



December 10, 2014

**ACCSES' Comments Regarding CMS' Response to
Senator McConnell's Letter of Inquiry Concerning the
Home and Community-Based Services Settings Requirement**

On October 24, 2014, CMS responded to a letter sent by Senator McConnell on behalf of his constituent, Rick Christman, CEO of Employment Solutions, Inc. in Lexington, KY. Below is the body of the response letter received by Senator McConnell's office and reproduced by ACCSES with our comments to the CMS answers inserted within.

The Honorable Mitch McConnell
317 Russell Senate Office Building
Washington, DC 20510-1702

Dear Senator McConnell:

Thank you for your letter, written on behalf of your constituent, Mr. Rick Christman, Chief Executive Officer of Employment Solutions, Inc. in Lexington, Kentucky. You expressed Mr. Christman's concerns about the Centers for Medicare & Medicaid Services' newly published regulations regarding Home and Community-Based Services (HCBS).

This regulation is the result of multiple stakeholder engagement processes over multiple years as we developed the policy behind the regulation. Once published, the regulation generated significant response from the public at large. The final regulation sought to assure that Medicaid recipients of HCBS services enjoy access to community-integrated services and settings, and also provided states and providers with time to make necessary changes to assure community integration.

Below I am providing you with responses to the questions posed by Mr. Christman. We hope this information is useful to your constituent.

(1) What is the specific statutory authority for the new HCBS "setting" requirement in the regulations and the specific interpretations of the regulation in the "Toolkit?"

The statutory authority for the new HCBS "setting" requirement in the regulation and the corresponding "toolkit" is Social Security Act, Section 1915(c).

ACCSES Comment #1

- 1. Section 1915(c) does not define the term “home and community-based services;” nor does the statute include a definition of the term “home and community-based services setting.”**
- 2. Section 1915(c) includes examples of home and community-based services. One example included is habilitation services. Section 1915(c) defines “habilitation services” to mean 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 and includes prevocational, educational, and supported employment services.**
- 3. Section 1915(k), which authorizes home and community-based attendant services and supports, includes examples of the types of settings that are not home and community-based, i.e., does not include a nursing facility, institution for mental illness, or an intermediate care facility for the mentally retarded.**
- 4. In contrast, the regulatory definition of home and community-based setting includes outcome-based criteria as well as an expansive list of settings that are not home and community-based which extend beyond the list included under Section 1915(k) home and community-based attendant services and supports program.**
- 5. In sum, the specific statutory authority for including the outcome-based criteria in the regulation is unclear.**

(2) What is the relationship between the ADA and *Olmstead* and the HCBS setting requirement?

- Will the sub-regulatory guidance make it clear how the HCBS setting requirement is consistent with and does not go beyond the policies in the ADA regulation requiring that services be provided in the most integrated setting appropriate to address the needs of the individual? Will the HCBS sub-regulatory guidance regarding settings make it clear that separate or different services are permissible when necessary to ensure effective opportunity, as specified in the ADA regulations? Will the guidance make it clear that a range of options is permissible as described in the *Olmstead* decision?

*One of the goals of the new regulations is to help Medicaid support state strategies to meet their obligations under the ADA and the Supreme Court decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). In the *Olmstead* decision, the Court affirmed a state's obligations to provide covered program services to eligible individuals with disabilities in the most integrated setting appropriate to their needs. A state's obligations under the ADA and section 504 of the Rehabilitation Act are not defined by, or limited to, the services provided under the State's Medicaid program. However the*

Medicaid program can support compliance with the ADA, section 504 of the Rehabilitation Act, and Olmstead through the provision of Medicaid services to Medicaid-eligible individuals in integrated settings. The HCBS rule defines the minimum qualities for a home and community-based setting as experienced by the individual; states may set a higher threshold for home and community-based settings than that required by the regulation.

ACCSES Comment #2

- 1. The questions raised by Mr. Christman concern the sub-regulatory guidance and whether the sub-regulatory guidance will be consistent with or go beyond the ADA and *Olmstead* Supreme Court decision. The CMS answer does not respond to the question; instead of addressing the sub-regulatory guidance, CMS' response addresses the regulation.**
- 2. Three questions are raised by Mr. Christman:**
 - **The first question concerns the most integrated setting appropriate requirement. CMS' response does not explain that the term "most integrated setting" connotes a continuum or range of options with a presumption that the services are provided in a setting that allows maximum interaction with nondisabled persons and the setting chosen must always be appropriate and must address the individual's needs. This interpretation is consistent with the ADA regulation.**
 - **The second question concerns the provision in the ADA regulation that separate or different services are permissible when necessary to ensure effective opportunity. The CMS response does not address this policy.**
 - **The third question concerns the Supreme Court's interpretation of the ADA relating to the range of permissible options. The CMS response does not address this question here but does address the topic in its response to the next question.**
- 3. In sum, the question remains whether the regulation will be interpreted by CMS in its sub-regulatory guidance as going beyond the ADA "most integrated setting appropriate" policy and limiting state flexibility.**

• Will the HCBS setting requirement be interpreted by CMS as going beyond the ADA, as interpreted by *Olmstead*, by no longer allowing state flexibility to allow nonresidential community-based programs that are determined by the individual, the individual's legal guardian, and the treating professional to be appropriate and meet the needs of individuals with disabilities as identified in the individual's person-centered plan in the most integrated setting appropriate? Will these non-residential community-based programs determined to be appropriate no longer be fundable by states under HCBS? Will these non-residential programs be fundable under other Medicaid authorities or will the new HCBS setting regulation eliminate Medicaid as a source of funding for the full range of appropriate non-residential options?

The statute authorizes funding for home and community-based services and the HCBS regulations at §441.301(4)(i)-(vi) describe the qualities of home and community-based (HCB) settings for purposes of determining whether a service qualifies for that funding. The selection of service,

provider and setting by the individual is based on the needs of the individual as indicated in their person-centered service plan. It is the states' responsibility to ensure that all settings meet these qualities and the regulation's requirements about person-centered planning. States will determine which settings meet the qualities and will set forth a transition plan to address those settings that do not meet the qualities. Medicaid reimbursement/or services in settings currently approved can continue throughout a state identified transition period, not to extend beyond March 17, 2019. States may determine that certain settings do not meet the HCB qualities but with changes could in fact comply. This is why there is a transition period permitted. While the new HCBS setting regulation may require settings to change and/or transform it does not necessarily eliminate Medicaid as a source of funding for the full range of non-residential options.

If in fact the setting does not qualify for HCB funding, the state can explore other Medicaid funding options. For instance, if the setting is a Nursing Facility the state could fund the services under the Nursing Facility option. There is a public input process for each HCBS transition plan that is submitted to CMS for review. We strongly recommend providers, consumers, and other stakeholders review and comment on the state's HCBS transition plan during the public input process. We note that states identify the services and settings within the particular waiver system, and determine the "full range of appropriate non-residential options." The range would differ based on the state and the particular waiver.

ACCSES Comment #3

- 1. It is a positive development that CMS' response places significant authority on the states to make critical decisions, including:**
 - **Ensuring that the selection of service, provider and setting by the individual is based on the needs of the individual as indicated in their person-centered service plan;**
 - **Ensuring that all settings meet the "qualities" of a home and community-based setting and the regulation's requirements about person-centered planning;**
 - **Determining which settings meet the qualities and will set forth a transition plan to address those settings that do not meet the qualities; and**
 - **Determining that certain settings do not meet the HCB qualities but with changes could in fact comply.**
- 2. CMS response also clarifies that Medicaid reimbursement for services in settings currently approved can continue throughout a state identified transition period, not to extend beyond March 17, 2019.**
- 3. CMS notes that states identify the services and settings within the particular waiver system, and determine the "full range of appropriate non-residential options." The range would differ based on the state and the particular waiver.**

ACCSES Comment #3 Continued

4. **CMS also notes that while the new HCBS setting regulation may require settings to change and/or transform it does not necessarily eliminate Medicaid as a source of funding for the full range of non-residential options. If in fact the setting does not qualify for HCB funding, the state can explore other Medicaid funding options. For instance, if the setting is a Nursing Facility the state could fund the services under the Nursing Facility option.**
5. **Mr. Christman’s question focuses on non-residential programs; thus the reference to the use of Medicaid to fund non-residential services under the Nursing Facility option is misleading. CMS still does not address the question of what Medicaid funding sources (in addition to HCBS) exist to support non-residential services, e.g., prevocational and day habilitation services when the individual is not in a residential program.**
6. **CMS response also clarifies that Medicaid reimbursement for services in settings currently approved can continue throughout a state identified transition period, not to extend beyond March 17, 2019.**
7. **CMS notes that states identify the services and settings within the particular waiver system, and determine the “full range of appropriate non-residential options.” The range would differ based on the state and the particular waiver.**
8. **CMS also notes that while the new HCBS setting regulation may require settings to change and/or transform it does not necessarily eliminate Medicaid as a source of funding for the full range of non-residential options. If in fact the setting does not qualify for HCB funding, the state can explore other Medicaid funding options. For instance, if the setting is a Nursing Facility the state could fund the services under the Nursing Facility option.**
9. **Mr. Christman’s question focuses on non-residential programs; thus the reference to the use of Medicaid to fund non-residential services under the Nursing Facility option is misleading. CMS still does not address the question of what Medicaid funding sources (in addition to HCBS) exist to support non-residential services, e.g., prevocational and day habilitation services when the individual is not in a residential program.**

- Will the HCBS setting requirement be interpreted by CMS as going beyond the ADA by not allowing state flexibility to allow residential community-based programs that are determined by the individual, the individual's legal guardian, and the treating professional to be appropriate and meet the needs of individuals with disabilities as identified in the individual's person-centered plan? Will these residential community based programs determined to be appropriate no longer be fundable under HCBS?

Residential settings that meet the qualities of home and community-based settings described in the HCBS regulations at §441.301(4)(i)-(vi), or will meet those qualities as a result of remediation

strategies outlined in the state's transition plan will qualify for Medicaid reimbursement.

- Will they be fundable under other Medicaid authorities or will the new HCBS setting regulation eliminate Medicaid as a source of funding for the full range of appropriate non-residential options?

The state will determine which settings meet the HCB qualities and which do not consistent with federal guidance. The covered services provided in residential and non-residential settings that comply with the settings requirements will continue to be reimbursed by Medicaid HCB funding. States may determine that certain settings do not meet the HCB qualities but with changes could in fact enhance the individual's experience in a manner that would comply. This is why there is a transition period permitted. While the new HCBS setting regulation may require settings to change and/or transform it does not necessarily eliminate Medicaid as a source of funding for the full range of non-residential options. If in fact the setting does not qualify for HCB funding, the state can explore other Medicaid funding options. For instance, if the setting is a Nursing Facility the state could fund the services under the Nursing Facility option. The regulation applies to all home and community-based settings identified in programs using the 1915(c), 1915(i) and 1915(k) authority.

ACCSES COMMENT #4

1. CMS' response is that "the state will determine which settings meet the HCB qualities and which are not consistent with federal guidance." CMS' answer is ambiguous. It is clear from CMS' response that states will determine which settings meet the HCB qualities and which do not. The question that remains unanswered, however, is what criteria will be used to determine "consistent with federal guidance" and whether the sub-regulatory guidance will provide states with the flexibility they need to determine which settings meet the regulatory HCBS qualities and whether the settings criteria effectively negate regulatory authority to provide authorized services, e.g., prevocational services in facility-based programs.
2. Federal guidance needs to interpret the outcome-quality standards to allow states the flexibility and discretion to fund programs authorized by the Medicaid HCBS regulations implementing the prevocational services and day habilitation option.
 - Home and community-based services are defined by the Medicaid statute and regulations as including prevocational services. Under the existing HCBS regulations, prevocational are distinguishable from noncovered vocational services by the following criteria: (A) the services are provided to persons who are not expected to be able to join the general work force, (B) If the recipients are compensated, they are compensated at less than 50 percent of the minimum wage, (C) the services include activities which are not primarily directed at teaching specific job skills but at underlying habilitative goals, and (D) the services are reflected in a plan of care directed to habilitative rather than explicit employment objectives.
 - The 2011 Information Bulletin explains that prevocational services may be furnished in a variety of locations in the community, including fixed-site facilities; however prevocational services are not limited to fixed-site facilities.
3. It is imperative that sub-regulatory guidance interpret the new HCBS setting requirement to allow states to continue to provide prevocational services as defined in CMS regulations and Informational Bulletin. The prevocational services regulation clearly permits such services to be provided in facilities and allows the payment of commensurate wages consistent with the FLSA. Nothing in the setting requirement should be construed to preclude the continuation of these services in facilities.
4. Sub-regulatory guidance should make it clear that there will not be a gap in services deemed appropriate for the individual in accordance with his/her person-centered plan. In other words, the HCBS setting requirement should be construed to facilitate not impede or preclude states from paying for services recognized in the Medicaid statute and regulations, e.g., facility-based prevocational and day habilitation services deemed appropriate in an individual's person-centered plan by the individual, his or her family, and the treating professional.

3) The new HCBS rule regarding settings specifies that home and community-based settings must have all of qualities specified in the regulations. If a setting in which services are provided meets all of these qualities, will the setting be considered as not "isolating" individuals with disabilities? If the answer is no, is every facility-based program and group home in this country:

- Subject to heightened scrutiny?
- Subject to specific case-by-case determinations by states and included in state submissions to CMS?
- Subject to review by CMS and approval by the Secretary?
Please explain the relationship between the ten "qualities", the heightened scrutiny provision, the role of the states, and the role of CMS/Secretary of HHS.

States determine how they will assess settings to determine they are compliant with the HCB settings qualities. States will also determine which settings are presumed not to be home and community-based in nature in accordance with the regulations. If the state believes the setting has the qualities of a home and community-based setting and does not have the qualities of an institution, the state can submit evidence of this to CMS and request CMS's review of the information provided. CMS will review the state's submission to determine if we concur with the state's finding.

ACCSES COMMENT #5

- 1. CMS' focus on the role of the state is a positive development. The real question is what happens when CMS reviews the state's submission "to determine if we concur with the state's finding."**
- 2. CMS' answer does not address the critical questions raised by Mr. Christman including the request to explain the relationship between the ten qualities, the heightened scrutiny provision, the role of the states, and the role of CMS/Secretary of HHS.**

Quality #1 specifies that "the setting is integrated in and supports full access of individuals with disabilities receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS." Please explain, with examples, how this provision will be interpreted and the relationship between this provision and the "isolation" provision.

Please see the HCBS Toolkit located at <http://medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/home-and-community-based-services.html> for examples of how these provisions may be assessed. CMS offers states, through the Toolkit, examples of how states may assess settings for compliance with the HCB qualities. CMS allows states the flexibility to determine whether or not the setting is isolating in nature, as many factors may affect that determination. This is one of the factors that are considered when assessing HCB setting qualities.

ACCSES COMMENT #6

1. **The question seeks examples applicable to non-residential programs, not residential programs. The examples included in the Toolkit only apply to residential programs.**
2. **Possible examples of appropriate practices regarding the provision of prevocational services in fixed site facilities that illustrate the qualities of a home and community-based setting include:**
 - **The program is in a facility that resembles any other business of its size and scope;**
 - **Individuals are working on production of goods and services for the greater business community, similar to other businesses;**
 - **The program may serve populations other than HCBS participants with disabilities, including Veterans, individuals who are poor and under-privileged and need assistance;**
 - **Participants are provided an overview of employment options, including discussions about and referrals to state vocational rehabilitation and other programs for competitive integrated employment;**
 - **Community competitive integrated employment is discussed, encouraged, and promoted at every review, and the person is directly involved in making informed choices, as well as during the delivery of prevocational services; and**
 - **Prevocational services include opportunities to gain greater exposure to the greater community and to teach individuals how to access the greater community, including trial work experiences, and internships, and tours of local businesses.**
3. **CMS' answer is a positive development—CMS allows states the flexibility to determine whether or not the setting is isolating in nature.**
4. **The concern with CMS' answer relates to what is not included in the response, i.e., what happens when CMS reviews the state's submission to determine if it concurs with the state's finding? [See CMS answer above]**
5. **CMS' answer does not address Mr. Christman's question--how will it interpret the relationship between the criteria used to assess settings for compliance with the HCBS qualities and whether or not the setting is isolating in nature?**

5) Home and community-based services are defined by the Medicaid statute as including prevocational services. Under the existing HCBS regulations, prevocational are distinguishable from non-covered vocational services by the following criteria: (A) the services are provided to persons who are not expected to be able to join the general work force, (B) If the recipients are compensated, they are compensated at less than 50 percent of the minimum wage, (C) the services include activities which are not primarily directed at teaching specific job skills but at underlying habilitative goals, and (D) the services are reflected in a plan of care directed to habilitative rather than explicit employment objectives. The 2011 Information Bulletin explains that prevocational services may be furnished in a variety of locations in the community and are not limited to fixed-site facilities. Please

explain how the new HCBS setting requirement will be interpreted to allow states to continue to provide prevocational services as defined in CMS regulations and Informational Bulletin.

The new HCBS regulations address settings. The September 16, 2011 Informational Bulletin addresses services, including pre-vocational services. States are expected to follow the information on pre-vocational services that were highlighted in the Informational Bulletin and the new HCBS regulation with regard to settings requirements.

ACCSES COMMENT #7

- 1. CMS' response is misleading. The Information Bulletin addresses pre-vocational services AND settings on numerous occasions.**
- 2. Examples include:**
 - **“Prevocational services should enable each individual to attain the highest possible 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. [page 7]**
 - **Prevocational services may be furnished in a variety of locations in the community and are not limited to fixed-site facilities. [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 the minimum wage in the community. [page 8]**

Again, I thank you for bringing this constituent's concerns to our attention. I hope we adequately addressed those concerns. We plan to continuously post additional information and answers to frequently asked questions, and encourage your constituents to check the Medicaid.gov HCBS website frequently. If CMS can be of further assistance, please contact Ralph Lollar, Director of Long Term Services and Supports, of my staff, at 410-786-0777 or Ralph.Lollar@cms.hhs.gov.

Sincerely,

Cindy Mann

cc: Ralph Lollar, CMS