

Disability Advocacy Alliance

Protecting the Rights of Ohio's Most Vulnerable Citizens

Testimony of Concerns in Response to:

Ohio's Draft Plan to Comply with New Federal Home and Community Based Services Requirements

Disability Advocacy Alliance (DAA) maintains that Ohio's Draft Plan to Comply with New Federal Home and Community Based Services Requirements (the "Draft Transition Plan") does not reflect the accurate meaning of *Olmstead* and its interpretation of the *Americans with Disabilities Act*, which clearly states the need for a range of choices and services to meet the diverse needs of people with intellectual and developmental disabilities (I/DD). Although the plan refers to "setting options", it specifically states that campus settings, farmsteads, and other intentional communities are not community based settings.

Olmstead recognizes that individuals with disabilities are a diverse population with diverse needs and that individual choice is a prerequisite to determining services, regardless of setting, and to ensuring individual health, welfare, and happiness.

The Draft Transition Plan states settings that are not compliant have "characteristics" of an institution. They are listed in the Plan as the following:

- A1. Group Home (with more than 4 individuals);
- A2. Disability Specific Farm;
- A3. Cul-de-sac of Group Homes; and
- A4. Campus Settings. (APPENDIX 2: ICF/IID System, Page 3.)

[Note: In places the Draft Transition Plan references the "ICF/IID system" (see e.g., Appendix I). ICFs/IID are expressly outside the scope of the CMS HCBS Rule. In no way should the Draft Transition Plan affect ICFs/IID. To the extent these references are relating to the ICF/IID *waiver*, the draft must be edited for clarity].

The Draft Plan is misguided in its presumption that the physical structure, location, and the number and demographics of residents make these entities non-community based. These restrictive criteria, however defined, (whether by the number of individuals, their diagnoses, or the proximity to non-disabled communities) do not give an accurate indication of a setting's viability as an individual's home or community. These criteria should not determine the overall value of a setting to an individual. According to CMS, what's paramount is *how* the setting promotes person-centered planning:

"The rule creates a more outcome-oriented definition of home and community-based settings, rather than one based solely on a setting's location, geography, or physical characteristics." ["Fact Sheet: Home and Community Based Services," CMS (January 10, 2014)]

"Characteristics" such as rural settings or long hallways and wide corridors which the Transition Plan deems "institutional" have a purpose - they afford people with disabilities many benefits such as more independence, individual choice, freedom of movement, and safety. Rural settings for individuals with intellectual and developmental disabilities provide more room and a serene environment for greater independence. Likewise, in urban areas, long hallways and wide corridors in homes mean more room for residents in wheelchairs, gait trainers, and adaptive tricycles to move about independently. People with I/DD require settings that are sensory friendly in order to provide opportunities to interact with their surroundings on *their* terms. Open spaces and therapeutic activities that relate to real world experiences

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within the context of residents' and clients' unique abilities and challenges mean a more rewarding and engaging life for people with disabilities.

With respect to the Draft Plan's reliance on the Employment First rule, when people with disabilities come together in day habilitation programs, they develop pride, self-esteem, and satisfaction for a job well-done as they are associating with other individuals on a level playing field. Additionally, the environment is tailored to promote success based on the unique abilities and disabilities of the individuals. People without disabilities seek employment and day activities with suit their individual talents, strengths, and shared-interests with others. Why should this opportunity and decision-making be denied to people with disabilities?

In the true spirit of Olmstead, the ADA, and person-centered planning, a community in compliance with CMS rules should be outcome-oriented and individually tailored to the needs of residents and clients.

A "community" is defined as "the people with common interests living in a particular area" or "a group of people with a common characteristic or interest living together within a larger society." Therefore, a community is not strictly defined by a geographic location, nor is it defined by an ordained ratio of disabled vs. non-disabled people. To say that a community focused on improving the lives of people with disabilities does not constitute a community because there is not enough interaction with non-disabled people suggests that the relationships formed between people who are disabled are not valued relationships in our society.

The Draft Plan presumes that a person with disabilities' interaction with a non-disabled person is more valuable and meaningful than the interaction between people with disabilities. This discriminatory notion permeates Ohio's CMS Transition Plan. The significance and worth of relationships (between people who are disabled or otherwise) are not something to be litigated, determined or controlled by the Ohio Department of Developmental Disabilities.

The Draft Plan's narrow focus on the physical and demographic nature of a setting, whether residential, day habilitation, or workshops eliminates people with disabilities' right to freely choose their daily environment.

By removing individual choice and enforcing a state prescribed "integration" into what the state deems to be a community regardless of individual needs, the Draft Plan creates an environment that will isolate and subject people to situations that are not safe or in their best interest. As stated in *Olmstead*, Part III-B,

"As already observed...the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting..."

Furthermore, residents of ICF homes and nursing homes are being marginalized by CMS' new rules which prohibit group homes and sheltered workshops from operating on ICF and nursing home campuses. CMS does allow these valuable programs, which meet the spirit and letter of CMS' community criteria, to operate adjacent to ICF and nursing homes. These rules are arbitrary and serve no purpose other than to sideline ICF and nursing homes and their residents. DODD must go to bat for these valued programs. Not doing so renders DODD the "bully on the playground," determining who can play in the game while shutting out the least capable of speaking for themselves.

DAA acknowledges that small community settings for those who desire them and would benefit from them are an important part of a state's range of residential options, but no residential choice should come at the expense of limiting choices for others. *Olmstead* takes great care to state that settings which allow for a

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higher level of care must remain available for individuals who desire and require it. Disability specific farms, campus settings, ICF homes, and nursing homes all fulfill this Court-recognized need.

Olmstead states, Part III-B,

"For other individuals, no placement outside the institution may ever be appropriate...for these persons, institutional settings are needed and must remain available."

Building group homes of four individuals in order to move residents from their chosen homes (whether they be disability farms, ICF homes, or nursing homes), is not person-centered planning - it is the anti-thesis of person-center planning.

As of June 2013, the Ohio HCBS waiting list comprised 41,260 people. 22,280 stated that they needed services immediately. Many people who have been on the waiting list for years have little hope of ever accessing HCBS waivers. Moving individuals from their preferred homes and services suddenly considered non-compliant due to arbitrary rule changes only serves to increase the wait time of those on the waiting list.

Olmstead, Part III-B, states,

"To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications stated would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down..."

In the 2014-15 biennial budget, the State of Ohio in cooperation with the voluntary actions of ICFs homes decreased the number of ICF beds by 500, in addition to the individuals displaced by state-operated ICF/ IID ("developmental centers") closures. No argument can be made that the State of Ohio is endeavoring to keep its "institutions" fully populated at the expense of its waiting lists.

In the Draft Plan's Remediation Grid, the action steps are not clearly defined. Action steps that indicate "convene a workgroup or stakeholder group" or "modify" are ambiguous and do not indicate clearly how the DODD plans to actually implement steps for remediation. This does not provide transparency in the process of identifying the actions steps that will be taken. DAA asks that the Draft Plan account for the remediation steps with full transparency before implementing any further action.

In conclusion, DAA asserts that people with disabilities, along with their legal guardians, should determine what constitutes their home and community. Indeed, that is the true essence of person-centered planning.

Disability Advocacy Alliance asks that the DODD rely on the accurate interpretation of the *Olmstead* decision to protect the health and welfare of Ohio's most fragile citizens. *Olmstead* states, Part III-A,

"We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings....Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it."