

## 902 KAR 20:036, Operation and services; personal care homes (PCH)

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### Federal Law and Potential Litigation

- The 1999 Supreme Court's *Olmstead* decision interpreted the Americans with Disabilities Act (ADA) to require states to provide state-funded supports and services to individuals with disabilities who want to live in the community rather than in institutions, if certain criteria are met.
  - The U.S. Department of Justice enforces the ADA's "integration mandate" to ensure that states provide community-based services for people with disabilities and avoid unnecessary institutionalization.
  - Kentucky's reliance on personal care homes (PCH) and the lack of community-based alternatives prior to 2012 placed the state at odds with the ADA and *Olmstead* decision.
  - Kentucky's Program Review and Investigations Committee released a research report on PCHs in December 2012, acknowledging that the "use of facilities like PCHs in other states has been found to be in violation of" the ADA.
  - Kentucky Protection & Advocacy (P&A) was prepared to file a federal lawsuit against the Cabinet in 2012 to ensure compliance with the ADA's integration mandate.
  - As a result, the Cabinet entered into a series of settlement agreements with P&A, committing the Cabinet to providing community-based housing options and community supports for adults with serious mental illness (SMI) who prefer to live in the community.
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### Proposed Amendment of 902 KAR 20:036 – Community Transition Skills

- To further the goal and requirements of the ADA of supporting individuals with SMI who want to live in the community, the Cabinet works with providers to identify individuals who desire to transition to community living and provide the preparation and supports needed to make that possible.
- In the latest settlement agreement between the Cabinet and P&A, the Cabinet agreed to promulgate a regulation to require instruction in Activities of Daily Living (ADLs) (bathing, dressing, grooming, toileting, and eating) and Instrumental Activities of Daily Living (IADLs) (housekeeping, shopping, laundry, chores, transportation). **This training is only required for a small number of specific PCH residents identified as working to transition to independent community living.**
  - PCH staff are not responsible for choosing which residents receive the instruction, nor are they responsible for ensuring a resident has mastered a skill.
  - This requirement is intended to foster collaboration between PCHs and other providers, primarily community mental health centers (CMHCs). The CMHCs identify clients who meet the criteria to transition and who express a desire to do so, and then work to develop a transition plan for those clients, including identifying activities they need to work on to live independently.
  - CMHC staff develop the plan and work with the client to learn these skills, but PCH staff are the individuals who are with the residents most often and who already assist them with ADLs. That puts them in a unique position to build on the CMHCs' work by providing basic instruction in a natural way as activities occur throughout the day – morning hygiene, mealtime, laundry, cleaning, bedtime, etc.
- The regulation is consistent with a recommendation of the 2012 Program Review and Investigations Committee report, which stated the Cabinet should:
  - ... ensure that personal care homes . . . increase their efforts to . . . **teach skills that could lead to greater independence**, and facilitate meaningful integration with . . . the community at large. (*Emphasis added.*)

## Opposition from KAHCF and Some of its Membership to the Amendment, and the Cabinet's Responses

- **Comment:** PCHs do not receive sufficient funding to provide instruction in community living skills.
  - **Response:** The Cabinet understands that PCHs that admit “state supplementation” residents have been without a funding increase for many years. That is why this regulation was drafted with input from stakeholders and with the intention to minimize the impact of the new requirements.
  - The Cabinet has been supportive of increased funding to improve the quality of life for residents of PCHs, and such funding was included by the GA in next year’s budget. **The FY 2020-2021 budget provides \$2.2 million to support an increase in reimbursements to PCHs that serve individuals with mental illness or intellectual disability.**
    - An amendment to DCBS regulation 921 KAR 2:015 to pass through the increased funding to PCHs will also be heard at the June ARRS meeting.
  - The OIG regulation requires PCHs to collaborate with CMHCs to provide the basic instruction in ADLs and IADLs to only those residents identified by the CMHCs as transitioning to independent community living, and the residents may even opt out if they so choose. **There are currently 17 residents statewide among 11 facilities who meet that description.** During the preceding 20 months, an average of 3 people per facility statewide transitioned to the community.
  - The CMHCs identify residents who need assistance and the skills they need to work on, and also work with residents on mastering those skills. The PCH staff are asked to build on the CMHCs’ work by providing basic instruction in these skills as the need for them arises in daily life.
  - To support the PCHs, the cabinet makes available some basic tools on ADL and IADL assistance through quarterly training and on its website. The amendment requires the PCH administrator and one direct care staff member to complete the training so that they can then share the information with other employees in the facility, but any employee can access the information.
  
- **Comment:** Only occupational therapists can offer basic instruction in ADLs and IADLs and PCH staff are not qualified to offer the instruction.
  - **Response:** The existing regulation currently requires PCHs to train their employees in “**methods of assisting patients to achieve maximum abilities**” in ADLs and it already requires PCH staff to assist residents with hygiene and grooming.
  - Although the requirement for assisting with ADLs is not new, the amendment would add a requirement that PCHs collaborate with the CMHCs to offer “basic instruction” in ADLs and also IADLs. “Basic instruction” is defined as having the same meaning as “assistance with.”
  - Similar work is regularly performed by persons who are not occupational therapists. PCHs do not use occupational therapists to meet the current ADL requirements. Other statutes require assisted-living communities to assist with ADLs and IADLs and perform a needs assessment on residents, and those duties also are not required to be performed by an occupational therapist.
  
- **Comment:** Individuals have a right to stay in a PCH if they prefer to do so.
  - **Response:** Absolutely. The Cabinet supports an individual’s right to self-determination.
  
- **Comment:** Because the Cabinet agreed as part of a settlement agreement to promulgate a regulation to require instruction in ADLs and IADLs, this circumvented KRS Chapter 13A.
  - **Response:** The Cabinet agreed to promulgate a regulation. “Promulgated” is defined by KRS 13A.010(9) to mean “submitted to the [LRC] in accordance with” KRS Chapter 13A.
  - The Cabinet complied with all of the requirements of KRS Chapter 13A and was fully engaged in the 13A process. In addition, Cabinet staff met with stakeholders in person and on the phone, shared proposed language with them, and sought their input. The Cabinet made several changes to the regulation to address stakeholders’ concerns, and believes the resulting amendment approved at the September 2019 ARRS meeting balances those concerns with the need to support PCH residents who are transitioning to living in the community.