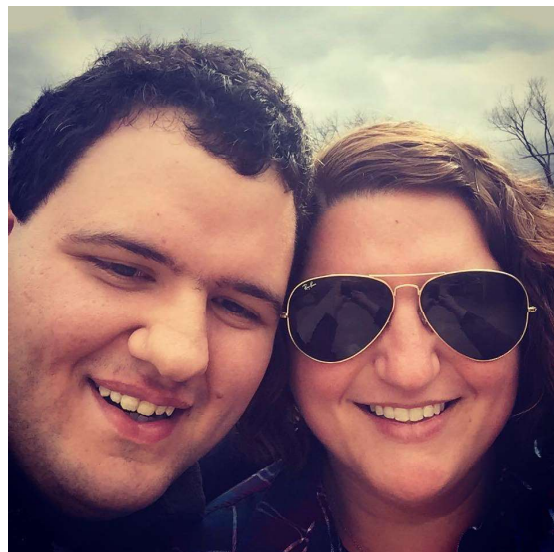
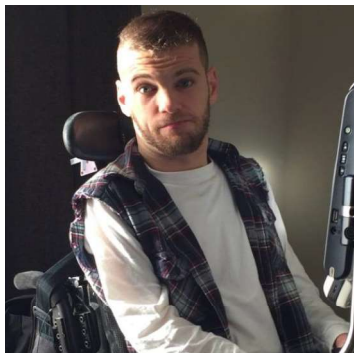


What The New HCBS Regulations *Really* Mean

Presented by: Nicole Jorwic, JD
Director of Rights Policy, The Arc
of the United States

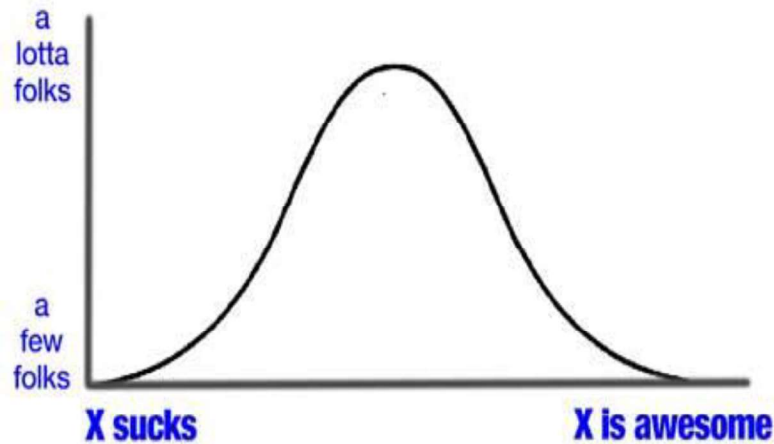
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My Story...



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Typical Reactions to Change



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From Dirk, a Self Advocate

- In the 70's:
 - Treated us like PLANTS
- In the 80's:
 - Treated us like PETS
- In the 90's:
 - Treated us like PEOPLE
- Now it's 2016:
 - It is really time to listen

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What Do We Want Our Disability Service Systems to Help People Do?

- Help people with disabilities live like people without disabilities
- Help people with disabilities have true integration, independence, choice 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 their own goals

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HCBS Rule

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HCBS Rule

- Released in March of 2014
- 5 year transition period
- Person Centered Planning aspects of the rule took IMMEDIATE effect

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Evolution of HCBS definition

- 2008 – NPRM 1915(i)
- 2009 – ANPRM 1915(c)
- 2011 – NPRM 1915(k)
- 2011 – NPRM 1915(c)
- 2012 – NPRM 1915(i) and 1915(k)
- 2014 – Final Rule

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Goal and Scope of the Rule

- To “ensure that individuals receiving services through HCBS programs have full access to the benefits of community living”
- To “further expand the opportunities for meaningful community integration in support of the goals of the ADA and the Supreme Court decision in *Olmstead*”
- Applies to all HCBS authorities (1915(c), 1915(i), 1915(k)) as well as 1115 demo’s and 1915(b)(3) managed care

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Heightened Scrutiny

CMS review the heightened scrutiny request to determine:

- Each and every one of the affirmative HCBS qualities is met;
- People in the setting are not isolated from the greater community; &
- Strong evidence that the setting does not have the qualities of an institution
- Evidence that all participants in the setting are afforded the degree of community integration required by the rule

Suggestions of information a state should include:

- Setting/provider requirements that are different from those for institutional settings
- Proximity to community resources, activities, and transportation
- Varied schedules based on interest and choice
- Choice of setting (including choice of a non-disability specific setting)
- On site visit, including participant interviews conducted by independent entity outside the presence of provider

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Heightened Scrutiny (contd.)

For settings on the grounds of or adjacent to an institution:

- Evidence must prove that there is a meaningful distinction between the facility and HCBS setting and that the latter is integrated in and supports full community access

For settings that isolate, evidence must prove that:

- People without disabilities in the same community would consider it part of their community and not associate it with the provision of services to PWD
- People in the setting regularly engage in community activities other than those organized by a provider and in a way that fosters relationships with community members unaffiliated with the setting

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Home and Community Based Settings Rule (Non-Residential Settings)

CMS Released exploratory questions around non-residential settings and HCBS

<https://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/exploratory-questions-non-residential.pdf>

- No settings are completely prohibited, but states must closely examine all nonresidential settings to see if they are “settings that isolate.”
- 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?”

-“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”



Home and Community Based Settings Rule (Non-Residential Settings)

Several states are using the transition process to change service models:

- Ohio, Oregon and Massachusetts are phasing out sheltered workshops
- Tennessee has identified day programs such as sheltered workshops and day habilitation as “settings that isolate”
- CMS has said the fact that someone chose a setting does not itself make the setting compliant with the rules

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So what does this all mean??

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Appropriate Timing for Capacity- Building, Transitions

- Assume that *some* people may want/need to change settings
 - Due process protections
 - Sufficient time for transition
- Build capacity – especially non-disability-specific settings
- Waiting until the end of five-year process = recipe for bad placements, bad experiences
- States not planning for provider changes/closures

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State Transition Plans: Early Trends

- Plans to plan v. full initial plan
- Systemic review v. minimum compliance
- Ongoing compliance: how do you measure?
- Reliance on biased results
- Participant v. provider focus
- Stakeholder involvement

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Ongoing Issues

- Assessments
- Integration standards
- Update of state regulations and policies
- Transparency
- Public education and involvement
- Capacity building

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Promising Practices

Some states are proposing to modernize day services through the HCBS transition process:

- Transforming models for facility-based day services (to a hub-and-spoke model) Phasing out sheltered workshops
- Expanding the capacity of competitive, integrated employment
- Funding help bring providers into compliance through model changes
- Some states have identified day programs such as sheltered workshops and day habilitation as “settings that isolate”
- CMS has said the fact that someone chose a setting does not itself make the setting compliant with the rules

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Promising Practices

Tiered Standards:

“a state may establish that certain settings currently in use in a home and community-based services waiver may continue within the waiver, as long as they will be able to meet the minimum standard set in the rule on or before the end of the transition period, but the state may suspend admission to the setting or suspend new provider approval or authorizations for those settings. Simultaneously, the state may establish or promote new or existing models of service that more fully meet the state’s standards for home and community-based services. This arrangement, though established through the transition plan, may continue beyond the transition period.”

- Must be in the transition plan
- Settings that meet the federal standard can remain in the waiver
- New settings must meet higher state standard for particular waiver
- Can continue beyond 2019

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Trends in State Transition Plans

- Some states are using the HCBS regs as a real opportunity to modernize services to support full integration
 - Including phasing out sheltered workshops, setting size limits on residential settings, and expanding capacity of non-disability specific settings
- 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 to continue funding these settings

For initial approval:

- States that include methods to validate their systemic assessments included in the plan
- Included outcomes of the assessment and any needed remediation strategies (legislative changes, contract changes and changes to regulations)
- Appropriate 30 day comment period and inclusion of a summary and response to comments collected.

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For full approval:

- A comprehensive site-specific assessment of EVERY HCBS setting, including necessary strategies for validating results.
- Draft remediation strategies with a timeline for the remediation strategies that align with the end of the HCBS transition period (Marcy 17, 2019).
- Site specific remediation strategies
- Identifying a heightened scrutiny process for settings that are identified as presumed to be institutional.

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For full approval (cont'd.)

- Identify a process for communicating with beneficiaries who may be impacted by changes, closures, etc.
- Establish ongoing monitoring and quality assurance processes.
- Process to evaluate privately-owned homes, can't assume they don't have characteristics that isolate.
- Plans to ensure that there is adequate capacity in the state for non-disability specific settings
- No reliance on reverse integration for non-residential services

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More on TN

First Approved Plan. On April 13, 2016, the Centers for Medicare & Medicaid Services (CMS) granted both initial and final approval to Tennessee's state transition plan (STP) for bringing settings into compliance with the final HCBS regulation.

In its approval letter, CMS noted that they granted this approval because:

1. The state completed its systemic assessment which
 - a. Included the outcomes of this assessment in the STP, and
 - b. Clearly outlined remediation strategies (both completed and planned) to rectify issues that the systemic assessment uncovered,
2. The state completed the site-specific assessment that
 - a. Detailed the strategies for validation, and
 - b. Outlined remediation strategies to rectify issues that the site-specific assessment uncovered
3. The state laid out its heightened scrutiny, ongoing monitoring and relocation process.

More on TN

Strong and/or Innovative Practices to Watch

In addition to the specific steps noted above, Tennessee's plan included some strong practices for consideration (some are underway and not yet completed).

- Clear expectations for providers and support to help them complete the work
- Program design strategies in new MLTSS program serving individuals with I/DD that builds upon the foundation of the rules, in services available, provider specifications and capacity building within the MCOs.
- Strong family and consumer engagement at every level of the assessments
- Detailed and comprehensive analysis of public comments
- Leveraging existing structures (such as the MCOs) as partners in the review process
- Living agreements between state level agencies
- Specific state staff assigned to transition planning
- Readiness reviews for MCOs related to their capacity to ensure initial and ongoing compliance with the HCBS rule
- Rate Methodology Innovations intended to support implementation of the HCBS rules

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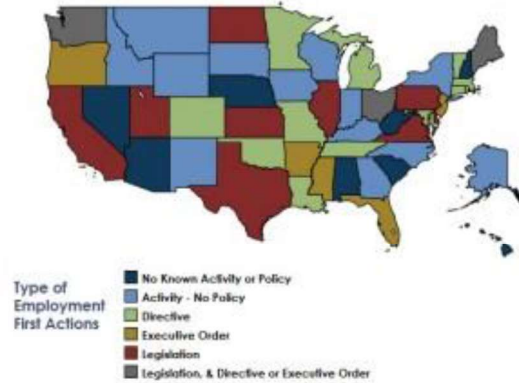
So what does this all mean??

Employment

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The Landscape

- State IDD service systems:
 - Only 18% of people receiving IDD day services are in integrated employment
 - This is DOWN from a peak of 25% in 2001
 - For those working, it is often for very limited number of hours
 - State investment in facility-based programs and community-based non-work is INCREASING



Source: <http://www.apse.org/wp-content/uploads/2014/01/activity.html>

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Employment First

- Employment First is a mindset that integrated, competitive employment should be the expected outcome for individuals with I/D and other disabilities. This will lead to economic independence and a meaningful life in the community.
- Nationally 85% of working aged adults with disabilities are unemployed.
- According to the National Association of State Directors of Developmental Disabilities Services (NASDDDS), “although the actual number of people with developmental disabilities in integrated community jobs has increased slightly over the past several years, the percentage of individuals served in state developmental disabilities systems who are employed in a regular community job has actually fallen in that same time period.”

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Employment First

- To make Employment First a reality it is imperative to move the expectations, commitment of state agencies and providers towards community employment and real work for real pay for individuals with disabilities.
- Many states have a long way to go to make this reality come to life. Changes to the following must occur:
 - Changes in infrastructure - move away from segregated settings
 - Changes in funding - states must fund providers for the time spend cultivating and providing supports for competitive employment.
 - Changes in attitudes - we must presume competence.

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Roadblocks to Employment First

- **Interagency Collaboration:** This is the **KEY** to making Employment First a reality. Individuals with disabilities require linkages and coordination between agencies.
- **Transition:** When we look at the National landscape of employment transition remains a hot bed.
- **Fear of Losing Benefits:** Many individuals with disabilities receive SSDI and other benefits, there is a knowledge gap when it comes to programs where individuals can retain their benefits while working. It is imperative through interagency collaboration that we ensure that all agencies are providing accurate advice and resources on the interplay between work and public benefits.

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The Workforce Innovation and Opportunity Act (WIOA)

WIOA

- **The Workforce Innovation and Opportunity Act (WIOA) of 2014** ([P.L. 113-128](#)) reauthorizes and updates existing federal workforce development programs including the Rehabilitation Act, which provides for vocational rehabilitation (VR) services for people with disabilities. WIOA focuses VR outcomes on competitive, integrated employment as well as promotes greater emphasis on transition services for youth with disabilities through: emphasis on coordination between VR and other agencies; extending the initial time period for VR supported employment services (from 18 to 24 months); and modification of eligibility determination to promote access to VR by people with the most significant disabilities.

State Plans

- Interagency coordination
- The department of education, the DD agency and VR must work together.
- Final Regulations expected this month

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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**

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Transition to Independence Act (S. 1604)

- Introduced by Senator Charles Grassley (R-IA). This bill would create a five-year Medicaid demonstration program in ten states. The program would give bonuses to the states for helping individuals with disabilities obtain integrated employment and for reducing reliance on segregated employment and day services.

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Recent AbilityOne Declaration

- **The AbilityOne Commission Issued a Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities:**
http://www.abilityone.gov/media_room/documents/US%20AbilityOne%20Commission%20Declaration%2018March2016%20Final.pdf
- “The U.S. AbilityOne Commission®, which oversees the AbilityOne® Program, recognizes there are strongly held positions about paying special minimum wages to people with disabilities under Sec.14(c) of the Fair Labor Standards Act. ... Our call to action is for all qualified nonprofit agencies participating in the AbilityOne Program to commit to, and begin (if not maintain), paying at least the Federal minimum wage, or state minimum wage if higher, to all employees who are blind or have significant disabilities working on AbilityOne contracts.”

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What does it all mean?

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What to Do...

- The HCBS rules and recent *Olmstead* enforcement – combined with WIOA, Executive Order 13658, and state Employment First Initiatives – have created opportunities for significant change in states' employment and day service systems to focus on competitive, integrated employment for people with disabilities.

Successful system change in employment and day service systems will require:

- Focusing on expanding the services necessary to support people in competitive, integrated employment and not just on downsizing or closing day programs like sheltered workshops, day habilitation and day treatment.
- Designing services to support all people with disabilities, including those with significant disabilities.
- Supporting providers to build expertise and capacity to help with this transition.

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Resources:

HCBS Settings Rule resources:

www.hcbsadvocacy.org

www.medicaid.gov/HCBS

Olmstead resources:

US Department of Justice Olmstead website:

www.ada.gov/Olmstead

Has guidance, findings letters, settlement agreements, and “Faces of Olmstead”

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Questions?

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