Behavioral Health is Essential To Health

Prevention Works

Treatment is Effective

People Recover
Mental Health and the New Home and Community Based Services Regulation
Speakers

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What Is Our Vision for People with Disabilities?

- Support people with disabilities to have lives like people without disabilities
- Provide opportunities for true integration, independence, choice, recovery and self-determination in all aspects of life – where people live, how they spend their days, and real community membership
- Ensure quality services that meet people’s needs and help them achieve goals they have identified through real person-centered planning

The HCBS Rule and *Olmstead* can be a path towards this vision!
HCBS SETTINGS RULE
Goal and purpose of the rule:

To “ensure that individuals receiving services through HCBS programs have full access to the benefits of community living” (1-14 Informational Bulletin)

To “further expand the opportunities for meaningful community integration in support of the goals of the Americans with Disabilities Act and the Supreme Court’s decision in Olmstead v. L.C.” (IB)

“To be a tool to assist states with adhering to the Olmstead mandate and the requirements of ADA” (rule’s preamble)
HCBS Settings Rule (cont’d)

- Final rule moved away from trying to define what was not community to focusing on what is community
  - Focus on people’s actual experiences in settings, not the name or type of setting/service
- Applies to all services provided under any of the HCBS authorities
  - 1915(c) waivers
  - 1915(i) HCBS state plan services
  - 1915(k) Community First Choice option
Characteristics of Home and Community Based Settings

An outcome oriented definition that focuses on the nature and quality of individuals’ experiences, including that the setting:

1. Is integrated in and supports access to the greater community;
2. Provides opportunities to seek employment and work in competitive integrated settings, engage in community life, and control personal resources;
3. Is selected by the individual from among setting options, including non-disability specific settings.
4. Ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid HCBS

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

6. Optimizes individual initiative, autonomy, and independence in making life choices

7. Facilitates individual choice regarding services and supports, and who provides them
Additional Requirements for Provider-Owned Residential Settings

- A lease or other legally enforceable agreement
- Privacy in his or her unit and lockable doors
- Choice of roommate
- Freedom to furnish or decorate the unit
- Control of his or her schedule, including access to food at any time
- Right to visitors at any time
- Physical accessibility of the setting (not modifiable)

Any modification of these conditions must be supported by a specific assessed need and justified in the person-centered plan; must first attempt alternative strategies and have periodic reviews.
Presumptively Non-HCB Settings

- Settings that are presumed to be unallowable, unless a state can prove through a “heightened scrutiny” process that it does in fact meet the HCB characteristics and does not have institutional qualities:
  - Facilities providing inpatient institutional services
  - Settings on the grounds of, or adjacent to, a public institution
  - Settings that have the effect of isolating HCBS recipients from the broader community
Settings that Isolate

- Non-exhaustive list of characteristics of “settings that isolate”:
  - Designed specifically for PWD or with specific disabilities
  - Comprised primarily of PWD and staff providing services
  - PWD are provided multiple types of services onsite
  - PWD have limited interaction with the broader community
  - Use restrictive interventions
Settings that Isolate (cont’d)

- CMS has provided specific examples of residential settings that isolate, including:
  - Disability-specific farms
  - Gated disability communities
  - Residential schools
  - Congregate, disability-specific settings that are co-located and operationally related

- CMS has not provided specific examples of non-residential settings that isolate
  - But it has made clear the “settings that isolate” guidance applies to non-residential settings too
Transition Plans

- States must submit transition plans to CMS that outline the changes to the HCBS program to come into compliance with the new regulations – all initial plans were already due to CMS.
- Transition plans may be as long as five years.
- CMS has issued sub-regulatory guidance, including a “toolkit” with “exploratory questions” for residential and non-residential settings and a description of the “heightened scrutiny” process if a state wants to try to prove that a setting that is presumptively institutional in fact meets the HCBS settings requirements.
A State must provide at least a 30-day public notice and comment period and two statements of public notice and input procedures.

The full plan must be available to the public.

The State must consider and modify the plan to account for public comment.

Whenever a state substantively amends the plan, the new plan must be put out for public comment.

This is a critical opportunity for advocacy!
CMS Q&A (Dec. 2014): Public Input

- State must respond to public comments – explaining why it did or did not make a change in response – before submitting transition plan to CMS
- State must seek additional public comment for any substantive change in a transition plan
  - Examples: additional assessment findings, changes in/new milestones, etc.
- States are encouraged to have a process for ongoing transparency and input from stakeholder on implementation of the plan
CMS Q&A (Dec. 2014): Residential Settings

- Individuals must be given an option of a non-disability specific setting and of a private unit
  - Non-disability specific residential setting includes getting services in own home/apartment or provider owned setting with people with and without disabilities
  - Person-centered plan should document the options and different types of settings considered
- Regulation does not set a size limit for residential settings but states can set size restrictions/limitations
CMS Q&A: Residential Settings (cont’d)

• Settings on the grounds of or adjacent to private institutions not per se unallowable but may be “settings that isolate” (ones on the grounds of or adjacent to public institutions are presumptively institutional)
  • States can set higher standards and prohibit all residential settings on the grounds of any institution
CMS Q&A: Non-Residential Settings

- Although facility and site-based day service settings are not per se prohibited, they must be closely examined and may be unallowable “settings that isolate”
  - States have flexibility to limit or even prohibit facility or site-based day services (including sheltered workshops)
  - Pre-vocational services are not limited to being provided in facility or site-based settings (like sheltered workshops) and may be offered in the community
CMS Q&A:
Non-Residential Settings (cont’d)

• Day services offered in any institutional setting (ICF, hospital, or nursing home) or on the grounds or adjacent to a public institution are presumed unallowable.

• Day services on the grounds of or adjacent to private institutions are not automatically presumed to be non-HCBS but must be closely examined and may be unallowable “settings that isolate.”

• States have flexibility to limit or even completely prohibit all day settings in or on the grounds of all institutions.
States can get FFP for settings that are not currently in compliance with the rule during the transition period

- January 12, 2015 Joint statement by ANCOR, NASDDDS, and disability and aging advocates (including APSE) highlight that this guidance addresses misinformation that people are facing imminent risk of losing services
CMS “Exploratory Questions” Regarding Residential Settings

- Lays out specific questions regarding each required HCBS characteristic that states may (but are not required) to use in their assessment of residential settings
  
  - Questions include ones about control over own schedule and activities, access to the broader community and transportation, choice of roommates, and privacy and autonomy.
CMS “Exploratory Questions” Regarding Non-Residential Settings

- Lays out specific questions regarding each required HCBS characteristic that states may (but are not required) to use in their assessment of non-residential settings
  - Questions include ones about geographic location, access to the broader community and transportation, opportunities for employment, and choice of non-disability specific settings
  - For employment settings, do they “provide individuals with the opportunity to participate in negotiating his/her work schedule, break/lunch times and leave and medical benefits with his/her employer to the same extent as individuals not receiving Medicaid funded HCBS?”
The nature of day services (clinical/medical vs. rehabilitative vs. employment) as well as the duration (i.e., short-term vs. long-term services) may impact how to comply with the rules.

Whether the “right” service is being provided is relevant:

“For individuals seeking supports for competitive employment, the state should consider whether the right service is being appropriately provided to achieve its goal, including the duration of the service and the expected outcomes of the service, or whether the provision of a different type of service would more fully achieve competitive employment in an integrated setting for the individual.”
Trends in Statewide Transition Plans

• Most are “plans to plan,” laying out a framework for the assessment process
  • Actual assessment of settings in most states have yet to be completed; in these states, they will have to submit an updated plan to CMS after public comment on the results of the assessment

• Varied approaches to assessing settings
  • Good state plans are using multiple sources of information – regs/certification standards, provider assessments, information from participants and stakeholders, other data sources (like National Core Indicators data) and on-site visits
  • Poor state plans rely primarily on paper review and provider self-assessments (where there are potential conflict of interest issues)
Trends in Statewide Transition Plans (cont’d)

• Some states are using the HCBS regs as a real opportunity to modernize services to support full integration; other states are attempting to keep the status quo

• Varied approach to presumptively institutional settings, especially “settings that isolate”
  • Some states are being rigorous in identifying settings that are presumed institutional (such as settings on the grounds of institutions, campuses, and sheltered workshops)
  • Other states are only identifying settings on the grounds of/adjacent to public institutions and have said they will seek “heightened scrutiny” to continue funding these settings
Impact of HCBS Standards for Mental Health Services

- States that have mental health services in existing 1915(c) waivers, 1915(i)s, or 1115s, states must include an evaluation of these service settings in their statewide transition plan.
- State considering new 1915(i)s or moving towards managed care under an 1115, states will need to comply with the new standards.
- States that have mental health consumers in settings that also have individuals funded through HCBS programs must ensure these specific settings comply with the rules.
USING THE HCBS REGULATIONS TO FURTHER OLMSTEAD COMPLIANCE
Title II of the ADA

- Prohibits discrimination by public entities in services, programs and activities
- Integration regulation requires administration of services, programs and activities in the most integrated setting appropriate
- Most integrated setting is one that enables people with disabilities to interact with people without disabilities to the fullest extent possible
Olmstead v. L.C.: Unjustified segregation is discrimination

- S. Ct. held that ADA prohibits unjustified segregation of PWD and that public entities are required to provide community-based services when:
  - Such services are appropriate;
  - Affected persons do not oppose community-based treatment; and
  - Community-based treatment can be reasonably accommodated, taking into account the resources available to the entity and the needs of others receiving disability services

- Applies to all facilities, services, or programs funded/designed by the state, not just those directly operated by the state
- Applies to people in and at-risk of entering segregated settings/programs
What is an Integrated Setting?

Integrated settings provide people with disabilities the opportunity to live, work and receive services in the greater community

- Located in mainstream society
- Offer access to community activities when and with whom the person chooses
- Choice in daily life activities
- Ability to interact with people without disabilities to the fullest extent possible

Examples: scattered site supportive housing, supported employment in a mainstream job

Note the ADA definition similar to the HCBS settings requirements.
What is a Segregated Setting?

- Have **institutional qualities**, including:
  - Congregate settings with primarily or exclusively people with disabilities
  - Regimentation in daily activities, lack of privacy/autonomy, limits on ability to freely engage in community activities
  - Settings that provide for daytime activities primarily with other people with disabilities
- Examples: ICFs, nursing homes, adult care homes, sheltered workshops, segregated day programs
- Note that the language is similar to the HCBS regulations about “settings that isolate”.
Types of Residential Settings that Have Been Successfully Challenged Under the ADA

- Residential settings
  - Publicly and privately-operated ICFs
  - Publicly and privately-operated psychiatric hospitals
  - Privately-operated nursing homes
  - Privately-operated adult homes/board and care homes

- Remedies have included expansion of integrated housing (e.g., scattered site supportive housing, supported apartments) and services need to support people in those community settings (e.g., HCBS waivers, crisis services, supported employment)
Examples of Mental Health *Olmstead* Cases Regarding Residential Services

- **People in or at risk of entering psychiatric hospitals**
  - **US v. Georgia:** Target group of people in state hospitals or at risk of entering due to SMI and homeless, ER visits, or police involvement. Settlement relief includes supportive housing (most scattered site), range of crisis services (mobile crisis, crisis line, crisis walk-in centers, and crisis apartments), supported employment and ACT teams.
  - **US v. Delaware:** Target group of people in or at risk of entering state-operated and private psych. hospitals due to SMI and homeless, criminal justice involvement or ER visits. Settlement relief includes scattered site supportive housing, range of crisis services, supported employment, and ACT teams.
  - **Amanda D. v. Hassan/US v. New Hampshire:** Class action of people in or at risk of entering state-operated psych hospital & nursing home. Settlement relief includes scattered site supportive housing, crisis services, and ACT teams.
Examples of Mental Health *Olmstead* Cases Regarding Residential Services (cont’d)

- **People in or at risk of entering privately operated facilities**
  - *US v. North Carolina:* Target population of people in or at risk of entering privately operated adult care homes. Settlement relief includes scattered site supportive housing, ACT teams, range of crisis services, supported employment, diversion process for people at risk of entering adult homes, and enhanced quality management system.
  - *Williams v. Quinn:* Class action regarding people in private IMDs. Settlement relief includes scattered site supportive housing and range of community services.
Types of Non-Residential Settings that Have Been Successfully Challenged Under the ADA

- Non-residential settings
  - Sheltered workshops
  - Segregated day programs
- Remedies have included expansion of individual, integrated supported employment and integrated day services (e.g., individualized recreational, social, and educational activities of the individual’s choosing)
Progression of *Olmstead* Litigation Regarding Day Services

- Supported employment services (to facilitate employment in competitive wage jobs in integrated settings) part of community services remedy for people leaving or diverted from institutions (both IDD and mental health)
  - *Examples: settlement agreements in Georgia, Delaware, North Carolina and Virginia*
- Direct challenge to over-reliance on providing employment services in segregated settings (i.e., sheltered workshops), seeking supported employment services as a remedy
  - *Example: Lane v. Kitzhaber (Oregon)*
Lane v. Kitzhaber

- Complaint and Motion to Intervene alleges Oregon administers the State’s employment, rehabilitation, vocational, and education service system such that people with disabilities are denied the benefits of the State’s vocational and employment services, programs, or activities in the most integrated setting.
  - Alleges over-reliance on sheltered workshops: 61% received services in sheltered workshops, while only 16% in individual supported employment.
  - Alleges once in workshops, likely to remain: average LOS of 11-12 years; some remain for as long as 30 years.
  - Alleges Oregon fails to ensure that students with I/DD are provided with meaningful choices and prepared for work in integrated settings (“at-risk” class)
Lane v. Kitzhaber (cont’d)

- Court rejected the state’s argument that ADA and Olmstead not apply to states’ day service systems
  - Court found that ADA and Olmstead applies to all government services, programs and activities, including employment. Rejected argument that only applies to residential services and programs.
  - Court agreed with DOJ’s position in statement of interest.
Progression of *Olmstead* Litigation (cont’d)

- Direct challenge to over-reliance on segregated employment and other day settings (i.e., sheltered workshops and day habilitation); remedy includes expansion of supported employment services and “wraparound” integrated non-work day services (e.g., mainstream recreational, social, educational, cultural and athletic activities)
  - *Example:* settlement agreement in US v. Rhode Island
- Future *Olmstead* litigation will likely challenge over-reliance other types of segregated day services, such as day treatment
United States v. Rhode Island

- DOJ statewide investigation of entire day services system found:
  - Over-reliance on segregated day settings: over 80% of people with ID/DD receiving state services in segregated sheltered workshops or facility-based day programs; only 12% in individual, integrated settings
  - Long-term placement in segregated day settings: almost half of sheltered workshop participants for 10 or more years; 1/3 for 15 or more years
  - Youth from schools at serious risk of placement in segregated day settings: only 5% of students transitioned to jobs in integrated settings
United States v. Rhode Island (cont’d)

- **United States v. Rhode Island** settlement agreement:
  - Expansion of supported employment placements to people currently in workshops and facility-based day programs and to students leaving high school
  - Benchmark of system average of at least 20 hours per week of employment in integrated settings
  - All people provided with “wraparound” integrated non-work day services (e.g., mainstream recreational, social, educational, cultural and athletic activities) so an opportunity for 40 hours of integrated day services per week
  - Development of a cross-agency Employment First policy (including schools)
  - Provider support: conversion trust fund, institute and TA
What is the Relationship Between the HCBS Rules and *Olmstead* Compliance?

- States can use the HCBS settings rules to further *Olmstead* compliance by rebalancing away from providing services in segregated settings and ensuring system capacity to provide all HCBS participants a choice of receiving services in the most integrated setting.

- **BUT** states’ obligations under Medicaid (including the HCBS settings rules) and the ADA are separate and independent.
  - A determination that a setting complies with the HCBS rules does not necessarily mean that it is an “integrated setting” under the ADA.
  - CMS’ approval of a state’s transition plan does not necessarily mean that the state is in compliance with the ADA and *Olmstead*. 
Advocacy to Align States’ HCBS Transition Process with Olmstead Compliance

• Transition plans are an opportunity to move your state’s system towards real integration and community membership and further Olmstead compliance.

• HCBS rules create an opportunity for expansion of services like supportive housing and supported employment.
  • HCBS rules require that all HCBS participants be given an option of a non-disability specific setting. Advocates should ensure that state transition plans include an evaluation of existing capacity in such settings and a plan to expand capacity as needed to meet this requirement.
Advocacy to Align States’ HCBS Transition Process with *Olmstead* Compliance (cont’d)

- Ensure that states carefully examine all settings for compliance with HCBS requirements and identify day program settings presumed to be non-HCBS
  - *These settings include settings in/on the grounds of/adjacent to institutions and “settings that isolate”*
  - *Mental health settings that should be particularly scrutinized as “settings that isolate” include large congregate residential settings (including adult homes), campus settings, and day treatment*
Advocacy to Align States’ HCBS Transition Process with *Olmstead* Compliance (cont’d)

- Actively comment on any settings going through the “heightened scrutiny” process
  - *Use the “exploratory questions” as a framework*
  - *Comment at the state level; if state not responsive, comment to CMS*

- Encourage your state to set high standards for implementing the HCBS rules.
  - *The HCBS rules set the floor; states can set higher standards.*
  - For example, states could prohibit settings in/on the grounds/adjacent to institutions, set size or concentration limits for residential settings, or limit/prohibit facility-based programs like sheltered workshops.
Resources

• HCBS Settings Rule resources:
  • [www.hcbsadvocacy.org](http://www.hcbsadvocacy.org) (sponsored by NDRN, AUCD, and NACDD)
  • [www.medicaid.gov](http://www.medicaid.gov)

• Olmstead resources:
  • Bazelon Center resources: [www.bazelon.org](http://www.bazelon.org)
  • US Department of Justice Olmstead website: [www.ada.gov/Olmstead](http://www.ada.gov/Olmstead)
    • Has guidance, findings letters, settlement agreements, and “Faces of Olmstead”
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