



Contact: Terry Farmer
202-349-4258
trfarmer@accses.org

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**ACCSES' DESCRIPTION AND ANALYSIS
OF CMS' INFORMATION BULLETIN REGARDING UPDATES TO THE SECTION 1915(c)
WAIVER INSTRUCTIONS AND TECHNICAL GUIDE
REGARDING EMPLOYMENT AND EMPLOYMENT RELATED SERVICES**

On September 16, 2011, the Centers for Medicare and Medicaid Services (CMS) released CMCS Informational Bulletin regarding *Updates to the Section 1915(c) Waiver Instructions and Technical Guide regarding employment and employment related services*. Specifically, this Information Bulletin provides updates to several sections of the current Waiver Technical Guide Version 3.5, which was released in January of 2008, in advance of a future release of Technical Guide Version 3.6.

According to CMS, this Informational Bulletin is intended to provide clarification of existing CMS guidance on development and implementation of §1915 (c) Waivers regarding employment and employment related services. This guidance does not constitute new policy, but rather highlights the opportunities available to use waiver supports to increase employment opportunities for individuals with disabilities within current policy.

Further, the Information Bulletin underscores CMS's commitment to the importance of work for waiver participants and provides further clarification of CMS guidance regarding several core service definitions. This guidance highlights opportunities for states to use waiver supports to increase employment opportunities for individuals with disabilities by emphasizing the importance of employment in the lives of people with disabilities. [Preamble at page 1]

According to CMS, the major changes in the Instructions and Technical Guide include;

- Highlighting the importance of competitive work for people with and without disabilities and CMS' goal to promote integrated employment options through the waiver program [Preamble at page 1]
- Emphasizing the critical role of person centered planning [Preamble at page 2]
- Explains that pre-vocational services are not an end point but a time-limited (although no specific limit is given) for the purpose of helping someone obtain competitive employment.[Preamble at page 2]

Section 1 of the memorandum provides a summary of the key provisions included in the Medicaid statute and implementing regulations applicable to Home and Community-Based

Services waivers. Section 2 provides key statements of guidance included in the revisions to the *Waiver Instructions and Technical Guide* with a particular focus on the provisions applicable to prevocational services. Section 3 presents ACCSES’ overarching analysis and conclusions regarding the revisions made by CMS applicable to prevocational services. The final section includes frequently asked questions and suggested responses.

The information contained in this memorandum is only for general guidance on matters of interest. The application and impact of laws and regulations can vary widely based on the specific facts involved. Accordingly, the information in this memorandum is provided with the understanding that the author is not engaged in rendering legal advice and services. As such, it should not be used as a substitute for consultation with professional legal advisors.

SUMMARY OF HCBS STATUTE AND REGULATIONS

The Medicaid statute applicable to home and community-based services specifies that the Secretary may by waiver provide that a State plan may include medical assistance under such plan payment for part or all of the cost of home or community-based services approved by the Secretary which are provided pursuant to a written plan of care. A waiver granted may provide medical assistance to individuals (to the extent consistent with written plans of care) for, among other things, habilitation services.

The term “habilitation services” means services designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community based settings. The term “habilitation” includes, among other things, prevocational and supported employment services but does not include, among other things, vocational rehabilitation services which otherwise are available to the individual through a VR program funded under Title I of the Rehabilitation Act (Section 110).¹

In accordance with regulations issued by CMS, home and community-based services include, among other things, the following services, as they are defined by the state agency and approved by CMS:² “habilitation services” and “expanded habilitation services.” “Habilitation services” are services designed to assist participants in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings. “Expanded habilitation services”³ include “prevocational services,” “supported employment services,”⁴ and “educational services.”⁵

¹ Section 1915(c) of the Social Security Act.

² 42 CFR 440.180(b).

³ 42 CFR 440.180(c).

⁴ The second category of “expanded habilitation services” is “supported employment services.” Supported employment services are services that facilitate paid employment that are:

- (1) Provided to persons for whom competitive employment at or above the minimum wage is unlikely, and who, because of their disabilities, need intensive ongoing support to perform in a work setting;
- (2) Conducted in a variety of settings, particularly worksites in which persons without disabilities are employed; and

Prevocational services means services that prepare an individual for paid or unpaid employment and are not job-task oriented but instead are aimed at a generalized result. For example, prevocational services may include teaching an individual such concepts as compliance, attendance, task completion, problem solving, and safety.⁶ Prevocational services are distinguishable from noncovered vocational services by the following criteria:⁷

- (1) The services are provided to persons who are not expected to be able to join the general work force or participate in a transitional sheltered workshop within one year (excluding supported employment programs);
- (2) If the recipients are compensated, they are compensated at less than 50 percent of the minimum wage;
- (3) The services include activities which are not primarily directed at teaching specific job skills but at underlying habilitative goals (for example attention span, motor skills); and
- (4) The services are reflected in a plan of care directed to habilitative rather than explicit employment objectives.

Vocational rehabilitation services that are otherwise available to the individual through a program funded under Title I of the Rehabilitation Act may not be included as expanded habilitation services.⁸

SUMMARY OF REVISIONS TO INSTRUCTIONS AND TECHNICAL GUIDE

Supported Employment and Prevocational Services, In General

The actual revisions to the Instructions and Technical Guide emphasize that work is a fundamental part of adult life; it is essential to people's economic self-sufficiency as well as self esteem and well being. People who want to work should be provided the opportunity and support to work competitively within the general workforce...building on each person's strengths and interests. Individually tailored and preference based job development, training, and supports should recognize each person's employability and potential contributions to the labor market. [Attachment 1 at page 3]

Supported employment and prevocational services may be furnished as expanded habilitation services. These services may be offered to help beneficiaries realize their goals of obtaining and maintaining community employment in the most integrated setting. [Attachment 1 at page 4]

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- (3) Defined as any combination of special supervisory services, training, transportation, and adaptive equipment that the state demonstrates are essential for persons to engage in paid employment and that are not normally required for nondisabled persons engaged in competitive employment.

⁵ The third category of expanded habilitation services are "educational services," which means special education and related services [as defined in the Individuals with Disabilities Education Act] to the extent they are not otherwise available to the individual through a local educational agency.

⁶ 42 CFR 440.180(c) (2).

⁷ 42 CFR 440.180(c) (2).

⁸ 42 CFR 440.180(c) (3).

Waiver funding is not available for the provision of vocational services delivered in facility-based or sheltered work settings, where individuals are supervised for the primary purpose of producing goods or performing services. The distinction between vocational and pre-vocational services is that prevocational services, regardless of setting, are delivered for the purpose of furthering habilitation goals such as *attendance, task completion, problem solving, interpersonal relations, and safety*, as outlined in the individual's person-centered and supports plan. [Attachment 1 at page 4-5]

Prevocational services should be designed to create a path to integrated community based employment for which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals without disabilities.

Although the guidance is applicable to the 1915(c) Waiver program, CMS notes that states have obligations under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Supreme Court's *Olmstead* decision. Consistent with the *Olmstead* decision and with person centered planning principles, an individual's plan of care regarding employment services should be constructed in a manner that:

- Reflects individual choice,
- Reflects the goals related to employment, and
- Ensures provision of services in the most integrated setting appropriate. [Attachment 1 at page 5]

Prevocational Services

Prevocational services provide learning and work experiences, including volunteer work, where the individual can develop general, non-job-task-specific strengths and skills that contribute to employability in paid employment in integrated community settings. Prevocational services are intended to develop and teach general skills [Attachment 1 at page 7]

Examples include:

- Ability to communicate effectively with supervisors, co-workers and customers;
- Generally accepted community workplace conduct and dress;
- Ability to follow directions;
- Ability to attend to tasks;
- Workplace problem solving skills and strategies; and
- General workplace safety and mobility training. [Attachment 1 at page 7]

Individuals receiving prevocational services must have employment-related goals in their person-centered services and supports plan; the general habilitation activities must be designed to support such employment goals. [Attachment 1 at page 7]

- Prevocational services should enable each individual to attain the highest level of work in the most integrated setting and with the job matched to the individual's interests, strengths, priorities, abilities, and capabilities, while following applicable federal wage guidelines.⁹ [Attachment 1 at page 7]
- Competitive integrated employment is considered to be the optimal outcome of prevocational services. [Attachment 1 at page 7]
- Prevocational services are associated with building skills necessary to perform work and optimally to perform competitive, integrated employment. [Attachment 1 at page 8]
- Individuals participating in prevocational services may be compensated in accordance with applicable federal laws and regulations and the optimal outcome of the provision of prevocational services is permanent integrated employment at or above minimum wage in the community. [Attachment 1 at page 8]

Prevocational services are expected to occur over a defined period of time and with specific outcomes to be achieved, as determined by the individual and his/her services and supports planning team through an ongoing person-centered planning process. [Attachment 1 at page 7] All prevocational services should be reviewed and considered as a component of an individual's person-centered services and supports plan no less than annually, more frequently as necessary or as requested by the individual. These services and supports should be designed to support successful employment outcomes consistent with the individual's goals. [Attachment 1 at page 8]

Prevocational services may be furnished in a variety of locations in the community and are not limited to fixed-site facilities. [Attachment 1 at page 8]

Pre-vocational services include activities that are not primarily directed at teaching skills to perform a particular job, but at underlying habilitative goals (e.g., attention span, motor skills, interpersonal relations with co-workers and supervisors) that are associated with building skills necessary to perform work and optimally to perform competitive, integrated employment. Vocational services, which are not covered through waivers, are services that teach job task specific skills required by a participant for the primary purpose of completing those tasks for a specific facility based job and are not delivered in an integrated work settings through supported employment. [Attachment 1 at page 8]

The distinction between vocational and pre-vocational services is that pre-vocational services, regardless of setting, are delivered for the purpose of furthering habilitation goals that will lead to greater opportunities for competitive and integrated employment and career advancement at or above minimum wage. These goals are described in the individual's person centered services and supports plan and are designed to teach skills that will lead to integrated competitive employment. Pre-vocational services are intended to assist individuals to enter the general workforce. [Attachment 1 at page 8]

⁹ Applicable federal wage guidelines include Section 14(c) of the Fair Labor Standards Act which permits the payment of commensurate wages.

ANALYSIS AND CONCLUSIONS

Below is ACCSES' analysis and conclusions regarding the Information Bulletin providing updates to the Section 1915(c) Home and Community-based Services *Waiver Instructions and Technical Guide* regarding employment and employment related services.

First, the Information Bulletin and the revisions to the *Waiver Instructions and Technical Guide* must be read in a manner that is consistent with the Medicaid statute and implementing regulations. CMS statements in the Information Bulletin recognize that the revisions do not constitute new policy. Thus, the definition of “habilitation” in the statute (which includes prevocational services) still governs i.e., services designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community based settings.

Similarly, the criteria set out in the regulations for distinguishing prevocational services from noncovered vocational services govern, including the following criteria:

- Services are provided to persons who are not expected to be able to join the general workforce;
- If recipients are compensated, they are compensated at less than 50 percent of the minimum wage;
- Services include activities which are not primarily directed at teaching specific job skills but at underlying habilitative goals; and
- Services are reflected in a plan of care directed to habilitative rather than explicit employment objectives.

Second, the Information Bulletin and the revisions to the *Waiver Instructions and Technical Guide* recognize that central role that “work” plays in people’s lives—not only in enhancing economic self-sufficiency but also in enhancing self-esteem and well-being.

Third, the Information Bulletin and the revisions to the *Waiver Instructions and Technical Guide* emphasize the critical role that person-centered planning and individual choice plays in the provision of prevocational services i.e., prevocational services:

- Must be provided consistent with the individual’s interests, strengths, priorities, abilities, and capabilities;
- As determined by the individual and his or her services and supports planning team; and
- As reflected in the individual’s person-centered services and supports plan.

Fourth, consistent with the central role of work and the critical role that person-centered planning and individual choice plays in the provision of vocational services, the Information Bulletin and the revisions to the *Waiver Instructions and Technical Guide* highlight that individuals receiving prevocational services must have employment-related goals in their person-centered services and supports plan and that the provision of prevocational services should enable each individual to attain the highest level of work in the most integrated setting appropriate with the job matched to individual interests, strengths, priorities, abilities and

capabilities. The *Waiver Instructions and Technical Guide* also highlights the importance of competitive work for people with and without disabilities--competitive integrated employment is considered the “optimal” outcome (i.e., not the only outcome) of prevocational services. Prevocational services will lead to “greater opportunities” for competitive and integrated employment and career advancement at or above minimum wage. Prevocational services are designed to teach skills that will “lead to” integrated competitive employment. At the same time, the *Waiver Instructions and Technical Guide* recognizes that individuals participating in prevocational services may be compensated in accordance with applicable Federal laws and regulations e.g., section 14(c) of the Fair Labor Standards Act regarding commensurate wages.

Fifth, the revisions to the *Waiver Instructions and Technical Guide* distinguish between vocational and pre-vocational services by specifying that prevocational services, regardless of setting, are delivered for purposes of furthering habilitation goals that will lead to greater opportunities for competitive, integrated employment and career advancement. In contrast, vocational services, which are not covered through waivers, are services that teach job task specific skills for the primary purpose of completing those tasks for a specific facility-based job and are not delivered in an integrated work setting through supported employment.

Sixth, the Preamble to the Informational Bulletin explains that pre-vocational services are not an end point but a time-limited (although no specific time is given) service. The actual revisions to the *Waiver Instructions and Technical Guide* specifies that prevocational services are expected to occur over a “defined period of time” and with “specific outcomes to be achieved.” The “defined period of time” and the “specific outcomes to be achieved” must be “determined by the individual and his/her service and supports planning team through an ongoing person-centered planning process.” All prevocational services should be reviewed no less than annually (more frequently as necessary or as requested by the individual).

Finally, the *Waiver Instructions and Technical Guide* recognizes that prevocational services may be provided in a “variety of settings,” including, but not limited to, center-based programs.

FREQUENTLY ASKED QUESTONS AND SUGGESTED ANSWERS

QUESTION 1: What is the relationship between the ADA, Section 504 of the Rehabilitation Act, and the *Waiver Instructions and Technical Guide*?

ANSWER 1: The *Waiver Instructions and Technical Guide* explains that although the guidance is only with respect to the Waiver program, states have obligations under the ADA, Section 504, and the *Olmstead* decision.

The ADA regulations require that services be provided in the “most integrated setting appropriate.” The conclusion and holding in the *Olmstead* decision highlight the importance of making individualized determinations based on the strengths and needs of the individual (person-centered planning) and ensuring the availability of a range of options to meet these needs i.e., the most integrated setting appropriate mandate must reflect the strengths and needs of the individual.

“Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated taking into account the resources available to the State and the needs of others with mental disabilities.”

“Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But, we recognize, as well, the State’s need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the State’s obligation to administer services with an even hand.”

In sum, the ADA and *Olmstead* require that a state provide a range of options to address the particular needs of the diverse population of individuals with disabilities—one-size does not fit all. ADA prohibits unnecessary, inappropriate, unjustified segregation and requires individual choice, options and opportunities. The optimal outcome for a recipient is competitive integrated employment but other outcomes must be recognized and a range of choices, options and opportunities made available based on the strengths and needs of the individual and the determination by the state’s treatment professionals.

Consistent with the *Olmstead* decision and with person-centered planning principles, an individual’s plan of care regarding employment services should be construed in a manner that reflects:

- Individual choice,
- Goals relating to employment, and
- Ensures provision of services in the most integrated setting appropriate.

QUESTION 2: Under the revised *Waiver Instructions and Technical Guide*, what is the process that agencies are expected to use to determine whether prevocational services are necessary and appropriate, the length of time during which prevocational services are provided, and the specific outcomes to be achieved?

ANSWER 2: Under the revised *Waiver Instructions and Technical Guide*, the prevocational services are expected to be provided over a “defined period of time” and with “specific outcomes to be achieved” “as determined by the individual and his/her service and supports planning team through an ongoing person-centered planning process.” “Such determinations must be made consistent with the individual’s interests, strengths, priorities, abilities and capabilities.”

QUESTION 3: Can the revised *Waiver Instructions and Technical Guide* be construed to require or justify the adoption by states of policies that limit the amount, duration, and scope of

prevocational services provided to a participant based on arbitrary time limits (e.g., 24 months), based on the site or location of prevocational services (e.g., center-based programs), or by substituting part-time services for full-time services?

ANSWER 3: The Information Bulletin recognizes that pre-vocational services are not an end point but a time-limited service. However, no specific time limit is given. Furthermore, the revised *Waiver Instructions and Technical Guide* specifies that the prevocational services are expected to occur over a “defined period of time” “as determined by the individual and his/her service and supports planning team through an ongoing person-centered planning process.” All prevocational services should be reviewed no less than annually (more frequently as necessary or as requested by the individual). In addition, the revised *Waiver Instructions and Technical Guide* specifies that prevocational services may be provided in a “variety of settings” including, but not limited to center-based programs.

Thus, the revised *Waiver Instructions and Technical Guide* cannot be used as a basis for subjecting participants to arbitrary time limits regarding the provision of prevocational services such as time limits based on the site or location of the prevocational services or by substituting part-time services for full-time services when prevocational services are considered necessary and appropriate by the individual and his/her service and supports planning team through an ongoing person-centered planning process.

QUESTION 4: Can the revised Waiver Instructions and Technical Guide be construed to limit the availability of prevocational services only to those individuals who agree to include in their plan of care competitive integrated employment as their employment outcome or does the revised *Guide* ensure that employment goals are matched to the individual’s interests, strengths, priorities, abilities and capabilities and participants are provided ongoing opportunities to attain competitive integrated employment?

ANSWER 4: Under the revised *Waiver Instructions and Technical Guide*, participants receiving prevocational services must have “employment-related goals” in their person-centered services and supports plan and the general habilitation activities must be designed to support such “employment goals.” The employment goals must be consistent with the individual’s interests, strengths, priorities, abilities, and capabilities, while following applicable federal wage guidelines (including the payment of commensurate wages under Section 14(c) of the Fair Labor Standards Act).

It is also important to note that the revised *Waiver Instructions and Technical Guide* include a number of additional guidelines regarding the adoption of employment-related goals:

- The provision of prevocational services should enable each individual to attain the highest level of work in the most integrated setting appropriate with the job matched to individual interests, strengths, priorities, abilities and capabilities.
- Competitive integrated employment is considered the “optimal” outcome (i.e., not the only outcome) of prevocational services.
- Pre-vocational services will lead to “greater opportunities” for competitive and integrated employment and career advancement at or above minimum wage.

- Prevocational services are designed to teach skills that will “lead to” integrated competitive employment.
- At the same time, the *Waiver Instructions and Technical Guide* recognizes that individuals participating in prevocational services may be compensated in accordance with applicable Federal laws and regulations e.g., section 14(c) of the Fair Labor Standards Act regarding commensurate wages.

QUESTION 5: Under the revised *Waiver Instructions and Technical Guide*, do prevocational services include assisting a participant retain functioning and prevent deterioration of functioning?

ANSWER 5: In accordance with the Medicaid statute, the term “habilitation” includes services designed to assist individuals in “acquiring, retaining, and improving self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings.” Thus, prevocational services include “retaining” functioning (i.e., maintaining functioning and preventing deterioration of functioning) because prevocational services are considered a form of “expanded habilitation” services.

The determination of whether a particular individual requires prevocational services in order to retain functioning/prevent deterioration of functioning must be made by the individual and his/her service and supports planning team through an ongoing person-centered planning process. Such determinations must be made consistent with the individual’s interests, strengths, priorities, abilities and capabilities.