



August 6, 2013

Ensuring Sufficient State Flexibility under the Medicaid Home and Community-Based Services Regulations Regarding the Provision of Prevocational Services to Recipients with Significant Disabilities

This document includes a short overview of the issues related to Medicaid Home and Community-Based Services programs and the provision of HCBS services in skill development centers. In addition, this document provides background information and a draft letter for providers to ask their Members of Congress to send to the Secretary of Health and Human Services. In addition, included are two appendices – the first appendix includes the CMS proposed regulation dealing with “integrated setting”. The second appendix includes our alternative language.

Overview of Issue:

The Secretary of Health and Human Services (HHS) issued a proposed regulation (May 3, 2012) under the Medicaid Home and Community Based Services (HCBS) program that may be finalized in the near future. The proposed regulation would require that all HCBS services be provided in a setting that meets federally-prescribed “one-size-fits-all” criteria, regardless of whether or not the setting is appropriate to the individuals’ particular strengths, needs, and abilities. These HCBS services include personal care services, day treatment, and habilitation services such as supported employment (leading to competitive integrated employment) and prevocational services (including employment in skill development centers—sometimes referred to as “sheltered workshops”).

Instead of adopting the criteria in the proposed regulation, the Secretary should adopt the mandate included in the Americans with Disabilities Act (ADA) and the U.S. Supreme Court decision in *Olmstead vs. L. C.* which requires a range of services and supports in various settings, provided that the services and supports are provided in the most integrated setting appropriate to meet the needs of the individual as set out in his/her person-centered plan.

Thus, in all cases, the final regulations should ensure that the appropriate setting is determined by the particular needs of the individuals, rather than by “one-size-fits-all” federal criteria that disregard the individuals’ strengths, needs, and abilities. For example, the final regulation must permit the provision of prevocational services in skill development center-based settings when those settings are determined to be the most integrated settings appropriate to the needs of the individual with disabilities.

Background

Below is additional background information to better understand the issue and recommendations.

Values and Principles

Federal Medicaid Policy Must Reflect the Following Values and Principles:

1. Services, programs, and activities must be administered in the most integrated setting appropriate to the needs of individuals with disabilities. [ADA regulations, 35 CFR 35.130(d)]
2. Separate or different services, programs, and activities may not be provided unless such action is necessary to provide individuals with disabilities with services or supports that are as effective as those provided to others. [ADA regulations, 35 CFR 35.130(b)(1)(iv)]
3. Despite the existence of permissibly separate or different services, programs, and activities, individuals with disabilities may not be denied the opportunity to participate in services, programs, or activities that are not separate or different. [ADA regulations, 35 CFR 35.130(b)(2)]
4. State systems may not result in an overreliance on separate or different services. State systems may not result in inappropriate, unjustified, unnecessary placements in separate or different programs. [DOJ letters of findings and DOJ settlement agreements]
5. Decisions regarding what is “appropriate,” “justified,” “necessary,” and “effective” for the individual must be based on the individual’s person-centered plan, informed choice, and self-determination. [Medicaid, Home and Community-Based Program]
6. The presumptive, priority, default, optimal outcome in the employment context is competitive integrated employment. [ADA, Medicaid HCBS CMS Information Bulletin (September 16, 2011)]
7. The presumptive, priority, default, and optimal outcome in the residential context is the individual’s home. [ADA, Medicaid HCBS CMS Information Bulletin (September 16, 2011)]
8. There is a need to maintain a “range” of services and supports for persons with “diverse” needs and there is an obligation to “administer services with an even hand.” [*Olmstead v. L.C.*, 570 U.S. 581 (1999)]
9. Decisions by states regarding “appropriate” services, supports, and programs must reflect the determinations by the treatment “professionals” and not be “opposed” by the affected individual. [*Olmstead v. L.C.*, 570 U.S. 581 (1999)]
10. Wages paid and hours worked must fully comply with the Fair Labor Standards Act.

11. The Medicaid statute authorizing the provision of Home and Community-Based Services describes a range of service options, including personal care services, day treatment, and habilitation services (such as prevocational, educational, and supported employment services). [Section 1915(c)(4)(B) and 1915(c)(5)]
12. Prevocational services may be provided in a variety of locations in the community and are not limited to fixed site facilities. [CMS *Informational Bulletin* (September 16, 2011 at page 8)]

CMS Medicaid HCBS Regulations and Oversight Must Reflect Principles in ADA and Olmstead Decision

Oppose

ACCSES opposes provisions in the May 3, 2012 proposed regulation [See Appendix 1] that would create a “one-size fits all” federal prescription that denies states the flexibility and discretion to make available the full range of home and community-based services options included in the statute that reflect an individual’s strengths, priorities, needs, abilities, and capabilities.

In the employment context, ACCSES opposes any policy that would permit the federal government the authority to deny states the option to make available the full range of home and community-based services for individuals when such options are person-centered, appropriate, necessary, justified, and effective. As stated above, the full range of HCBS options includes provision of prevocational services provided in skill development centers and disability-focused nonprofit businesses operated by community rehabilitation providers.

In the residential context, ACCSES opposes any policy that would permit the federal government the authority to deny states the option to make available the full range of home and community-based service options including group homes.

Support

Consistent with the ADA, Olmstead, and FLSA, ACCSES supports the expansion and improvement of the range of home and community-based services options included in the Medicaid statute. [See Appendix 2] ACCSES believes that the particular services and supports provided to the individual should be based on a person-centered plan, informed, choice, and self-determination and that the services and supports must be provided in the most integrated setting appropriate and must be justified, necessary, and effective.

In the employment context, ACCSES supports services and supported that result in a full range of outcomes, including supported employment and customized employment services leading to competitive, integrated employment and self-employment. ACCSES also supports services and supports, including prevocational services, that enable an individual to be employed in skill development centers (formerly referred to as “sheltered workshops”) and disability-focused nonprofit businesses operated by community rehabilitation providers. In the residual context ACCSES supports services and supports that include residing in one’s own home or apartment and group homes.

Conclusion

ACCSES is concerned that a new definition of “integrated “setting” under the Medicaid home and community-based program that has been proposed by CMS may result in the elimination of the full range of options available to individuals with significant disabilities, thereby denying them appropriate, justified, necessary, and effective services and supports consistent with their person-centered plan. The proposed regulation must be revised to allow states the discretion to make available the full range of service options and reflect the principle of most integrated setting appropriate to the needs of the individual.

Draft Letter from Member of Congress Regarding Proposed Medicaid Home and Community-Based Services Setting Requirement

As a member of Congress, I write to express my considerable concern with the recent proposed regulation regarding Medicaid Home and Community-Based Services (HCBS) waivers [76 Federal Register 21311 (April 15, 2011), REVISED 77 Federal Register 26362 (May 3, 2012)] and the adverse impact these proposals could have on my constituents with the most significant disabilities served by community rehabilitation programs (CRPs).

Congress authorized HCBS waivers for individuals with significant disabilities who would otherwise require a level of care provided in institutional settings. My constituents are concerned that the language included in the proposed regulation will have the effect of thwarting informed choice by negating or severely restricting longstanding (and in some cases award winning) program options expressly authorized by the HCBS provisions of the Medicaid statute and regulations and significantly restricting state flexibility to respond to identified needs of Medicaid beneficiaries. More specifically, my constituents are concerned that if the proposed language is adopted, the following program options could be **eliminated or severely restricted**:

- The provision of home and community-based services explicitly authorized under Section 1915(c) of the Social Security Act (Medicaid), including center-based day habilitation programs providing critical prevocational services, day treatment programs, and psychosocial rehabilitation programs.
- The provision of home and community-based services in group homes for people with disabilities in which CRPS have adopted reasonable policies governing their operation designed to respect the individual's rights and at the same time respect the rights of other residents.
- The provision of home and community-based services to residents with disabilities in supported living arrangements authorized under and meeting the requirements of HUD Section 811 and Section 202 multi-family housing units.
- The provision of home and community-based services in group homes set around a courtyard where individuals with disabilities have many needed services and supports built into their day-to-day living and have transportation and other assistance to access the general community.
- The provision of home and community-based services in programs located adjacent to a public institution even though the program is also adjacent to other buildings such as local community colleges and universities, stores and businesses, and residential communities.

I truly believe that this is not the time to adopt federal "one-sizes fits all" absolute standards that may have the effect of negating statutory options, restrict state flexibility, and severely limit informed choice, options, and opportunities for individuals with the most significant disabilities and their families and guardians. This is the time to reassure individuals with the most significant disabilities that they will continue to receive the Medicaid home and community-based services and supports they need and want and choose. Expanding and enhancing choice, options, opportunities, and access should be the guiding principles.

I look forward to hearing from you about these very critical issues.

APPENDIX 1

CMS Proposed Regulation (MAY 3, 2012)

Sec. 441.530 Home and Community-Based Setting.

(a) States must make available attendant services and supports in a home and community-based setting consistent with both paragraphs (a)(1) and (2) of this section.

(1) Home and community-based settings shall have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:

(i) The setting is integrated in, and facilitates the individual's full access 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, in the same manner as individuals without disabilities.

(ii) The setting is selected by the individual from among all available alternatives and is identified in the person-centered service plan.

(iii) An individual's essential personal rights of privacy, dignity and respect, and freedom from coercion and restraint are protected.

(iv) Individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact are optimized and not regimented.

(v) Individual choice regarding services and supports, and who provides them, is facilitated.

(vi) In a provider-owned or controlled residential setting, the following additional conditions must be met. Any modification of the conditions, for example, to address the safety needs of an individual with dementia, must be supported by a specific assessed need and documented in the person-centered service plan:

(A) The unit or room is a specific physical place that can be owned, rented or occupied under another legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord tenant law of the State, county, city or other designated entity;

(B) Each individual has privacy in their sleeping or living unit:

(1) Units have lockable entrance doors, with appropriate staff having keys to doors;

(2) Individuals share units only at the individual's choice; and

(3) Individuals have the freedom to furnish and decorate their sleeping or living units.

(C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time;

(D) Individuals are able to have visitors of their choosing at any time; and

(E) The setting is physically accessible to the individual.

(2) Home and community-based settings do not include the following:

(i) A nursing facility;

(ii) An institution for mental diseases;

(iii) An intermediate care facility for the mentally retarded;

(iv) A hospital providing long-term care services; or

(v) Any other locations that have qualities of an institutional setting, as determined by the Secretary. The Secretary will apply a rebuttable presumption that a setting is not a home and community-based setting, and engage in heightened scrutiny, for any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or disability-specific housing complex.

APPENDIX 2

Proposed Alternative HCBS Setting Requirement

§441.656 State plan home and community-based services under the Act.

(a) Home and Community-Based Setting. Under section 1915(i)(1) of the Act, States must make HCBS available in a home and community-based setting consistent with paragraph (a)(1), (2) and (3) of this section

(1) The home and community-based setting chosen for an individual shall be based on the individual's strengths, needs, priorities, interests, abilities and capabilities as indicated and documented in their person-centered service plan. Consistent with the individual's person-centered service plan, the setting chosen shall:

- (i) Be selected by the individual from among all available alternatives;
- (ii) Be the most integrated setting appropriate to address the needs of the individual;
- (iii) Reflect individual informed choice regarding services and supports and who provides them;
- (iv) Facilitate full access to and achievement of the goals applicable to the particular home and community-based services identified in the person-centered service plan;
- (v) Protect an individual's essential personal rights of privacy, dignity and respect, and freedom from coercion and restraint; and
- (vi) Optimize individual initiative, autonomy, and independence in making life choices, including but not limited to daily activities, physical environment, and with whom to interact.”
[see (iii) above]

“Home and Community-Based Setting. States must make HCBS available in a home and community-based setting consistent with paragraph... (2), ... of this section.

(2) To the extent the setting chosen for an individual is a provider-owned or controlled residential setting, the setting shall be based on the individual's strengths, needs, priorities, interests, abilities and capabilities as indicated and documented in their person-centered service plan. Consistent with the individual's person-centered service plan, the setting chosen shall meet the following conditions:

- (i) The unit or room is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity.
- (ii) Each individual has privacy in their sleeping or living unit. “To the greatest extent practicable:
 - (1) Each sleeping or living unit has lockable entrance doors, with appropriate staff having keys to doors;
 - (2) Individuals should share units only at the individual's choice; and
 - (3) Individuals should have the freedom to furnish and decorate their sleeping or living units.
- (iii) To the extent reasonable and appropriate, individuals should have the freedom and support to control their own schedules and activities, including access to food and ability to have visitors of their choosing.
- (iv) The setting shall be physically accessible to the individual.”

“Home and Community-Based Setting. States must make HCBS available in a home and community-based setting consistent with paragraph...(3),...of this section.

(3) Home and community-based settings do not include the following:

- (i) A nursing facility;
- (ii) An institution for mental diseases;
- (iii) An intermediate care facility for the mentally retarded;
- (iv) A hospital certified for the provision of long-term care services;
- (v) A building on the grounds of a facility or institution described in paragraphs (i)-(iv) which is still in operation; or
- (vi) A building on the grounds of a facility or institution which is no longer in operation as a facility or institution described in paragraphs (i)-(iv) and the facility or institution is geographically segregated from the larger community.”

The interpretive guidance accompanying the final regulation should explain that a program located in a building on the premises of a disability-specific housing complex may receive home and community-based services if, and only if, the housing complex is in compliance with the underlying laws and implementing regulations, including Section 811 of the National Affordable Housing Act of 1990, as amended and implementing regulations (supported housing for persons with disabilities), the Fair Housing Act, and the ADA.