

TO: Barbara Coulter Edwards; Director, Disabled and Elderly Health Programs Group, CMS
Ralph Lollar; Director, Division of Long Term Services and Supports, CMS
FROM: Terry Farmer; CEO, ACCSES
RE: ACCSES' Recommendations Regarding HCBS Sub-Regulatory Guidance Applicable to
Non-Residential Settings
DATE: February 19, 2014

As a follow-up to our conference call, the purpose of this memorandum is to provide CMS with ACCSES' recommendations for sub-regulatory guidance regarding the application of the final Medicaid HCBS rule to non-residential HCBS settings. Thank you for considering our input.

The first section of the memorandum sets out the principles we used to develop our recommendations. The second section includes specific recommendations organized by the five qualities that a setting must have to be considered a home and community-based setting.

GUIDING PRINCIPLES

1. Home and community-based settings must have all of the qualities set out in the rule and such other qualities as the Secretary determines to be appropriate, based on the needs of individuals as indicated in their person-centered service plans. [441.301(c)(4)]
2. The intent of the final rule is to ensure that individuals receiving long-term services and supports through HCBS programs under Medicaid authorities have full access to benefits of community living and the opportunity to receive services in the most integrated setting appropriate. [CMS Webinar Power Point, slide 3]
3. The final rule regarding home and community-based settings must continue to permit the full array of home and community-based services, as defined in the Medicaid HCBS statute and regulations and included in the individual's person-centered services plan. [79 FR 2954]

According to 440.180(c), prevocational services are included as a form of expanded habilitation services under the HCBS programs. Prevocational services means services that prepare an individual for paid or unpaid employment and that are not job-task oriented but are, instead, aimed at a generalized result. These services may include, for example, teaching an individual such concepts as compliance, attendance, task completion, problem solving and safety.

Prevocational services are distinguishable from vocational services that are not covered by using the following criteria:

- The services are provided to persons who are not expected to be able to join the general workforce;

- If the recipients are compensated they are compensated at less than 50 percent of the minimum wage;
 - 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
 - The services are reflected in a plan of care directed to habilitative rather than explicit employment objectives.
4. The HCBS rule must ensure that Medicaid is supporting needed strategies for states in their efforts to meet their obligations under the ADA and the Supreme Court decision in *Olmstead v. L.C.* Under ADA and *Olmstead*, a state is obligated to provide covered program services in the most integrated setting appropriate to the individual's needs. [79 FR 2951]
 5. The most effective and consistent way to assure that individuals receiving Medicaid HCBS are offered in the most integrated setting appropriate to their needs and preferences, regardless of age or disability, is to focus on the qualities of "home" and "community" that assure independence and integration from the perspective of the individuals. [79 FR 2977]
 6. It is not the intent of the rule to prohibit congregate settings from being considered home and community-based settings. HCBS must be delivered in a setting that meets the HCBS setting requirements. [79 FR 2957; 2968; 2975]
 7. The rule moves away from defining HCBS settings by what they are not and towards defining them by the nature and quality of beneficiaries' experiences. The final rule establishes a more outcome-oriented definition rather than one based solely on a setting's location, geography, or physical characteristics. [79 FR 3011]
 8. The policies reflected in the September 16, 2011 CMCS Informational Bulletin related to employment and day treatment provide an appropriate emphasis on the critical role of person-centered planning in achieving desired quality outcomes based on the individual's needs, interests, strengths, priorities, abilities, and capabilities.

Prevocational Services [page 7-8]

- Competitive integrated employment is considered to be the optimal outcome of prevocational services.
- 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.
- Prevocational services may be furnished in a variety of locations in the community and are not limited to fixed-site facilities.

Day Habilitation Services [page 6-7]

- Day habilitation services focus on enabling the participant to attain or maintain his or her maximum potential and shall be coordinated with any needed therapies in the individual's person-centered services and supports plan, such as physical, occupational, or speech therapy.

- Day habilitation may be furnished in any of a variety of settings in the community other than the person’s private residence. Day habilitation services are not limited to fixed-site facilities.

Supported Employment—Small Group Employment Support [page 11-13]

- Services and training activities provided in regular business, industry and community settings for groups of two to eight workers with disabilities. Examples include mobile crews and other business-based workgroups employing small groups of workers with disabilities in employment in the community.
- Supported employment small group employment support must be provided in a manner that promotes integration into the workforce and interaction between participants and people without disabilities in those workplaces.
- The outcome of this service is sustained paid employment and work experience leading to further career development and individual integrated community-based employment 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.

9. The HCBS rule should facilitate, and not impede the achievement of congressionally recognized goals and outcomes, including goals and outcomes prescribed by the AbilityOne program as articulated in the Javits-Wagner-O’Day (JWOD) Act.

SPECIFIC RECOMMENDATIONS (EXAMPLES OF PRACTICES)

Consistent with the “qualities” specified in the rule applicable to HCBS settings, we recommend that CMS reaffirm the continued viability and applicability of the policies specified in the September 2011 Information Bulletin.

In addition, we recommend that CMS include in the sub-regulatory guidance the following examples of appropriate practices to illustrate the qualities of a home and community-based setting. These practices are indicated by the use of bullet points. The bullet points are intended to illustrate possible practices that satisfy a particular “quality.” It is not our intent that a provider will be expected to adopt all practices indicated by the bullet points. For example, under quality 1 (see below), a program in a rural area may not be “centrally located” and may not have public transportation available.

With regard to non-residential settings, the revised Medicaid Home and Community-Based Services (HCBS) Settings regulation specifies that HCBS settings must have all of the following **qualities**, and such other qualities as the Secretary determines to be appropriate, based on the needs of individuals as indicated in their person-centered service plans:

1. **The setting is integrated in and supports full access of individuals 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.**

- The program is centrally located within the community among other businesses such as industrial parks and store fronts, in a modern 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 does not serve only HCBS participants with disabilities but may serve other populations such as Veterans, individuals who are elderly, individuals who are poor and under-privileged and need assistance.
 - Participants are provided with an overview of options, including discussions about and referrals to state vocational rehabilitation programs for competitive, integrated employment.
 - Community-integrated employment is discussed, encouraged, and promoted at every review, and the person is directly involved in making an informed choice, as well as during the delivery of prevocational services.
 - Individuals are taught what types of integrated employment are available in the community and how to access opportunities.
 - Prevocational activities include opportunities to gain greater exposure to the greater community and to teach individuals how to access the greater community, including volunteering in various integrated community settings, trial work experiences, and internships, recreational outings, educational outings, and tours of local businesses.
 - Participants are provided education on the use of and how to access public transportation.
 - Opportunities are provided for HCBS-supported workers with disabilities to interact with non-Medicaid HCBS supported employees without disabilities.
 - At each program review, the program documents describe the individual's and/or guardian's concerns regarding integrated employment and the learning and/or work experiences and other action steps the provider is taking to address the concerns.
 - To the extent the program operates a business, such as a kitchen or electronics recycling program, that enables workers to interact with customers and the general public, workers with disabilities are provided an opportunity to interact with these customers and the general public on a regular basis in a manner comparable to the opportunities provided to others.
 - Day services programs are designed to provide exposure to the greater community and teach individuals how to access the greater community, including providing community outings and individualized links to the community. Curricula include opportunities to participate in current events classes, health and wellness activities, money skills and management, cooking, laundry, shopping, bowling, swimming, computer skills, coping and social skill training, and participation in cultural activities throughout the days, evenings, and weekends. Curricula also include soft skills training such as completion of job applications, interview skills and techniques, hygiene, communication and relationships and problem solving skills and strategies.
 - Individuals may work in both competitive integrated employment and skill development centers under applicable federal wage guidelines.
2. **The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.**

- All participants are presented with an overview of options for programs at the time of entrance and on a regular basis thereafter and then an informed choice is made by the individual and his or her circle of support regarding the most integrated setting appropriate. Competitive integrated employment is always included in the options presented to the individual as the priority/optimal outcome and the option is presented on an ongoing basis.
- All of the information regarding competitive integrated employment is well documented and can be confirmed by those who use the services and those who fund the services.
- Addenda to plans are written any time a need is identified that was not addressed previously and the addendum must be signed by all parties.

3. Ensures an individual’s rights of privacy, dignity and respect, and freedom from coercion and restraint.

- Individuals with disabilities in the program are protected by a client bill of rights and procedures that include filing a complaint if they feel their rights have been violated.
- Policies and work place procedures are in place to ensure that people are treated with dignity, respect, and freedom from coercion and restraint.

4. Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

- The person leads the person-centered service planning process; the person is presented with options and makes an informed choice; participation in the program is voluntary; in the work setting, people are free to choose how they will spend their lunch breaks, who they will interact with, etc.
- Independence and individual problem solving are encouraged within the program.

5. Facilitates individual choice regarding services and supports, and who provides them.

The person-centered service plan documents the options that are provided and that the person is able to choose from an array of services and supports and who provides them, including the option to self-direct services and supports.