



**TO:** Barbara Coulter Edwards; Director, Disabled and Elderly Health Programs Group, CMS Ralph Lollar; Director, Division of Long Term Services and Supports, CMS

**FROM:** Association of People Supporting EmploymentFirst (APSE)

**RE:** APSE's Recommendations Regarding Home and Community-Based Service (HCBS) Program Sub-Regulatory Guidance Applicable to Non-Residential Settings

**DATE:** July 24, 2014

APSE is writing to express our strong support of recent actions taken by CMS for advancing employment for individuals with significant disabilities and to provide recommendations for sub-regulatory guidance regarding the application of the final Medicaid Home and Community Based Services (HCBS) rule to non-residential HCBS settings. As the *only* national organization with an *exclusive* focus on integrated employment and career advancement opportunities for individuals with disabilities, we commend CMS for its ongoing efforts in supporting states to encourage more individuals with disabilities to achieve competitive integrated-employment. We applaud the September 2011 guidance on this issue and subsequent follow-up actions. With the January 16, 2014 publication of the final rule on HCBS setting requirements, CMS has further clarified its commitment to full implementation of the American's with Disabilities Act and more particularly, the Supreme Court's Olmstead vs. L.C. ruling, and is a clear statement about protecting the rights of citizens with significant disabilities, ensuring they have opportunities for maximum integration and inclusion in the community, leading full and rich lives like other citizens. We are confident that the upcoming guidance on non-residential HCBS settings will reinforce this Final Rule in terms of placing a priority on integrated employment in the general workforce as the first and preferred option for individuals served under the HCBS Waiver Program, and with a priority for supports and settings during non-work hours that are fully integrated in generic settings in the community.

### **Background on Recent Federal Actions**

The April 2014 U.S. Department of Justice (DOJ) settlement agreement with Rhode Island has provided an example that should be useful as CMS considers sub-regulatory HCBS setting guidance for non-residential settings. That agreement occurred in response to DOJ's ADA Olmstead investigation which found an over-reliance on segregated and facility-based services to the exclusion of integrated alternatives. The U.S. District Court for the district of Rhode Island has entered the settlement agreement as a court-enforceable consent decree. The reference to appropriate service settings states, "Supported Employment Placements made available under this Consent Decree cannot be in sheltered workshops, group enclaves, mobile work crews, time-limited work experiences (internships), or facility-based day programs." (U.S. District Court,



Case No. 14-175, Section V., Sub-section G.). In describing the agreement, Acting Assistant Attorney General Jocelyn Samuels stated it would allow Rhode island citizens with disabilities to “find, get, keep and succeed in real jobs with real wages – typical jobs out in the community, the kind of jobs available to people without disabilities: jobs that pay a competitive wage, jobs that are individual jobs (not “group” employment, as we see sometimes with respect to people with I/DD),” (Press conference remarks made April 8, 2014, Providence, Rhode Island).

The definition of integrated employment presently being used by the U.S. Department of Labor’s Office of Disability Employment Policy (ODEP) provides additional guidance on appropriate employment settings:

“Integrated employment refers to jobs held by people with disabilities in typical workplace settings where the majority of persons employed are not persons with disabilities, where individuals earn the greater of prevailing or minimum wages with related employment and health benefits, are paid directly by the employer, are preferably engaged full-time, and have the opportunity for professional and career advancement” (ODEP’s State Employment Resource Rebalancing Initiative).

Of note in this definition is “typical workplace settings where the majority of persons employed are not persons with disabilities” and “are paid directly by the employer.” The latter phrase specifically eliminates group employment settings as they are contractual arrangements between an agency and the business that do not allow for direct payment.

In her recent comments on the 15<sup>th</sup> anniversary of the *Olmstead* ruling, Assistant Secretary of Labor for Disability Employment Policy, Kathy Martinez stated, “While progress has been made since *Olmstead*, much work remains to be done and we won’t stop until the Employment First philosophy is adopted nationwide,” and “We must ensure they advance *workplace* inclusion, a key component of full community inclusion” (Employment First: A Key Component in Community Inclusion, June 25, 2014). Workplace inclusion and Employment First increasingly defines regular employment with supports as the goal, not a program within a segregated setting or an artificially created congregate setting within a business.

APSE believes that the HCBS final rule, recent *Olmstead* guidance, and other actions from CMS and the Obama Administration all promote the concept of Employment First: that employment in the general workforce should be the first and preferred outcome in the provision of publicly funded services for all working age citizens with disabilities, regardless of level of disability (see APSE’s full statement on Employment First, attached to this letter). To be clear:

- Employment First does **not** mean “employment only.” Employment First does **not** mean “forced employment” – only that integrated community employment is the first and preferred option, before other options are considered.
- Employment First does **not** limit individual choices but rather increases personal choices, expands opportunities, and enhances self-determination through greater access to the workforce, jobs, earned income, and community.



APSE recommends that CMS reaffirm this support by providing a clear presumption of competence in the sub-regulatory guidance for non-residential settings. Close to 30 states have some type of Employment First Policy and transformation of a multitude of systems and services funded by CMS Medicaid funds are underway. We do not want future guidance to slow this progress or worse yet reverse these efforts across the United States to improve integrated employment opportunities for individuals with disabilities. We believe this guidance would be strengthened by illustrating the distinctive characteristics of a home and community-based setting specific to employment, that have been successful in the implementation of Employment First.

### **Specific Recommendations**

The following are APSE's recommendations for language within the sub-regulatory guidance for non-residential settings. As noted, in order to assure consistency across federal agencies, language from the recently passed Workforce Innovation and Opportunity Act (H.R. 803) is used as appropriate (excerpts attached).

1. Working in competitive integrated settings is one of the primary mechanisms for engaging in community life and controlling personal resources. Individuals with disabilities have the right to have increased incomes, financial assets, and economic wealth. As such, integrated employment is the first and preferred option when exploring goals and a life path for individuals with disabilities, with employment in competitive integrated settings considered the preferred outcome for individuals served under the HCBS waiver program.
2. Level of disability does not preclude work in competitive integrated settings; individuals are to have opportunities to be employed in the community regardless of the severity of disability and assistance required.
3. Work in competitive integrated settings may require ongoing supports via supported employment for successful employment in such a setting. Work in competitive integrated settings may also include jobs that are developed via customized employment strategies including— (i) customizing a job description based on current employer needs or on previously unidentified and unmet employer needs; (ii) developing a set of job duties, a work schedule and job arrangement, and specifics of supervision (including performance evaluation and review), and determining a job location; (iii) representation by a professional chosen by the individual, or self-representation of the individual, in working with an employer to facilitate placement; and (iv) providing services and supports at the job location. *(Note: the language on Customized Employment is taken from the definition in the Workforce Innovation and Opportunities Act.)*
4. The specific characteristics of the preferred employment setting for individuals served via the HCBS waiver programs include the following *(Note: the language in a), c), and d) below is primarily taken from the definition of competitive integrated employment in the Workforce Innovation and Opportunities Act.)*
  - a) Employment is at a location where the employee interacts with other persons who are not individuals with disabilities (not including supervisory personnel or individuals who are



- providing services to such employee) to the same extent that individuals who are not individuals with disabilities
- b) The position is an individual job, not an enclave or mobile work crew.
  - c) Individuals are paid by the employer (not the service provider), and receive minimum wage or higher, at a pay rate that is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills.
  - d) For individuals who are self-employed, the business is owned by the individual, and not by a service provider, and yields an income that is comparable to the income received by other individuals who are not individuals with disabilities, and who are self-employed in similar occupations or on similar tasks and who have similar training, experience, and skills.
  - e) The employment setting and job is one that is reflective of the individual's person-centered plan, and based on the strengths, interests, and needs of the individual.
5. Employment of individuals with disabilities in businesses operated by service providers is not a preferred outcome, even when paying minimum wage or higher. Such business models are at odds with the integration mandate of Olmstead – i.e., the majority of employees are individuals with disabilities, and interaction with the general public in mobile crew and similar arrangements is insufficient to meet the integration mandate. Such models also reinforce stigma of people with disabilities, and having individuals work for the entity that is also responsible for provision of assistance and support is an inherent conflict of interest.
  6. Within the person-centered planning process, integrated employment is to be given full consideration and explored. If a decision is made to not consider employment for an individual, the underlying reasons and rationale are to be fully documented and addressed in service provision. (*See attached Ohio Employment First Form as an example.*) This decision is to be re-evaluated on at least an annual basis.
  7. Individual preferences and choices will be driven by a person-centered planning process and informed choice. In line with US Department of Justice guidance ([www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm)), simply asking individuals their preferences regarding where they want to spend their days is insufficient. Affirmative steps must be taken to ensure that individuals have an opportunity to make an informed choice, including providing information about the benefits of integrated employment settings; facilitating visits or other experiences in such settings; and offering opportunities to meet with other individuals with disabilities who are working and receiving services in integrated settings, with their families, and with community providers. Public entities also must make reasonable efforts to identify and address any concerns or objections raised by the individual or another relevant decision-maker.
  8. Assessments are to be conducted primarily via community settings. A comprehensive assessment that determines the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment of



the eligible individual will not be recognized, if conducted in segregated facility-based program including but not limited to sheltered workshops.

9. In line with the requirements in the final HCBS Rule, qualifications for agents performing independent assessments and plans of care must include training and knowledge in best practices in employment and non-work supports for individuals with significant disabilities, including current knowledge of available resources, service options, providers, and best practices to improve quality of life outcomes.
10. In order to make informed decisions, individuals are to have access to high quality work incentives counseling services, which provide guidance on management of benefits in a way that maximizes employment opportunities and asset development.
11. As with the general population, individuals who pursue and acquire employment are to have access to the appropriate supports needed to succeed in the workplace. Funding is to be sufficient so that quality services and supports are available as needed for long-term employment success.
12. As with employment services and supports, services provided to individuals requiring assistance and support during non-work hours will similarly facilitate full inclusion and integration of individuals into the community. The preferred setting for services provided to individuals requiring assistance and support during non-work hours will be fully integrated within the community, with a preference for generic settings and services used by the general population, over disability specific services and settings, and avoiding congregate facility-based service settings. Non-work services and settings will be determined based on individual preferences and choices, and an individually-driven person-centered planning process. Non-work services are to be deliberate and purposeful in nature, and align with an individual's goals.
13. HCBS funds may not be used to unnecessarily segregate individuals with disabilities from the general (non-disabled) population, in such settings as sheltered workshops, facility-based pre-vocational programs, and facility-based day activity programs.
14. States are in no way required to provide settings for day and employment services that are solely for people with disabilities, and states have the option of providing all services and supports fully integrated within the community.

In addition to the above proposed language for sub-regulatory guidance, APSE also recommends the following:

- A. APSE recommends that CMS provide grants and resources with enhanced rates, focused solely on day and employment services and directed at individuals who have long been provided day or employment services in settings that could be presumed not to be in compliance with the new Final Rules and sub-regulatory guidance, such as sheltered workshops or congregate day habilitation centers. This will assist states in building capacity (bridge resources for providers to retool their business models, invest in training workforce to assure competency in delivering quality individualized employment and habilitation supports, etc.) to come into compliance with the intent of the new HCBS regulations,



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- B. CMS should institute requirements for inclusion of outcome data for employment services in service utilization reports from states. Such data would specify the number of people working who are being served under the HCBS program in integrated employment positions, regardless of service type, as well as the number of individuals in facility-based and non-work programs.

## **Definitions from the Workforce Innovation and Opportunities Act of 2014 (H.R. 803)**

### **COMPETITIVE INTEGRATED EMPLOYMENT**

The term ‘competitive integrated employment’ means:

(A) Work that is performed on a full-time or part-time basis (including self-employment) for which an individual is compensated at a rate that:

(a) shall be not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the rate specified in the applicable State or local minimum wage law; and

(b) is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; or in the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities, and who are self-employed in similar occupations or on similar tasks and who have similar training, experience, and skills; and

(c) is eligible for the level of benefits provided to other employees;

(B) that is at a location where the employee interacts with other persons who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that individuals who are not individuals with disabilities and who are in comparable positions interact with other persons;

(C) that, as appropriate, presents opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions.’’

### **SUPPORTED EMPLOYMENT**

The term ‘supported employment’ means competitive integrated employment, including customized employment, or employment in an integrated work setting in which individuals are working on a short-term basis toward competitive integrated employment, that is individualized and customized consistent with the strengths, abilities, interests, and informed choice of the individuals involved, for individuals with the most significant disabilities—

a) for whom competitive integrated employment has not historically occurred; or

b) for whom competitive integrated employment has been interrupted or intermittent as a result of a significant disability; and

c) who, because of the nature and severity of their disability, need intensive supported employment services and extended services after the transition described in paragraph (13)(C), in order to perform the work involved

### **CUSTOMIZED EMPLOYMENT**

The term ‘customized employment’ means competitive integrated employment, for an individual with a significant disability, that is based on an individualized determination of the strengths, needs, and interests of the individual with a significant disability, is designed to meet the specific abilities of the individual with a significant disability and the business needs of the employer, and is carried out through flexible strategies, such as—

‘A) job exploration by the individual;

(B) working with an employer to facilitate placement, including—

- (i) customizing a job description based on current employer needs or on previously unidentified and unmet employer needs;
- (ii) developing a set of job duties, a work schedule and job arrangement, and specifics of supervision (including performance evaluation and review), and determining a job location;
- (iii) representation by a professional chosen by the individual, or self-representation of the individual, in working with an employer to facilitate placement; and
- (iv) providing services and supports at the job location.



### **APSE Statement on Employment First**

*Employment in the general workforce is the first and preferred outcome in the provision of publicly funded services for all working age citizens with disabilities, regardless of level of disability.*

#### **Underlying Principles**

- The current low participation rate of citizens with disabilities in the workforce is unacceptable.
- Access to “real jobs with real wages” is essential if citizens with disabilities are to avoid lives of poverty, dependence, and isolation.
- It is presumed that all working age adults and youths with disabilities can work in jobs fully integrated within the general workforce, working side-by-side with co-workers without disabilities, earning minimum wage or higher.
- As with all other individuals, employees with disabilities require assistance and support to ensure job success and should have access to those supports necessary to succeed in the workplace.
- All citizens, regardless of disability, have the right to pursue the full range of available employment opportunities, and to earn a living wage in a job of their choosing, based on their talents, skills, and interests.
- Implementation of Employment First principles must be based on clear public policies and practices that ensure employment of citizens with disabilities within the general workforce is the priority for public funding and service delivery.
- Inclusion or exclusion of the specific term “Employment First” does not determine whether a public system or agency has adopted Employment First principles. Such a determination can only be made in examining whether the underlying policies, procedures and infrastructure are designed for and ultimately result in increased integrated employment in the general workforce for citizens with disabilities.

#### **Characteristics of Successful Implementation of Employment First**

- There are measurable increases in employment of citizens with disabilities within the general workforce, earning minimum wage or higher with benefits.
- Greater opportunities exist for citizens with disabilities to pursue self-employment and the development of microenterprises.
- Employment is the first and preferred option when exploring goals and a life path for citizens with disabilities.
- Citizens with disabilities are employed within the general workforce, regardless of the severity of disability and assistance required.

- Young people with disabilities have work experiences that are typical of other teenagers and young adults.
- Employers universally value individuals with disabilities as an integral part of their workforce, and include people with disabilities within general recruitment and hiring efforts as standard practice.
- Individuals with disabilities have increased incomes, financial assets, and economic wealth.
- Citizens with disabilities have greater opportunities to advance in their careers, by taking full advantage of their individual strengths and talents.
- Funding is sufficient so that quality services and supports are available as needed for long-term employment success.
- A decision not to consider employment in the community for an individual is re-evaluated on a regular basis; the reasons and rationale for this decision are fully documented and addressed in service provision.

*Adopted by the APSE Executive Board on October 11, 2010.*



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# OHIO DEPARTMENT OF DEVELOPMENTAL DISABILITIES

## Employment First Form

Name: \_\_\_\_\_ Waiver Span: \_\_\_\_\_

### What is Employment First?

It is the policy of the Self-empowered Life Funding (SELF) waiver that emphasizes employment as the priority and preferred outcome for working-age adults with disabilities. Employment First recognizes the social and economic benefits of meaningful work for all individuals. Everyone, regardless of disability, should have the opportunity to earn at least minimum wage in integrated, community-based settings.

Each working-age adult enrolled in SELF is encouraged to consider integrated or supported employment before any other day service option. Through the waiver, you may receive help with:

- Developing a plan to get a job in the general workforce that pays at least minimum wage
- Finding a job that fits your strengths/interests
- Getting an internship or apprenticeship
- Starting a new business
- Initial and ongoing training to help you maintain your job
- Transportation to help you find and keep a competitive job in your community

### Employment and Benefits:

- Medicaid Buy-in for Workers with Disabilities (MBIWD)

MBIWD is an Ohio Medicaid program that provides health care coverage to working Ohioans with disabilities. Historically, people with disabilities were often discouraged from working because their earnings made them ineligible for Medicaid coverage. MBIWD was created to enable Ohioans with disabilities to work and still keep their health care coverage. For more information visit <http://www.ifs.ohio.gov/ohp/mbiwd.stm> or contact your local Job and Family Services office.

- Social Security Incentives

Special rules make it possible for people with disabilities receiving Social Security or Supplemental Security Income (SSI) to work and still receive monthly payments and Medicare or Medicaid. Social Security calls these rules "work incentives." For more information regarding these incentives, visit <http://www.socialsecurity.gov/disabilityresearch/wi/generalinfo.htm> or contact your local Social Security office.

### Other day service options available through the waiver:

- Adult Day Services – non-work activities provided outside of one's residence
- Vocational Habilitation – services designed to teach and reinforce concepts related to work.

**If you choose to receive Adult Day Services or Vocational Habilitation through SELF, a reason for this choice is required. Please provide information requested on the back of this form.**

Chosen service(s): \_\_\_\_\_

Why did you select this service over Integrated Employment or Supported Employment-Enclave?

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Have you ever had the opportunity to participate in a community-based assessment for employment?

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Do you see any barriers keeping you from Integrated Employment or Supported Employment-Enclave?

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What additional supports are needed for you to consider Integrated Employment or Supported Employment-Enclave?

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**Individual/Guardian**

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**Date**

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**County Board Representative**

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**Date**