



The Disability Law Center

- The Disability Law Center (DLC) is a private, non-profit organization designated by the governor as Utah's Protection and Advocacy (P&A) agency
- Our mission is to enforce and strengthen laws that protect the opportunities, choices and legal rights of Utahns with disabilities
- Our work includes:
 - Accessibility
 - Assistive Technology
 - Civil Rights
 - Community Living
 - Education
 - Housing
 - Medicaid and Medicare Appeals
 - Employment
 - CAP advocacy (Vocational Rehabilitation)

The Home and Community Based Services Settings Rule:

What it is and is not



What it is: Part of the Disability Rights Movement towards integration and self-determination for people with disabilities

The Rehabilitation Act of 1973

Prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment and in the employment practices of federal contractors.



Title II of the Americans with Disabilities Act



Title II's integration mandate requires that a public entity's services be provided "in the most integrated setting appropriate to the needs of qualified individuals with disabilities" 28 C.F.R. § 25.130(d)

Olmstead v. L.C.



In *Olmstead v. L.C.* the Supreme Court affirmed Title II, holding that unjustified segregation of individuals with disabilities is a form of discrimination prohibited by Title II of the Americans with Disabilities Act (ADA)



Utah's Employment First Priority legislation of 2011

Requires the Department of Workforce Services, the Utah State Office of Rehabilitation, and the Division of Services for People with Disabilities to, when providing services to a person with a disability, give priority to providing services that assist the person in obtaining and retaining meaningful and gainful employment.” H.B. 240.

Further the legislation prioritized supporting individuals with disabilities to be independent to the maximum extent possible noting that people with disabilities should have “sufficient income to: (a) purchase goods and services; (b) establish self-sufficiency; and (c) exercise economic control of the person's life.” Utah Code 35A-3-103.5



The Workforce Innovation and Opportunity Act of 2014

Passed to ensure that federal vocational rehabilitation funds be used to assist individuals with disabilities to achieve competitive integrated employment.

Placed strict prohibitions on the payment of sub-minimum wages to individuals with disabilities working in sheltered workshops and required state vocational rehabilitation agencies to provide each individual working in such a setting with “career counseling, and information and referrals . . . delivered in a manner that facilitates independent decision-making and informed choice” 29 U.S.C. § 794g(c).



HCBS Settings Rule of 2014

In the preamble, CMS describes the HCBS Settings rule as a tool to assist states in fulfilling their obligation under the ADA, section 504 of the Rehabilitation Act, and *Olmstead* to serve individuals in integrated settings. 79 Fed. Reg. 2948, 2451 (Jan. 16, 2014).

The purpose of the new settings requirements is to:

- Improve the quality of HCBS
- Provide protections to consumers
- Ensure consumers have full access to the benefits of community living

HCBS Settings Rule of 2014

Institutional services like nursing facilities and intermediate care facilities for people with intellectual disabilities (ICF/ID) are part of the State Medicaid Plan and are an **entitlement**.

Medicaid-funded home and community-based services (HCBS) are an alternative to institutional care and are provided through waivers. Unlike institutional services, HCBS services are limited to a certain number of recipients and there are **waiting lists** for these services.

CMS wants to ensure that people who wait for community services receive services that are truly community-based.

HCBS Settings Rule Requirements

Under the new rule, HCBS settings must have all of the following qualities:

- The setting is integrated in and supports full access to the community (including the opportunity to work in competitive and integrated settings)
- The setting is selected by the individual from among a range of options, including non-disability specific settings
- Ensures an individual's rights of privacy, dignity, and respect
- Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices
- Facilitates individual choice regarding services and supports, and who provides them

Settings that do not meet these requirements by 2022 will be disenrolled as Medicaid HCBS providers

What it is: A Collaborative Process for States to Fulfill ADA Obligations

- Under the Settings rule, States must create a transition plan detailing how the state will comply with the settings requirements in all waivers
- Transition is an interactive process: the new rule requires states to gather public input throughout the transition process.
- This is an opportunity for providers and other stakeholders to provide feedback about what is needed and how to best create a service system that facilitates choice and integration for people with disabilities.

What it is: An Opportunity to Improve the Service System

- Clear from our 34 HCBS visits that providers want to provide the highest quality services to their clients
- However, many providers are unable to offer the degree of integration required by the rule
- Additional resources will be needed to bring the service system into compliance by 2022.
- The rule presents an opportunity for providers to improve the quality of services for the clients it serves, as well as a compelling reason to seek state appropriations to do so.
- We would encourage providers to provide feedback to policymakers and regulators what additional resources are needed and what these resources would do for consumers

What it is not: A Prohibition of Facility-Based Settings

- Facility-based settings, including sheltered work, are not prohibited by the regulation.
- A state could allow services to be delivered in a facility-based setting that demonstrates the qualities of an HCBS setting and does not isolate individuals from the broader community.
- Every setting must still facilitate full access to the community, including opportunities to seek employment in competitive integrated settings, engage in community life, control personal resources, and receive services in the community to the same degree as individuals not receiving HCBS.
- Significant changes would need to be made to Utah's current model of sheltered work in order to be compliant with not only the Settings Rule, but also the ADA and the *Olmstead* decision.
- Many states have decided to eliminate or radically change facility-based settings, including sheltered work, because of the difficulty of delivering services in these settings in a way that does not segregate people with disabilities in violation of the ADA.

What it is not: a Requirement That Consumers Work

- Under the final rule an individual is *not required* to seek employment but also cannot waive the *opportunity* to seek employment.
- Medicaid HCBS dollars cannot be used to fund segregated settings that do not meet the requirements of the settings rule.

What it is not: a Requirement That Consumers Participate in Activities They Don't Want Wo

- The rule judges compliance by the nature and quality of an individual's experience—meaning this is not a one size fits all definition, but should be tailored to an individual's needs, preferences, and strengths.
- The rule does not require individuals to be involved in community activities that they do not want to participate in.
- However, settings must still provide for the degree of community integration required by the rule.
- Medicaid HCBS dollars cannot be used to fund segregated settings that do not meet the requirements of the settings rule.

What it is not: a Reduction in Services

- While services may look different in a setting that is compliant with the regulation, individuals will not lose services.
- In place of full-time sheltered work or day programs as currently constituted, individuals can be supported full-time through a combination of integrated day supports, pre-vocational supports and integrated employment, based on the consumer's needs and wants.

What it is not: The Only Mandate Requiring Integration for People with Disabilities

- The Rehabilitation Act, ADA, *Olmstead*, Employment First, WIOA and the Settings Rule all mandate integrated opportunities for people with disabilities.
- Recent *Olmstead* suits concerning the use of segregated employment programs:
 - *U.S. v. Rhode Island*: consent decree requires a phasing-out of sheltered workshops and increase in supported employment services
 - *Lane v. Brown*: proposed settlement would decrease the number of individuals in sheltered workshops and increase the number of supported employment services
- Delayed implementation date of the Settings rule in conjunction with the withdrawal of DOJ guidance on non-residential settings in no way impacts the legal obligations to comply with currently enacted regulations (the Settings Rule), currently enacted law (the ADA), and fully in-force supreme court legal precedent (the *Olmstead* Decision).

What it is not: Impossible to Do

Recently we visited a facility-based provider that actively encourages full-access to the community by:

- Offering multiple community activities each day
- Encourages individuals with disabilities to interact with those without disabilities
- Assists individuals in their day program to pursue competitive integrated employment
- Has an “open door” policy for visitors from the community
- Allows individuals to eat when and what they want, even if this is at an offsite location
- Reviews budgets and money management with clients each month
- Clients have individualized schedules that they helped to create



For More Information

- For a copy of this presentation, local resources, fact sheets, and more visit our website at:

<http://disabilitylawcenter.org/hcbs/>

- If you have further questions or presentation inquiries, email us at:

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