

November 10, 2022

Joseph Billingsley  
Department of Health Care Services  
Integrated Systems of Care Division  
1501 Capitol Avenue, MS 4502  
PO Box 997437  
Sacramento, California 95899-74133

Re: State Transition Plan (STP) Public Comment  
Delivered via email: STP@dhcs.ca.gov

Dear Mr. Billingsley:

Disability Rights California and Justice in Aging along with the undersigned organizations and HCBS users thank you for the opportunity to comment on California's Final State Transition Plan for implementation and compliance with the Final HCBS Settings Rule. Collectively, our organizations represent a wide range of consumers and advocates who share the goal of achieving compliance with the HCBS regulations and advancing community integration. We write to express our significant concerns with the state's Transition Plan and its efforts to date to comply with the Final Rule. We provide our overarching concerns below followed by extensive comments and recommendations.

The underlying intent of the HCBS Settings Rule is to ensure that HCBS settings are different from institutional settings and facilitate community integration.[i] Importantly, the intent is not to reduce the availability of HCBS or, alternatively, allow non-compliant settings to remain in non-compliant status indefinitely. Yet, this is likely the result based on the current draft State Transition Plan (STP).

In light of the March 2023 federal deadline for compliance, we are disheartened that the STP indicates that there are currently only 2,213 settings that have been validated as fully compliant with the HCBS Settings Rule. Meanwhile, the STP indicates that there are 880 non-compliant settings and 4,816 settings working toward compliance, but requiring modification. Considering the state received federal approval for its initial STP in 2018, it is deeply concerning that the majority of settings remain out of compliance, leaving thousands upon thousands of HCBS consumers in limbo as to whether their HCBS services will continue, or whether they are receiving services that are actually not HCBS in nature and will be terminated.

The draft final STP provides minimal detail on what actions the state intends to take to ensure HCBS settings become compliant by the March 2023 deadline. Instead, the Final STP looks remarkably the same as the 2021 STP and 2018 STP. We are particularly concerned that California intends to submit a corrective action plan that has not been shared with the public to the Centers for Medicare & Medicaid Services (CMS) to obtain additional time to comply with the HCBS Settings Rule on the basis that the COVID-19 pandemic has impeded the state's

efforts to comply by the March 2023 deadline. While the COVID-19 pandemic has indisputably caused delay, it does not account for the inadequacy of the draft Final STP and its absence of affirmative steps and transparency to ensure compliance as we outline more fully in our comments below.

It is imperative that California's Final STP outline in detail what steps the state will take to ensure compliance, including: 1) robust technical assistance, resources and training to support providers and their staff in becoming compliant, ongoing provider monitoring, and strong enforcement mechanisms; 2) clear consumer protections and appeal rights paired with robust consumer education; and 3) data collection and transparency measures.

The state should leverage the funding it has received under the American Rescue Plan Act to develop and carry out an STP that equitably advances the state's obligations to comply with the HCBS Settings Rule by the March 2023 deadline. A robust STP will ensure individuals with disabilities in California have access to integrated settings in furtherance of the principles outlined in *Olmstead* and the state's goals under the Master Plan for Aging.

In addition, to ensure that there is robust implementation, monitoring, and enforcement of the HCBS Settings Rule in a manner that truly advances community integration, and does not inadvertently result in the inequitable displacement of residents, we request that an ongoing working group be formed. This HCBS settings workgroup will be tasked with ensuring that the Plan implementation advances the mandates of inclusion and community integration under *Olmstead*.

Our detailed comments follow. If you have any questions, please contact Hagar Dickman at [hdickman@justiceinaging.org](mailto:hdickman@justiceinaging.org) and [william.leiner@disabilityrightsca.org](mailto:william.leiner@disabilityrightsca.org).

Respectfully submitted,  
Disability Rights California  
Justice in Aging

## **Organizations**

The Arc of Los Angeles and Orange Counties  
Bay Area Legal Aid  
California Advocates for Nursing Home Reform  
California Alliance for Retired Americans  
California Commission on Aging  
California Community Living Network  
California Council of the Blind  
Californians for Disability Rights Inc  
California Foundation for Independent Living Centers (CFILC)  
CA IHSS Consumer Alliance  
California State Independent Living Council (SILC)  
Caring Across Generations

Choice in Aging  
Community Living Campaign  
Corporation for Supportive Housing (CSH)  
Dayle McIntosh Center for the Disabled  
Disability Rights Education and Defense Fund (DREDF)  
Disability Services and Legal Center (DSLCL)  
Disability Voices United  
Family Caregiver Alliance  
Hope House for the Multiple-Handicapped, Inc.  
Housing California  
Independent Living Partnership  
Jewish Family Service of Los Angeles  
The Kelsey  
Law Foundation of Silicon Valley  
Legal Aid Society of San Mateo  
Mercy Housing  
National Health Law Program  
New Horizons: Serving Individuals with Special Needs  
Partners in Care Foundation  
Personal Assistance Services Council (PASC)  
Placer Independent Resource Services  
Resources for Independence Central Valley  
Rolling Start, Inc.  
Senior Coastsiders, Inc.  
Senior Services Coalition of Alameda County  
Service Center for Independent Life (SCIL)  
Silicon Valley Independent Living Center  
United Domestic Workers of America AFSCME Local 3930  
United Way of Greater Los Angeles  
Western Center on Law & Poverty  
West Health

## **Individuals**

Brenda Schmitthenner  
Carrie L. England  
Assemblymember Cheryl Brown (ret)  
Emily Bridges  
Heather M. Young, PhD, RN, FAAN  
John A. Kotick, JD  
Kelly Maxwell  
Lisa Whitesell  
Marcos Villa  
Marilyn Fernandez  
Marty Lynch  
Maxine Hayden

Michele Mashburn  
Mollie McLeod  
Monica Ramos  
Nikki Diaz  
Norma Ramirez  
Paula Herman  
Robert Miland Taylor  
Robert Nelson  
Sara Martinez de Osaba  
Susan L. Miller  
Teresa Mitchell  
Tina Ann

Cc: CA HHS Secretary Mark Ghaly  
DHCS Director Michelle Baas  
DDS Director Nancy Bargmann  
CDSS Director Kim Johnson  
CDA Director Susan DeMarois  
CMS Administrator Chiquita Brooks-LaSure  
Director of Division of LTSS, CMS, Ralph Lollar  
ACL Acting Director Alison Barkoff

## Detailed Comments on California's Final State Transition Plan

### I. The STP Must Include More Measures to Ensure Legitimate Compliance with the HCBS Settings Final Rule

The October 2022 Statewide Transition Plan (STP) identified **691** non-compliant residential settings, 620 of which are Adult Residential Settings (ARS) also known as “board and care” facilities that serve adults ages 18 – 59 with a mental disability or medically fragile adults with a developmental disability; 24 residential care facilities for the elderly (RCFE); and 47 adult and group homes subject to heightened scrutiny. There are also **3,415** residential settings that are required to submit modifications to become compliant, but whose current compliance status is unknown, and **118** residential settings are subject to heightened scrutiny, whose compliance is also not yet known. (STP at 30). In addition, there are at least **189** non-residential HCBS settings that are non-compliant and **1,426** that require modification before becoming compliant. (STP at 31). Unfortunately, subtotals provided for non-residential settings are higher than the data for each type of setting, and [data](#) provided by the Department of Developmental Services on settings requiring heightened scrutiny is missing altogether. Finally, neither the STP nor Attachment I, “Draft CBAS HCBS Transition Plan” include the number of CBAS centers currently not in compliance or in compliance with modification. Similarly, the Department of

Developmental Disabilities (DDS) has not posted which settings in the developmental disabilities system are subject to heightened scrutiny and whether they have approved plans for remediation. This troubling lack of transparency deprives the public, individuals receiving services, and stakeholders the ability to provide input, which is required by the STP, about whether settings subject to heightened scrutiny can overcome the institutional presumption. (STP at 33).

The STP, notably, also does not include the number of HCBS users who would be impacted if these providers do not become compliant by March 2023. However, considering the number of settings that are currently non-compliant or require modification, the risk for loss of services is significant – likely affecting several thousand individuals --and demands far more planning, resources, and intervention from the state.

Given that all these individuals meet nursing facility level of care, waiver services are essential for receipt of services outside of an institution. Yet, it is clear that there are not enough residential settings to meet the current need. For example, the Assisted Living Waiver (ALW) already has a waitlist with almost 5,000 individuals. Despite the addition of 7,000 spots after approval by Centers for Medicare Services (CMS) retroactive to July 2021, the number of enrollees has increased by only 854 participants through August 2022– an indication, in large part, of how few providers are approved to accept ALW participants.[ii] There is also a significant lack of affordable housing in California and over 16,000 adults age 65 and older currently experiencing homelessness.[iii] If existing HCBS providers do not become compliant with the Final Rule, thousands of people with disabilities are at significant risk of institutionalization or homelessness. Accordingly, it is incumbent on the state to ensure that current providers become compliant by providing robust technical assistance, support and incentives.

It is also imperative that compliance legitimately fulfills the intent of the HCBS Settings Rule. While we appreciate that the state assigns non-compliant providers a remedial plan to guide corrective actions, we are concerned that these remedial action plans lack rigor and do not ensure actual compliance with the rule by addressing the underlying institutional qualities of facilities. In reviewing the remedial plans, we found, for example, that some settings that were deemed isolating due to residents rarely having opportunities to leave the facility, would only have to share information about rideshare and public transit with residents as a corrective action. This corrective action is clearly not sufficient to address the isolating nature of these settings. Even assuming that the remedial plans are sufficient to satisfy the HCBS Settings Rule, the STP provides no details on how the state will ensure the provider has actually implemented the remediation plan.

Specifically, the STP should include:

- **Implications of Non-Compliance.** The STP should make clear what the implications are for non-compliance for current HCBS providers, including the loss of Medi-Cal funding and, for residential settings, their continued obligations under state law to

adhere to pre-existing admission agreements and, at a minimum, provide eviction and due process rights in accordance with state law.

- **Technical Assistance to HCBS Providers.** The STP indicates that the state will provide technical assistance (TA) to providers through the final stages (STP at 24). Yet, there are no specific details to describe what this technical assistance includes or the extent of ongoing communication the state is having with non-compliant providers. At a minimum, California should follow Utah and Minnesota and publish updated provider manuals and trainings to guide, educate, and support providers<sup>[iv]</sup>; include specific details regarding the type and extent of TA that is offered to non-compliant providers; and incorporate the HCBS Settings Final Rule into the state’s licensing statute to provide transparency, oversight, and enforcement.<sup>[v]</sup>

Technical assistance should include ongoing staff training so that implementation of the final rule is carried out both in policy and in practice. Finally, to ensure that inequities in access to HCBS are not perpetuated or increased, TA should be tailored to be culturally competent, in the providers’ language, and ensure that HCBS providers that have fewer resources to implement the Final Rule receive adequate TA and support.<sup>[vi]</sup>

However, merely making more technical assistance and training on compliance *available* to providers is not enough. We appreciate that since 2016, California has spent approximately \$15 million per year for providers in the developmental services system to take steps towards compliance. This funding has largely taken the form of grant projects designed and implemented by providers. Despite these significant investments, there has been little to no evaluation or transparency regarding the outcomes of these grant projects, and the degree to which they succeeded in bringing the grant recipients into greater compliance. The state should create more stringent requirements so that technical assistance and training are not just something that providers can choose to opt into, but specific steps they *must* undertake to remediate their setting to come into compliance.

**New Provider Enrollment and Assistance.** The STP should outline how the state is ensuring new providers who want to enroll in HCBS programs are educated and screened for HCBS Settings Rule compliance, including the newly funded 668 beds/units under the state’s [Community Care Expansion \(CCE\)](#).<sup>[vii]</sup>

- **Remedial Action Plans.** The STP must more fully explain the types of corrective actions the state is requiring from non-compliant settings and what monitoring activities the state is undertaking to ensure non-compliant HCBS settings implement their remedial action plans.

- **On-Going Compliance with the HCBS Rule.** The STP should outline how the state is ensuring ongoing compliance with the Final Rule.<sup>[viii]</sup>

## II. The STP Must Provide Explicit, Extensive, and Clear Participant Protections to Protect Older and Disabled Adults from Loss of Services and/or Housing

## A. Appeals Process and Notice Requirements

We appreciate that the STP describes notice requirements for individuals who may lose access to HCBS due to the non-compliance of their provider. However, the notice requirements and protections contemplated by the STP are unclear, contradictory, and confusing.

Specifically, the STP provides:

- For settings subject to heightened scrutiny, individuals receiving services will be provided a 30-day notice “in advance of the effective date of the change” in services or providers. (STP at 33). However, this section does not define “effective date” nor is it clear who provides this notice and what rights are associated with this notice.
- In the section pertaining to the ALW and HCBA waivers, the STP mentions providing a non-specified “reasonable notice to all individuals receiving services.” (STP at 34). This section vaguely describes notice to individuals “well before” March 2023 if their provider is not compliant.
- In the section on appeals, individuals have the right to request a state fair hearing to dispute the determination that the setting does not meet the settings rule including the right to aid paid pending (STP at 37).

To ensure adequate notice protections, the STP should bolster its:

- **Appeals Process.** The STP must outline a clear appeal process for both HCBS users and providers that includes clear timelines, notice requirements, and outline what efforts the state will take to ensure administrative law judges are trained to adjudicate HCBS settings appeals.
- **Notice Requirements.** Make clear that notices are required across all HCBS settings. Currently, the STP only lays out notice requirements for certain HCBS (e.g. ALW and HCBS). The notice should contain all the information required under Cal. Code Regs. Tit.22 87224((a)(5)(d), and should be sent to both the resident and any person designated to receive notices on the resident’s behalf.
- **Clear Timelines.** The STP should put in place clear timelines. The STP’s “well before” and “reasonable” language for notices is ambiguous. The STP should outline clear notice timelines and those timelines must provide more than 30-day notice. Thirty-day notice is not sufficient for HCBS users to determine whether there is a need to request a hearing.
- **Notice Responsibility.** The STP should make clear what agency/department/waiver organization will be responsible for sending notices to affected individuals and providers.

- **Notice Accessibility.** The STP should outline what efforts the state will take to ensure that notices are beneficiary-tested; released for stakeholder input and comment; are at reading level; are translated into threshold languages and are made accessible; and what consumer assistance resources will be included on notices. Timelines should run from the date on which translated and/or accessible notices are provided.
- **HCBS Recipient Education.** While the STP indicates that education, including the creation and distribution of fliers, have been targeted to individuals receiving services and their families, providers, and managed care plans, those efforts seem to have been undertaken in 2018 – nearly four years ago. The STP should outline what steps the state will now take to ensure HCBS users impacted by the rule know about the rule and their rights including, for example, creating: consumer facing factsheets, website materials, and other resources, including, for example accessible videos.[ix]

## **B. Transition Timeline and Supports**

The STP fails to provide clear timelines for how long HCBS users have to transition to another compliant HCBS setting of their choosing and lacks guidelines to waiver agencies, health plans, regional centers, and other state actors on how to support HCBS users transitioning to a new provider when their current provider fails to meet the HCBS settings rule. While individuals using services deemed to be compliant that are subsequently determined to be non-compliant are offered up to 90 days to find an alternative setting during which period Medicaid will continue to reimburse the HCBS provider (STP at 40), this protection is not outlined for current non-compliant providers. Further, while the STP indicates that “a discussion” will take place following notice of the change in a provider’s status that will be about available settings and alternatives, it is not clear what entity is responsible for having this “discussion,” nor is there a clear requirement that HCBS waiver agencies, health plans, or the state have any responsibility to ensure individuals retain access to HCBS and are not unnecessarily institutionalized.

The STP should make clear:

- **Resident Rights.** The STP must align with, and incorporate, existing California statutes regulating the discharge and eviction of ARF, RCFE, and residents in other settings, including developmental disability settings, to ensure that residents are afforded maximum protection, and that implementation of the STP does not run afoul of pre-existing laws. Recognizing the lack of bargaining power of individuals living in facilities, the California Legislature has enacted substantial protections for ARF/RCFE residents, for example. These protections govern admission agreements, the limited circumstances under which a facility may modify agreement terms, including fee-for-service payment structure, and additional rights such as the right to receive at least 60-day-notice of any change in rate or rate structure.[x] State regulations also limit the ability of facilities to evict or discharge residents to a limited list of reasons.[xi] Finally, regulations provide protections, including due process protections, in the event of an eviction or discharge.[xii]



- **Transition Periods.** The STP should make clear the period of time an individual has to transition to an HCBS-compliant setting following a notice to transition or following an appeal decision. We recommend that the post-notice or post-appeal transition period be a minimum of 90 days.
- **Transition Supports.** The STP must outline the role of DDS and DHCS, as well as requirements of each HCBS provider, regional center, waiver agency, and Medi-Cal managed care plan to ensure that HCBS recipients have continued access to HCBS settings of their choosing, including transition supports, through the development of All Plan Letters or other directive authority. The STP should outline each entity's responsibility and the specific supports that must be developed and/or provided to ensure continued HCBS access for all impacted HCBS users.[xiii]

### III. The STP Must Include Data Collection and Transparency Measures

The STP lacks any data collection or transparency measures that track the effects of the Final Rule's implementation on the availability of services. For example, the STP states that "until California completes the process of assessing provider settings and determines appropriate remediation plans, it cannot estimate the number of individuals that may need to be transitioned eventually to other settings." (STP at 35). However, that information is known, should be made available, and can be reported on a continuing basis. Transparency is paramount considering the consequences of this monumental policy implementation – particularly in light of current provider shortages and known gaps in HCBS access. Accordingly, the STP should outline:

- **Impacted HCBS Users.** The STP must require the ongoing collection and reporting of HCBS users who would be potentially impacted if a provider remains non-compliant and the actual number of individuals who are ultimately required to transition, and the place of relocation, with robust demographic data including age, disability, race, ethnicity, language spoken, and county of residence.
- **Provider Compliance Data.** The STP must require the publication of providers who are deemed non-compliant including identifying information such as the name and location of the provider. All HCBS settings must be reported, including CBAS centers and DDS settings.
- **Provider Technical Assistance.** The STP must require the publication of what steps and communication the state has engaged in with HCBS providers in efforts to bring providers into compliance.
- **Corrective Action Plan.** If California submits a Corrective Action Plan (CAP) to the Centers for Medicare & Medicaid Services, it should be made public and should include clear timelines for the state to ensure compliance. As part of its CAP, the state should commit to meeting specific targets for the number of settings that will have completed their modifications by a specific deadline, and to set time lines for bringing all non-

compliant providers into compliance. The CAP should also reference the specific COVID-19 Pandemic-related reasons that require an extension for compliance beyond March 17, 2023, including data to support that need. For example, if the state requires additional time due to pandemic-related staff shortages, measures and a time from it plans to take to address these shortages.

· **Formation of HCBS Settings Workgroup.** The STP should require the development of an HCBS Settings compliance workgroup within or in concert with the state’s Disability and Aging Living Advisory Committee (DACLAC) and other interested stakeholders. DACLAC is responsible for carrying out the state’s obligations under *Olmstead* to advance community living, inclusion, and integration across California and should be fulfilling its advisory role in overseeing the implementation of the settings rule. It should be comprised of the relevant agencies (DHCS, DDS, CDSS), a subset of DACLAC members, and other aging and disability stakeholders, including residents of these settings.

We thank you for your careful consideration of these comments. We look forward to working with you as California moves toward full compliance with the requirements of the HCBS settings rule in a way that truly advances community integration, inclusion and equity.

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[i] Final Rule, Federal Register 79, no. 11 (January 16): 2947–3039. <https://www.govinfo.gov/content/pkg/FR-2014-01-16/pdf/2014-00487.pdf>

[ii] DHCS, “Assisted Living Waiver (ALW) Year to Date Enrollment and Waitlist January 2019 through August 2022,” available at <https://www.dhcs.ca.gov/services/ltc/Documents/ALW-YTD-Dashboard-Aug2022.pdf>.

[iii] Homeless Data Integration System, accessed Nov. 2, 2022, available at <https://bcsh.ca.gov/calich/hdis.html>

[iv] For Utah’s provider trainings and other communication, visit <https://medicaid.utah.gov/ltc-2/hcbstransition/>; and for Minnesota’s publicly available provider toolkit, visit: <https://mn.gov/dhs/partners-and-providers/news-initiatives-reports-workgroups/long-term-services-and-supports/hcbs-transition/hcbs-toolkit-.jsp>

[v] Utah committed to updating its HCBS provider manuals, agreements, and contracts to include the requirements of the Final Rule. See Utah’s Final State Transition Plan (2019) at 14, available at [https://medicaid.utah.gov/Documents/pdfs/ltc/hcbstransition/Files/Utah\\_HCBS\\_Setting\\_Transition\\_Plan\\_Final.pdf](https://medicaid.utah.gov/Documents/pdfs/ltc/hcbstransition/Files/Utah_HCBS_Setting_Transition_Plan_Final.pdf). In comparison, California has made no such commitment and has not updated its HCBS provider manual since 2008, available at [https://www.dds.ca.gov/wp-content/uploads/2019/02/HCBS\\_WaiverPrimerPolicy\\_20190212.pdf](https://www.dds.ca.gov/wp-content/uploads/2019/02/HCBS_WaiverPrimerPolicy_20190212.pdf)

[vi] See, for example, HHS Equity Action Plan, available at <https://www.hhs.gov/sites/default/files/hhs-equity-action-plan.pdf>.

[vii] Community Care Expansion (CCE) Data Dashboard, accessed Nov. 2, 2022, available at, <https://dashboard.buildingcalhhs.com/index.php/cce-data-dashboard/>; See, for example, Minnesota’s State Transition Plan, which requires to receive Medicaid HCBS waiver services dollars, any new housing built specifically for people with disabilities must be approved through the site-specific review process before the new service may

be authorized and paid for in the setting. (at 50). Available at <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-7817B-ENG>.

[viii] For a model of ongoing oversight and compliance measures, see Minnesota’s strategy using a) the provider enrollment process, b) personal experiences through annual case management, and c) licensing reviews every 2-4 years to identify the need for follow-up audits and site visits; providing on-going technical assistance; and issuing of fines, correction orders and licensing actions (at 55-7); similar ongoing oversight is outlined in Utah’s Transition Plan, which monitors compliance with Final Rule requirements through participant surveys, annual service planning, and ongoing provider certification (at 13), available at [https://dspd.utah.gov/pdf/Utah\\_HCBS\\_Setting\\_Draft\\_Transition\\_Plan\\_February2015.pdf](https://dspd.utah.gov/pdf/Utah_HCBS_Setting_Draft_Transition_Plan_February2015.pdf)

[ix] See, for example, Utah’s multi-media educational resources, available at <https://dspd.utah.gov/settings-rule/#resources>.

[x] Welf. & Inst. Code Secs. 1569.884; 1569.886; 22 ADC Sec. 87507.

[xi] RCFE evictions are limited to five reasons, including Cal. Welf. & Inst. Code Sec. 1569.682, 22 ADC Section 87224; AFR’s are limited to six reasons, together with a good-cause provision, as outlined in 22 ADC Sec. 80068.5.

[xii] Such protections also include requiring 30 to 60 days advance notice, affirming a right to appeal the determination to court, and describing a facility’s obligation to assist with relocation. While a change in care needs is one of the enumerated reasons for eviction/discharge, it must be based on a previously unidentified need, not the facility’s failure to meet a compliance deadline. 22 Cal.Code. Regs. Tit.22 § 87224(a)(4); § 80068.5(a)(6).

[xiii] For comparison, see Minnesota’s comprehensive “Person-Centered, Informed Choice and Transition Protocol,” available at <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-3825-ENG> ; and See MN’s Long Term Care Consultation Services [statute 256B.0911](#), providing for long term care consultation services to assist with transition services, and mandating the commissioner of human services to use volunteers and to maximize use of available funds for this purpose.