

**A Review of Maine DHHS's Draft Transition Plan for Complying with New HCBS Rules:
Ensuring the Alignment with Maine's Employment First Law:**

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Review and Recommendations Prepared By:

Lisa A. Mills, PhD

Subject Matter Expert

Employment First State Leadership Mentoring Program

Office of Disability Employment Policy

US Department of Labor

Introduction

Overall, the Maine draft Transition Plan is an impressive document with far more detail regarding method and process than many other states' transition plans. Providing an overview of the actual rule is an extremely valuable way to introduce the plan, and demonstrates the state's commitment to ensuring those submitting public comments are informed about the context and purpose for the plan. Another key element that sets this plan apart from others is that state personnel clearly undertook a preliminary yet thorough assessment of compliance with the new HCBS rule and based the transition plan on this preliminary assessment as a starting point for both public input and the proposed transition strategies.

Applying an *Employment First* lens to the transition plan is not something many states have done; however, given that Maine has an Employment First law that is cross-disability, it makes sense to apply this lens in Maine. The particular areas of focus that are highly relevant to Employment First are the following:

- The overarching standard that requires all settings where any Home and Community-Based service is delivered to be integrated in and support full access to the greater community;
- The standard that requires all settings where a Home and Community-Based service is delivered to “provide opportunities to seek employment and work in competitive integrated settings”;
- The standard that requires all settings where a Home and Community-Based service is delivered to “provide opportunities to engage in community life”; and
- The standard that requires all settings where a Home and Community-Based service is delivered to “provide opportunities to control personal resources” which includes earned income when a person is working.

In terms of prioritizing integrated employment and reducing the extent to which HCBS participants default into segregated, non-work services and non-competitive employment services, the following additional requirements in the new Rule provide an opportunity for states to advance *Employment First* as part of coming into compliance:

- The presumption that settings which isolate individuals receiving HCBS from the wider community of people not receiving HCBS will not be considered HCBS, with states having the option to try to overcome that presumption or to implement a transition plan that phases out use of these settings; and
- The expectation that individuals will be offered a choice of settings, ***including non-disability specific settings***, for each HCBS service included in their plan.

The following represents a collection of observations and recommendations focused on ensuring that Maine's final HCBS Transition Plan contributes to the advancement of *Employment First* in Maine.

1. Reconsider whether “No Change” is necessary for Waivers 18, 19, 20 and 22, and only a “Technical Change” is necessary for Waivers 21 and 29 with regard to the standard that requires all settings where a Home and Community-Based service is delivered to “provide opportunities to seek employment and work in competitive integrated settings.”

This particular setting standard included in the new HCBS rule is the strongest affirmation of *Employment First* and offers states an opportunity, if not an obligation, to ensure its entire HCBS program is oriented toward supporting competitive integrated employment outcomes. Few states looking at their HCBS programs through an *Employment First* lens find that there is nothing significant they need to do to embed *Employment First* policies, practices and accountability mechanisms into their HCBS programs. Keep in mind these settings standards are distinct and separate from the new rules governing person-centered planning. What is done with regard to offering opportunities to pursue competitive integrated employment in person-centered planning is one consideration; but by also including the expectation that all HCBS settings shall be held to an expectation that they provide opportunities to pursue employment and work in competitive integrated settings, CMS is expecting states to evaluate their HCBS system’s ability to support *Employment First* from multiple vantage points.

2. Ensure the standard that requires all settings where a Home and Community-Based Service is delivered to “provide opportunities to seek employment and work in competitive integrated settings” is applied consistently across all waivers, whether they contain employment services or not, and across all HCBS settings.

- This standard should not be disregarded simply because a particular setting is being used to deliver a non-employment HCBS service to a transition-age youth or working-age adult.
 - It is recommended that the state determine how providers of each type of HCBS service could reasonably be expected to contribute to ensuring that people have opportunities to seek employment and work in competitive integrated settings. The extent to which these expectations are being met should be measured through the provider self-assessments and site visit verification tools being used. If it is determined that some providers are not meeting the expectations, the transition plan should address how providers will come into compliance in these areas. Additionally, it is recommended that policies, provider standards and licensing requirements be reviewed to ensure these expectations are included if not currently. We know through experience that a person’s ability to obtain and maintain competitive integrated employment is not simply about the support they receive from employment service providers. Providers of other HCBS services must be critical partners in supporting people to pursue and participate in competitive integrated

employment. Some examples of expectations for providers of HCBS non-employment services include the following:

- Residential services:
 - Facilitate career exploration and discussions about the benefits of working during service delivery time.
 - Adapt supports to ensure people are supported to successfully participate in VR services (e.g. help people open/respond to mail and respond to phone calls or emails from VR personnel in a timely manner; helping people with transportation arrangements to ensure VR appointments are kept).
 - Adapt supports to ensure people are supported to participate in job search activities (e.g. helping people obtain and care for interview clothes, know which days interview clothes are necessary and assisting the person to ensure these clothes are clean and ready to wear on these days; helping people with transportation changes to enable participation in job search activities and interviews).
 - Adapt supports to ensure people are supported to maintain integrated competitive employment once secured (e.g. helping people obtain and care for clothes appropriate for work; assisting the person to ensure these clothes are clean and ready to wear on work days; helping people arrange transportation to/from work in order to ensure person is on time to work every day; helping people get ready for work and pack lunch if needed so that person gets to work on time every day).
 - Adapt supports to assist the person to receive and control his/her earned income in ways that maximizes independence.
- Non-medical transportation providers:
 - Provide flexible service to ensure people are supported to successfully participate in VR services.
 - Provide flexible service to ensure people are supported to participate in job search activities.
 - Provide flexible and reliable service to ensure people are supported to maintain competitive integrated employment once secured (e.g. rides to/from work are provided in reliable manner so that person is on-time for

work each day; adopt policy and practice that supports individuals with varying work schedules).

- Personal care providers:
 - Adapt supports to ensure people are supported to successfully participate in VR services (e.g. adjust schedule for personal care to ensure people are ready to leave the home in time for any VR service meetings or appointments they may have; help people open/respond to mail and respond to phone calls or emails from VR personnel in a timely manner; helping people with transportation arrangements to ensure VR appointments are kept)
 - Adapt supports to ensure people are supported to participate in job search activities (e.g. adjust schedule for personal care to ensure people are ready to leave the home in time for any interviews or other job search activities; help people care for interview clothes, help people remember which days interview clothes are necessary and assist the person to ensure these clothes are clean and ready to wear on these days; help people with transportation changes to enable participation in job search activities and interviews)
 - Adapt supports to ensure people are supported to maintain integrated competitive employment once secured (e.g. adjust schedule for personal care to ensure people are ready for work and pack lunch if needed so that person gets to work on time every day; help people care for clothes appropriate for work; assist people to ensure these clothes are clean and ready to wear on work days; help people arrange transportation to/from work in order to ensure person is on time to work every day)
- Adult Day Health/Community Supports providers:
 - Facilitate formal and informal opportunities for career exploration during service delivery time for working-age adult and transition-age youth participants.
 - Facilitate discussions about the benefits of working during service delivery time for working-age and transition-age youth participants.
 - Document information in progress notes and reports that has been learned/gathered during service delivery and which is specifically relevant to identifying a working-age

or transition-age participant's employment interests, strengths, goals and conditions for success.

- Maintain and expand access to direct service staff who have training on how to implement career exploration and Discovery strategies in the context of Adult Day Health and Community Supports services.
- This standard should not be disregarded for waivers that serve transition-age youth and/or working-age adults, simply because the waivers (e.g. Waivers 19 and 22 discussed on page 32) do not currently include employment services.
 - It is recommended that the state consider whether waivers that serve transition-age youth and/or working-age adults with disabilities and which do not currently include employment services to support competitive, integrated employment, should have at least one employment service added.

3. Strengthen focus on steps that will be taken to determine whether a setting isolates HCBS participants from the wider community of those not receiving HCBS.

- Given that the Draft Plan acknowledges the state has not undertaken a preliminary analysis with regard to which HCB settings should be presumed disqualified because they isolate HCBS participants from the wider community of those not receiving HCBS (p. 11), it is recommended that the state ensure each provider self-assessment and site visit verification tool include a distinct section to assess whether a setting isolates, and if so, whether changes can be made during the transition period to remedy this or whether the setting must be presumed disqualified because sufficient changes cannot be made to mitigate the isolating nature of the setting. It is important to ensure the state is only determining HCB settings to be compliant if they both do not isolate and do meet the various setting standards outlined in the new rule.
- With regard to Adult Day Health Centers offered under Waiver 19 to adults with disabilities (discussed on page 36), it should be noted that determination of whether the settings isolate HCB participants from the broader community needs to be focused on the participants experiences while in these settings. The argument made – that HCBS participants attending Adult Day Health Centers are not isolated from the broader community because “they return each day to their own homes and own families” is not a valid argument for concluding the Adult Day Health Center settings do not isolate these individuals from the broader community while they participate in these settings. Additionally, the fact that these settings may provide respite for family members, and greater social

engagement for the person than spending time at home, is not sufficient for the state to conclude the settings meet the new standards in the rule.

- It appears the state has already determined that the Supported Employment Enclave option cannot meet the standard that requires provision of opportunity to seek employment and work in competitive integrated settings (p. 38). If a provider self-assessment is planned for providers delivering Supported Employment Enclave option, it will be important to design that self-assessment so the evidence is clear that this HCB setting has isolating qualities and does not provide opportunities to pursue employment in competitive integrated settings.

4. Develop distinct provider self-assessment tools and site visit evaluation tools for each type of non-residential service covered under Waiver 21 and 29.

It is recommended that a provider self-assessment tool and site visit evaluation tool, which are customized to the type of service being provided, will yield more accurate and useful results than attempting to create one universal provider self-assessment tool and one universal site visit evaluation tool. It is recommended that the customized tools should be sure to address two critical areas:

- Questions that focus on whether the setting isolates HCBS recipients from the wider community of people not receiving HCBS. In anticipation that the most commonly used non-residential setting (Center-Based Community Supports setting) may isolate HCBS participants, ensure the provider self-assessment tool also includes a section that asks the provider to propose specific changes it would make, if the state concludes (after reviewing the self-assessment and results of verification site visits evaluation) that the setting does isolate HCBS recipients from the wider community of people not receiving HCBS. This will help the state identify its expectations for change during the transition plan phase.
- Questions that go more deeply into assessing each non-residential setting on these particular standards in the rule:
 - The overarching standard that requires all settings where any Home and Community-Based service is delivered to be integrated in and support full access to the greater community;
 - The standard that requires all settings where a Home and Community-Based service is delivered to “provide opportunities to seek employment and work in competitive integrated settings”;
 - The standard that requires all settings where a Home and Community-Based service is delivered to “provide opportunities to engage in community life”;and

- The standard that requires all settings where a Home and Community-Based service is delivered to “provide opportunities to control personal resources” which includes earned income when a person is working.

Again, it is recommended that the state ensure the provider self-assessment tool also includes a section that asks the provider to propose specific changes it would make if the state concludes (after reviewing the self-assessment and results of verification site visits evaluation) that the setting does not meet one or more of these standards. This will help the state identify specific changes that providers should be expected to make during the transition plan phase, including how it will develop capacity to deliver services that support competitive integrated employment outcomes and that occur in integrated settings that fully comply with the new Rule.

The transition plan states that site visits will include interviews with participants which, while very important, should not be the only evaluation method employed for the site visits. Observation of typical routines and opportunities provided to participants will also be a very important part of the site visits.

5. Strengthen expectations for rule compliance applied to Center-Based Community Support settings under Waiver 21 and 29.

The data (p. 42) appears to show that the majority of individuals on Waiver 21 and 29 use Center-Based services rather than supported employment services which, from an *Employment First* perspective, is concerning. The following specific concerns were noted with regard to how Center-Based Community Support services (the state’s facility-based day service model) will be addressed:

- Given the state has already determined that the Supported Employment Enclave option cannot meet the standard that requires provision of opportunity to seek employment and work in competitive integrated settings (p. 38), it is concerning that Center-Based Community Supports has not, and it appears will not be subject to the same scrutiny. Again, keep in mind that this standard is applicable to all HCB settings, not only those that involve the delivery of employment services.
- The Draft Transition Plan suggests that Center-Based Community Supports are used with such high frequency because they are chosen by waiver participants (p. 42). The new regulations require that individuals be given a choice of settings, including at least one non-disability specific setting, for each waiver service included in their plan of care. It is recommended that the state ensure that it offers the option of receiving Community Supports in non-disability specific settings (non-Center-Based) throughout the state and not just in some

areas of the state. If this is not currently the case, this should be addressed in the final Transition Plan.

- Regardless of whether the state offers the option to receive Community Supports in non-disability specific settings (non-Center-Based) on a consistent statewide basis, there is still a need for Center-Based Community Supports service settings to meet the standards in the new rule. Center-Based settings must not isolate HCBS participants from the wider community of those not receiving HCBS and must meet all of the setting standards outlined in the new rule including:
 - Being integrated in, and providing full access to the greater community for those receiving HCB services in that setting;
 - Offering opportunities for those receiving HCB services in that setting to pursue employment and work ~~in~~ in competitive integrated settings; and
 - Providing opportunities to engage in community life for those receiving services in that setting.

6. With regard to Waivers 20, 21 and 29, consider revising the method proposed for validating survey responses. Validating a 5% random sample of all provider self-assessments may not yield a large enough sample of non-residential, disability-specific settings to ensure statewide compliance with the new rules. Recommend focusing site visits on a random sample of disability-specific settings where the providers operating those settings return a self-assessment that concludes no or very minimal changes are required for their disability-specific setting(s) to be compliant with the full scope of the new rule. This is the group where validation of provider self-assessments is most needed.

7. Given the state has already determined that the Supported Employment Enclave option cannot meet the standard that requires provision of opportunity to seek employment and work in competitive integrated settings (p. 38), and the draft Transition Plan therefore proposes to amend the waivers to eliminate this option, from an Employment First perspective, it will be critical to develop a transition plan that ensures the 708 participants impacted by this change transition successfully to individualized integrated employment at competitive wage with SE-Individuals services as needed to obtain and maintain this employment. The detailed plan for ensuring, as far as possible, this outcome for those who will be transitioned out of Enclave settings appears to be missing from the draft Transition Plan but should be part of the final Transition Plan submitted to CMS. The goal for these individuals should be that they do not experience a reduction in paid work hours as a result of the transition out of Enclave settings. It is recommended a specific collaborative partnership be developed between Maine DHHS and Maine VR, focused on this particular population and the transitions of the 708 individuals over the four year transition period that remains.

8. The Draft Transition Plan explains that the state is moving to implement the Supports Intensity Scale as a resource allocation tool for Waivers 21 and 29 (p. 17). The use of individualized budgets creates particular challenges for advancing Employment First that the state should consider.

Unfortunately, the use of a capped individualized budget that does not change regardless of the types of services a person chooses to include in their plan, often creates no incentive (and sometimes creates a clear disincentive) to choose supported employment or supported Customized Employment services. With a fixed budget, the natural incentive is for people to choose those services for which they can purchase the most units rather than services that may produce the outcomes that most contribute to better health, increased community inclusion, access to natural supports, independence and skill development, and economic self-sufficiency. As well, once a plan is created using the assigned budget, making changes (for example, adding supported employment services to maintain integrated competitive employment created through VR services) requires the person to eliminate some other service(s) from their plan to “free up” the funds to cover the supported employment services.

There is indeed a significant challenge to marry *Employment First* policy goals with the values and fiscal management advantages to states inherent in the individualized budgeting model. Some might say that self-determination does not support a state policy to promote or expect community employment for individuals served. In fact, one of the principles of self-determination, albeit often overlooked, is responsibility – not just in relation to use of public funds, but also in relation to contributing to one’s community. Where states have adopted both a commitment to *Employment First* and individualized funding for self-determination, it is essential that strategies are developed that ensure both policy goals can be achieved simultaneously. In Maine’s case, with *Employment First* being part of state law, it is essential that individualized budget allocation processes promote integrated community employment as a preferred investment and outcome of public funds. If desired, additional TA specific to this issue can be provided.

9. With regard to the new rule’s expectation that all HCB settings will ensure HCBS participants have opportunities to control personal resources, it is recommended that the state give greater consideration to how this might be addressed for those under legal guardianship, those with Representative Payees and those living in licensed settings.

On page 24 of the draft Transition Plan there is a proposal to modify Waiver 18 policy “to ensure individuals living in unlicensed settings, not under guardianship, have control over personal resources.” Similar proposals for policy change are made for Waiver 20 (p. 27). For Waivers 21 and 29, the policy change proposed involves providing “greater clarity regarding the

individual's right to control his or her personal resources including a personal checking or savings account, when a representative payee is not involved" (p. 38).

It appears, although perhaps inadvertently, the state has concluded that HCBS providers serving individuals living in licensed settings, individuals under legal guardianship and individuals with a representative payee do not have to meet the standard related to ensuring people have opportunities to control person resources. It is recommended that the state consider modifying this to ensure that HCBS providers are expected to provide appropriate opportunities to control personal resources for HCBS participants in each of these three categories. From an *Employment First* perspective, this is particularly important with regard to earned income. If an individual works but has little or no access to, or ability to control, the earnings from that work, the person may not be motivated to continue to work. Often, there is widespread misunderstanding of the roles of legal guardians and representative payees, leading to assumptions that they have the legal authority to collect and control all personal resources (including earned income) in all cases. In the area of legal guardianship, the extent of the guardian control depends on the guardianship order issued by the court and whether a conservator has been appointed. With regard to representative payees, they are only empowered to manage Social Security benefits so a person with a representative payee should still be able to control his/her earned income with assistance as needed. There should be no policy that requires or expects individuals to turn over control of their earned income to a representative payee. For those living in licensed settings, there should be no reason why the HCBS provider should not be expected to implement practices that allow participants opportunities to control their personal resources (particularly earned income and any Social Security income provided to them by the representative payee) with assistance as needed.

10. Be careful not to presume that simply because a service is provided in a person's own home (p. 12) that this means the setting meets all of the standards in the new rule. While it is true that the sections of the rule related to provider owned and controlled residential settings are not applicable in these situations, the primary setting standards still must be met and still do apply to all HCB settings. There needs to be some level of assessment and verification of whether HCB services provided in a person's own home actually do:

- Provide full access to the greater community for those receiving HCB services in their own home;
- Offer opportunities for those receiving HCB services in their own home to pursue employment and work in in competitive integrated settings;
- Provide opportunities to engage in community life for those receiving HCB services in their own home;
- Provide opportunities for those receiving HCB services in their own home to control personal resources.

It could be the case that HCB services provided in a person's own home are not meeting all of the above standards; but changes can be made during the transition period that will bring these settings into full compliance and result in a better quality experience for the HCBS participants.