



# Employment, Health Care and Disability Policy Update: September 2016 Newsletter

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## **September 30, 2016**

The LEAD Center's Policy Update - Employment, Health Care and Disability is a monthly update focusing on the intersection of disability, employment and health care policy. The LEAD Center's Policy Update - Employment, Health Care and Disability provides policymakers, disability service professionals, individuals with disabilities and their families with information about relevant policy developments regarding Medicaid, the Affordable Care Act and related topics, with a focus on improving employment outcomes for individuals with disabilities.

The LEAD Center Policy Update - Employment, Health Care and Disability is a project of the LEAD Center in collaboration with the [Autistic Self Advocacy Network](#).

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## **September HCBS Transition Plan Update**

In September, the states of Iowa and Pennsylvania were granted initial approval of their HCBS Transition Plans by the Center for Medicare and Medicaid Services (CMS). The state of Florida released a revised version of its HCBS Transition Plan and posted it for public comment.

### ***Iowa HCBS Transition Plan***

Iowa was granted initial approval of its HCBS Transition Plan on August 9, 2016. In its [initial approval letter](#), CMS stated that Iowa completed its systemic assessment, identified areas in

need of remediation, and clearly outlined the ways in which it would perform that remediation. CMS reiterated in its letter the need for Iowa to address several specific concerns it had in order to receive final approval. Among these requirements, CMS requested that Iowa provide additional details with regards to its site-specific and provider self-assessment processes. They also asked that Iowa ensure all settings which cluster participants, including non-residential settings providing group supported employment services, for the purpose of receiving HCBS services, be evaluated for full compliance with the Final Rules. That includes how Iowa will determine which settings have the effect of isolating individuals, including non-residential employment settings, as part of their heightened scrutiny process.

In its crosswalk and timeline, the Iowa Transition Plan identifies specific actions it has taken or will take to support full Final Rules compliance, including compliance with the employment-related provisions. On May 4, 2016, Iowa implemented new supported employment rules for the Intellectual Disability, Brain Injury, and Habilitation program waivers. The new rules “implemented changes to the provider qualifications, service definitions, and reimbursement methodologies for HCBS Prevocational and Supported Employment services” and will bring these services into compliance within the definitions and service structure provided by CMS. Most of these changes are listed in [Iowa’s Attachment B](#) for the Transition Plan. The service definitions of all Iowa waivers have been altered so that they further competitive integrated employment for individual beneficiaries rather than for groups of persons with disabilities.

For more information, read the [Iowa HCBS Transition Plan](#) and [Attachment B, which lists changes to Iowa’s rules concerning supported employment](#).

### ***Pennsylvania HCBS Transition Plan***

On August 30, 2016, CMS granted the state of Pennsylvania approval of its HCBS Transition Plan. In its [initial approval letter](#), CMS stated that Pennsylvania had completed its systemic assessment, outlined its intended remediation strategies, and responded quickly to all of CMS’ remaining concerns and feedback on the Transition Plan.

CMS identified several remaining issues in Pennsylvania’s plan including, but not limited to, requesting assurance that it had assessed all non-residential services under Office of Developmental Programs (ODP) waivers for compliance, and for how it intends to monitor ongoing compliance.

Pennsylvania’s responses to public comments indicate that the state is planning several initiatives it will use to reform delivery of employment services in the state. Pennsylvania’s ODP has sponsored intensive workshops on how prevocational service providers can transition people with disabilities from segregated settings to community-based employment. ODP is also funding a project to develop provider capacity in providing supported employment services. Pennsylvania’s Department of Human Services (DHS) is also collaborating with Pennsylvania’s Office of Vocational Rehabilitation to develop employment resources for supporting people with

disabilities that significantly impact their employment.

For more information on the Pennsylvania HCBS Transition Plan, [read the Transition Plan](#), [Pennsylvania's responses to public comments on the Plan](#), and [the initial approval letter by CMS](#).

### ***Florida HCBS Transition Plan***

On August 26, 2016, Florida released a Revised HCBS Transition Plan and posted it for public comment. The public comment period ended on September 25, 2016.

Florida has developed an assessment of its residential settings, including whether people are supported to seek competitive integrated employment in the broader community.

With regard to ensuring that the state meets its employment-related HCBS setting obligations, the state has created waiver service definitions and provider manuals that require service providers to (a) develop programs and services that support people to live as independently as possible, including integrated community employment; (b) conduct an orientation annually that informs service beneficiaries of employment opportunities in the community; and (c) reduce noncompetitive employment and promote competitive integrated employment.

For more information, [read the Florida HCBS Transition Plan](#).

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## **U.S. Department of Justice Issues New Regulations Clarifying What Is Considered a Disability under the Americans with Disabilities Act**

The United States Department of Justice (USDOJ) has [new regulations revising the Americans with Disabilities Act \(ADA\)'s Title II and Title III regulations](#) in order to fully implement the ADA Amendments Act of 2008. The regulation restores the original, broad definition of “disability” that Congress intended when it initially passed the ADA and embeds it into the ADA’s Title II and III regulations.

The regulation amends 28 C.F.R. § 35.108 to contain Rules of Construction, which indicate how agencies and employers should interpret the terms “substantially limits” and “major life activity” in the definition of “disability.” They note that term “substantially limits” must be interpreted broadly. It only needs to substantially limit one major life activity rather than multiple major life activities to be considered a “substantially limiting impairment.” Also, the regulations specify that it should not be considered “a demanding standard” that requires extensive analysis. The regulations further specify that an ADA analysis should focus on whether or not the agency or business has fully complied with its ADA obligations, rather than on whether the plaintiff or petitioner has a disability. USDOJ clarified that the burden of proof will be

on the covered entity to show that a particular impairment is “transitory and minor” for the petitioner.

“Writing” has been added to the list of “major life activities,” as has “operation of a major bodily function,” including cell growth, bladder control, the respiratory system, the cardiovascular system, and other aspects of bodily function where previous ADA coverage may have been unclear.

For more information, [read the new USDOJ ADA regulations](#).

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## **Research on Disability Releases Monthly nTIDE Report and Webinar which Shows Rising Disability Employment**

On September 2, 2016, Research on Disability, a coalition of disability-focused research projects at the Institute on Disability and University of New Hampshire, released their latest [National Trends in Disability Employment \(nTIDE\) report](#) and [“Lunch and Learn” webinar on the report](#).

The report shows that, according to multiple sources, the amount of people with disabilities who are employed has risen for the fifth month in a row. By August 2016, workers with disabilities represented three percent of all workers in the United States. Andrew Houtenville, associate professor of economics at the University of New Hampshire, stated that more people with disabilities are looking for work this year than in previous years. The report notes that one reason for the increases may be the efforts of proponents of the Workforce Innovation and Opportunity Act (WIOA) and its Advisory Committee to promote competitive integrated employment.

Similarly, the Lunch and Learn webinar on the report noted that the Advisory Committee on Increasing Competitive Integrated Employment of Individuals with Disabilities (ACICIEID) contributed cross-agency strategies for maximizing the employment of people with disabilities. The Center for Medicare and Medicaid Services (CMS), Social Security Administration, U.S. Department of Labor, and Administration on Intellectual and Developmental Disabilities all had representatives on the Advisory Committee, to ensure that people with significant disabilities have access to Long-Term Supports and Services (LTSS), much of which is funded through Medicaid; and that people have the supports they require to maintain health care coverage. One of the Committee’s main purposes was, according to nTIDE, to propose strategies that build capacity among agencies and government-funded disability service providers to assist people in achieving competitive integrated employment.

For more information, [read the report](#) and [view the links on the nTIDE webinar portal page for Episode #7](#).

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## **Texas Health and Human Services System to Transform Its Service Offerings**

On September 1, 2016, the Texas Department of Health and Human Services (DHHS) will begin an overhaul that will convert its five agencies providing health and human services into three. The Department of Assistive and Rehabilitative Services will have its supported employment and vocational rehabilitation programs transferred to the Texas Workforce Commission (TWC), a non-DHHS agency, with most of its other services transferred to the Health and Human Services Commission (HHSC), after which it will cease to exist. The Department of Aging and Disability Services will have most programs and regulatory activities transferred to the Health and Human Services Commission (HHSC) which will then too cease to exist.

All client services provided by the Texas DHHS will be provided by the Medical and Social Services Division, a division within the Health and Human Services Commission. Texas' DHHS has stated that this change will centralize service provision so that behavioral, medical, preventative care, and disability services are all connected in order to "better meet the needs of the whole person."

By 2017, the new DHHS will consist of the HHSC and the new Medical and Social Services Division. These changes reconfigure disability service provision in the state of Texas. Vocational rehabilitation and supported employment case managers might change, given the elimination of some agencies and the transfer of other agency functions. Medicaid and CHIP services will now be provided by DHHS' Medical and Social Services Division.

For more information on these changes, read [the resources available on the Texas DHHS' website portal on Transformation](#).

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## **Illinois Passes New Employee Sick Leave Act Allowing Employees to Take Leave to Support Family Members' Health Needs**

The Illinois General Assembly recently passed [House Bill 6162, or the Employee Sick Leave Act](#). The Employee Sick Leave Act would allow employees to use paid sick leave benefits provided by the employer to care for any spouse, child, or other family member due to an "illness, injury, or medical appointment," including any that are related to a disability. Disability leave or disability plan benefits were originally excluded from the sick leave provided, but the exclusion was removed.

The law states that the employee can use the benefit "for reasonable periods of time as the

employee’s attendance may be necessary” or on the same terms that the employee uses their own sick leave benefits. This would allow an employee to treat a family member’s need for care in a similar manner to the employee’s own needs.

For more information, read [the text of the law and its amendments](#).

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## **Brooklyn Law School Files Federal Complaint Challenging Private Health Insurance Company**

The Disability and Civil Rights Clinic at Brooklyn Law School recently filed a complaint against two health insurance companies, Group Health Incorporated (GHI) and EmblemHealth. The complaint alleges that GHI and EmblemHealth together violated a contract with a person with a disability that provided her with private duty nursing services. The complaint also alleges that GHI and EmblemHealth violated Section 1557 of the Affordable Care Act (ACA) by refusing to provide the plaintiff with private duty nursing services in the community, as well as in the plaintiff’s home. The complaint was brought as a class action, given that there are many other people who may be unable to receive private duty nursing services to support them in the community.

The named plaintiff is a person with a significant disability who requires the assistance of a private duty nurse due to complex medical needs. The plaintiff wants to participate in a day habilitation program in the community, which offers opportunities for skills development and socialization with persons in the community. The plaintiff must do so with the assistance of a nurse. The complaint alleges that the plaintiff cannot do so because the defendant refused to pay for the nursing services, stating that the plaintiff’s Comprehensive Benefits Plan only covers nursing services rendered “at home or at a hospital.”

The facts alleged in the complaint may have important implications for persons with disabilities with significant health care needs who pursue employment in the community. If this population cannot receive necessary nursing services outside the home under the defendant’s benefits plans, and if provisions like those described are widespread in benefit plans, they may be rendered unable to work in the community.

For more information, read the [publicly available complaint](#).

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