



STATE OF TENNESSEE

Federal Home and Community Based Services (HCBS) Settings Rule and its impact on sheltered workshops and facility-based day services

What is the HCBS settings rule?

In January 2014, the federal Centers for Medicare and Medicaid Services (CMS) issued a new federal rule. The new rule, often called the HCBS settings rule, applies to all home and community based services (HCBS) that Medicaid pays for. This rule impacts the services provided in Tennessee's three HCBS waivers that are operated by the Department of Intellectual and Developmental Disabilities (DIDD). This is how the state provides services and support to 8,000 people with intellectual disabilities.

The rule requires that all of the settings in which Medicaid-reimbursed HCBS are provided, including residential and day services, are integrated in and support full access to the greater community. This includes opportunities for people receiving HCBS to seek employment, work in integrated settings and earn a competitive wage. It also includes opportunities for people receiving HCBS to spend time with others who don't have disabilities and to use community services and participate in community activities (like shopping, banking, dining, transportation, sports, fitness, recreation, and church) in their communities the same way that people who don't have disabilities do.

All states must comply with the new rule. While states will be given time to come into compliance, after a reasonable period, Medicaid funding can no longer be used to pay for HCBS delivered in settings that do not comply with the new rule. A "reasonable period" is the time needed to complete actions that are necessary to comply with the new rule. While CMS is giving states until March of 2019 to achieve full compliance, states are expected to bring settings into compliance as quickly as possible. States cannot simply continue to pay for services in non-compliant settings until the March 2019 deadline. If a setting is not expected to come into compliance, states are expected to begin helping individuals served in the setting transition to other services or settings that meet the federal HCBS setting requirements as soon as possible.

What is a setting?

As it relates to the new federal rule, a setting is any location where a person receives home and community based services (HCBS) that Medicaid pays for. Settings include supported living and residential group homes, employment sites, day programs, and sheltered workshops. HCBS settings must be integrated into the community—meaning that the people who receive services are able to spend time with other people who don't have disabilities and access community services the same way that people without disabilities do. The setting should not look or feel like an institution.

Are these changes Tennessee is making or are these federal changes?

The HCBS settings rule is a federal rule. It was issued in January 2014 by the Centers for Medicare and Medicaid Services (CMS). CMS is the federal agency that must approve each of the Medicaid waiver programs that provide home and community based services (HCBS) to people with intellectual disabilities in Tennessee. CMS pays for about 2/3 of the cost of HCBS provided in these waiver programs. To keep getting these federal funds, we have to follow their rules.

Is every state making the same changes to their HCBS waiver programs?

Every state that receives federal Medicaid funding to provide home and community based services (HCBS) must comply with the new federal HCBS settings rule to keep getting federal Medicaid funds. However, every state has to decide how their state will assess and comply with the new rule. States may also decide to apply an even higher standard, such as not covering any sheltered workshops or facility-based programs. Some states began making these changes years ago.

- Vermont worked with families to transition from facility based employment to community based employment in 2002, and Medicaid funds are now used only for community employment services.
- Dane County, Wisconsin made a public policy change 25 years ago that places community integrated employment as the central element around which other community-based supports and services are built. This has resulted in high integrated employment rates (75%) for people with disabilities receiving HCBS, as well as employment providers transitioning their service model from facility-based to community integrated employment services.
- Some providers of day services in Tennessee started making these changes years ago and now provide all of their employment and other day services in the community. SRVS, one of the largest HCBS providers for people with intellectual disabilities in Tennessee, closed its sheltered workshop in 2015, after 53 years of operation. SRVS worked with persons supported and their families to find person-centered alternatives to the facility that allowed for full participation in the community. Some of the people who worked in the facility now have integrated jobs in the community earning minimum wage or higher.

In addition to the HCBS settings rule, states must comply with other federal laws that protect the rights of people with disabilities to be served in integrated community settings, including the Americans with Disabilities Act (ADA).

The United States Department of Justice (DOJ)—responsible for protecting the rights of people with disabilities and enforcement of the ADA—defines the most integrated setting as one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” Recently the DOJ has been more actively reviewing states’ compliance with the 1999 landmark Supreme Court Olmstead decision. In the Olmstead decision, the Supreme Court found that people with disabilities have a right to be fully integrated into community life. This decision affects how services are provided by the government to people with disabilities.

The Olmstead ruling is related to the new HCBS settings rule because both focus on using public funds and programs to promote community participation and decrease the use of institution-like settings.

In 2011, U.S. DOJ developed a technical assistance guide for state and local governments on complying with and enforcement of the integration mandate of the ADA and Olmstead. The guidance specifically includes among “persons who are unnecessarily segregated” those “individuals residing in facilities for individuals with developmental disabilities...[and] individuals spending their days in sheltered workshops or segregated day programs.” The DOJ may bring lawsuits against states and other entities for violations of the ADA and Olmstead. Since 2008, 25 states have faced legal action for various Olmstead violations in residential, non-residential, and publicly funded programs. DOJ letters of findings to states, court rulings, negotiated settlements, and consent decrees have consistently affirmed the Olmstead ruling and its applicability to sheltered workshops and segregated day services, among other services and settings.

Some states have agreed to close sheltered workshops and facility-based day programs because of lawsuits brought by the DOJ regarding violations of the ADA.

- On April 8, 2014, the DOJ entered into the nation’s first statewide settlement agreement affirming 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 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 consent decree requires phase-outs of sheltered workshops and an increase in supported employment services.
- The DOJ announced on Sept. 8, 2015, that it has entered into a proposed settlement agreement with the state of Oregon that will resolve alleged violations of the ADA and will provide relief that will impact approximately 7,000 Oregonians with intellectual and developmental disabilities who can and want to work in typical employment settings in the community.

Tennessee’s Statewide Transition Plan includes changes we think are required to comply with the new HCBS settings rule and the ADA.

How will the HCBS settings rule affect the sheltered workshop or facility I attend?

Sheltered workshops and facility-based day programs are designed specifically for people with disabilities and in many cases, don’t comply with the new federal HCBS settings rule. Except for paid staff, people receiving services in these settings usually have limited, if any, interaction with people who do not have disabilities or the broader community during the hours this service is provided. This means changes will be required for facility-based programs in order to continue to receive Medicaid funding.

Does this mean that the sheltered workshop I attend will have to close?

No, the new rule does not say that sheltered workshops must close. It does, however, dictate where services that are reimbursed by Medicaid can be provided.

Medicaid funds cannot be used to pay for employment (or vocational) services in a sheltered workshop. Medicaid funding can be used to pay for pre-vocational services in a sheltered workshop, but only if the services are time-limited, and intended to help prepare the person to work in an integrated setting.

It's important to note even in those situations, there is an expectation that people are supported to be engaged in the broader community

It's also important to understand that the impact of the HCBS settings rule on Medicaid reimbursement of services in a sheltered employment setting is not new. In 2011, CMS issued guidance to states which made clear that Medicaid waiver funding could not be used to pay for vocational services (i.e., employment services) in a sheltered employment setting. The 2011 guidance also said Medicaid payment for pre-vocational services in a sheltered setting must be time-limited, and only to prepare a person to transition into employment in integrated settings.

What if I don't want to work or I'm not able to work?

The federal HCBS settings rule doesn't require that every person work. It does require, however, that everyone has the opportunity and the supports needed to work in an integrated setting and to participate fully in their communities. It's important that each person receiving HCBS understand that they can work and have the supports they need to work, no matter how significant their disabilities. It's also important that providers help people explore jobs that would match interests and abilities with opportunities to be productive and earn a competitive wage or develop customized employment opportunities.

If a person is no longer working age or doesn't want to work, the other services the person receives must comply with the new HCBS settings rule and include opportunities to spend time with people in the community who don't have disabilities and participate in community services and activities. This includes residential and day services options.

Does this mean that the facility-based day program I attend will have to close?

No, the new rule does not say that facility-based day programs must close. It does, however, dictate where services that are reimbursed by Medicaid can be provided. Medicaid funds can only be used to pay for services that comply with the new HCBS settings rule and include opportunities to spend time with people in the community who don't have disabilities.

What changes will have to be made in order for the center to stay open?

Each provider has the opportunity to decide how best to transition their programs into compliance with the new federal rule. Many agencies have engaged the people they support, local advocacy groups and families in developing a transition plan. Employment providers may step up their efforts to help people that have been employed in sheltered settings find jobs and transition to integrated employment, earning a competitive wage. Providers may find ways to ensure that people participating in facility-based programs for some portion of their day or week also have opportunities to engage in work or non-work activities in integrated community settings.

DIDD and TennCare are committed to helping providers come into compliance and will assist in coordinating regional focus groups upon request to aid in providers' efforts.