



**DELAWARE ASSOCIATION OF REHABILITATION FACILITIES**

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**Member Agencies**

- Autism Delaware
- Bancroft Neurohealth
- Benedictine Delaware
- Brandywine Counseling, Inc.
- Center for Disabilities Studies
- C.E.R.T.S., Inc.
- Chimes of Delaware
- Choices for Community Living
- Community Integrated Services
- Connections CSP, Inc.
- DE Council on Gambling Problems
- Delaware MENTOR
- Delmarva Community Services
- Dove Pointe
- Easter Seals Delaware and Maryland's Eastern Shore
- Elwyn Delaware
- Fellowship Health Resources
- Gaudenzia Fresh Start
- Goodwill Industries of Delaware
- Homeless Planning Council
- Horizon House Delaware, Inc.
- KenCrest Services
- Kent Sussex Community Services
- Kent-Sussex Industries, Inc.
- Keystone Services MidAtlantic
- Limon House
- MOSAIC Delaware
- NHS Human Services
- Open Door, Inc.
- Psychotherapeutic Services, Inc.
- Quality Management Associates-DE, Inc.
- Recovery Innovations
- Resources for Human Development
- Salvation Army
- ServiceSource
- St. John's Community Services
- The ARC of Delaware
- Thresholds

December 29, 2014

The Honorable Jack Markell  
Governor  
Tatnall Building  
Dover, Delaware 19901

I am writing on behalf of the members of the Delaware Association of Rehabilitation Facilities in response to the December 5<sup>th</sup> letter that was addressed to you from Diann Jones, the Chair of the Delaware Developmental Disabilities Council. As the state's largest provider association, we have a different viewpoint regarding the regulation that was issued by the Secretary of Health and Human Services (HHS) on January 16, 2014, which contained a new "setting" requirement applicable to Medicaid home and community-based services (HCBS) waiver and state plan options as well as the home and community-based attendant services and supports option.

There is confusion in the field regarding the meaning and scope of this new HCBS setting requirement. For example, family members, disability service providers, and other stakeholders have been told by a number of state officials here and across the nation that the Centers for Medicare and Medicaid Services (CMS) has indicated they will not accept waiver or state plan applications that authorize HCBS funds to be used to fund: (1) prevocational services provided in facility-based employment programs where individuals are paid commensurate wages in accordance with Section 14(c) of the Fair Labor Standards Act (FLSA), like Elwyn or Kent-Sussex Industries or (2) day habilitation services provided at facility-based locations, like Easter Seals.

On December 15, 2014, CMS released sub-regulatory guidance, in the form of a Toolkit, regarding non-residential settings. The purpose of this letter is to provide background information and recommendations regarding the state of Delaware's response to this guidance, as it formulates the transition plan required by the regulation.

**OVERARCHING POLICY GOAL AND OBJECTIVE**

As interpreted by CMS in the sub-regulatory guidance that has been issued on both non-residential and residential settings, states continue to have flexibility regarding the funding of the full array of services and supports authorized by the Medicaid statute and regulations (including facility-based prevocational and day habilitation programs), consistent with the ADA mandate that Medicaid services must be provided by a State in the **most integrated setting appropriate** to meet the needs of all

individuals receiving such services, consistent with their person-centered plans.

DelARF requests that the HCBS setting requirement and the sub-regulatory guidance on residential and non-residential settings be interpreted by the state of Delaware in a flexible manner to avoid creating gaps in Medicaid services and supports for individuals by restricting or eliminating state options authorized by the Medicaid statute and regulations, when these services and supports are determined appropriate by individuals, their legal guardians, and their treating professionals and when they are provided in the most integrated setting appropriate for addressing the needs of the individuals.

## **BACKGROUND: OVERVIEW OF ADA, OLMSTEAD AND MEDICAID HCBS POLICY**

In order to provide a foundation for our recommendations, this section of the letter describes the policy frameworks applicable to:

- Medicaid HCBS setting requirements
- ADA/Olmstead
- Definition of Home and Community-Based Services
- Person-Centered Planning, Informed Choice, and Role of Individual and Family, and Treating Professionals
- Definition of Habilitation Services
- Definition and Policies Applicable to Prevocational Services
- Sub-regulatory Guidance on Non-Residential Services Issued on December 15, 2014

### **Medicaid HCBS Setting Requirements**

On January 16, 2014, the Secretary of HHS issued a regulation containing new “setting” requirements applicable to HCBS waiver and state plan options and the new home and community-based attendant services and supports option. The stated purpose of these “setting” requirements is to provide clear alternatives to services provided in institutions by including affirmative “outcome-based criteria” describing what (a) is, (b) may not be, and (c) absolutely is not a setting that qualifies for funding under the HCBS option. A second stated purpose is to maximize the opportunities for individuals with disabilities to receive services in the most integrated setting appropriate, consistent with the Americans with Disabilities Act (“ADA”), as interpreted by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

More specifically, for Section 1915(c) HCBS waivers and, for Section 1915(i) State plan home and community-based services, HCBS settings must have all of the following qualities defined at §441.301(c)(4) and §441.710 respectively, 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.
2. The setting is selected by the individual from among setting options that include non-disability specific settings. An option for a private unit in a residential setting must also be provided. The setting options considered should be identified and documented in the person-centered service plan and must be based on

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the individual's needs, preferences, and for residential settings, the individual's resources available for room and board.

3. The setting ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.
4. The setting 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.
5. The setting facilitates individual choice regarding services and supports, and who provides them.

In a provider-owned or -controlled residential setting, in addition to the qualities specified above, the following additional conditions must be met:

6. The unit or dwelling 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. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.
7. Each individual has privacy in their sleeping or living unit:
  - Units have entrance doors lockable by the individual, with only appropriate staff having keys to doors.
  - Individuals sharing units have a choice of roommates in that setting.
  - Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.
8. Individuals have the freedom and support to control their own schedules and activities and have access to food at any time.
9. Individuals are able to have visitors of their choosing at any time.
10. The setting is physically accessible to the individual.

Any modification of the additional conditions specified in items 6 through 9, above, must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:

- Identify a specific and individualized assessed need.
- Document the positive interventions and supports used prior to any modifications to the person-centered service plan.
- Document less intrusive methods of meeting the need that have been tried but did not work.
- Include a clear description of the condition that is directly proportionate to the specific assessed need.
- Include regular collection and review of data to measure the ongoing effectiveness of the modification.

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- Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.
- Include the informed consent of the individual.
- Include an assurance that interventions and supports will cause no harm to the individual.

Settings That are Not Home and Community-Based. For Section 1915(c) home and community-based waivers, settings that are **not** home and community-based are defined at §441.301(c)(5) as follows:

- A nursing facility;
- An institution for mental diseases;
- An intermediate care facility for individuals with intellectual disabilities;
- A hospital; or
- Any other locations that have qualities of an institutional setting, as determined by the Secretary.

For 1915(i) State plan home and community-based services, settings that are **not** home and community-based are defined at §441.710(a)(2) as follows:

- A nursing facility;
- An institution for mental diseases;
- An intermediate care facility for individuals with intellectual disabilities;
- A hospital; or
- Any other locations that have qualities of an institutional setting, as determined by the Secretary.

Settings that are Presumed to have the Qualities of an Institution. For Section 1915(c) home and community-based waivers, section 441.301(c)(5)(v) specifies that the following settings are presumed to have the qualities of an institution:

- any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment,
- any setting that is located in a building on the grounds of, or immediately adjacent to, a public institution, or
- any other setting that has the effect of **isolating** individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

For Section 1915(i) State plan home and community-based services, section 441.710(a)(2)(v) specifies that the following settings are presumed to have the qualities of an institution:

- any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment,
- any setting that is located in a building on the grounds of, or immediately adjacent to, a public institution, or
- any other setting that has the effect of **isolating** individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS.

## ADA/Olmstead

The Americans with Disabilities Act (ADA) statute, regulations, statements of congressional intent, and interpretations by the U.S. Supreme Court recognize the authority of states to provide a full array of services and supports, including facility-based programs.

1. The ADA statute incorporates by reference regulations implementing Section 504 of the Rehabilitation Act.
2. The legislative history accompanying the ADA specifies that “**the legislation in no way is intended to diminish the continued viability of sheltered workshops and programs implementing the Javits-Wagner-O’Day Act** [The AbilityOne program].”
3. The regulations implementing the ADA specify that a public entity shall administer services, programs, and activities in the **most integrated setting appropriate to the needs of individuals with disabilities**. The regulations also specify that states may not provide different or separate aids, benefits, or services to individuals with disabilities **unless such action is necessary to provides individuals with disabilities with aids, benefits, or services that are as effective as those provided to others**. In other words, if it is necessary to do so, the provision of different or separate aids, benefits, and services would not be considered a discriminatory form of segregation.
4. The Supreme Court in *Olmstead v. L.C.* held that **unjustified** isolation is properly regarded as discrimination based on disability. But, the Supreme Court also recognized the State’s need to maintain a **range of facilities** for the care and treatment of persons with disabilities. The Supreme Court concluded that under the ADA states are required to provide community-based treatment when the state’s **treating professionals** determine that such placement is appropriate, the **affected persons do not oppose** such treatment, and the community-based placement can be **reasonably accommodated**, taking into account the **resources available to the state and the needs of others with disabilities**.
5. In a recent consent decree involving compliance with Title II of the ADA, the State of Rhode Island and the Department of Justice agreed to establish supported employment, i.e., employment in competitive integrated employment with supports as the presumptive, priority, default placement outcome for individuals with disabilities. DOJ and Rhode Island also recognized that an individual who makes an **informed choice for placement in a facility-based work setting, group enclave, mobile work crew, or facility-based day program or other separate or different setting may seek a variance allowing such a placement and that individuals currently in sheltered workshops who receive such a variance will continue to receive employment services**.

## Definition of Home and Community-Based Services

1. Congress uses different approaches for defining key terms in a statute. One approach is to define a term by specifying specific criteria; a second approach is to define a term by using specific examples instead of specific criteria. With respect to the term “home and community-based services” Congress chose not to include specific criteria; rather Congress adopted the later approach of defining the term by using specific examples. The term “home and community-based services” reiterates the definition set out in the statute.
  - Congress specified that “home and community-based services” includes, among other services, services described in subsection (c)(4)(B) [“case management services, homemaker/home health

aide services and personal care services, adult day health services, habilitation services, respite care, and such other services requested by the state as the Secretary may approve and for day treatment or other partial hospitalization, psychosocial rehabilitation services, and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness.”], services described in paragraph (4) [“case management services, homemaker/home health aide services and personal care services, adult day health services, respite care, and other medical and social services that can contribute to the health and well-being of individuals and their ability to reside in community-based care setting”], and personal care services.

- With respect to a new State plan option to provide HCBS attendant services and supports, Congress specified that these services may be provided in a home or community setting and then specified settings which were **not** permissible: “**a nursing facility, institution for mental illness, or an intermediate care facility for the mentally retarded.**”

### **Person-Centered Planning, Informed Choice, and Role of Individual, Family, and Treating Professionals**

1. As explained above, in determining the “most integrated setting appropriate to the needs of the individual with disabilities” under the ADA, the *Olmstead* Supreme Court decision focuses on the role of the individual and the treating professionals.
2. The Medicaid statute and regulations place significant reliance on the person-centered planning process, including independent assessments, individual choice, the role of the individual’s authorized representative, the role of the treating professional, and the role of families.

### **Definition of Habilitation Services**

1. The definition of the term “home and community-based services” in the Medicaid statute and the regulations includes “**habilitation services.**” The Medicaid statute includes a definition of the term “habilitation.” The term means “services designed to assist individuals **acquiring, retaining, and improving** the self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings.” In other words, the definition of the term “habilitation” focuses not only on “acquiring” and “improving” skills but also “retaining” such skills. This is particularly important for individuals with intellectual disabilities.
2. This definition is consistent with the stated purposes of the Medicaid program which includes the provision of rehabilitation and other services to help individuals “**attain or retain** capability for independence and self-care.”

### **Definition and Policies Applicable to Prevocational Services**

- The regulations specify that “habilitation services” includes “expanded habilitation” and “expanded habilitation” includes “prevocational services.”
- The regulations also define prevocational services to mean 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.

- In accordance with these regulations, prevocational services are distinguishable from **NONCOVERED vocational services** by the following criteria:
  - The services are provided to persons who are “not expected to be able to join the general workforce.”
  - If the beneficiaries 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 habilitation goals (for example, attention span, motor skills).
  - The services are reflected in a plan of care directed to habilitation rather than explicit employment objectives.
- CMS issued an Information Bulletin (IB) on September 16, 2011 updating waiver instructions regarding employment and employment-related services. CMS explained in the overview that “this guidance does not constitute new policy” and thus the guidance should be construed consistent with the existing regulations regarding, among other things, prevocational services.
  - The IB stressed the importance of work as fundamental part of adult life and that work is essential to self-esteem and well-being.
  - The IB highlighted the distinction between **vocational services** (which are not fundable under the waiver) and **prevocational services** (which are fundable under the waiver).
  - **Vocational services**, which are not covered by the waiver or state plan option, are services that teach job task specific skills.
  - **Prevocational services**, which are covered by the waiver and state plan option, 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 coworkers and supervisors that are associated with building skills necessary to perform work.
  - IB explained that prevocational services must have **employment-related goals**, with **competitive integrated employment as the optimal outcome**.
  - 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.
  - Prevocational services may be **furnished in a variety of locations in the community including, but not limited to, fixed-site facilities**.
  - Individuals participating in prevocational services may be **compensated in accordance with applicable federal laws and regulations**, e.g., Section 14(c) of the FLSA.
  - With competitive integrated employment as the optimal outcome, in furthering habilitation goals, prevocational services should lead to greater **opportunities** for competitive and integrated employment.
  - Prevocational services, as a form of expanded habilitation, are designed to assist individuals **acquiring, retaining, and improving** the self-help, socialization, and adaptive skills necessary to obtain an employment outcome. Prevocational services are time limited, but the time limitations are to be determined based on the individual’s needs as identified in his or her person-centered plan. Thus, for example, prevocational services may be funded under the waiver for so long as deemed appropriate for an individual to **retain** certain habilitative skills.

## **Sub-regulatory Guidance on Non-Residential Services Issued on December 15, 2014**

The CMS guidance issued earlier this month was titled, “Exploratory Questions to Assist States in Assessment of *Non-Residential* Home and Community-Based Service (HCBS) Settings.” It pertains to non-residential programs and provides states with a reasonable amount of flexibility to support the full array of HCB non-residential service options that address an individual’s strengths, needs, abilities, and capabilities consistent with his or her person-centered plan. Of course, that flexibility is subject to the quality standards set out in the definition of HCBS settings, as outlined above.

- The CMS guidance reaffirms that the definition of HCBS settings is based on “individual experience and outcomes, rather than one based on a setting’s location, geography, or physical characteristics.” For example, in response to the question “Do the regulations prohibit individuals from receiving pre-vocational services in a facility-based setting such as a sheltered workshop?”, the CMS response was “no,” with a rationale.
- CMS guidance reaffirms that states may adopt more stringent requirements for HCBS settings, as the federal regulations only establishes a floor.
- CMS guidance reaffirms that if a state determines that a current HCBS setting is not compliant with the new regulation, it does not have to stop providing services in that setting immediately, i.e., the state has until March 2019 to bring its HCBS programs into compliance with the rule, consistent with its State Transition Plan.

The sub-regulatory guidance offered considerations for states as they assess whether non-residential HCBS settings meet the Medicaid HCBS settings requirements in the form of questions, which serve as “suggestions” to assist states and stakeholders in understanding what indicators might reflect the presence or absence of each quality in a setting. The questions are offered as a tool, and not a requirement, to help illustrate the qualities of non-residential HCBS that are consistent with the regulation that was issued by the Secretary of Health and Human Services (HHS) on January 16, 2014. They are intended to assist states in developing their transition plan for an existing waiver or state plan or for ensuring initial compliance with HCBS requirements. The CMS guidance does not constitute guidance on states’ obligations under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the *Olmstead* decision.

The Exploratory Questions contained in the sub-regulatory guidance may be construed as allowing a state the flexibility to support a full array of service options identified in his or her person-centered plan. The focus of many of these exploratory questions is on whether the individual is provided “opportunities” consistent with his/her interests and abilities as identified in his/her person-centered plan. The kinds of opportunities illustrated in the guidance reflect best practices already in use by many DelARF member organizations.

## **RECOMMENDATIONS**

The December 5<sup>th</sup> letter from the Delaware Developmental Disabilities Council argued that the HCBS Settings Regulation, the *Olmstead* decision, and the ADA require the state of Delaware to make significant changes to its service system. The Council specifically said that it is their position that state and federal funds “should not support segregated living arrangements where all or nearly all of the residents are people with disabilities.” Taken to its logical conclusion, this position would result in the elimination of all group homes in Delaware in favor of much more expensive supported living arrangements. The Council has also called for phasing out the payment of commensurate wages permitted under Section 14(c) of the FSLA, which would eliminate some of the employment options currently available for people with the most significant disabilities.




*DelARF Letter to Governor Markell re: the HCBS Settings Transition Plan*

Based on the background provided above, DelARF has a different perspective on the requirements of HCBS Settings Regulation, the *Olmstead* decision, and the ADA. We believe that the State has sufficient flexibility, as it formulates its HCBS Waiver Transition Plan, to create additional opportunities for living and working in local communities, while retaining services that meet the needs of people with the most significant disabilities. We offer the following recommendations for your consideration:

1. The Transition Plan submitted by the state of Delaware should be written to accurately reflect the public input that is required by CMS, which will be sought in January and February 2015. We believe that the public at large and most stakeholders in the DDDS system will speak out in support of a full range of residential and non-residential service options.
2. The planning groups that will be set up to implement the Transition Plan should represent all stakeholders within the DDDS system and not a hand-picked few who would echo the talking points of those who oppose the funding of facility-based and other “segregated” services. In other words, membership in these groups should not be limited to those that subscribe to the viewpoint expressed in the Council’s December 5<sup>th</sup> letter that settings intended primarily to serve people with disabilities not be funded. Delaware’s citizens should be proud of the separate aids, benefits, or services that have been developed to serve those individuals who truly need them, as determined through a person-centered planning process. These services merit continued state and federal financial support.
3. The Transition Plan should include realistic cost estimates for any changes that are proposed in the DDDS service system. As pointed out in the study of the DSP / ICAP rates published by DDDS on January 17, 2014, there is already a significant shortfall in funding. If the Transition Plan were to dictate a major restructuring of non-residential services similar to the changes that were made in Maine and Vermont, which eliminated facility-based service options, the fiscal impact could result in a number of unintended consequences, including diminished access to services and additional demand for out-of-home placements by families who have adults with disabilities living with them.

The members of DelARF very much appreciate your leadership and that of Secretary Landgraf in responding to the needs and preferences of people with disabilities and their families, including your “Better Bottom Line” National Governor’s Association initiative and the development by DHSS of new community-based services such as Pathways to Employment. We hope that our perspective will continue to be taken into account as the State adopts its HCBS Waiver Transition Plan to ensure that all individuals with disabilities are served in the most integrated setting appropriate to their needs.

Sincerely,



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Executive Director, DelARF

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