



## **Right To Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID)**

Individuals who qualify for Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID)\* under Medicaid have a legal right to such facilities for as long as they remain eligible and choose to do so. Despite a deinstitutionalization effort by those opposed to congregate care, the ICF/IID program remains a legally enforceable federal entitlement under Medicaid. States which have included ICF/IID in their Medicaid State Plans, but instead offer only Waiver services, are in violation of federal Medicaid law.

### **Right to ICF/IID services is legally enforceable:**

Participation by states in the Medicaid program is voluntary; however, once a state elects to provide services, the state's provision of those services is “*mandatory upon them.*” 42 U.S.C. § 1396a(a)(1).

<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section1396a&num=0&edition=prelim>

If a state elects in its Medicaid State Plan to offer qualified individuals services in an ICF/IID, it must provide that “*all individuals wishing to make application under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.*” 42 U.S.C. § 1396a(a)(8).

<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section1396a&num=0&edition=prelim>

The right to ICF/IID services has been tested in Federal District and Appellate Courts in Florida. In *Doe v. Chiles*, 136 F.3d 709 (1998) the State of Florida argued that ICF/IID services are an optional Medicaid program. The Eleventh Circuit rejected the argument, noting that “*even when a state elects to provide an optional service, that service becomes part of the state Medicaid plan and is subject to the requirements of federal law.*” Id at 721. The 11th Circuit found, “*In sum, we hold that the appellees have a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act, and that this right is enforceable under section 1983.*”

<http://caselaw.findlaw.com/us-11th-circuit/1306318.html>

ICF/IID as an enforceable right under 42 U.S.C. § 1983 was also acknowledged (although not actually ruled upon) in the Federal District Court and Seventh Circuit decisions in *Bertrand v. Maram*, (2006, 2007).

[http://www.abisoft.org/opinions/2006/1\\_05-cv-00544\\_20060925.pdf](http://www.abisoft.org/opinions/2006/1_05-cv-00544_20060925.pdf)  
<http://caselaw.findlaw.com/us-7th-circuit/1478192.html>

**The Home and Community Based Waiver is optional, not mandatory, and cannot be imposed on an individual who qualifies for and chooses an ICF/IID. In fact, the HCBS waiver will not be granted and may be revoked unless the state offers ICF/IID services to those who qualify.**

The Medicaid Act provides that the Home and Community Based Service waiver “*shall not be granted*” to states unless the state provides satisfactory assurances that “*such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital, nursing facility services or services in an intermediate care facility for the mentally retarded.*” 42 U.S.C. § 1396n(c)(2)(C).

<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section1396n&num=0&edition=prelim>

CMS Regulations implementing this law stipulate that “CMS will not grant a waiver...and may terminate a waiver already granted” unless a state provides certain “*satisfactory assurances*” including assurances that “*the recipient or his or her legal representative will be 1) Informed of any feasible alternatives available under the waiver, and 2) Given the choice of either institutional or home and community-based services.*” 42 C.F.R. § 441.302(d).

[http://162.140.57.127/cgi-bin/text-idx?SID=42049c80e5fc366349391435bb959f15&mc=true&node=pt42.4.441&rgn=div5#se42.4.441\\_1302](http://162.140.57.127/cgi-bin/text-idx?SID=42049c80e5fc366349391435bb959f15&mc=true&node=pt42.4.441&rgn=div5#se42.4.441_1302)

**The right to ICF/IID services as a valid service offering was affirmed – NOT struck down – by the Supreme Court decision in *Olmstead v. L.C.***

*“We emphasize that nothing in the ADA...condones termination of institutional settings for persons unable to handle or benefit from community settings...Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it.”* *Olmstead v L.C.* 527 U.S. 581, 601-02 (1999)

<https://www.law.cornell.edu/supct/search/display.html?terms=98-536&url=/supct/html/98-536.ZO.html>

**\*Note:** ICF/IID is now used in federal regulations. Federal statute still uses the original term – Intermediate Care Facility for Mentally Retarded (ICF/MR).