



## Home and Community Based Services (HCBS) Settings Rule Overview

- Federal HCBS Settings Rule enacted in 2014 – established standards for settings reimbursed by Medicaid for home and community based services (42 CFR§ 441.301)
- Full compliance required by March 2022
- By March 2015, states were required to submit to CMS, a plan (Statewide Transition Plan) to detail how compliance will be achieved. 7 states have final approval, Utah is one of remaining states with initial approval.

## Utah's Transition Plan – Activities Update

- To evaluate compliance with settings rule, providers completed self-assessments for ~2000 sites
  - Residential Services – assisted living facilities, group homes
  - Services delivered during the day – supported employment, day supports, sheltered workshops
- State performs onsite validation visits of a sample of provider sites (279 sites)
- Providers submitting initial remediation plans based on self-assessments and onsite validation visits (~1600 sites assessed require some level of remediation to come into full compliance)
- Part of CMS final approval requires Utah to submit results of provider self-assessments and state remediation efforts.

## How does Settings Rule Define Home and Community Based Services?

### Settings that are NOT HCBS:

- Nursing Facilities
- Institution for Mental Diseases (IMD)
- Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/ID)
- Hospitals

### Settings Presumed NOT to be HCBS:

- Settings in a publicly or privately-owned facility providing inpatient treatment
- Settings on grounds of, or adjacent to, a public institution
- ***Settings with the effect of isolating individuals from the broader community of individuals not receiving HCBS***
  - CMS' Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community states that the following two characteristics alone might, but will not necessarily, have the effect of isolating individuals: 1) The setting is designed specifically for people with disabilities, or for people with a certain type of disability 2) Individuals in the setting are primarily or exclusively people with disabilities

### **CMS Definition of Setting Characteristics that ARE HCBS:**

- ***Characteristic 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. 42 CFR 441.301(c)(4)(i)/441.710(a)(1)(i)/441.530(a)(1)(i)
- ***Characteristic 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 settings options are identified and documented in the person-centered plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board. 42 CFR 441.301(c)(4)(ii)/ 441.710(a)(1)(ii)/441.530(a)(1)(ii)
- ***Characteristic 3:*** The setting ensures an individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint. 42 CFR 441.301(c)(4)(iii)/441.710(a)(1)(iii)/441.530(a)(1)(iii)

- **Characteristic 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. 42 CFR 441.301(c)(4)(iv)/441.710(a)(1)(iv)/441.530(a)(1)(iv)
- **Characteristic 5:** The setting facilitates individual choice regarding services and supports, and who provides them. 42 CFR 441.301(c)(4)(v)/441.710(a)(1)(v)/441.530(a)(1)(v)
- **Characteristic 6:** The setting enforces the Home and Community-Based Settings Regulation requirements. 42 CFR 441.301(c)(4)/441.710(a)(1)/441.530(a)(1)

## Examples of Non-Residential Provider Self-Assessment Questions: (Questions developed by CMS)

- Does the setting provide individual HCBS in an area of the setting that is fully integrated with individuals not receiving Medicaid HCBS?
- Does the setting restrict access to non-disability-specific settings, such as competitive employment in an integrated public setting, volunteering in the community, or engaging in general non-disabled community activities such as those available at a YMCA?
- In settings where the individual(s) are of working age, is there activity with the individual(s) to pursue work as an option?
- Does the setting allow the individual(s) the freedom to move about inside and outside of the setting as opposed to one restricted room or area within the setting?
- Can the individual(s) come and go at any time?

## Modifications to HCBS Characteristics are permitted when:

- Supported by specific assessed need
- Justified in the person-centered service plan
- Documented in the person-centered service plan including:
  - Specific individualized assessed need
  - Prior interventions and supports including less intrusive methods
  - Description of condition proportionate to assessed need
  - Ongoing data measuring effectiveness of modification
  - Established time limits for periodic review of modifications
  - Individual's informed consent
  - Assurance that interventions and supports will not cause harm

## Heightened Scrutiny Process

States will have the ability to employ a "heightened scrutiny process" to evaluate individual providers that are presumed to have qualities of an institution or that have been evaluated to have the effect of isolating.

- The settings regulation requires that, in order to overcome the presumption that a setting has the qualities of an institution, CMS must determine that the setting: –
  - Does not have the qualities of an institution; and
  - Does have the qualities of a home and community based setting
- A state may overcome the presumption that a setting has institutional qualities by submitting evidence to CMS demonstrating the setting does not have the qualities of an institution and that it does have the qualities of a home and community-based setting
- When the state submits this evidence to CMS, the state triggers a process known as "heightened scrutiny"
- Under the heightened scrutiny process, CMS reviews the evidence submitted by the state and makes a determination as to whether the evidence is sufficient to overcome the presumption that the setting has the qualities of an institution/has the effect of isolating

# Utah Department of Human Services

## Division of Services for People with Disabilities

### Sheltered Workshop National Review

February 20, 2018

DSPD conducted a national review of Intellectual/Developmental Disabilities Home and Community Based Services (HCBS) Medicaid Waivers. DSPD attempted contact of all fifty states; and reviewed state publications to determine the status of sheltered workshop services and HCBS funding.

States are eliminating or redesigning sheltered workshop services in order to comply with, the following:

- The Center for Medicaid/Medicare Services Final Rule, a.k.a., The Settings Rule
- Workplace Innovation and Opportunity Act (WIOA); and Employment First
- Department of Justice (DOJ) *Olmstead* Enforcement Settlement Agreements
- Americans with Disabilities Act (ADA) Title II
- State legislation or policy changes

Facility- based, segregated employment programs, that do not comply with the Settings Rule risk losing HCBS funding. The Rehabilitation Act, as amended by WIOA, emphasizes engagement in competitive integrated employment.

Sixteen states have closed or plan to close sheltered workshops (Arkansas, District of Columbia, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington) as shown in the figure below; three due to DOJ settlement agreements.

#### Sheltered Workshop Status:



Seven main themes emerged from state strategies to close or redesign sheltered workshops:

- Closing new enrollment and phasing out existing clients
- Use of non-HCBS waiver funds to keep workshops open
- Passing state legislation prohibiting subminimum wage
- Transitioning sheltered workshops to time-limited pre-vocational services
- Restructuring reimbursement rates to incentivize supported employment and disincentivize sheltered work
- Increasing integrated work and activities through mandated percentages of service time spent in the community
- Requirement that all persons engaging in sheltered work have a competitive employment plan as part of person-centered planning

Although California does not show use of the seven identified themes, the state did legislate a new vouchered community- based employment service that takes advantage of the self-administered service delivery model.

Five states passed legislation eliminating subminimum wage for persons with disabilities (Alaska, New Hampshire, Delaware, Maryland, and Mississippi). Idaho vocational rehabilitation administrative rules prohibit the use of subminimum wage. The City of Seattle amended labor standards to prohibit subminimum wage for persons with disabilities, and no longer issues 14(c) licenses.

Seven states/districts (Arkansas, Delaware, District of Columbia, Kentucky, Oklahoma, Tennessee, and Washington) have Statewide Transition Plan (STP) final approval from CMS, which carries two implications: (1) the STP satisfies Settings Rule compliance, and (2) implementation must be completed by 2022. Those seven STP's use variations of all seven theme strategies.

A complete list of STPs can be found here: <https://www.medicaid.gov/medicaid/hcbs/transition-plan/index.html#CMIA>

Five states (Arkansas, Idaho, New Jersey, Missouri, and Tennessee) do not use HCBS funds for sheltered work:

- Arkansas created the Arkansas Works 1115 Demonstration Waiver.
- Idaho provides extended employment services, “work in a non-integrated or sheltered setting” at no less than minimum wage, through the state vocational rehabilitation agency. 34 C. F. R. § 361.5. Following a vocational rehabilitation case closure to extended employment services, status of the person must be reviewed semi-annually for the first two years, and annually thereafter. 34 C. F. R. § 361.55. Persons receiving LTSS funding are not eligible. Program also offers community supported employment.
- New Jersey and Missouri maintain sheltered work, extended employment, through state funds only.
- Tennessee does not provide public funds for sheltered work, but has not legislatively prohibited the service. Sheltered work remains available for private pay.

## Status of Sheltered Workshops by State, Including D.C.

	Statewide Transition Plans				Statewide Transition Plans		
	Initial Approval	CMIA	Final Approval		Initial Approval	CMIA	Final Approval
<b>AL</b>	PS, EP			<b>MT</b>	PS, EP, IA, SE		
<b>AK</b>	SE, SW			<b>NE</b>	PO		
<b>AZ</b>	SE			<b>NV</b>		SE	
<b>AR</b>			PO, NF, SE	<b>NH</b>	C, SW		
<b>CA</b>		N		<b>NJ</b>		NF	
<b>CO</b>		PS, EP		<b>NM</b>	C		
<b>CT</b>	N			<b>NY</b>		PO, IA	
<b>DE</b>			SW, IA	<b>NC</b>	N		
<b>D.C.</b>			C	<b>ND</b>	PS, EP		
<b>FL</b>		N		<b>OH</b>	IA		
<b>GA</b>	PS, IA			<b>OK</b>			IA, EP
<b>HI</b>	C			<b>OR</b>	PO*		
<b>ID</b>	NF, SW			<b>PA</b>	PS, IA		
<b>IL</b>		SE, IA		<b>RI</b>	PO*		
<b>IN</b>	SE, IA			<b>SC</b>	N		
<b>IA</b>	PS, SE			<b>SD</b>	N		
<b>KS</b>		PS, IA		<b>TN</b>			PS, EP, RR, NF
<b>KY</b>			SE, RR	<b>TX</b>		SE	
<b>LA</b>	PS			<b>UT</b>	N		
<b>ME</b>		C		<b>VT</b>	C		
<b>MD</b>	SW, IA			<b>VA</b>	C*		
<b>MA</b>		C		<b>WA</b>			PO
<b>MI</b>	PS, PO			<b>WV</b>	PS		
<b>MN</b>	PS, PO, IA			<b>WI</b>	PS, IA		
<b>MS</b>	PS, SW, IA			<b>WY</b>	N		
<b>MO</b>	NF						

**NOTES:** C- Closed; PO - Closing New Enrollment & Phasing Out; NF- Non HCBS Funding; SW - Prohibits Subminimum Wage; PS - Prevocational Services (Time Limited); SE - Incentivizing Supported Employment; RR - Service Reimbursement Rates Disincentivize Service; IA - Increased Integrated Activity; EP - Mandated Competitive Employment Plan; N - No Strategies Identified (related to sheltered workshops)

\* Changes due to Olmstead lawsuit

CMIA - Modification to Initial Plan

The first two are specific to sheltered work.

**Oregon:** *Lane v. Brown (formerly Lane v. Kitzhaber)* – 12-CV-00138 – (D. Or. 2012)

On September 8, 2015, the United States entered into a settlement agreement with the State of Oregon to vindicate the civil rights of individuals with intellectual and developmental disabilities (I/DD) who are unnecessarily segregated in sheltered workshops, or at risk of such unnecessary segregation. The settlement agreement with Oregon resolves a class action lawsuit by private plaintiffs in which the Department moved to intervene in May 2013. The lawsuit alleged that the State's employment service system over-relied on segregated sheltered workshops to the exclusion of integrated alternatives, such as supported employment services, and placed individuals, including youth, at risk of entering sheltered workshops.

As a result of the proposed settlement, over the next seven years, 1,115 working-age individuals with I/DD who are currently being served in segregated sheltered workshops will have opportunities to work in real jobs at competitive wages. Additionally, at least 4,900 youth ages 14 - 24 years old will receive supported employment services designed to assist them to choose, prepare for, get, and keep work in a typical work setting. Half of the youth served will receive, at a minimum, an Individual Plan for Employment through the State's Office of Vocational Rehabilitation Services. Correspondingly, the State will reduce its reliance on sheltered workshops and implement policies and capacity-building strategies to improve the employment system to increase access to competitive integrated employment and the opportunity for people with I/DD to work the maximum number of hours consistent with their abilities and preferences.

The settlement agreement was approved by U.S. Magistrate Judge Janice Stewart of the District of Oregon, who is presiding over the lawsuit, on December 29, 2015.

**Rhode Island:** *United States v. Rhode Island* – 1:14-cv-00175 – (D.R.I. 2014)

On April 8, 2014, the United States entered into the nation's first statewide settlement agreement vindicating the civil rights of individuals with disabilities who are unnecessarily segregated in sheltered workshops and facility-based day programs. The settlement agreement with the State of Rhode Island resolves the Civil Rights Division's January 6, 2014

findings, as part of an ADA Olmstead investigation, that the State's day activity service system over-relies on segregated settings, including sheltered workshops and facility-based day programs, to the exclusion of integrated alternatives, such as supported employment and integrated day services.

The settlement agreement provides relief to approximately 3,250 individuals with I/DD over ten years. Rhode Island will provide supported employment placements to approximately 2,000 individuals, including at least 700 people currently in sheltered workshops, at least 950 people currently in facility-based non-work programs, and approximately 300-350 students leaving high school. Individuals in these target populations will receive sufficient services to support a normative 40 hour work week, with the expectation that individuals will work, on average, in a supported employment job at competitive wages for at least 20 hours per week. In addition, the State will provide transition services to approximately 1,250 youth between the ages of 14 and 21, ensuring that transition-age youth have access to a wide array of transition, vocational rehabilitation, and supported employment services intended to lead to integrated employment outcomes after they leave secondary school. The U.S. District Court for the District of Rhode Island has entered the settlement agreement as a court-enforceable Consent Decree.

**New Mexico:** *Jackson v. Fort Stanton*, 757 F.Supp. 1243 (D.N.M. 1990) is not *Olmstead* litigation because it was filed before the ADA went into effect. The cause of action is based on Rehabilitation Act section 504 and Social Security Act Title XIX prohibition of discrimination and segregation. In 1994, the court allowed Plaintiff to amend the complaint adding an ADA claim. Fort Stanton and Los Lunas, state owned ICF/IDs, operated sheltered workshops among other services. Both facilities are now closed. The settlement is still open with active judicial oversight. But it is now known as *Jackson v. Los Lunas Center*, <https://www.leagle.com/decision/infdco20150324749>.

In 2016, the judge denied Defendant's Motion for Disengagement, concluding that the state had not "demonstrated sustained substantial compliance" with over 300 decree obligations in 18 areas of deficiency. NM filed an appeal with the 10th Circuit in 2016. January 2018, the 10th Circuit vacated the order to dismiss and remanded the case back to the district court for further examination of whether the state has "current violations of federal law or have reached only fleeting compliance."

The eighteen areas of deficiencies are: (1) individual program plans; (2) medical records; (3) discharge plans; (4) data collection; (5) qualified

mental retardation professional services; (6) behavior management; (7) use of physical restraints; (8) prevention of abuse of residents; (9) reduction of accidents and injuries to residents; (10) reports of abuse, accidents, and injuries; (11) staff supervision; (12) preservice training of staff; (13) in-service training of staff; (14) sufficiency of professional staff; (15) adaptive equipment; (16) functional and chronologically age appropriate programming; (17) coordination between residential areas and training program areas; and (18) inadequate space in training program areas. Jackson v. Fort Stanton Hosp. & Training Sch., 757 F. Supp. 1243, 1316–17 (D.N.M. 1990).

As of the 2015 proceedings, NM still had deficiencies in the areas of health, safety, and supported employment, though were close to substantial compliance.

Circuit decision available at: <https://law.justia.com/cases/federal/appellate-courts/ca10/16-2172/16-2172-2018-01-23.html>