



Let's Get to Work: Federal Policies Creating Opportunities to Expand Competitive Integrated Employment

Alison Barkoff
Director of Advocacy
Center for Public Representation
abarkoff@cpr-ma.org

Pennsylvania Employment 1st, Employment Now Symposium
May 23, 2017

What Is the Vision of a System For People with Disabilities?

- Support people with disabilities to have **lives like people without disabilities**
- Provide opportunities for **true integration, independence, choice, and self-determination in all aspects of life** – where people live, spend their days, and community membership
- Ensure **quality services and supports** that meet people's needs and help them achieve goals they have identified through real person-centered planning

Employment is Critical To Meeting Our System Goals

- Supporting people with disabilities to work in integrated employment in the community is critical to:
 - Helping people with disabilities access the greater community;
 - Facilitating relationships with people without disabilities;
 - Building new skills and self-esteem;
 - Helping bring people with disabilities out of poverty;
 - Reducing utilization of other Medicaid services; and
 - Providing meaningful ways for people to spend their days.
- Good systems make sure employment is the centerpiece of how they think about all other day services

Role of Employment in Evan's life



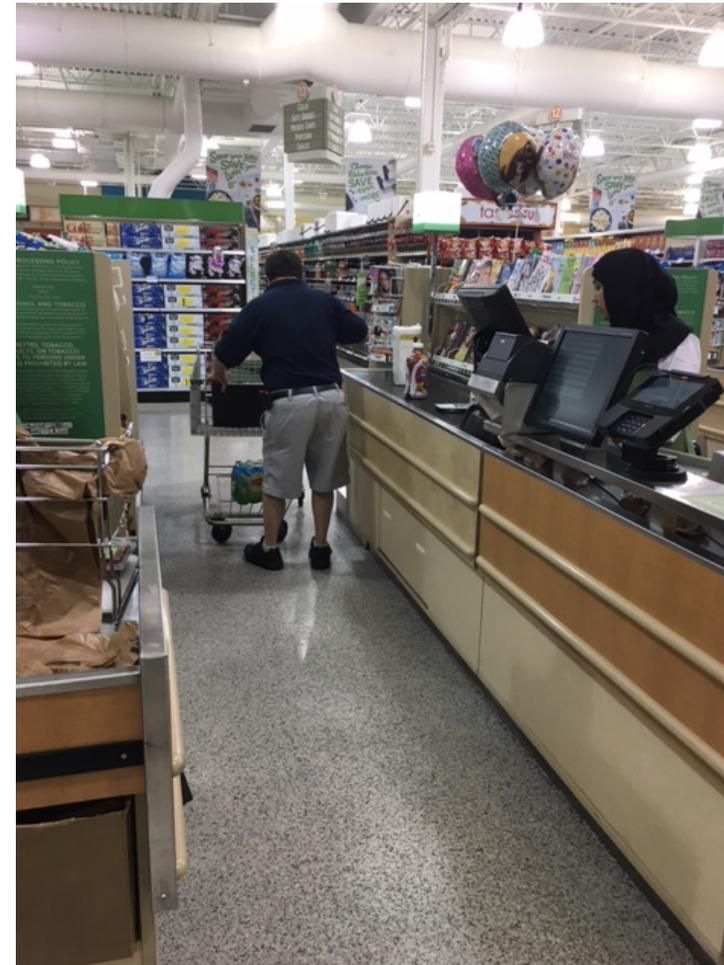
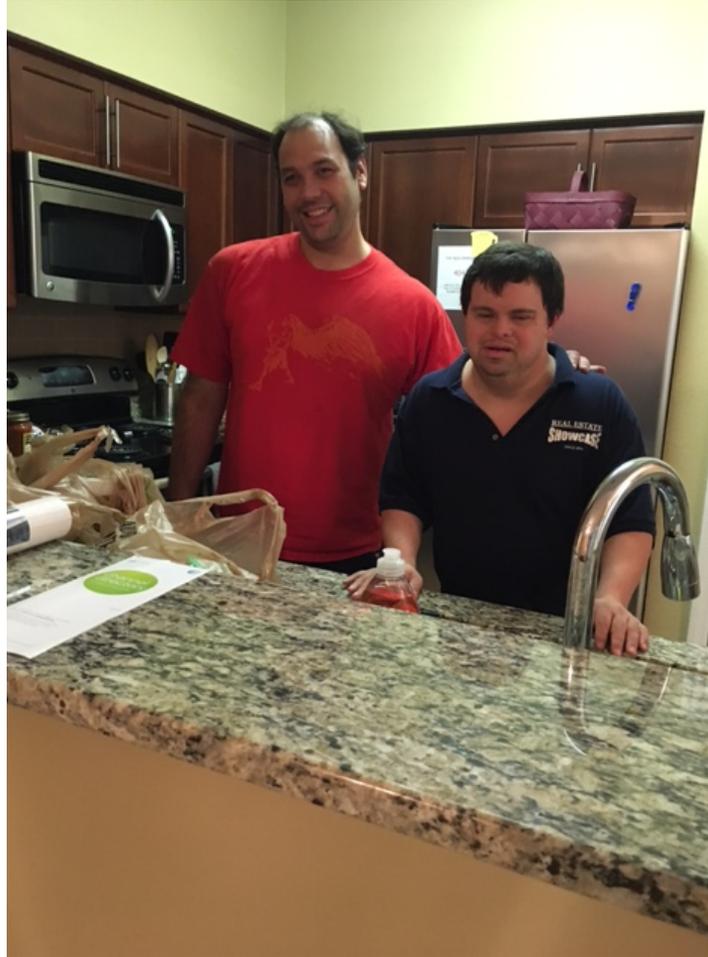
Skills and Relationships In the Workplace



Relationships with Co-workers Outside the Workplace



Work Helps People Afford to Live Independently



Work Helps People Afford a Social Life



Work Builds Self Advocacy Skills



So Where Are We On Employment?

Current State of Day Service Systems

- Many states have “Employment First” policies (on paper) or initiatives. YET
- Only 19% of people receiving IDD day services receiving integrated employment services
 - This is DOWN from a peak of 25% in 2001
 - For those working, it is often for very limited number of hours
- Only 11% of state IDD funding for day services goes towards competitive integrated employment; the remainder largely goes to congregate, facility-based day programs

The Opportunity for Change is Now

States should be seriously focusing on increasing opportunities for competitive integrated employment through implementation of:

- The HCBS Settings rule
- The ADA & Olmstead
- Workforce Innovation and Opportunity Act (WIOA)
- Federal hiring of people with disabilities (Section 501 and 503)

CMS' HCBS SETTINGS RULE

Opportunities Created by the HCBS Settings Rule

- Expand capacity of more integrated and individualized services
 - Including competitive integrated employment
- Transformation of more segregated service models
 - Including sheltered workshops and facility-based day habilitation programs
- Help states comply with their obligations under *Olmstead* including around employment

Characteristics of Home and Community Based Settings

An outcome oriented definition that focuses on the nature and quality of individuals' experiences, including that the setting:

1. Is **integrated in and supports access to the greater community**;
2. Provides **opportunities to seek employment and work in competitive integrated settings**, engage in community life, and control personal resources
3. Is selected by the individual from among setting options, **including non-disability specific settings**

HCBS Setting Characteristics (cont'd)

4. Ensures the individual receives services in the community to the **same degree of access** as individuals not receiving Medicaid HCBS
5. Ensures an individual's rights of **privacy, dignity, respect, and freedom from coercion and restraint**
6. Optimizes **individual initiative, autonomy, and independence** in making life choices
7. Facilitates **individual choice** regarding services and supports, and who provides them

States Must Assess and Categorize All Settings

- 1) Meets all requirements of Rule (or can with modifications)
- 2) Can never meet requirements because it is an institution (nursing home, ICF, IMD or hospital)
- 3) Is presumed institutional
 - Setting is unallowable unless a state can provide through a “heightened scrutiny” process that the setting overcomes the institutional presumption and meets the rules’ requirements

Presumptively Institutional Settings

- Settings in facilities providing inpatient institutional services
- Settings on the grounds of, or adjacent to, a public institution
- Settings that **have the effect of isolating HCBS recipients from the broader community**. Characteristics may include:
 - Designed specifically for PWD or with specific disabilities
 - Comprised primarily of PWD and staff providing services
 - PWD are provided multiple types of services onsite
 - PWD have limited interaction with the broader community
 - Use restrictive interventions

CMS Guidance Re Non-Residential Settings

- Although facility and site-based day service settings are not per se prohibited, **they must be closely examined and may be unallowable “settings that isolate”**
 - States can to limit or even prohibit facility or site-based day services
 - Pre-vocational services need not be site-based settings; may be offered in the community

CMS Guidance Re Non-Residential Settings

- Day services on/adjacent to private institutions not per se unallowable but may be “settings that isolate” (ones on/adjacent to public institutions are presumptively institutional)
 - States can set higher standards and prohibit all day service settings on the grounds of any institution

CMS “Exploratory Questions” Regarding Non-Residential Settings

- Lays out specific questions regarding each required HCBS characteristic that states may (but are not required) to use in their assessment of non-residential settings
 - Questions include ones about geographic location, access to the broader community and transportation, opportunities for employment, and choice of non-disability specific settings
 - For employment settings, do they “provide individuals with the opportunity to participate in negotiating his/her work schedule, break/lunch times and leave and medical benefits with his/her employer to the same extent as individuals not receiving Medicaid funded HCBS?”

CMS “Exploratory Questions” Regarding Non-Residential Settings (cont’d)

- The nature of day services (clinical/medical vs. rehabilitative vs. employment) as well as the duration (i.e., short-term vs. long-term services) may impact how to comply with the rules
- Whether the “right” service is being provided:
 - “For individuals seeking supports for competitive employment, the state should consider whether the right service is being appropriately provided to achieve its goal, including the duration of the service and the expected outcomes of the service, or whether the provision of a different type of service would more fully achieve competitive employment in an integrated setting for the individual”

CMS “Exploratory Questions” Regarding Non-Residential Settings (cont’d)

- The “right” service (cont’d):
 - Referencing the Sept. 2011 CMS guidance that clarifies:
 - The **expected outcome of prevocational services is competitive, integrated employment** in the community at or above minimum wage.
 - Prevocational services are not a pre-requisite for supported employment services, and they **must be time limited**.

Some Day Service Settings Will Need to Be Closely Examined

- As recognized in several state transition plans, some day service settings may have trouble meeting the HCBS characteristics required by the rules and/or may be presumptively institutional “settings that isolate” including:
 - Facility-based day programs
 - Pre-vocational services in sheltered workshops
 - Day habilitation

Opportunities to Move State Systems Towards More Integrated Day Services

- Requirement for a choice of a “non-disability specific setting”
 - States must assess capacity and develop a plan for ensuring that people have an option of competitive integrated employment or integrated day activity

Opportunities to Move State Systems Towards More Integrated Day Services

- **Tiered standards** that allow states to “close the front door” to legacy programs and focus new capacity on more individualized and integrated services
 - Numerous states doing this with their sheltered workshops & day habilitation programs
- States aligning transition plan with **state goals and initiatives**
 - Employment first, *Olmstead* or WIOA initiatives

Pennsylvania's Statewide Transition Plan

- Status of Pennsylvania's transition plan:
 - State got initial approval on August 30, 2016 (review of regulations, licensing, provider manuals, etc.)
 - Next steps for final approval include individual site assessments & validation; developing remediation plans for non-compliant strategies; identifying presumptively institutional settings and process for determining if presumption overcome; beneficiary transition process; and ongoing monitoring
 - Updates to the plan must go back out for public comment – this is a great advocacy opportunity!

Pennsylvania's Statewide Transition Plan (cont'd)

- Guidance from CMS relevant to employment & day services:
 - 100% of settings must completely comply with the rules
 - All non-residential settings must be validated (including day habilitation, workplaces, and community settings)
 - All group settings must be assessed, including non-residential settings that provide prevocational services, group supported employment (crews & enclaves) & day habilitation

Pennsylvania's Statewide Transition Plan (cont'd)

- Guidance from CMS relevant to employment & day services (cont'd):
 - Must have a plan for increasing capacity of non-disability specific settings (this includes mainstream employment options)
 - Reverse integration strategies are not sufficient to meet the rule's requirement for community integration; hiring & recruiting non-disabled individuals is insufficient

Pennsylvania's Statewide Transition Plan (cont'd)

- PA's STP described for its DD system using tiered standards for:
 - Implementing different limits on the number of people who can receive services in different settings (both residential and non-residential)
 - Implementing different requirements about permissible locations for settings (both residential and non-residential)
- These tiered standards are being developed through service definitions and standards in the State's waiver renewals

Recent Updates from CMS: Extended Implementation Timeline

- March 15, 2017 letter from Sec. Price and Administrator Verma to states regarding Medicaid flexibility:
 - “In recognition of the significance of the reform effort underway, CMS will work toward providing additional time for states to comply” with the HCBS Settings Rule

Recent Updates from CMS: Extended Implementation Timeline

- March 15, 2017 Medicaid flexibility (cont'd)
 - “We will be examining ways in which we can improve our engagement with states on implementation of the HCBS settings rule, including greater state involvement in the process of assessing compliance of specific settings”
- Expect imminently guidance from CMS re extension of timeframe – likely just for implementation, not STP approvals

Recent Updates from CMS: Extended Implementation Timeline

May 9, 2017

- “Promoting Community integration remains a high priority for CMS” and “acknowledge the important work underway at the state level in implementing” the HCBS Settings Rule
- STPs for settings operating before March 17, 2014; meaning all new settings must comply with the rule (consistent with prior guidance)
- Final STP approval by original deadline of March 17, 2019
- Three extra years for implementation of STP to be “helpful to states to ensure compliance activities are collaborative, transparent & timely”
- CMS committed to ongoing TA to states & other stakeholders

Recent Updates from CMS (cont'd)

- Under Trump Administration, initial approvals have continued
 - 6 new approvals, bringing the total up to 28 states with initial approvals and 1 with final approval as of May 15, 2017
- Approval letters reiterate central HCBS themes/requirements:
 - Spot-checking states' systemic assessments for accuracy
 - State validation of provider self-assessments
 - Comprehensive site-specific assessments for all settings
 - Detailed plans for identification of settings with qualities that isolate
 - Beneficiary communication and ongoing monitoring/QA activities

**Application of the ADA & *Olmstead*
to Day Service Systems**

Title II of the ADA

- Prohibits discrimination by public entities in services, programs and activities
- Integration regulation requires administration of services, programs and activities **in the most integrated setting** appropriate
 - Most integrated setting is one that enables people with disabilities to **interact with people without disabilities to the fullest extent possible**

***Olmstead v. L.C.*: Unjustified segregation is discrimination**

- S. Ct. held that ADA prohibits unjustified segregation of PWD and that public entities are required to provide community-based services when:
 - Such services are appropriate;
 - Affected persons do not oppose community-based treatment; and
 - Community-based treatment can be reasonably accommodated, taking into account the resources available to the entity and the needs of others receiving disability services
- Applies to all facilities, services, or programs funded/designed by the state, not just those directly operated by the state

What is an Integrated Setting?

- Integrated settings provide people with disabilities the **opportunity to live, work and receive services in the greater community**
 - Located in mainstream society
 - Offer access to community activities when & with whom a person chooses
 - Choice in daily life activities
 - Ability to interact with people w/o disabilities to the fullest extent possible
- Example: supported employment in a mainstream job

What is a Segregated Setting?

- Have **institutional qualities**, including:
 - Congregate settings with primarily or exclusively people with disabilities
 - Regimentation in daily activities, lack of privacy/autonomy, limits on ability to freely engage in community activities
 - Settings that provide for daytime activities primarily with other people with disabilities
- Example: sheltered workshops and segregated day programs

Olmstead Application to Segregated Day Services

- ADA and *Olmstead* applies to **all types of services**, both residential and non-residential
 - Segregated setting under the ADA include those “that provide for daytime activities primarily with other people with disabilities”
 - Integrated settings under the ADA include those that provide people with disabilities the “opportunity to live, **work** and receive services **in the greater community**”
- Recent *Olmstead* litigation challenging states over-reliant on providing “employment-related services” in segregated settings (i.e., sheltered workshops) in Oregon and Rhode Island

Day-related *Olmstead* Litigation

- *Lane v. Kitzhaber/US v. Oregon*:
 - DOJ and private plaintiffs alleged Oregon violating *Olmstead* by over-relying on sheltered workshops, individuals remaining in workshops for long periods instead of moving to real work, and youth-to-workshop pipeline.
 - Court rejected Oregon’s argument that *Olmstead* limited to residential segregation and found *Olmstead* applies to all services, including employment-related service
 - Settlement includes providing supported employment services to people transitioning from, or diverted from, sheltered workshops and “closing the front door” to sheltered workshops

Day-related

Olmstead Litigation (cont'd)

- *US v. Rhode Island*:
 - DOJ alleged State violating *Olmstead* by over-relying on sheltered workshops and day habilitation, individuals remaining in workshops and day for long periods instead of moving to real work, and youth pipeline to segregated settings.
 - Expansion of supported employment placements to people currently in workshops and facility-based day programs and to students leaving high school
 - Benchmark of system average of at least 20 hours/ week of employment in integrated settings
 - Wraparound” integrated non-work day services (e.g., mainstream recreational, social, educational, cultural and athletic activities) so an opportunity for 40 hours of integrated day services per week
 - Development of a cross-agency Employment First policy (including schools)
 - Provider support: conversion trust fund, institute and TA

DOJ's October 2016 *Olmstead* Guidance on Employment

- Guidance broadly focuses on unnecessary segregation in non-residential services:
 - “The civil rights of persons with disabilities . . . are violated by unnecessary segregation in a wide variety of settings, including in segregated employment, vocational and day programs.”

DOJ *Olmstead*

Guidance on Employment (cont'd)

- “Integrated setting” under ADA aligns with WIOA definition for competitive integrated employment.
 - Interaction with people without disabilities, at or above minimum wage, and same opportunities for benefits and advancement
- “Segregated setting” under ADA include “settings that are managed, operated or licensed by a service provider to serve primarily people with disabilities who are supervised by paid support staff.”
 - Examples include sheltered workshops and enclaves

DOJ *Olmstead*

Guidance on Employment (cont'd)

- Factors to consider when evaluating if a state's system has sufficient capacity to offer opportunities for CIE:
 - Individualization of services: matching of a person's skills, abilities, and interests with a set of services and jobs; requires trained and experienced employment professionals
 - Amount, intensity and duration of services: receiving services that help people work for the maximum number of hours consistent with their preferences and skills; may require rebalancing of resources and performance based payments
 - Access to integration during non-work hours: Integrated day services as a wraparound and to increase employment outcomes

DOJ *Olmstead*

Guidance on Employment (cont'd)

- Evidence that people in segregated settings can work includes:
 - Employment first policies that presume employability
 - People with similar needs are working with supports
 - History of employment
- Informed choice requires active engagement, including:
 - Information, assessments, discovery, job exploration, peer-to-peer mentoring, visits, benefits counseling
 - Must take affirmative steps to address the history of people being told they cannot work and/or that the segregated setting is their only option

DOJ *Olmstead*

Guidance on Employment (cont'd)

- ADA applies to people at serious risk of segregation including youth transitioning from school
- Remedies for *Olmstead* violations (similar to OR and RI):
 - Expansion of supported employment services, as measured by “indicators of integration” (interaction with people w/o disabilities, # hour working, parity in wages and benefits)
 - Systemwide capacity building, including adequate rates and provider transformation
 - In-reach to people in segregated settings

DOJ *Olmstead*

Guidance on Employment (cont'd)

- Components of Olmstead plan
 - Concrete, reliable and specific commitments re moving people from segregated day settings to CIE
 - Must include funding to support the plan (can be reallocation)

DOJ *Olmstead*

Guidance on Employment (cont'd)

- *Olmstead* applies to all types of segregated day services
 - *Olmstead* may be violated when people spend part of their day in SW and part in day hab, or all of their day in segregated day program
 - “Public entities cannot evade their *Olmstead* obligations by limiting access to one segregated setting while moving individuals into a different segregated setting” (e.g., cease referrals to sheltered workshops but instead move people to day habilitation programs)

WORKFORCE INNOVATION AND OPPORTUNITY ACT

Workforce Innovation and Opportunity Act

- Goal is to increase employment of people with disabilities in integrated employment settings; attempts to significantly limit the use of 14(c), particularly for transition-age youth:
 - **Defines and prioritizes integrated employment** as work at or above minimum wage, with wages and benefits comparable to people without disabilities and fully integrated with co-workers without disabilities
 - **Limits use of sub-minimum wage.** Requires anyone under 24 to explore and try integrated employment before they can be placed in a sub-minimum wage setting; prohibits schools from contracting with sub- minimum wage providers; and requires at least annual engagement of anyone in sub-minimum wage setting

WIOA (cont'd)

- Additional relevant provisions to increase access to integrated employment for people with disabilities:
 - Requirement for formal cross-agency cooperative agreement between voc. rehab., state IDD agency, and Medicaid agency
 - Requirement that at least 15% of voc. rehab. funds be used for pre-employment transition services
 - Definition of supported employment clarified to make clear that it is integrated, competitive employment
 - Post-employment support services extended from 18 to 24 months
 - Requirement that at least half of supported employment state grant funds used to youth (up to age 24) with most significant disabilities
- Recent final rules from DOL and DoEd

WIOA Advisory Committee

- Created **Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities**
 - Representatives include federal agencies (DOL, CMS, SSA, RSA), providers, national experts, representatives from national disability advocacy groups, and self-advocates
 - Charged with making recommendations about way to increase competitive integrated employment for people with significant disabilities and about use of 14(c) certificates for subminimum wage
 - Final report with findings, conclusions and recommendations sent to Congress and the US Labor Secretary September 15, 2016

WIOA (cont'd)

- Highlights of recommendations in Report:
 - **Overall capacity building:** aligning federal policy, practice and funding to prioritize and incentivize CIE and improving quality through development of uniform outcome measures
 - **Capacity building for youth:** increasing early work experiences, postsecondary education opportunities, and creating family expectations for competitive integrated employment (CIE)
 - **Capacity building through changes in use and oversight Section 14c:** aligning with modern federal disability policy by considering well-planned phase out of the program as a result of increasing CIE; short-term increased oversight and monitoring and better data

WIOA (cont'd)

- **Building capacity in the marketplace:** employer and business models to promote hiring of PWD and building better partnerships between businesses, providers and gov't programs
- **Capacity building in specific federal agencies:** addressing real and perceived disincentives to employment caused by concerns about loss of benefits, guidance on integrated day and wraparound services; and expanding ticket to work to youth
- **Increasing competitive integrated employment in the AbilityOne program:** reforming the program to align with federal disabilities policy and emphasize CIE; improved oversight of the program (including addressing real or perceived conflicts of interest)

The Future: Threats and Opportunities

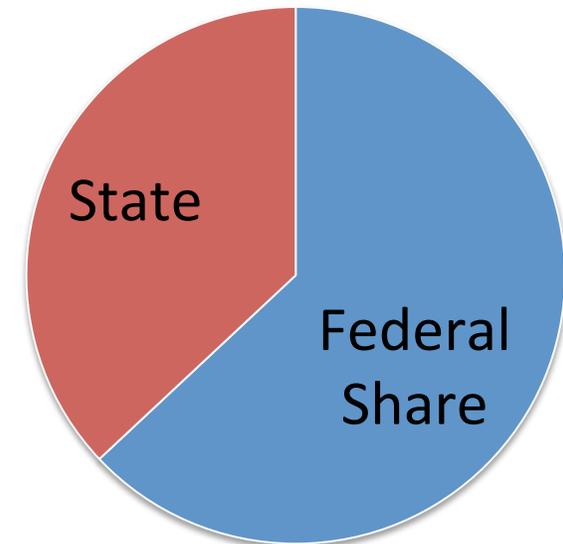
Concerns: Healthcare and Medicaid Reforms

- The House has passed the American Healthcare Act and the Senate is now considering it
- Because Congress is using a vehicle called “budget reconciliation,” it must reduce the deficit
- Huge cuts to Medicaid were included as the primary “pay for” to repeal the revenue-side provisions of the ACA
- House version of the AHCA proposed **per capita caps** for Medicaid & an option to block grant Medicaid for some populations (not people with disabilities)

Medicaid's Current Structure

- Federal government and states share actual costs of coverage
- Feds pay on average 63%
- Different matching rates by state (50 to 75%)
- Some services or populations incentivized with higher match
 - Ex: Community First Choice Option that some states are using in their IDD systems gives an extra 6% match; Money Follows the Person 100% of costs covered for 1st year someone moves from an institution to the community

Actual Costs



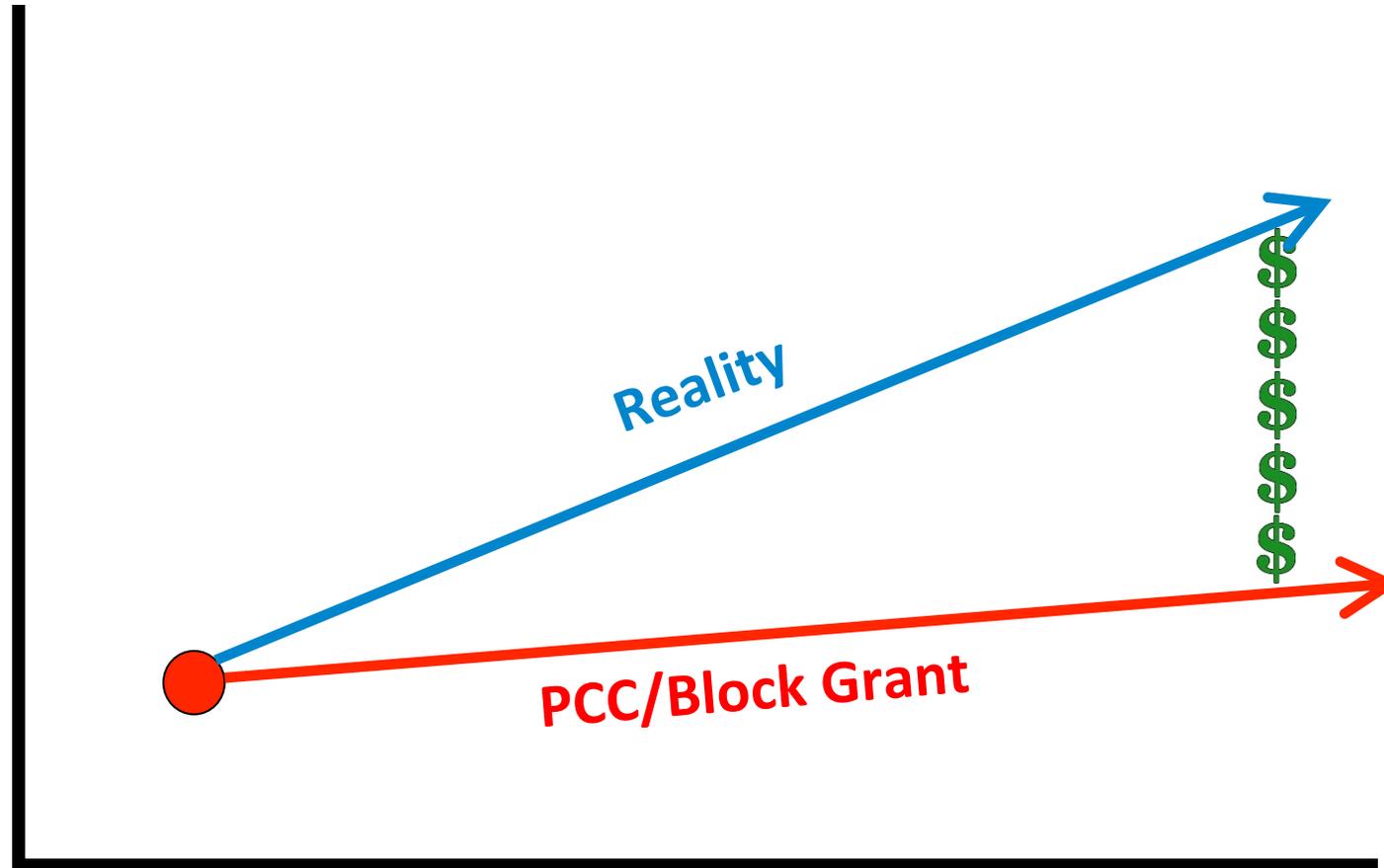
Per capita caps

- AHCA proposes a **per capita cap**, a funding formula for federal \$ based on the # of enrollees, not actual spending.
- AHCA proposes to set a baseline of 2016 spending & use a growth index **that increases much more slowly than Medicaid spending**

Per capita caps (cont'd)

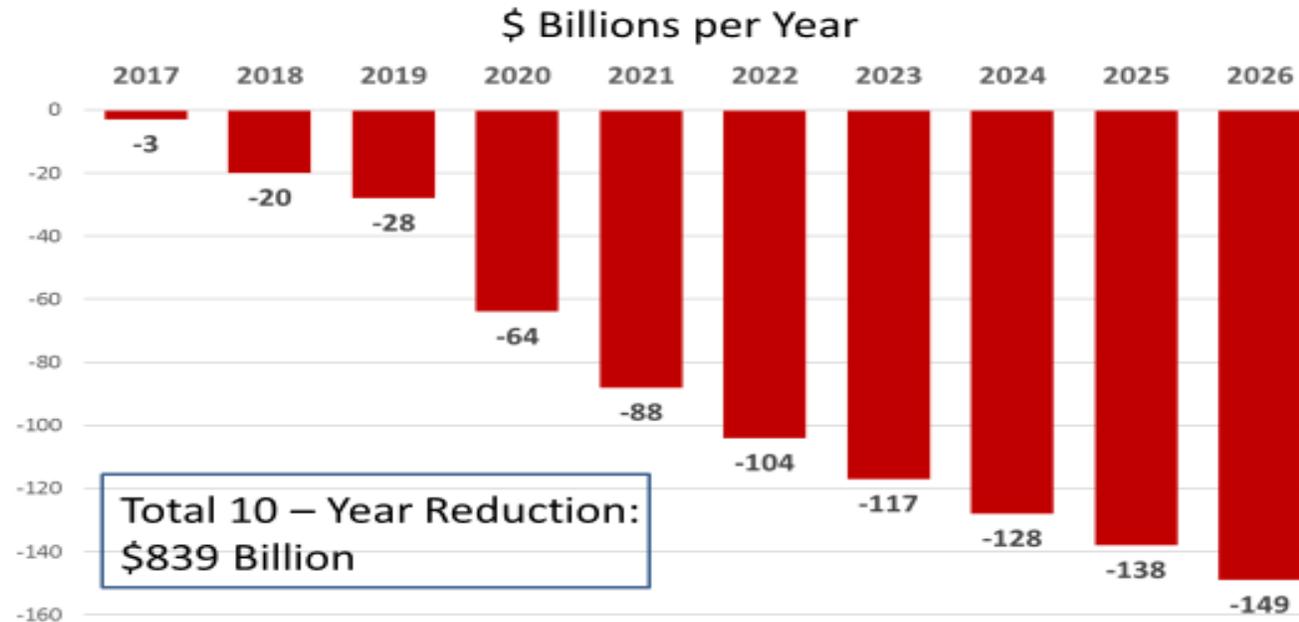
- Last version of the AHCA proposed using a medical CPI plus 1% for people with disabilities
 - But negotiations in the Senate around potentially decreasing the growth rate
- Ultimately PCCs make federal funding gap *grow* every year
- This means that states budget shortfalls in their Medicaid programs increase each year.

From bad to worse



Congressional Budget Office: Over \$800 billion cut in federal Medicaid spending

Figure 1: AHCA *Dollar* Cuts in Federal Medicaid Payments to States, 2017 - 2026

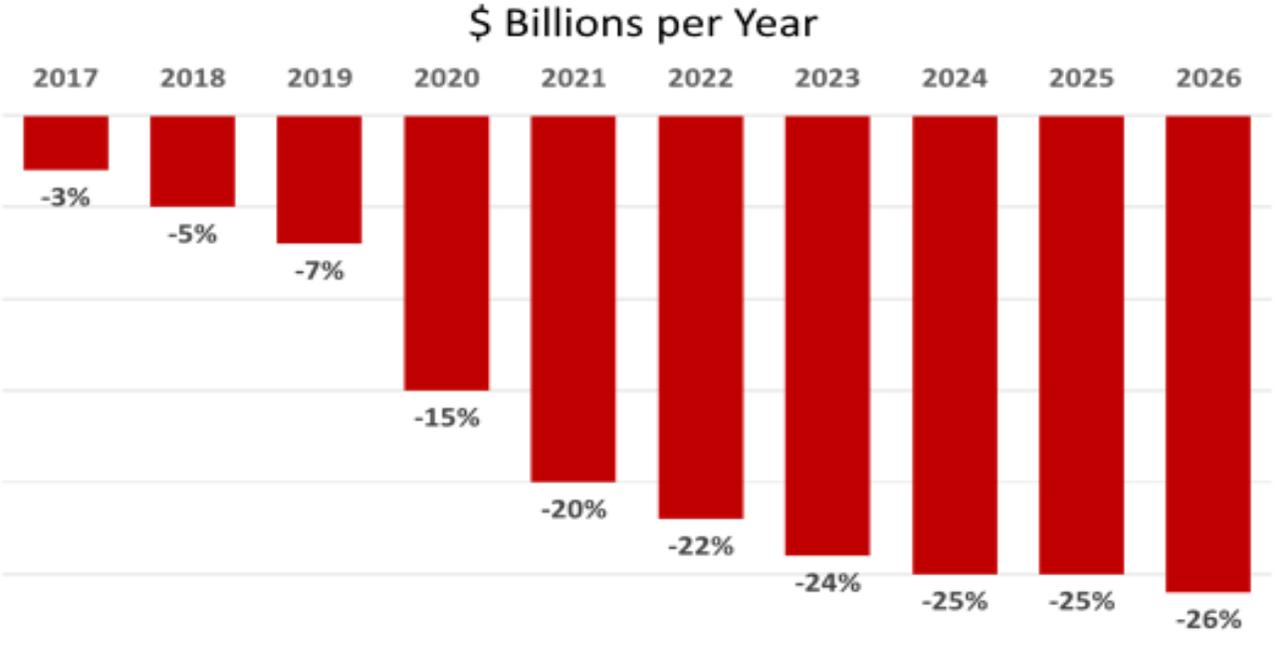


Source: HMA, based on CBO letter to House Speaker Paul Ryan, March 23, 2017

HEALTH MANAGEMENT ASSOCIATES

Cuts in Federal Medicaid Funds to States

Figure 2: AHCA: *Percentage* Cuts in Federal Medicaid Payments to States, 2017 - 2026

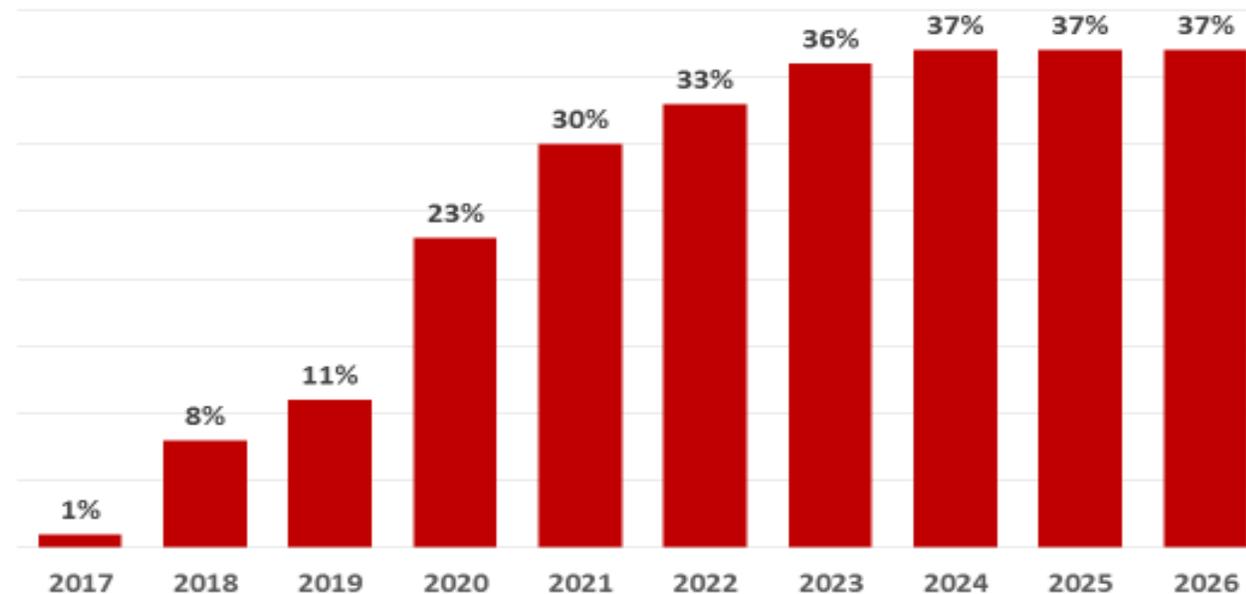


Source: HMA, based on CBO 2017 Medicaid Baseline and CBO letter to House Speaker Paul Ryan, March 23, 2017

HEALTH MANAGEMENT ASSOCIATES

What It Will Cost for States Just to Maintain the Status Quo

Figure 3: *Percentage Increase in State Funds Needed to Maintain Current Medicaid Program, With AHCA Cuts to Federal Funds, 2017 - 2026*
\$ Billions per Year



Source: HMA, based on CMS projections 2017, CBO 2017 Medicaid Baseline and CBO letter to House Speaker Paul Ryan, March 23, 2017.

HEALTH MANAGEMENT ASSOCIATES

Impact of Medicaid PCCs on Employment

- Approximately 70% of funding for employment and day services comes from Medicaid
- As state Medicaid budget shortfalls grow through PCCs, states may:
 - **Cut services** (esp. “optional” services like employment)
 - **Totally eliminate optional services** (again like employment)
 - **Increase waitlists for services** (Many states already have thousands of people on waitlists for HCBS)
 - **Decrease provider rates**

Potential Rollback of Medicaid Through Agency Action

- Last month, HHS Secretary Price and CMS Administrator Verma issued letters to Governors re “Medicaid flexibility”
 - They invited states to submit 1115 waiver proposals
 - Letter made clear that even if Congress does not pass the AHCA, they will attempt to allow states to make as many changes as they want to their Medicaid programs
 - Since the letter, states are now submitting proposals for Medicaid work requirements, drug testing, and block grants
 - BUT HHS’s waiver authority is limited and must further the goals of the Medicaid statute

Uncertainties: Federal Agency Priorities and Regulations

- Will federal agencies continue to play an active role in enforcement of disability laws, like the ADA?
 - Even if not, private plaintiffs can still bring private lawsuits
 - And legal precedents created in courts continues
- President Trump has issued an executive order regarding federal regulations. What will that mean?
 - Vast majority of regulations can only be repealed through formal rulemaking progress (including HCBS settings rule & home care rule)
 - Some recent regulations (done in last 60 legislative days) were repealed by Congress through the Congressional Review Act

Potential Opportunities

- Employment has historically been bi-partisan
 - WIOA, ADA, IDEA – all passed with significant bi-partisan majorities
 - TIME Act & Transitions to Independence – both had Republican sponsors/co-sponsors
- President Trump ran on a platform focused on employment
 - It will be critical to ensure that people with disabilities are included in any employment initiatives

Take Aways

- We have made steady progress towards integration and inclusion over the last several decades, across Democratic and Republican administrations.
- Recent laws and policies have added momentum and creates opportunities for state-level changes, esp around employment.
- But there are threats on the horizon, including potential significant cuts and restructuring of Medicaid.
- **Advocate, advocate, advocate!!!** Stakeholders must have a voice and can influence the direction of federal policies and how they are implemented at a state level.

Resources

- HCBS Settings Rule resources:
 - www.hcbsadvocacy.org (sponsored by national disability orgs)
 - www.medicaid.gov/hcbs (Centers for Medicare & Medicaid Services)
- Medicaid and AHCA resources
 - www.protectourmedicaid.org (includes links to other resources)
 - www.familiesusa.org
- Olmstead resources: www.ada.gov/Olmstead (DOJ)
- WIOA Resources
 - <https://www.dol.gov/odep/topics/wioa.htm> (Department of Labor)

QUESTIONS?