

## **OPWDD ASSESSMENT OF PUBLIC COMMENT**

### **Site Based and Community Based Prevocational Services**

This document contains responses to public comments submitted during the public comment period for proposed regulations concerning site based and community prevocational services. OPWDD received comments from five provider associations and three providers of prevocational services.

Note: This assessment does not provide answers to questions submitted, as questions are not addressed through the regulatory comment process. Questions are being answered through other mechanisms (e.g. trainings and policy/guidance). This assessment does not respond to comments that did not directly address the proposed regulations

**Comment:** A provider association expressed concern about the prohibition of new enrollments into site based prevocational services in day training programs. The provider commented that this is an expansion of the existing requirement that prohibits new enrollments into sheltered workshops. The provider association commented that it has day training programs that are not sheltered workshops and that, on the operating certificate issued by OPWDD's Division of Quality Improvement, the sheltered workshop is certified as "day training/sheltered workshop." The provider association recommended that the regulation be amended to clarify that the prohibition only applies to day training programs that are sheltered workshops.

A provider association and a provider also requested clarification as to where site based prevocational services can be provided.

**Response:** OPWDD will issue an Administrative Memorandum (ADM) that will provide clarification on the prohibition of new enrollment into day training/sheltered workshops and on the location of site based prevocational services. Although OPWDD is promulgating the proposed regulations without changes, OPWDD may make clarifying changes in future proposed regulations.

**Comment:** A provider association and a provider suggested that OPWDD provide clarification that "site based" means only sites certified by OPWDD that primarily service individuals with disabilities.

**Response:** OPWDD confirms that for the purpose of delivery and reimbursement of prevocational services, "site based" means only non-residential facilities certified by OPWDD, as stated in the regulation.

**Comment:** A provider commented that the regulations do not contain any reference to compliance with the federal Home and Community Based Services (HCBS) Settings regulations. The provider suggested adding the following to the regulation: "All site based Prevocational Services must be provided in settings that do not have institutional qualities, and that optimize, but do not regiment, individual initiative, autonomy, and

independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact, and that do not isolate individuals from individuals not receiving Medicaid HCBS in the broader community.”

**Response:** OPWDD plans to reference compliance with federal HCBS Settings regulations in its ADM on site based and community prevocational services. OPWDD appreciates the suggested language from the provider and will consider using such language in its ADM.

**Comment:** A provider is requesting clarification regarding the provision that OPWDD approval for enrollment into site based prevocational services is not required for individuals enrolled in prevocational services at a site prior to July 1, 2015. The provider commented that it strongly objects to this provision if this provision means that people already in site-based prevocational service programs will be permanently “grandfathered in” to those programs. The provider commented that since the proposed requirements are new and substantially different from existing requirements, no “pro forma” review can be accepted. The site and service plan must be carefully scrutinized “de novo” and a written statement indicating compliance or noncompliance with federal HCBS settings and person-centered planning requirements should be issued. The provider recognizes that compliance with HCBS settings requirements is not required until October 1, 2018 and recommended making a change to the provision in the proposed regulation to add that the provision doesn’t go into effect until October 1, 2018.

**Response:** OPWDD clarifies that the provision of the regulation only applies to enrollment and that it is not meant to address the review of service delivery plans. Therefore, OPWDD is promulgating the proposed regulations without changes. OPWDD expects providers to comply with the requirements outlined for service delivery and documentation of service delivery beginning on the effective date of the regulations, July 1, 2015.

**Comment:** Two provider associations recommended deleting the requirement in regulation that, to participate in site based prevocational services, the individual must have a demonstrated or assessed earning capacity of less than 50 percent of the current state minimum wage, federal minimum wage or prevailing wage, whichever is greatest.

A provider association and a provider commented that it is unclear whether the requirement for earning capacity of less than 50 percent of the minimum wage applies to community prevocational services because it is not found in the proposed regulation for this service. Another provider association expressed that it is hopeful that omitting any restriction of eligibility for individuals whose earnings exceed 50 percent of the minimum wage suggests that OPWDD is trying to create ways for such individuals to become eligible for community prevocational services.

**Response:** In an effort to promote service delivery in the community under the new community prevocational service, OPWDD did not include a requirement for earning capacity of less than 50 percent of the minimum wage in regulations on community prevocational services. For this same reason, OPWDD does not intend to expand eligibility requirements for site based prevocational services to allow for individuals with a capacity that exceeds 50 percent of the minimum wage to participate in site based prevocational services. Consequently, OPWDD is promulgating the proposed regulations without any changes.

**Comment:** A provider association recommends a clarification in the definition of community prevocational services to include consideration of the individual's choice when determining the integrated setting that is the most appropriate to the needs of the individual. The provider cited employment guidance from the Centers of Medicare and Medicaid Services (CMS) that advises that employment plans be constructed in a manner that reflects individual choice.

**Response:** OPWDD plans to implement requirements for person-centered planning and HCBS Settings that require consideration of individual choice of integrated settings and services in its service delivery system. OPWDD has been and continues to train and guide providers on how to offer individual choice in service planning and delivery. OPWDD will consider adding employment guidance, similar to the guidance issued by CMS, to its ADM on site based and prevocational services in order to reinforce that individual choice should be considered in deciding on the most integrated setting for site based prevocational services.

**Comment:** A provider expressed concern about provisions of the regulation that allow individuals to meet for time-limited periods at a site while receiving community prevocational services. The provider commented that there is potential under such provisions for people who are supposed to be receiving services "in the most integrated settings" to spend 4 continuous hours daily in a segregated congregate setting. The provider commented that this is especially problematic considering that many full-time day program attendees only spend a total of five or six hours daily in such programs and part-time attendees typically spend 3 to 4 hours in such programs. The provider commented that "the purpose of prevocational services is not to provide supervision or to keep people busy. It is to teach specific skills, which a specific individual can reasonably be expected to actually learn within a limited period of time, after which they will stop receiving the service. If the necessary training environment is not available, then no training should be paid for."

The provider recommended that OPWDD remove requirements that allow for individuals to meet at a site due to inclement weather or a public emergency, or to identify activities for the day, and revise the provision that allows for job readiness training at a site to state, "individuals may use a site (see subdivision 635-10.4(k) of this subpart) as a meeting space for job readiness training that meets their individually assessed needs, as specified in their individual person centered plan, on a time limited basis not to

exceed 2 hours for a single training event, and not to exceed a total of 20 hours annually.”

**Response:** OPWDD will provide clarification in the ADM on the criteria for providing community prevocational services in a certified setting.

**Comment:** A provider commented that a rate structure that forces use of groups will severely reduce the number and variety of employment situations that can be used for training. The provider commented that a group model will reduce the extent to which training can be matched to individual needs, preferences, and abilities, and the result will be a low rate of success in getting people trained and moved on to real jobs.

The provider suggests that the regulations be modified to state, “The number of individuals receiving community prevocational services while in a group assembled for the purpose of receiving generic job readiness training or preliminary tours of job sites shall be limited to no more than 8 individuals. ‘Generic job readiness training’ means instruction in matters that do not need to be individualized for each participant, such as expectations for appropriate dress, or information about the impact of employment on public benefits. Potentially appropriate training sites in which a participant has expressed interest shall not be excluded because they cannot accommodate more than one participant and one staff person at one time.”

The provider suggests adding a provision that states, “Individualized skills training as a community prevocational service shall ordinarily be delivered in a staff-to-participant ratio of 1-to-1. A staff-to-participant ratio of 1-to-2 may be used only when the individually assessed needs, abilities, and interests of both participants are so similar as to ensure an equally high likelihood of eventual successful transition to competitive employment for both.”

**Response:** OPWDD will provide clarification in the ADM on the criteria for providing community prevocational services in a groups of 2-8 individuals.

**Comment:** Two provider associations commented that Federal and State Department of Labor (DOL) regulations require that employers reimburse employees for travel when those employees are being paid for their work. The provider associations commented that failure to include travel for staff providing community prevocational services as a billable activity represents a major inconsistency with existing DOL regulations and threatens the viability of prevocational services. The provider associations recommended that OPWDD amend the regulations to create consistency with existing DOL regulations. The provider associations also commented that clarification is needed to indicate the individual to whom the staff transportation activity is to be “billed.” The provider associations recommend that the individual to whom the staff person is traveling to support would be appropriate.

**Response:** OPWDD has considered these concerns about transportation and plans to include the following guidance in the ADM on site based and community prevocational services: Allowable transportation activities include time that staff travels to billable prevocational activities, such as travel (with or without the individual) to assist the individual to experience a variety of employment options within the community. Travel time should be billed to either an individual or group activity with specific prevocational service participants identified. A staff member's travel between his or her home and place of employment at the start and conclusion of the work day is not a billable transportation service. In addition, staff travel to a non-billable activity, such as travel to lunch, is not a billable transportation service. With this guidance provided in the ADM, OPWDD plans to promulgate the proposed regulation without any changes.

**Comment:** A provider association recommended that OPWDD add the following allowable activities under community prevocational services in order to be consistent with the supported employment (SEMP) activities that are a part of the SEMP regulation:

- Support services in the community setting that will enable the individual to be successfully integrated into that setting (e.g., development of natural supports) and as a preparation for the individual to possibly be integrated into a workplace environment;
- Developing community based settings with prospective entities on behalf of an individual;
- Communication with an existing community setting to review the individual's progress in meeting expectations and to discuss and address any challenges the individual may have in the community based setting;
- Communication with family and/or an individual's advocate to discuss and address any issues or concerns;
- Meetings and communication with staff providing other OPWDD approved services that impact an individual's ability to successfully achieve his or her prevocational goals.

**Response:** OPWDD will provide clarification in the ADM on how these activities are covered in the regulation.

**Comment:** A provider commented that OPWDD's Transformation Agreement with CMS specifies that the agency must make efforts to reduce the use of segregated congregate non-employment day programs, and the provider thinks that the agency must, at minimum, create a clear and attractive financial incentive for providers to do so. The provider commented that it is questionable as to whether the billing limits in the regulation create such a financial incentive depending on what fees will be paid for both services. The provider commented that, at present, the proposed regulation states that fee information can be found in a location in state regulations that does not exist; therefore the provider can't assess the impact of the billing limits.

**Response:** The Department of Health (DOH) is responsible for promulgating regulations pertaining to prevocational fees. Consequently, OPWDD is promulgating the proposed regulations without any changes.

**Comment:** A provider noted that the combinations of services identified in provisions on billing limits do not include SEMP.

**Response:** OPWDD will provide clarification in the ADM that the billing limits are not applicable to SEMP.