



Vermont Developmental Disabilities Council

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TO: Agency of Human Services
RE: Vermont's Statewide Transition Plan and Comprehensive Quality Strategy
FROM: Susan Aranoff, J.D., Senior Planner and Policy Analyst
DATE: June 17, 2022

The Vermont Developmental Disabilities Council (VTDDC) is commenting on the Statewide Transition Plan (STP) and Comprehensive Quality Strategy (CQS) submitted to the Centers for Medicaid and Medicare Services (CMS) on October 11, 2021 (2021 STP). The State did not provide notice or an opportunity to comment prior to submitting this iteration of the plan to CMS. However, in the 2021 STP, the State reports that it will accept public comments on its updated STP at any time¹.

The Vermont Developmental Disabilities Council is compelled to comment at this time due to our grave concerns about both the inadequacy of the State's transition plan and the inadequacy of the State's public engagement efforts in the transition planning process.

The Vermont Developmental Disabilities Council

The Vermont Developmental Disabilities Council (hereafter "VTDDC") is a statewide board created by the federal Developmental Disabilities Assistance and Bill of Rights Act

¹ The State will ensure ongoing transparency and input from stakeholders by posting updates to the STP on its website and accepting comments on any updates. 2021 STP Page 12.

(hereafter “the DD Act”), first adopted by Congress in 1970. Our constituents are healthcare users who have an important stake in the cost, quality, and availability of both traditional healthcare and disability long term services and supports (DLTSS). An estimated 86,000 Vermonters experience a developmental disability as defined by the DD Act, with approximately 5,100 receiving Medicaid-funded, home and community-based support (HCBS) through the Developmental Disabilities Services System of Care or in some cases, the Choices for Care Program.

VTDDC is charged under federal law with engaging at the state level in “advocacy, capacity building and systems change activities that... contribute to the coordinated, consumer-and-family-centered, consumer-and-family directed, comprehensive system that includes needed community services, individualized supports, and other forms of assistance that promote self-determination for individuals with developmental disabilities and their families.”²

In addition to our federal mandate, we are commenting in our unique role within the Agency of Human Services (AHS). As per our signed assurances with AHS, the VTDDC advises AHS on quality strategies as they pertain to people with disabilities.³

INTRODUCTION

The VTDDC is compelled to comment on the 2021 State Transition Plan and Comprehensive Quality Strategy because the Council has concluded that it does not adequately address the civil rights of Vermonters with disabilities. Specifically, Vermont is failing to ensure that individuals with developmental disabilities receive home and

² Developmental Disabilities Assistance and Bill of Rights Act of 2000. 42 USC 15001 et. seq.

³ “Section M. The Council will participate in the planning, design or redesign, and monitoring of State quality assurance systems that affect individuals with developmental disabilities.” Signed by AHS Secretary Samuelson.

community-based services (HCBS) in settings that meet the requirements set forth in the 2014 Home and Community-Based Services Settings Rule.

2014 HCBS SETTINGS RULE

In 2014, the Centers for Medicare and Medicaid Services (CMS) at the Department of Health and Human Services issued the HCBS Settings Rule to require that every state ensure that services delivered to people with disabilities living in the community – that is, outside of institutions – meet minimum standards for integration, access to the community, choice, autonomy, and other important consumer protections.

The HCBS Settings Rule was put in place because of concerns that many states and providers were using federal dollars dedicated to community-based supports to pay for disability services that were still institutional in nature. Too many of the so-called “community” options were exercising the same control and isolation over individuals as larger institutions. By articulating a set of minimum requirements for HCBS funding, the Settings Rule ensures that federal funds are used for their intended purpose and that individuals with disabilities have an opportunity to enjoy the autonomy and freedom associated with community life.

The VTDDC strongly supports robust implementation of the Home and Community Based Services (HCBS) Settings Rule because it is a vital part of the broader effort to promote community integration for people with disabilities. People with disabilities deserve the same rights to make choices, access their communities, and interact with the world as people without disabilities. Full implementation of the HCBS Settings Rule supports these basic civil and civic rights.

Specifically the 2014 HCBS Settings rule requires that the setting:

- is integrated in the greater community;
- supports the individual's full access to the greater community, including opportunities to seek employment, work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community;
- is selected by the individual from among different setting options, including non-disability specific options and an option for a private unit in a residential setting;
- ensures an individual's rights to privacy, dignity, respect, and freedom from coercion and restraint;
- optimizes individual initiative, autonomy, and independence in making life choices, including in daily activities, physical environment, and personal associations; and
- facilitates individual choice regarding services and supports and who provides them.

These requirements are designed to ensure that people with disabilities living in the community have access to the same kind of choice and control over their own lives as those not receiving Medicaid HCBS funding.

A "provider-owned or controlled residential setting" is one in which the service provider also owns or controls the real estate where the individual lives, as distinct from a setting owned or controlled by the person receiving services or their family where the provider merely arrives to deliver support services. Vermont provides home and community-based services in provider-owned or controlled residential settings. The residences of shared living providers are considered provider-owned or controlled residential settings.

The 2014 Settings Rule contains specific requirements for provider owned settings because research shows that these settings are more likely to limit residents' rights – in part due to the inability of residents to fire their service provider without having to move to a new home. Individuals in provider-owned or controlled residential settings must have:

- a lease or other legally enforceable agreement providing similar protections;
- privacy in their unit, including lockable doors, choice of roommates, and freedom to furnish or decorate their space;
- the right to control his/her own schedule including access to food at any time;
- the right to visitors at any time; and
- a setting that is physically accessible.

FAILURE TO SEEK HEIGHTENED SCRUTINY

To support states in their implementation of the 2014 HCBS Settings Rule, CMS issued guidance in 2019 and gave states clear examples of HCBS settings that tend to isolate their residents. States are required to give settings that isolate heightened scrutiny in the settings rule compliance assessment process.

Farmstead communities are included in a non-exhaustive list of settings that by tend to isolate. Here is how the CMS guidance describes a farmstead:

Farmstead or disability-specific farm community: These settings are often in rural areas on large parcels of land, with little ability to access the broader community outside the farm. Individuals who live at the farm typically interact primarily with people with disabilities and staff who work with those individuals. Individuals typically live in homes only with other people with disabilities and/or staff. Their neighbors are other individuals with disabilities or staff who work with those individuals. Daily activities are typically designed to take place on-site so that an individual generally does not leave the farm to access HCB services or participate in

community activities. For example, these settings will often provide on-site a place to receive clinical (medical and/or behavioral health) services, day services, places to shop and attend church services, as well as social activities where individuals on the farm engage with others on the farm, all of whom are receiving Medicaid HCBS. While sometimes people from the broader community may come on-site, people from the farm do not go out into the broader community as part of their daily life. Thus, the setting does not facilitate individuals integrating into the greater community and has characteristics that isolate individuals receiving Medicaid HCBS from individuals not receiving Medicaid HCBS.⁴

The VTDDC notes with grave concern that Vermont did not identify any settings that by their nature tend to isolate their residents. As set out above, the guidance issued by CMS finds that farmstead communities, by their very nature, may be settings that tend to isolate their residents. Heartbeet is a farmstead community providing HCBS services in Hardwick, VT. Given the known presence of Heartbeet in Vermont, the VTDDC is concerned that the authors of Vermont's 2021 STP concluded that there are no HCBS settings in Vermont that tend to isolate their residents and therefore no HCBS settings in Vermont that required heightened scrutiny.

In addition to providing HCBS services at a farmstead, Vermont also provides HCBS services to over 2000⁵ individuals residing in provider owned or controlled settings, including the residences of shared living providers and other adult foster care providers. Vermont has failed to do due diligence to assess if and how the individuals in these settings will receive the full benefit of the rights enumerated in the HCBS Settings Rule. There have been no efforts to date to educate the residents of these settings as to their rights, including the right to a lease or lease-like protections.

⁴ (March 22, 2019) SMD # 19-001 Re: Home and Community-Based Settings Regulation, Heightened Scrutiny.

⁵ 2021 STP, page 20.

All shared living residences could be settings that isolate because in most cases, the residents in a shared living residence do not control their own access to the community. The VTDDC is concerned that there has been very little monitoring of the quality of life of the residents of shared living providers. While HCBS clients served by Choices for Care have access to the services of the Long-term Care Ombudsman, there is no comparable independent entity monitoring the quality of developmental disability services in Vermont.

Vermont lacks person-centered planning processes that are free from undue conflicts of interest. Conflicts of interest are rife within Vermont's HCBS system because frequently, all a person's services -- from case management, through service planning, extending to employment supports and shared living provider -- are provided by the same agency. There is no outside agency that can address a resident's shared living or service quality concerns.

VTDDC notes that the Vermont Agency of Human Services is under a plan of correction to address the lack of conflict-of-interest free case management in Vermont. Vermont has failed to support the civil rights of Vermonters with disabilities with the timely remediation of a conflict riddled service-delivery system. Instead, Vermont maintained for years that the HCBS person-centered planning and settings rules do not apply to HCBS services in Vermont because Vermont has a different type of Medicaid waiver. Vermont's failure to implement conflict-of-interest free case management and other parts of the person-centered planning rules of 2014, constitutes an abdication of the state's duty to protect the civil rights afforded Vermonters with disabilities under federal laws and regulations. The years' long lack of concern for the rights of service recipients to receive services free from conflicts of interest is very troubling to the VTDDC and cries out for greater oversight from CMS.

The Council notes that the Vermont Legislature is similarly concerned about the lack of oversight and quality assurance within the Developmental Services System. During the 2022 Session, the General Assembly passed Act 186⁶, which requires the Department of Disabilities Aging and Independent Living (DAIL) to review the frequency and rigor of quality assurance systems for developmental disability services. Specifically, DAIL must submit two reports to the legislative committees of jurisdiction, including a “an implementation plan that shall address the fiscal and workforce requirements for conducting a minimum of at least one annual on-site quality assurance and improvement visit by the Department to the designated and specialized service agencies and other providers serving individuals with developmental disabilities to address the quality of home- and community-based services, including health and safety, in accordance with personalized service plans for the individuals served.”⁷

The VTDDC notes further that Vermont’s 2021 STP fails to provide an adequate plan for monitoring compliance with the 2014 HCBS Settings Rule. The 2021 STP provides that the State will assess 15% of all HCBS residential settings every 2 years. This means that any given person receiving HCBS in a provider-controlled residence has only a small chance of having an inspection from the State agency responsible for assuring the quality of that person’s services.

INADEQUACY OF THE PUBLIC ENGAGEMENT PROCESS

Turning to issues of process, VTDDC notes that Vermont did not share its 2021 STP with stakeholders prior to its submission to CMS on October 11, 2021. Moreover, the State has not shared the 2021 STP with its federally required Medicaid and Exchange Advisory

⁶ Act 186,

<https://legislature.vermont.gov/Documents/2022/Docs/ACTS/ACT186/ACT186%20As%20Enacted.pdf>

⁷ Act 186, Section 3(b).

Council or any of the several boards, councils, and advisory committees within the Agency of Human Services and its member Departments. The State did not even generate a notice for its Global Commitment Registry regarding the existence of the October 11 submission. Other than simply posting the October 2021 STP on a single state website, the State has done nothing to engage with the public regarding the October 2021 STP despite substantive changes in this iteration of the STP.

Furthermore, the description of the public engagement process contained in the 2021 STP is misleading. The 2021 STP states the following with respect to Public Engagement:

A description of the Public Input Process. Vermont is committed to ensuring that all elements of our statewide Comprehensive Quality Strategy (CQS) are reviewed publicly, and that public input is incorporated into the final version of the strategy. The CQS is subject to public input, as required at 42 CFR 441.301(6)(B)(iii) and 42 CFR 441.710(3)(iii). Prior to submission of the CQS, the state will:

- Issue a public notice inviting public comment on the CQS
- Allow a minimum of a 30-day public comment period on the CQS
- Consider public comments and modify the CQS accordingly
- Submit evidence of public comment and our response to comments

Notice regarding the draft CQS/STP was posted on the AHS website and distributed to subscribers using the Global Commitment Register (GCR). The GCR is a database of policy changes to and clarifications of existing Medicaid policy under Vermont's 1115 Global Commitment to Health waiver. The Global Commitment Register is available here. (Hot link omitted). Comments were accepted by email, mail, or fax. All public comments were evaluated by the HCBS Implementation Team. The summary and response of all comments can be found here. (Hot link omitted). If the state's determination differed from the public comment, then additional evidence and the rationale the state used to confirm its determination were included. If the state's determination agreed with the public comment, then the location of the supporting evidence in the transition plan was indicated. The State assures that the STP, with modifications, will be posted for public information no later than the date of submission to CMS, and that all public

comments on the draft STP will be retained and made available for CMS review for the duration of the transition period or approved waiver, whichever is longer.⁸

This section is misleading because the draft STP referenced here is the draft STP that was filed in 2020, not the significantly revised STP that was filed October 11, 2021.

The VTDDC commented on the draft STP in 2020, and the State's response highlights another problem with Vermont's public engagement process – the confusion created by the merger of the State Transition Plan and the Comprehensive Quality Strategy. As a combined document, it is hard for the public to follow the process and to know which issues to raise at which time and in which forum. For instance, when the VT DDC commented on the STP/CQS in 2020, we received the following email response from the State official in charge of the plan:

From: Skaflestad, Shawn

To: Aranoff, Susan

Cc: Backus, Ena; Berliner, Ashley; Hutt, Monica; O'Connell, Tracy E; Frazer, Dylan; Hickman, Selina

Subject: RE: Comprehensive Quality Strategy

Date: Monday, June 1, 2020 12:33:00 PM

Hi Susan,

The CQS/STP was submitted to CMS along with the VTDDC comment in its entirety.

Vermont has been directed by CMS that the correct avenue for managing Conflict Free Case Management requirements is through its upcoming waiver renewal. Given this guidance, no modifications were made to the STP based on the feedback. We will continue to work with CMS and stakeholders on the correct approach to these requirements for each of our home and community-based services programs outside of the Statewide Transition Plan, which is specific to CMS requirements regarding HCBS settings.

Best,

Shawn

CMS has admonished Vermont for its poor public process in the past, including over the confusion created by conflating the STP and the CQS for those wishing to follow and/or comment on the process.⁹

⁸ 2021 STP, page 12

⁹ <https://www.medicaid.gov/sites/default/files/2019-12/vt-cmia.pdf>

In its 2015 letter to then DVHA Commissioner Stephen Costantino, CMS stated the following: “CMS is concerned that it was difficult for the public to provide meaningful comments on the STP because it was hard to identify specifically those sections of the CQS that addressed the home and community-based settings requirements. We note this concern was also reflected in the stakeholder feedback the state received on its plan.”

This CMS feedback notwithstanding, Vermont is still combining its Statewide Transition Plan with its Comprehensive Quality Strategy much to the confusion of those who try to follow the process.

RECOMMENDATIONS

Going forward, VTDDC has the following recommendations to improve the STP and the public engagement process that should inform the STP.

1. Heartbeet, the Developmental Disabilities Shared Living Program, and any other settings that by their nature tend to isolate residents with disabilities should be subject to heightened scrutiny.
2. Independent Ombudsman: Vermonters with disabilities who are receiving home and community-based services for a developmental disability need an outside entity to address complaints and conduct independent investigations. These beneficiaries should have access to a service that has been embedded in Choices for Care since its inception. Vermont would benefit from implementing a Ombuds Program for developmental service immediately as a mitigating strategy supporting their efforts to comply with conflict-of-interest free case management.
3. Quality reviews and monitoring of compliance with HCBS rules should be increased to significantly more than a 15% review every 2 years.

4. The State must provide a Notice of Rights for HCBS recipients – in plain language – detailing the rights enumerated in the settings rule and in the person-centered-planning rule.
5. The State must create and provide a standardized agreement for state-funded shared living providers that contains lease-like protections. If each of the 14 designated agencies creates its own, there will be confusing differences between beneficiaries receiving the same services.
6. The State should use the American Rescue Plan Act Enhanced FMAP funds and other Covid PHE related funds to incentivize more people to become shared living providers and to assist current shared living providers to make any improvements necessary for the health and safety of their residents or to comply with the settings rule.
7. The State should separate the Statewide Transition Plan (STP) and its future updates from the Comprehensive Quality Strategy (CQS). The combined format makes it difficult to understand the status of either the STP or the CQS on its own.
8. The State should be required to put the 2021 STP out for public comment.
9. Going forward, the State should be required to notice the VTDDC, the MEAC and all relevant councils and advisory boards within AHS each time the STP is updated or other times there is a similar filing with CMS.

Thank you for the opportunity to comment on Vermont's State Transition Plan as filed with CMS, October, 11, 2022.