

January 17, 2017

Memorandum

To: Villa de Vida

From: Caroline Brown, Philip Peisch, and Shruti Barker

Re: Legal Vulnerabilities of CMS's Regulation of Home- and Community-Based "Settings"

I. Executive Summary

We have been asked to identify potential legal challenges to the regulations and subsequent guidance documents issued by the Department of Health and Human Services' (HHS) Centers for Medicare & Medicaid Services (CMS) that redefine the "settings" in which individuals may live to receive certain Medicaid home- or community-based services (HCBS). Specifically, you have asked us to evaluate whether CMS can lawfully exclude individuals living in "intentional communities" designed to support individuals with disabilities from receiving Medicaid HCBS services.

We believe that both the regulations and subsequent CMS guidance can be challenged as exceeding CMS's authority. The effect of the regulations is to limit the choices of living situations for individuals with disabilities, and to replace the preferences of individuals, families and guardians with the preferences of CMS as to which setting best suits the needs of a particular individual.

As set forth below, we believe that CMS has exceeded its statutory authority in the manner in which it has regulated HCBS settings:

- First, Congress never intended for the Secretary to exclude settings that are not excluded by the statute. The statute itself excludes only services provided in hospitals, nursing facilities, and intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs) from reimbursement under the HCBS waiver programs. Nothing in the statute gives the Secretary authority to create additional exclusions. The statute prohibits reimbursement for "room and board," yet the new regulations and guidance extensively regulate a waiver enrollee's living situation.
- Second, CMS's policy to effectively exclude individuals living in "intentional communities" is inconsistent with the text of the regulation and with the comments to the proposed regulation related to consumer choice.

- Finally, even assuming that the regulations can be upheld as validly promulgated and consistent with the statute, CMS's elimination of choice for waiver enrollees is in conflict with the Americans with Disabilities Act (ADA) and the Fair Housing Act.

For all of these reasons, there is a strong basis for challenging CMS's settings regulations and policies.

II. Congress Did Not Give CMS the Authority to Exclude Settings That Are Not Excluded By the Statute

Since 1981, Section 1915(c) of the Social Security Act (SSA) has authorized the issuance of waivers for the provision of HCBS to individuals who "but for" the provision of such services would require the level of care provided by a hospital, nursing facility (NF) or intermediate care facility for individuals with intellectual disabilities (ICF/IID). Section 6086 of the Deficit Reduction Act of 2005 (DRA) added Section 1915(i) to the SSA, to give states the option of offering HCBS through the state's Medicaid state plan, instead of applying for a waiver. In 2010, the Affordable Care Act added Section 1915(k) to the menu of options under which a state may choose to provide HCBS. On January 16, 2014, CMS published a final rule governing the settings in which recipients of Section 1915 services may live. 79 Fed. Reg. 2,948 (Jan. 16, 2014). The rule applies to individuals receiving services under any of the three Section 1915 authorities, 1915(c), 1915(i), or 1915(k). The rule is codified at 42 C.F.R. § 441.301(c)(4)-(5).

"[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986). Courts must "examine the nature and scope of the authority granted by Congress to the agency," *id.*, to determine whether the agency has "stayed within the bound of its statutory authority." *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). If "Congress has explicitly left a gap for the agency to fill," this is considered "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron USA, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). If Congress did not delegate authority to the agency, either expressly or by the use of ambiguous terms requiring interpretation, then the agency's regulations exceed agency authority and are invalid. See *Utility Air Regulatory Group v. EPA*, 123 S. Ct. 2427, 2447 (2014); *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990); *NLRB v. Fin. Inst. Employees of Am., Local 1182*, 475 U.S. 192, 204 (1986).

CMS has not attempted to explain the authority that would support its settings rules as applied to Section 1915(c) waivers. Section 1915(i) requires services to be provided in a "noninstitutional setting," and Section 1915(k) requires that they be provided in a "home and community based setting." Section 1915(c), however, does not require that individuals receiving HCBS be living in any particular type of "setting," and "where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998). Nor does anything in the statute indicate that Congress contemplated that Sections 1915(c), (i), and (k) would be interpreted in tandem. To the contrary, Section 1915(i)(4) states that "[n]othing in this subsection shall be construed as affecting the option of a State to offer [HCBS] under a waiver under subsection (c) . . . of this section."

Presumably, in regulating home- and community-based *settings*, CMS is relying on its authority to define home- and community-based *services*. The statute directly gives the Secretary the authority to define services, by repeated references to such services “as the Secretary shall approve.” However, the settings rule does not define the *services* provided under the waiver, but instead identifies (and limits) the *individuals* who may receive Medicaid-funded service, based on where they live. In fact, in the ANPRM, CMS expressly acknowledged that it tried to regulate settings through the definition of HCB services, and was unsuccessful. *See* 74 Fed. Reg. 29,453, 29,455 (June 22, 2009) (“For some years, we have attempted to address this problem indirectly through our review of State service definitions for HCBS, with limited success. . . . Through this ANPRM, we are announcing our intention to propose to affirmatively identify expectations for characteristics of home and community-based settings.”).

Nor does Section 1915(c) implicitly give CMS the authority to dictate the settings in which Medicaid beneficiaries live. Section 1915(c) already expressly identifies the three settings in which waiver services are not available: hospitals, nursing facilities, and ICFs/IID. For forty years, CMS interpreted this provision to mean that individuals not residing in one of these three institutional settings qualified for waiver services. *See* § 441.301(a)(3)(b) (2014) (waiver services may be provided “[o]nly to beneficiaries who are not inpatients of a hospital, NF, or ICF/IID”). There is no ambiguity as to what the statutory reference to these three institutions means, nor is there any catchall language like “such other settings as the Secretary may identify.” *Compare* SSA § 1902(a)(24) (requiring certain consultative services to hospitals, nursing facilities, home health agencies, clinics, laboratories, “and such other institutions as the Secretary may specify”); SSA § 1905(h) (referring to services provided in an inpatient psychiatric hospital or “in another inpatient setting that the Secretary has specified in regulations”); *see also* § 1902(a)(70) (listing certain modes of transportation “and such other transportation as the Secretary determines appropriate”); § 1902(a)(i) (website must contain “such other information that . . . the Secretary considers useful”); § 1905(bb)(2) (referring to specified smoking cessation services “and such other services that the Secretary recognizes to be effective”); § 1915(c)(4)(B) (referring to “such other services . . . as the Secretary may approve”); *id.* § 1915(d)(e)(1)(A) (“such other services . . . as the Secretary may approve”).

The statute does not support an inference that Congress intended to delegate authority to CMS to regulate an individual’s living situation (other than through the three excluded institutions). That is because Congress largely excludes “room and board” from the definition of home and community based services, with a limited exception for costs attributable to an unrelated personal caregiver who is residing in the same household. Yet, limiting Section 1915(c) services to individuals living in certain settings directly regulates “room” and “board.” For example, if an individual chooses to live in a “provider owned or controlled” residence, he or she must inhabit “a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services”; must have “the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity;” must “have the freedom to furnish and decorate their living units” and must “control their own schedules and activities, and have access to food at any time.” § 441.301(c)(4)(vi)(A). CMS guidance documents go into even greater detail by asking whether, individuals “use disposable cutlery, plates, and cups,” whether they “have access to such things as a television,” or whether they, “converse with others during meal times.”

Finally, CMS's regulation of settings is inconsistent with Section 1915(c)'s goal to promote individual choice, *see* § 1915(c)(2)(C). The regulations limit that choice by excluding residences that CMS does not consider to be adequately home- and community-based. Thus, the individual or family's choice is replaced by CMS's choice as to the type of community in which an individual should reside. This runs counter not only to the statutory language, but also to CMS's initial observation, in the 2008 rulemaking for 1915(i), that "a residence . . . may be homelike and community-integrated for one individual but may not be for another individual." 73 Fed. Reg. 18,684, 18,685 (Apr. 4, 2008).

For the foregoing reasons, based on a reading of Section 1915(c) as a whole, Congress did not delegate authority to the Secretary to limit the individuals receiving HCBS to those living in settings approved by the CMS.

III. Even if Congress Delegated Authority to Define Settings in Regulation, the Treatment of Disability-Specific Housing is Arbitrary and Capricious

Although it suggested otherwise in its final rule, CMS has effectively prohibited waiver services for individuals living in disability-specific housing. CMS's settings regulation provides that a "setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed" to be institutional "unless the Secretary determines through heightened scrutiny . . . that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings." § 441.301(c)(5).

In post-regulatory guidance, CMS announced that settings designed for people with disabilities, as well as gated or secure communities, are to be considered a "setting that has the effect of isolating individuals" and therefore automatically subject to heightened scrutiny, regardless of the specific characteristics of the setting. Specifically, CMS stated that settings "designed specifically for people with disabilities," and settings where the residents "are primarily or exclusively people with disabilities and on-site staff provides many services to them," are "isolating." CMS, *Guidance on Settings that Have the Effect of Isolating Individuals Receiving HCBS from the Broader Community*, available at <https://www.medicaid.gov/medicaid/hcbs/downloads/settings-that-isolate.pdf> (Mar. 17, 2014). With respect to gated or secure communities, CMS stated its view that "individuals receiving HCBS in this type of setting often do not leave the grounds of the gated community in order to access activities or services in the broader community" and "the setting typically does not afford individuals the opportunity to fully engage in community life and choose activities, services and providers that will optimize integration into the broader community." *Id.*

Although technically a "setting that isolates" may still survive "heightened scrutiny," CMS's process for such review makes it very unlikely that states will be willing to make the application. Once heightened scrutiny is triggered, the rules place a tremendous burden on state regulators to petition CMS to permit continued reimbursement for services provided to individuals in the disability-specific housing, including by collecting and submitting voluminous documentation, conducting a site visit, soliciting client surveys, obtaining photographs, establishing public transportation routes, etc. Not surprisingly, the path of least resistance for many states will be to prohibit reimbursement for disability-specific settings, even if they would have been a preferred choice for many waiver recipients, and even if the settings exhibit the

qualities of home- and community-based settings and not institutions. Further, CMS has effectively ensured that no further disability-specific housing complexes will receive financing to be built in the future, because of its guidance expressing skepticism that individuals living in such a complex will qualify for waiver services.

Under the APA, a court will “hold unlawful and set aside” any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” § 706; see, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). “At base, arbitrary and capricious review functions to ‘ensur[e] that agencies have engaged in reasoned decisionmaking.’” *Atrium Med. Ctr. v. HHS*, 766 F.3d 560, 567 (6th Cir. 2014) (quoting *Judulang v. Holder*, 132 S.Ct. 476, 484 (2011)).

Even if CMS has the authority to regulate settings, we believe its actions effectively eliminating disability-specific housing as a choice for individuals desiring Medicaid-funded services are arbitrary and capricious.

A. CMS’s Treatment of Disability-Specific Housing is Inconsistent with the Text of the Regulation

CMS’s post-regulation guidance requiring States to apply heightened scrutiny to disability-specific housing purports to be interpreting the regulatory language regarding which settings are isolating and therefore subject to heightened scrutiny. While an agency is generally entitled to substantial deference in interpreting its own ambiguous regulations, deference is unwarranted when “the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question.’” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2014) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)); see also *Perez v. Loren Cook Co.*, 803 F.3d 935, 939 (8th Cir. 2015).

CMS should not be entitled to deference in its interpretation of its setting regulations because it “does not reflect the agency’s fair and considered judgment on the matter in question.” As explained in the following section, there was significant opposition to CMS’s regulatory proposal to categorically deny funding for services to individuals living in disability-specific settings, on the ground that it eliminated choice for waiver recipients. After careful consideration of these comments in the rulemaking process, CMS eliminated the categorical treatment of disability-specific settings. In the months that followed, however, CMS effectively reversed that decision through sub-regulatory guidance, without any indication that it carefully considered facts relating to disability-specific housing or the implications of denying Section 1915(c) services to individuals who live in that type of housing. For example, in the sub-regulatory guidance, CMS did not cite any facts on which it bases its conclusion that disability-specific housing has “the effect of isolating.”

Even if CMS’s position is entitled to the deference accorded a carefully considered regulatory interpretation, that deference is not absolute. Rather, courts will reject any agency interpretation that “is ‘plainly erroneous or inconsistent with the regulation.’” *Christopher*, 132 S. Ct. at 2166 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); accord *Perez*, 803 F.3d at 939; *Linares Huarcaya v. Mukasey*, 550 F.3d 224, 288-29 (2d Cir. 2008).

CMS's position on disability-specific housing is inconsistent with its own regulations, in two respects.

First, CMS's position is inconsistent with the regulations' instructions that heightened scrutiny shall apply only to settings that actually "have the effect of isolating." Rather than having state regulators review whether a particular setting actually has such an effect on a case-by-case basis, CMS's post-regulatory guidance sweeps broadly, targeting particular types of residential settings that CMS believes "often," "typically," "may," and "generally" may have such an effect. Even disability-specific settings that do not have the "typical" and "general" characteristics that CMS has identified as a concern are subject to the heavy burdens of heightened scrutiny.

By applying the regulation to broad residential categories based on characteristics that CMS believes (without citing any evidence) "typically" and "often" isolate, CMS recreates the categorical approach to disability-specific housing that the final rule expressly rejected in response to public opposition. If CMS had intended for disability-specific housing to be presumed to be isolating – as the post-regulatory guidance indicates – it would have included them in the list of settings that are presumed to have "qualities of an institution." See § 441.301(c)(5)(v) (providing that the following settings "will be presumed to be a setting that has the qualities of an institution": "Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution").

Second, CMS's position is inconsistent with the regulation's treatment of "integration" and "isolation." CMS's regulation does not say that heightened scrutiny is triggered when an individual with a disability is not "integrated into the broader community," but rather when a setting isolates "individuals *receiving Medicaid HCBS* from the broader community of individuals *not receiving Medicaid HCBS*." In other words, CMS's regulation focuses not on the disability only, but on the payor for services (Medicaid). The post-regulatory guidance appears to assume that all individuals living in disability-specific housing are "receiving Medicaid HCBS," and all individuals in the "broader community" are not receiving HCBS. But not all individuals with disabilities receive Medicaid, and many disability-specific housing complexes will continue to house a majority of private-pay residents who do not receive Medicaid-funded services.

B. CMS's Treatment of Disability-Specific Housing Is Not Supported By the Administrative Record

Under the APA, agencies must "consider and respond to significant comments received during the period for public comments." *Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199, 1203 (2015), by "explain[ing] how the agency resolved any significant problems raised by the comments, and [] show[ing] how that resolution led the agency to the ultimate rule." *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1470 (7th Cir. 1985). The opportunity for public comment "is meaningless unless the agency responds to significant points raised," *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983), and a failure to address comments or set forth specific justifications precludes any meaningful review by the court, because it does not allow the court "to see what major issues of policy were ventilated by the

informal proceedings and why the agency reacted to them as it did.” *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 25 (D.C. Cir. 1977).

There was significant opposition to CMS’s proposed rule to categorically deny funding for services to individuals living in “disability-specific” settings, as eliminating choice for waiver recipients. Several commenters recommended the regulation be revised to remove “disability specific housing complex” as a setting in which HCBS may not be provided. Among other things, the commenters argued that: people with disabilities should be able to choose to live in disability specific housing if the housing addresses their needs; the elimination of disability-specific housing will compromise a housing market already in crisis; and there are significant differences between disability-specific housing and an institution. 79 Fed. Reg. at 2,973-74. In addition, “[m]any commenters” asserted that CMS’s proposal “would eliminate or severely restrict [HCBS] to residents with disabilities in supported living arrangements authorized under and meeting the requirements of HUD Section 811 and Section 202 multi-family housing units, because the homes built under HUD Section 811 or 202 are specifically restricted to people with specific disabilities.” *Id.* at 2,973.

CMS responded to these numerous comments by stating that it was removing the categorical treatment of “disability-specific housing” and instead providing that “any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS” and requiring an isolating setting to undergo “heightened scrutiny” to determine if it has the “qualities of an institution.” *Id.* at 2,974.

CMS’s post-regulatory guidance completely disregards the comments on the proposed rules and the regulatory changes CMS made in response to those changes. The comments focused on the fact that including disability-specific housing would eliminate consumer choice and be an unwarranted restriction of housing options. CMS’s regulations purport to respect such choice. But CMS’s post-regulatory guidance eliminates that choice by instructing states to apply “heightened scrutiny” that, in effect, is likely to be the equivalent of an absolute prohibition, because it creates a tremendous amount of work for states seeking to qualify individuals.

To the extent that CMS believed that settings that may “isolate” individuals with disabilities from the “broader community” should be subject to “heightened scrutiny,” the standard should not be whether those settings satisfy CMS’s preference as to where individuals should be living, but rather whether it is the preference of the *individual receiving services*. As written, the “heightened scrutiny” regulations give no weight to the choice of the individual consumer or his or her family or guardian, even though a founding purpose of Section 1915(c) waivers was to provide greater choices to individuals with disabilities, and the settings rules purport to honor such choice.

IV. The Regulations and Sub-Regulatory Guidance Are Discriminatory

In responding to comments on the proposed rule, CMS suggested that it was making modifications that would preserve the ability of individuals living in disability-specific housing. However, as explained above, its sub-regulatory guidance has all but made that an impossibility.

The Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA) each protect individuals from discrimination on the basis of their disability. States that implement CMS regulations and guidance in a manner that restricts the opportunity for individuals with disabilities to live in intentional communities may be violating both the ADA and FHA.

Courts have long recognized two core principles behind the ADA and FHA:

1. Provide clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities; and
2. Afford individuals with disabilities an equal opportunity to live in the dwelling of their choice.

While CMS's regulations claim to be supporting the goal of non-discrimination, its treatment of disability-specific settings in sub-regulatory guidance is not consistent with these two core principles. It could result in individuals with disabilities being denied services based on their decision to live with others with disabilities, or result in landlords capping the number of disabled residents who live in their housing complexes. *See* 28 C.F.R. § 35.130(e)(1) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept."); U.S. Dep't of Justice, A Guide to Disability Rights Laws (2009) (balancing the demographic makeup of a residence based on disability status is a violation of the Fair Housing Act); *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994) ("Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community."); *Tsombandis v. City of West Haven Conn.*, 129 F. Supp. 2d 136, 155 (D. Conn. 2001).

A. Legal Standard

Although the scope of the ADA and FHA are not co-extensive,¹ courts have applied identical legal standards to both statutes and have interpreted them "in tandem." *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1157 (9th Cir. 2013). The statutes have been applied broadly to strike down a variety of laws or policies that have a discriminatory intent or impact, including zoning regulations, and state or local health and safety laws. *Id.*

There are three ways to make a showing of discrimination under the ADA and FHA:

¹ The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The FHA prohibits discrimination "against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services of facilities in connection with such dwelling because of a handicap." 42 U.S.C. § 3604(f)(1). It also requires the Department of Housing and Urban Development (HUD) to administer its "programs and activities relating to housing and urban development in a manner affirmatively to further policies of this subchapter." 42 U.S.C. § 3608.

- 1) by proving discrimination in the form of disparate treatment or intentional discrimination;
- 2) by demonstrating that a law, practice, or policy has a disparate impact on individuals with disabilities; or
- 3) by demonstrating that the defendant failed to make reasonable accommodations in rules, policies, or practices so as to afford people with disabilities equal opportunities, including an equal opportunity to live in the home of their choice.

Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir. 1988), *aff'd* 488 U.S. 15 (1988).

B. Policies Restricting Disability-Specific Intentional Communities Constitute Discrimination Under the ADA and FHA

CMS's *de facto* prohibition on Medicaid services to individuals who live in disability-specific communities violates the ADA and FHA by explicitly treating individuals with disabilities differently than individuals without. In the past, courts have struck down policies that prohibited group homes for disabled individuals from operating within 2500 feet of another group home, *see, e.g. Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 952 (E.D. Wis. 1998), zoning ordinances that restricted the number of disability-specific group homes in certain residential zones, *see Pacific Shores Properties*, 703 F.3d at 1157, and limitations on the number of "unrelated" individuals that could live in a single home. *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 2d 683, 1183 (M.D. La 2013). Even local policies that seem "neutral" on their face have been rejected by both Congress and the courts, which have recognized that "neutral" policies aimed at restricting "congregate living arrangements" disproportionately affect disabled individuals, who are less likely to be able to live in the community without assistance, who are less likely to have families that are able to care for them in the community, and who often need to live in congregate settings to receive services efficiently. *Oconomowoc*, 23 F. Supp. 2d at 952; *Tsombandis*, 129 F. Supp. 2d at 155 (D. Conn. 2001); H.R. Rep No. 100-711, 100th Cong. 2d. at 24.

The fact that the settings rule was intended to promote integration and prevent segregation is not a defense to claims of discrimination.

First, "benign" or paternalistic justifications cannot provide a defense to an ADA or FHA claim that discriminates on face against individuals with disabilities. For example, in *Oconomowoc*, although "the state argue[d] that the spacing requirement protect[ed] disabled people by preventing them from being resegregated into enclaves of group homes," the court held that "benign intentions on the part of lawmakers cannot justify laws which discriminate against protected groups." 23 F. Supp. 2d at 952.

Second, the ADA focuses on individual choice and independence, and federal and state regulations limiting those choices based on an individual's disability status would not comport with the intent of the ADA. *See* § 35.130(e)(1)(1998) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept."); 28 C.F.R. pt. 35, App. A, p. 450 (1998) ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation."). In fact,

CMS's settings rules appear to contemplate that waiver enrollees should be provided a choice of both non-disability and disability-specific settings. See § 441.301(c)(4)(ii) ("The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting.").

Third, as a factual matter, limitations on intentional communities will not necessarily mean that residents will move into "more integrated" settings in the community. If applied as CMS apparently intends, the regulations and guidance run the risk of eliminating a range of previously available options between institutional settings and what CMS now considers to be an HCB setting. For example, individuals with severe behavioral issues may be able to live safely in disability-specific settings designed to accommodate their behavior, but not in private homes. Or, the cost of providing sufficient oversight, supervision and assistance in other settings (including transportation to medical providers who could otherwise be on-site) may exceed the cost of institutional care and thus not qualify for waiver funding. For individuals who are dependent on Medicaid-funded services, the alternative to disability-specific housing may not be a more integrated setting, but a move to an institutional setting, contrary to the intent of the ADA and *Olmstead v. LC*.

C. A Failure to Provide a Reasonable Exceptions Process to Overcome a Presumption of "Institutionality" Constitutes Discrimination under the ADA and FHA

The failure to provide a reasonable accommodation from state or local policies can separately be found to violate the ADA and FHA. Any accommodation process that requires intentional communities to provide evidence to overcome their presumed "institutional" nature must be both effective and reasonable in order to comport with the ADA and FHA standards. In *Pacific Shores Properties*, the Ninth Circuit struck down as unreasonable an administrative exceptions process that required "every group home . . . to submit a detailed application for a special use permit and/or reasonable accommodation in order to continue operating, and to attend public hearings at which those applications were subjected to public comment." 730 F.3d at 1165. The Court held that it unlawful discrimination to "subject individuals to the 'rigors of the governmental or administrative process' . . . with an intent to burden, hinder, or punish them by reason of their membership in a protected class." *Id.*

To the extent the heightened scrutiny process is unduly burdensome, unreasonable, or not effective in allowing appropriate settings to be deemed compliant with CMS's settings rule, it fails to meet the requirements for a reasonable accommodation.

V. Conclusion

For the foregoing reasons, we believe there is a strong basis on which to challenge CMS's setting regulations and the post-regulatory guidance as they apply to disability-specific housing.