (v) Facilitates individual choice regarding services and supports, and who provides them.
- (vi) In a provider-owned or controlled residential setting, in addition to the qualities at §441.301 (c)(4)(i) through (v), the following additional conditions must be met:
 - (A) The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity. For settings in which

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landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

(B) Each individual has privacy in their sleeping or living unit:

(1) Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.

(2) Individuals sharing units have a choice of roommates in that setting.

(3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.

(C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.

(D) Individuals are able to have visitors of their choosing at any time.

(E) The setting is physically accessible to the individual.”

CMS GUIDANCE ON NON-RESIDENTIAL SETTING REQUIREMENTS AS DESCRIBED IN Fact Sheet: Summary of Key Provisions of the Home and Community-Based Services (HCBS) Settings Final Rule (CMS 2249-F/2296-F):

“Application of home and community-based settings requirements to non-residential setting: CMS has clarified that the rule applies to all settings where HCBS are delivered, not just to residential settings. CMS will be providing additional information about how states should apply the standards to non-residential settings, such as day program and pre-vocational training settings.

The Final Rule requires that all home and community-based settings meet certain qualifications. These include:

- The setting is integrated in and supports full access to the greater community;
- Is selected by the individual from among setting options;
- Ensures individual rights of privacy, dignity and respect, and freedom from coercion and restraint;
- Optimizes autonomy and independence in making life choices; and
- Facilitates choice regarding services and who provides them.”

Assessment Process

State:

Residential Settings:

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HSD through the Medical Assistance Division (MAD), along with DOH, completed an initial assessment of the extent to which its standards, rules, and other requirements complied with HCBS residential setting requirements and Final Rule (2249-F/2296-F). DDW Service Standards and the New Mexico Administrative Code (NMAC) rules were analyzed against Final Rule (2249-F/2296-F) setting requirements. Based on the attached assessment (Attachment #1-CMS Final Rule Crosswalk), HSD determined its standards, rules, and other requirements comply with the Final Rule (2249-F/2296-F), with the exception of three areas.

1. The eligible recipient has a lease or other legally enforceable agreement providing similar protections. Each eligible recipient has privacy in their sleeping or living unit. Units have lockable entrance doors, with him or her and appropriate staff having keys to doors as needed.
2. The eligible recipient has access to food at any time. Modifications to the DDW Standards will include information necessary for Human Rights Committee review when food has the potential to be a danger to the eligible recipient.
3. An eligible recipient may have visitors at any time.

Non-Residential Settings:

HSD will conduct a similar type of provider self-assessment once CMS provides additional guidance.

Provider:

Currently there are 77 Living providers (Family, Intensive Medical and Supported), 79 Customized Community Supports providers, and 43 Community Integrated Employment providers statewide that provide DDW residential, day, and employment services. DOH, in collaboration with the HSD, will send a self-assessment survey to all residential, day, and employment (non-residential) provider agencies in order for HSD to determine if a provider is:

1. Fully aligned with the Final Rule (2249-F/2296-F); or
2. Non-compliant with the Final Rule (2249-F/2296-F) and as such will require modifications to its operations.

The provider self-assessment survey will be developed by 5/1/2015 and sent to residential, day and employment providers by 5/1/2015 via email. This survey will also be made available to providers, eligible recipients receiving DDW services, and representatives of consumer advocacy entities through the ACT New Mexico website <http://actnewmexico.org/> or by calling DOH at 505-476-8973 or toll free at 1-877-696-1472.

Remediation

State :

1. DDW Service Standards will incorporate these three areas and all requirements as outlined in Final Rule (2249-F/2296-F). HSD anticipates the revised DDW Standards will be completed by DOH by 7/1/2015. Once finalized, all DDW providers must comply with these standards.

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2. After the provider self-assessment is completed, DOH will conduct training for its providers onto the revised DDW Standards. The training documents will be disseminated to DDW providers by 2/1/2016. The training of providers will begin on 3/1/2016 and will be completed by 7/1/2016.
3. DOH regional offices will then perform a validity check on a statistically valid sample of provider self-assessment survey responses. This validity check will begin on 7/1/2016 and end on 12/1/2016.
4. HSD, in collaboration with DOH Division of Health Improvement (DHI), will develop a tool incorporating requirements from the revised DDW Service Standards. This tool will be created by 12/1/2016 and DHI will implement it during its routine provider surveys beginning in 2017 to ensure compliance by the start of 2018. DHI will conduct surveys of providers once every three years or sooner, as determined necessary.

Provider:

HSD, through DOH, will analyze data collected from the provider self-assessment surveys. Based on individual provider findings, DOH will develop corrective action plans with timelines to ensure compliance with DDW Standards (which include CMS final rule requirements). DOH will conduct follow up surveys to ensure on-going compliance and will continuously monitor systemic compliance through our Developmental Disabilities Services Quality Improvement (DDS/QI) Steering Committee and CMS Waiver Assurances; and through DOH on-going quality activities.

If a provider is unable to comply with the DDW Standards, HSD through DOH will relocate that provider's eligible recipient residents to a provider that is compliant. When relocation is necessary, HSD will make available to the eligible recipient reasonable notice of his or her due process rights. The process will ensure an eligible recipient, through the person-centered planning process, is given the opportunity, the information, and the support to make an informed choice of an alternate setting that aligns with the DDW Standards and that critical services and supports are in place in advance of his or her transition. DOH will ensure that appropriate planning takes place to facilitate a smooth transition of an eligible individual to an alternative environment. The every possible consideration will be given to eligible recipient's choices. Unless precluded by circumstances posing a danger to the health, safety or welfare of the eligible recipient or others prior to relocation, the Interdisciplinary Team will convene at least 30 calendar days prior to the proposed relocation action. This will allow adequate time to the development of the eligible recipient's relocation transition plan and to properly execute the plan. A provider will not be allowed to discharge an eligible recipient until all requirements are followed and all avenues are pursued to keep the person in a setting that meets his or her choice and needs for DDW services. In no instance may an eligible recipient be discharged from a provider until alternative arrangements are made to meet the eligible recipient's immediate needs.

Time Frame and Milestones:

HSD will adhere to the timelines outlined in Attachment #2 (pg. 15)

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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.

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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

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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.

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Modifications Made to Transition Plan as a Result of Public Input

There was a modification to the timeline, updating when the Transition Plan was sent for Tribal Notification, when the public hearing announcement was published, and an update to the submission date of the Transition Plan to CMS. No other modifications were made to the Transition Plan as a result of the public input process.

The final version of the Transition Plan is available for public viewing on the HSD website:

<http://www.hsd.state.nm.us/public-notice-proposed-rule-and-waiver-changes-and-opportunities-to-comment.aspx>

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ATTACHMENT #1 CMS RULE CROSSWALK					
HCBS SETTING REQUIREMENTS	APPROVED WAIVER	STANDARDS	REGULATIONS	POLICIES	COMMENTS
IS INTERGRATED IN AND SUPPORTS ACCESS TO THE GREATER COMMUNITY		X			
PROVIDES OPPORTUNITY TO SEEK EMPLOYMENT AND WORK IN COMPETITIVE INTEGRATED SETTING, ENGAGE IN COMMUNITY LIFE, AND CONTROL PERSONAL RESOURCES	X	X	X		
ENSURES THE INDIVIDUAL RECEIVES SERVICES IN THE COMMUNITY TO THE SAME DEGREE OF ACCESS AS INDIVIDUALS NOT RECEIVING MEDICAID HOME AND COMMUNITY BASED SERVICES.	X	X	X		
THE SETTING IS SELECTED BY THE INDIVIDUAL FROM AMONG SETTING OPTIONS INCLUDING NON-DISABILITY SPECIFIC SETTINGS AND AN OPTION FOR A PRIVATE UNIT IN A RESIDENTIAL SETTING		X	X		
THE SETTING OPTIONS ARE IDENTIFIED AND DOCUMENTED IN THE PERSON-CENTERED SERVICE PLAN AND ARE BASED			X		

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ON THE INDIVIDUAL'S NEEDS, PREFERENCES, AND FOR RESIDENTIAL SETTINGS, RESOURCES AVAILABLE FOR ROOM AND BOARD					
ENSURES AN INDIVIDUAL'S RIGHTS OF PRIVACY, DIGNITY, RESPECT, AND FREEDOM FROM COERCION AND RESTRAINT		X	X	X	
OPTIMIZED INDIVIDUAL INITIATIVE, AUTONOMY, AND INDEPENDENCE IN MAKING LIFE CHOICES		X	X		
FACILITATES INDIVIDUAL CHOICE REGARDING SERVICES AND SUPPORTS, AND WHO PROVIDE THEM.		X			
PROVIDER-OWNED OR CONTROLLED RESIDENTIAL SETTINGS					
SPECIFIC UNIT/DWELLING IS OWNED, RENTED OR OCCUPIED UNDER LEGALLY ENFORCEABLE AGREEMENT		X			
SAME RESPONSIBILITIES/PROTECTIONS FROM EVICTION AS ALL TENANTS UNDER LANDLORD LAW OF STATE, COUNTY, CITY OR OTHER DESIGNATED ENTITY		X			
IF TENANT LAWS DO NOT APPLY, STATE ENSURES LEASE, RESIDENCY AGREEMENT OR OTHER WRITTEN AGREEMENT IS IN PLACE PROVIDING PROTECTIONS TO ADDRESS EVICTION PROCESSES AND APPEALS COMPARABLE TO THOSE PROVIDED UNDER THE JURISDICTION'S LANDLORD TENANT LAW					TENANT LAWS DO APPLY
EACH INDIVIDUAL HAS PRIVACY IN THEIR SLEEPING OR LIVING UNIT		X			
INDIVIDUALS SHARING UNITS		X			

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HAVE A CHOICE OF ROOMMATES					
INDIVIDUALS HAVE THE FREEDOM TO FURNISH AND DECORATE THEIR SLEEPING OR LIVING UNITS WITHIN THE LEASE OR OTHER AGREEMENT.		X			
INDIVIDUALS HAVE FREEDOM AND SUPPORT TO CONTROL THEIR SCHEDULES AND ACTIVITIES		X			
SETTING IS PHYSICALLY ACCESSIBLE TO THE INDIVIDUAL		X			
PERSON CENTERED PLANNING					
THE PERSON-CENTERED PLANNING PROCESS IS DRIVEN BY THE INDIVIDUAL	X	X	X		
INCLUDES PEOPLE CHOSEN BY THE INDIVIDUAL	X	X	X		
PROVIDES NECESSARY INFORMATION AND SUPPORT TO THE INDIVIDUAL TO ENSURE THAT THE INDIVIDUAL DIRECTS THE PROCESS TO THE MAXIMUM EXTENT POSSIBLE	X	X	X		
IS TIMELY AND OCCURS AT TIMES/LOCATIONS OF CONVENIENCE TO THE INDIVIDUAL	X	X	X		
REFLECTS CULTURAL CONSIDERATIONS/USES PLAIN LANGUAGE	X	X	X		
INCLUDES STRATEGIES FOR SOLVING DISAGREEMENT	X				
OFFERS CHOICES TO THE INDIVIDUAL REGARDING SERVICES AND SUPPORTS THE INDIVIDUAL RECEIVES AND FROM WHO	X	X	X		
PROVIDES METHOD TO REQUEST UPDATES	X	X	X		
CONDUCTED TO REFLECT WHAT IS IMPORTANT TO THE INDIVIDUAL TO ENSURE	X	X	X		

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DELIVERY OF SERVICES IN A MANNER REFLECTING PERSONAL PREFERENCES AND ENSURING HEALTH AND WELFARE					
IDENTIFIES THE STRENGTH, PREFERENCES, NEEDS (CLINICAL AND SUPPORT), AND DESIRED OUTCOMES OF THE INDIVIDUAL		X	X		
MAY INCLUDE WHETHER AND WHAT SERVICES ARE SELF-DIRECTED			X		
WRITTEN PLAN REFLECTS					
SETTING IS CHOSEN BY THE INDIVIDUAL AND IS INTERGRATED IN, AND SUPPORTS FULL ACCESS TO THE GREATER COMMUNITY			X		
OPPORTUNITIES TO SEEK EMPLOYMENT AND WORK IN COMPETITIVE INTERGRATED SETTINGS	X	X	X		
OPPORTUNITY TO ENGAGE IN COMMUNITY LIFE, CONTROL PERSONAL RESOURCES, AND RECEIVE SERVICES IN THE COMMUNITY TO THE SAME DEGREE OF ACCESS AS INDIVIDUALS NOT RECEIVING MEDICAID HCBS		X	X		
INCLUDES INDIVIDUALLY IDENTIFIED GOALS AND PREFERENCES RELATED TO RELATIONSHIPS, COMMUNITY PARTICIPATION, EMPLOYMENT, INCOME AND SAVINGS, HEALTHCARE AND WELLNESS, EDUCATION AND OTHERS		X			
INCLUDES RISK FACTORS AND PLANS TO MINIMIZE THEM	X	X			
IS SIGNED BY ALL INDIVIDUALS AND PROVIDERS RESPONSIBLY FOR ITS IMPLEMENTATION AND A COPY OF THE PLAN MUST BE PROVIDED TO THE INDIVIDUAL			X		

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AND HIS/HER REPRESENTATIVE					
DISTRIBUTED TO THE INDIVIDUAL AND OTHERS INVOLVED IN PLAN		X	X		
INCLUDES PURCHASE/CONTROL OF SELF-DIRECTED SERVICES			X		
EXCLUDE UNNECESSARY OR INAPPROPRIATE SERVICES AND SUPPORTS		X	X		

ATTACHMENT #2: MILESTONE TIMELINE

YOUR PROJECT	
TIMELINE	
PROJECT DETAILS	
DATE	MILESTONE
7/1/2014	Project Start
7/21/2014	Cross Walk Completed
10/31/2014	Transition Plan Sent for Tribal Notification
11/30/2014	Public Hearing Announcement Published
12/15/2014	Public Hearing
1/1/2015	Submit Transition Plan to CMS
5/1/2015	Provider Self Assessment Survey Developed and Distributed
6/1/2015	Provider Self Assessment Survey Completed by Providers
7/1/2015	Standards Effective and Distributed
1/1/2016	New Rule Training Documents Developed for Providers
2/1/2016	New Rule Training Documents Disseminated to Providers
3/1/2016	Statewide Provider Training Begins
6/1/2016	State Regional Onsite Validity Tool Completed
7/1/2016	State Regional Onsite Validity Audit Starts
12/1/2016	State Regional Onsite Validity Audit Ends
12/1/2016	DHI Auditors Tool Completed
1/1/2017	DHI Auditors Begin Using Tool to Monitor DH, Residential, and SE
1/1/2018	Project End - Full Compliance/Ongoing Monitoring
3/1/2019	All Corrective Action Plans or Client Relocations Completed

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