

Action Alert Background

Section 1915(c) of the Social Security Act authorizes the Secretary of Health and Human Services to waive certain Medicaid statutory requirements so that the State may offer home and community-based services (HCBS) to groups of Medicaid beneficiaries specified by the State. Section 1915(i) of the Social Security Act permits states to include in their state plan one or several of the authorized home and community-based services. The HCBS program is administered by the Centers for Medicare and Medicaid Services (CMS). HCBS is defined in the statute to include habilitation services (including day habilitation, prevocational services provided in center-based and other settings, supported employment, and residential services) and day treatment.

On April 15, 2011, CMS published a Notice of Proposed Rulemaking to amend the HCBS regulations. On May 3, 2012, CMS issued a new proposed rule, which superseded previous proposed rules. One of the proposed changes is to define HCBS settings. The proposal specifies one set of nationwide standards that all HCBS programs must satisfy, including standards for day and residential programs. The proposal also specifies that a HCBS setting may not include any locations that have “qualities of an institutional setting, as determined by the Secretary.” The Secretary will apply a rebuttable presumption that a setting is not a home and community-based setting, and engage in heightened scrutiny, for any setting that is in a building on the grounds of, or immediately adjacent to, a public institution, or disability-specific housing complex.

The proposed language, although well-intentioned, would restrict or negate options, choices, and opportunities for people with significant disabilities as determined by the individual and his or her team during a person-centered planning process. The proposed language is confusing, ambiguous, and overly broad and will unnecessarily restrict state flexibility and force states to eliminate longstanding successful community-based day programs (including use of prevocational services in center-based programs, day habilitation and day treatment programs) and certain community-based residential programs (e.g., group homes).

ACCSES submitted extensive comments expressing concerns with the proposed definition of integrated setting and suggested alternative language. In a nutshell, ACCSES believes that services and supports provided under the State Plan HCBS option and the Medicaid HCBS waiver must: (1) recognize and support the full potential of each person with a disability to enjoy a meaningful life in the community in accordance with the policies embedded in the Americans with Disabilities Act and the holding in *Olmstead v. L.C.*, 527 U.S. 581 (1999) and (2) facilitate informed choice of the individual by providing access to an array of home and community-based service options recognized in the Medicaid statute and regulations that are consistent with the individual’s strengths, needs, priorities, abilities and capabilities as identified in his or her person-centered service plan.

ACCSES expressed concern that CMS proposed “one-size fits all” absolute standards will have the effect of unnecessarily restricting state flexibility and forcing states to eliminate long-standing successful home and community-based programs, projects and practices (including award-winning programs and practices), thereby denying informed choice and options and

opportunities for individuals with the most significant disabilities, including denying services and supports indicated and documented in their person-centered service plans.

ACCSES expressed its belief that the final regulation regarding home and community-based setting must be clear—individuals must continue to be permitted to receive the full array of home and community-based services, as defined by the Medicaid HCBS statute and regulations and included in the individual’s person-centered service plan. These home and community-based services include, but are not limited to, personal assistance services, home health aide services, respite care services as well as expanded habilitation services (supported employment in competitive integrated employment settings and prevocational services in center-based programs, residential services), day habilitation programs, and day treatment programs.

ACCSES also expressed its belief that nothing in the final regulation should be construed to restrict or in any way negate the State’s flexibility to include the full range of home and community-based services authorized in the statute and regulations or restrict the choice of a program participant to access the full range of these home and community-based services in accordance with his or her person-centered service plan, including those home and community-based services listed above.

As explained above, based on public statements by representatives from the Centers for Medicare and Medicaid Services (CMS) and “Special Terms and Conditions” entered into between CMS and New York State, it appears that CMS may now be demanding that renewals of Medicaid Home and Community-Based Services (HCBS) programs include language **prohibiting** the use of Medicaid HCBS funds for prevocational services provided in skill development centers (formerly referred to as “sheltered workshops”) and **restricting** funding in certain residential placements that fail to meet a PROPOSED definition of “integrated setting” which was included in a May 3, 2012 Notice of Proposed Rulemaking issued by the Secretary of Health and Human Services.

These new developments compelled us to issue this Action Alert, asking disability service providers and the people we serve, as well as their families, relatives, friends, and others in the community to expand our advocacy initiative to ensure that states continue to enjoy the flexibility they need to include the full range of home and community-based services authorized in the Medicaid statute, regulations, and information bulletins.