Frequently Asked Questions: Mitigation and Due Process

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Identifying abuse and harassment

Q: How do I determine when an individual's behavior falls under the definition of harassing or abusive conduct?

A: CMs should use their judgment and consult with other LO staff to determine if an individual's behavior (verbal or physical) constitutes abusive or harassing conduct. Staff and LO supervisor determine if abuse or harassment is occurring and to begin mitigation and due process. CO policy analysts are available to staff a case with the CM and LO supervisors.

See Mitigation and Due Process Guide:(3) Failure to maintain a safe and harassment-free workplace.

Q: Are racist comments and prejudicial language considered harassment?

A: Yes, based on federal and state labor laws, written or verbal communication referencing an individual's ethnic, racial or cultural background can be considered discrimination (being treated differently because of one's race, sex, age, disability, or other protected characteristics), and would constitute workplace harassment. Staff should follow mitigation and due process with individuals who use prejudicial language toward their providers.

Q: How should staff handle and discuss alleged racial or prejudicial comments made by an individual to a HCW, and what should be documented in case narration?

A: Staff should have a private conversation with the individual about alleged racial or prejudicial comments made to HCW or agency caregiver. The individual should be reminded that as an employer, they must follow federal and state anti-discrimination laws and the In-Home Services rule that describes the individual-employer's responsibility to ensure the workplace is safe and free from harassment (OAR 411-030-0040(4)(a)(G)). Case narration should provide a general summary of the concern, the individual's response, and any mitigation and due process action taken by staff.

See Mitigation and Due Process Guide:(3) Failure to maintain a safe and harassment-free workplace.

Q: What if a HCW considers the behavior of the individual inappropriate and harassing but the individual denies that the alleged behavior occurred?

A: If abusive or harassing conduct is alleged or suspected, the CM (with LO staff support) should investigate the issue immediately with the individual. If the individual does not consider their behavior to be inappropriate (not harassing or abusive), staff should first talk with the HCW (or agency provides if applicable), to understand the nature of the concerns and then talk with the individual to understand their perspective. CM and LO staff should exercise discretion to determine if mitigation and due process is needed.

See Mitigation and Due Process Guide:(3) Failure to maintain a safe and harassment-free workplace.

Q: Is discrimination considered abuse or harassment in the workplace?

A: A HCW or agency caregiver cannot be treated differently because of their personal characteristics. According to the Bureau of Labor and Industry (BOLI), it is illegal to discriminate against someone because of race, national origin, color, sex, gender identity, sexual orientation, age, religion, physical or mental disability, military status, or marital or family status. If an individual physically, verbally or emotionally abuses or harasses a provider based on their personal characteristics,, including their native language, ethnic background and cultural traditions, staff should instruct the individual of their responsibility to maintain a harassment-free work environment (OAR 411-030-0040(4)(a)(G)). The individual should be warned that abusing or harassing an individual based on their personal characteristics may result in being made ineligible for APD in-home services.

Mitigation strategies

Unsafe home environments

Q: How can staff determine that a home environment is not safe for providers to the extent that mitigation and due process procedures should be pursued with the individual?

A: When conditions in the home are unsafe and could jeopardize the health and wellbeing of a provider, staff should visit the home (preferably with another CM or LO supervisor), to examine the home's condition. Staff should explain to the individual why the conditions are considered dangerous for providers (Note: the individual may not agree that a dangerous condition to the provider exists). Staff should determine 1) if the individual has the cognitive ability to address the concern, 2) if the individual is able to put necessary safeguards in place to

remove the concern, and 3) if the individual is willing and has the resources to address the concern. If deemed necessary, the CM, LO staff should contact the CO to begin mitigation and due process.

See Mitigation and Due Process Guide:(2) When a CE fails to minimize dangerous conditions in the service setting.

Q: What if a HCW considers the workplace unsafe but the individual does not? How does the Department determine that the workplace is unsafe?

A: A HCW (or IHCA caregiver) has the right to not seek employment or stop working for an individual if they feel unsafe or that their health and wellbeing are or would be in jeopardy. HCWs should report their concerns to the CM. A CM may involve other LO staff to help evaluate the home environment. The CM and LO management have the authority to determine that a home environment is unsafe based upon their judgment. K-plan or Crisis Program support funding could be used to address some issues and to document unsafe conditions. The CM may also consult with CO for advice. If safeguards cannot be taken to improve the setting, mitigation and due process should be pursued.

See Mitigation and Due Process Guide:(2) When a CE fails to minimize dangerous conditions in the service setting.

Q: What if the individual is unable or unwilling to address dangerous conditions and make appropriate repairs to the service setting?

A: Individuals can make informed decisions and choices that result in jeopardizing their health and safety or the health and safety of others. An "informed decision" means the individual understands the benefits, risks, and consequences of the service choice selected. Staff should recommend support

and service options to help the individual minimize the risks. Staff can also explore the possibility of using K-Plan Ancillary Services or Crisis Program Funds to address and improve dangerous conditions. If necessary, safeguards are not taken to address the dangerous conditions and improve the setting, mitigation and due process should be pursued.

See Mitigation and Due Process Guide: (2) When a CE fails to minimize dangerous conditions in the service setting.

Abuse or harassment

Q: Should any mitigation or due process procedures be followed when a HCW states they are willing to "put up with" an individual's inappropriate speech or conduct (stating it "does not bother me," etc.)?

A: The Department is responsible for ensuring that the workplace is safe and free from harassment and abuse for providers and Department staff. Although one HCW may feel they can "put up with" an individual whose speech or behavior is unwelcomed or offensive, another HCW may find the individual's conduct highly inappropriate and that their behavior creates a hostile work environment. The standard for determining if an individual's speech or conduct is considered serious and pervasive enough to create a hostile work environment is to consider what a "reasonable person" would judge to be hostile, offensive or abusive. CM and LO staff are authorized to make this determination but may consult with a CO policy analyst for their input.

See Mitigation and Due Process Guide: (3) Failure to maintain a safe and harassment-free workplace.

Q: Can mitigation and due process procedures be pursued if the individual demands that HCWs do things not on the task list?

A: Yes, consumer-employers are responsible for supervising their HCW's activities as recorded on the task list. If an individual demands that a HCW do things not on the task list or that make the HCW feel uncomfortable, or that the worker considers demeaning, intimidating, threatening, or humiliating, the HCW should immediately report their concerns to the CM. These concerns should be investigated by the CM to determine if this conduct requires mitigation and due process.

See Mitigation and Due Process Guide: (1) When a CE fails to manage their employer responsibilities.

Due process

Q: If a due process step resolves the issue that was addressed, staff should monitor the situation to ensure there are no additional or reoccurring issues. If the individual starts harassing the HCW again or begins harassing a new HCW, will the process start over?

A: It depends on the situation. If the individual's behavior puts the new HCW's health and safety in jeopardy, then staff should immediately act to address the situation, pursue mitigation and due process, and document the issues. LO staff can decide to initiate due process, however, in most cases, due process will continue from the point the previously process was stopped. If the concern does not present an immediate and serious health or safety concern, then staff may choose to continue with due process and issue a new written warning that

indicates that any further incident may result in the termination of in-home services.

See Mitigation and Due Process Guide:(3) Failure to maintain a safe and harassment-free workplace.

Q: Shouldn't due process rest with CO? The thought of having a CM track and document all this is uncomfortable. If a HCW gets hurt and the CM wasn't following the steps or something bad happened, that could be a big deal.

A: No single individual should be addressing these types of concern themselves. When due process is needed, local office staff (including supervisors or managers) need to be involved and support the CM throughout the process. CMs should receive all the support they need and desire as they work with individuals and pursue due process. In addition, the Mitigation and Due Process Guide and training on this topic was created to provide clarity, guidance, and support for LO staff. The best way to ensure the health and safety of an individual, their providers and LO staff, is to practice transparent communication and provide mutual support for all involved, to address known issues and ensure that individuals receive due process. The safest way to address concerns with individuals is to carefully follow mitigation and due process procedures and seek support from other staff throughout the process.

Verbal warning

Q: Should more than one verbal warning be given prior to sending a warning letter? APD-PT-17-058 states, "If issues continue to persist within 12-months of the verbal warning, provide a written warning . . . ."

A: Providing and documenting a formal verbal warning to the individual is an essential step in due process. The goal in due process is to provide information, guidance and support to the individual to help them to successfully manage their services and paid providers. However, if a verbal warning is given so that the individual clearly understands the health and safety concern(s) and what changes in their behavior are needed to successfully manage their services, the verbal warning is sufficient. Once a verbal warning is given and understood, that warning is sufficient and no additional verbal warning is required. It is recommended,

- That a verbal warning be given in person to the individual, unless staff believe a safety concern exists in doing so.
- That staff have a conversation with the individual to ensure they understand the warning, understand their responsibility as a consumer-employ, and to answer any questions the individual may have.
- In many cases, it is helpful to follow-up a verbal warning with written record (letter) of the information that was shared, so that the individual can read the warning and contact the CM if any clarification is needed.

It is common for staff to have more than one conversation with the individual (or their representative), to address the known concern. Follow-up warnings help to 1) remind the individual of their CE responsibilities, 2) to describe the changes needed in the management of their service plan, and 3) to warn them about the potential of being made ineligible to receive in-home services provided by a HCW.

Q: After a verbal warning is issued, how many additional incidents need to occur before issuing a written warning? Also, how much time should be given between the verbal warning and a written warning?

A: The pace for implementing due process procedures depends on the severity of the issue(s) being addressed and the response of the individual to the verbal warning. The Department seeks to provide the support, resources and assistance needed by the individual to address known failures in the management of their service plan. When addressing serious abuse or harassment allegations, a shorter due process timeframe may be needed, particularly if it is felt the provider's health and safety is at risk of immediate jeopardy. CO is available to discuss a case and help determine when it's appropriate to move past a verbal warning in situations where it may be unclear, or a more objective view is needed.

CMs, coordinating with LO staff and CO, determine the appropriate time needed between the issuing of verbal and written warnings, depending on the circumstances of the case. We want to ensure that the individual receives due process while doing what is needed to protect a provider's health, safety, and wellbeing.

Q: How much time should be given after a verbal warning for an individual to prove they have made required changes to address a known concern? (Service plan failures, dangerous conditions, or abuse and harassment)?

A: After a verbal warning, staff should monitor the situation to ensure the CE is successfully addressing the concern. Monitoring means checking regularly with the individual (and possibly with HCW(s) or agency caregivers, natural support, LTCCN RNs, etc.), to discover if the individual is successfully addressing known concerns. CMs and LO staff should implement mitigation and due process procedures on a case-by-case basis, with a pace that matches the severity of the concern and the potential for injury or harm to the individual or their providers.

CO should be consulted for counsel and to support LO staff with mitigation and due process procedures.

Written warning

Q: How many additional incidents can occur after the written warning before making the decision an individual ineligible for services from a HCW (close APD in-home services)?

A: The goal is to ensure the safety of the individual and provider when implementing due process. The timing of the steps taken in due process may vary depending on the details and severity of the concern(s). It is important that the written warning describes clearly what the results will be if action is not taken by the individual or their representative to resolve the concerns addressed. In cases where the individual's behavior puts a provider's health, safety and wellbeing at risk of serious jeopardy, any additional incident that occurs after the written warning should be addressed (staffed with CO if needed) and may result in the termination of in-home services from HCW and agency providers. In cases where the individual's inability or refusal to manage their CE responsibilities and the individual's or provider's safety is not in immediate or serious jeopardy, if additional incidents occur, staff can determine the timing related to the closing of HCW services.

Staffing cases

Q: At what point should I discuss a concern with my manager and with CO about an individual's inability or unwillingness to manage their service plan or maintain a safe workplace, to determine what actions should be taken?

A: We want to do all we can to ensure and support an individual's and provider's health and safety. However, we want to "err" on the side of caution when we are aware of serious health and safety concerns. CMs and LO managers must address concerns regarding an individual's service plan management, dangerous conditions in the home or harassing conduct that have created an unsafe or dangerous workplace for paid providers. The CM and LO management can initiate mitigation and due process procedures and staff the concerns with CO for support and guidance.

See the Mitigation and Due Process Guide: (1) When a CE fails to manage their employer responsibilities.

Communicating known concerns to HCWs or IHCAs

Q: If I'm not going to authorize a service plan when there are known concerns in the service setting that jeopardize the health and safety of the individual or HCW, (APD-PT-21-034), how do I communicate this concern to the individual and their HCW? Does a conversation about known health and safety concerns happen only at intake and annual reviews?

A: When communicating information about a known health or safety concern, we must not share information that violates the individual's rights, privacy, choices, or confidentiality (APD-PT-21-034 Art. 20, Sec. 1) A CM should have a face-to-face conversation with an individual to help them understand the specific concern(s) and why their service plan is not authorized. If the individual's conduct is jeopardizing the health and safety of a provider, the CM (supported by LO staff), should pursue mitigation strategies with the goal of helping the individual, when possible, to correct known health and safety concerns. With the HCW: CMs should inform HCWs of known health or safety

risks with the individual or in the workplace, whether the HCW is seeking employment or is working currently for the individual.

CMs should follow the Minimum Necessary Standard rule (OAR 407-014-0040), meaning LO staff should limit the communication of protected and sensitive information to only that which is reasonably necessary to help a HCW or agency caregiver have a general understanding of a known health or safety concern. Regarding mitigation and due process, the Minimum Necessary Standard means the CM should share the least amount of information needed to gain a general understanding of alleged concerns, while not violating the individual's rights, choices, or confidentiality.

A HCW who receives minimal information of a health and safety concern may decide not to work for an individual or may decide to work for that individual. This decision is the HCW's prerogative (see APD-PT-21-034, Sec. 20). CMs should staff any concerns they have about communicating these concerns with LO supervisors and CO if desired.

See the Mitigation and Due Process Guide: Supporting HCW's health and safety.

Consumer employer and client representative support

Q: There is a subtle difference between the Consumer Employer Representative (CE Rep) and Client Representative roles. What's the difference between them? Can a designated Client Representative appoint a Consumer Employer Representative?

A: The Consumer-Employer Representative (CE Rep.) role is intended to support In-home individuals who employ HCWs in the Consumer-Employer Provider Program. An individual may voluntarily or because of their needs and inability to

manage CE duties (i.e., decline in cognition), appoint an individual to manage these responsibilities on their behalf (OAR 411-030-0040(4)(b)(5)(a)). Even when an individual selects a CE Rep., the individual is still to be involved in making decisions and communicating their desires related to their in-home services that are managed by the CE Rep.

The Client Re. role is a broader representative rule than the CE Rep. role. A Client Rep. helps an individual with long-term care future decision-making needs (i.e., helping an individual decide where to live, choose a provider, care setting, etc.). A Client Rep. helps with service plan decisions when the individual is no longer able to do so for themselves. A Client Rep. is designated by the individual using the priority order list (page 3) of the 737 form, if a physician or other healthcare professional determines that the individual can no longer make LTSS decisions on their own. A Client Rep. may be designated to fill both CE Rep. and Client Rep. roles (sign for both representative roles on the 0737 form), or as a Client Rep., may appoint another qualified individual to fill the CE Rep. role. Individuals who have the cognitive ability to make LTSS decisions can revoke a representative designation at any time. Neither a CE nor a Client Rep. can act as a substitute for an individual's court-appointed legal guardian. A guardian is a court-appointed individual who is authorized to make personal, health or other care decisions for a functionally incapacitated individual.

See: Comparison of In-Home Service Plan Assistance Role.

Q: In mitigation steps, when the Department appoints a Client Rep, what does that process look like and when is it appropriate for the Department to do so? Can the CM or other staff appoint the Client Rep?

A: The individual (at intake and recertifications), should be encouraged to list up to three Client Rep. choices on the 0737 form (pg. 4) for future LTSS needs. If the individual does not choose a representative (or is unable to do so), the Department may appoint a Client Rep. using the "priority order" list (pg. 3) of the 0737. Department staff will use a medical professional's written statement of the individual's capacity and the priority individuals referenced on the list to identify a Client Rep. who is willing to serve the individual to make long-term care decisions. If an individual is unable to make LTSS decisions and cannot designate a Client Rep., and no medical doctor is available to make this determination, staff can use a community nurse as a qualified health professional to determine if a Client Rep. is needed.

Q: When approving a CE Representative, how can a CM know if this individual has a criminal record, protective service record, credible allegations of fraud or collusion in fraudulent activities involving a public assistance program? Can we ask the individual or potential CE Rep?

A: There is no policy or rule that requires a background check before an individual appoints a representative. Per rule, individuals with a criminal history, protective services history, or credible allegations of fraud or collusion in fraudulent activities involving a public assistance program are not qualified to serve in these roles (OAR 411-030-0040(4)(d)). Some helpful guidance for recognizing characteristics of an adequate representative are also found in OAR 411-028-0000(13). If staff have reason to suspect that the potential representative is not qualified, staff may ask general questions related to the individual's capability and fitness to manage the representative responsibilities. Before approving a CE or Client Representative, staff should ensure that there is history of abuse or harassment and no conflict of interest with the individual in

their relationship with the consumer-employer. Staff should also have the individual review the information in rules cited above and read the 737 form so that the individual is aware of the representative's responsibilities and the requirements for the person designated as a representative. How can I find someone to be an individual's CE Rep when no family or friends live nearby or are interested in helping in this way?

Although the information on pages 3-4 of the 0737 form describes the Client Rep.'s role, the process outlined on the 0737 form for designating an individual can also be used to identify a CE Rep. If no one is identified from the priority order list, after following the process on the 0737, staff can: 1) seek to discover if any community organization (e.g., a church group, service/fraternal organization, etc.), have qualified individuals who may be willing to serve as the individual's CE Rep, or 2) assist the individual to pursue guardianship (for individuals who lack decision-making capacity, see Public Guardianship, Program Referral Information).

Q: What should be done if the individual cannot manage their service plan, no person can be found to serve as a CE Rep, and the HCW is knowingly or unwittingly managing the individual's service plan?

A: It if it suspected that the HCW is actually managing the service plan, the HCW Program Policy Analyst in CO should be alerted of the HCW's and conduct an administrative review of the worker (OAR 411-031-0040(1) and OAR 411-031-0050(4)). To assist the individual, the CM may contact the Oregon Public Guardian's office to pursue public guardianship for the individual.

See the Mitigation and Due Process Guide:(1) When a CE fails to manage their employer responsibilities.

Presenting other service setting options

Q: What factors should be considered when recommending an IHCA caregiver, when as a result of due process, it is determined that the individual is no longer eligible to hire HCWs?

A: In-home care agencies (IHCAs) can be a viable option for individuals who are unable to manage their CE responsibilities. However, IHCAs are not an appropriate option for individuals who lack the cognitive capacity to manage their service plans. Individuals receiving services from an IHCA caregiver, who struggle to manage their service plan and providers, should have the assistance of a representative to ensure their needs are met.

A rep. should be designated who lives close to the individual, is involved in their life, and desires to assist them to manage their service plan (this rep. role is described in OAR 411-033-0010(43)). This rep. is not a "CE Representative" (which applies only to individuals who are consumer-employers in the Consumer-Employed Provider program). This representative should live close by the individual (i.e., living in the same community as the individual), be knowledgeable and involved in the life of the individual, be able to check on the individual and manage their service plan.

Q: What should be done if there are no IHCAs able or willing to provide services for an individual who is made ineligible for in-home services from a HCW?

A: If there is a decision to close all in-home service options, the individual should be offered community-based care setting options. To close in-home services, the CM should staff the case with CO, since the Medicaid Services and Supports Unit Manager must make the final decision to close in-home services. A Notification

of Planned Action (SDS 540) should be sent which documents why the individual has been made ineligible for APD in-home services.

See the Mitigation and Due Process Guide Sample language for a 540 Closure Notice.

Q: Are we to continue Waivered Case Management (WCM) services if an individual is made ineligible for in-home services?

A: Yes, if an individual has their in-home services closed through due process and does not seek placement in a CBC service setting, that individual should continue receiving WCM services as well as the other service options described in this transmittal (APD-PT-18-023).

Documenting general information in Oregon ACCESS

Q: What information should be recorded in case narration about an individual's inability to manage their CE responsibilities, including inappropriate behavior, harassment or physical/verbal abuse?

A: It is important that information documented in an individual's Oregon ACCESS case narration record does not violate the individual's rights, privacy, or confidentiality. Only general information (minimum necessary) and a summary of the concern and mitigation and due process steps taken should be recorded in case narration. Example: "The individual's in-home service options were closed by the Department due to their failure to maintain a safe and harassment-free workplace."

See the Mitigation and Due Process Guide: Documenting mitigation and due process actions.

Documenting specific information in a separate file

Q: How should the CM or LO set up a "separate file" to capture specific details of individual's inappropriate behavior?

A: A "separate file" should be created to record appropriate, specific details and sensitive information about an individual's failure to manage their services or inappropriate behavior. This file should be managed by the local office to record relevant information related to due process for hearings or law enforcement purposes (if needed). This information should only be accessible by designated staff involved in the case. A secure local office shared drive is recommended. However, LO management may set up this type of record as they see fit. Specific and detailed information about the case or concern should not be recorded in a public-facing file and should not be uploaded to an electronic file that has public access.

See the Mitigation and Due Process Guide: Documenting mitigation and due process actions.

Q: What documents or information should be uploaded to an electronic file about this case?

A: Documents uploaded to an electronic file include relevant information received from the individual, providers, medical professionals, notes on phone calls/conversations, ERC consultant reports, APS investigations and law enforcement reports if applicable, warning letters or other written documentation, and the 540 notice. Documents placed in a separate file (with specific details about the case) should not be uploaded to an electronic file to maintain individual confidentiality.

See the Mitigation and Due Process Guide: Documenting mitigation and due process actions.

Service closure notices

Q: In the final step of due process when closing in-home services, is this a 10-day notice?

A: Depending on the situation and issues addressed in a case, staff should choose the appropriate service closure decision notice (Sample Decision Notices, i.e., Closure notices number 16. Unable to manage individual-employer responsibilities, or number 17. Unable to safely deliver services). Whichever closure notice is used, LO staff should consult with Central Office (CO) for appropriate language for the notice. In most cases, a 10-day notice is recommended.

Miscellaneous issues

Q: Maintaining a safe and harassment free workplace would technically be the responsibility of the State or IHCA as an employer, right? We say it is the CE but that isn't who signs the paycheck. The state or IHCA would be the one open to a lawsuit, not the individual.

A: The individual is considered the employer of HCWs in the Consumer-Employer Program (OAR 411-030). IHCAs are licensed by the OHA and contracted by the state to provide in-home care services for compensation to an individual (OAR 411-033). The agency is the employer of caregivers sent to provide care for the individual.

The individual is responsible based on federal and state labor laws and Medicaid rules to maintain a safe and harassment-free workplace. The Department's responsibility is to provide the individual with services and support (as documented in the individual's service plan and required by CMS) and conduct due process when the individual fails to fulfill their responsibilities. APD provides a legal hearings process for any disagreements, complaints, or grievances by an individual (related to service hours, Medicaid rules, due process, etc.), to be addressed in a fair and unbiased process.

Q: If a person is made ineligible for in-home services provided by a HCW through due process, are they always ineligible or is there a chance for them to correct deficiencies and again employ HCWs?

A: If an individual was made ineligible for in-home services through due process, on a case-by-case basis, they may reestablish eligibility by fulfilling the requirements outlined in OAR 411-030-0040(4)(c)(A). In this case, the individual must demonstrate the ability to consistently meet their employer responsibilities (managing their service plan and maintaining a safe and harassment-free workplace). Cases must be staffed with CO before an individual is reopened for in-home services.

Mitigation and due process resources

Documents on APD CM Tools website

- Mitigation and Due Process Worker Guide
- Representative Choice Form SDS 0737
- Comparison of In-Home Service Plan Assistance Roles

- Consumer-Employer Responsibilities & Indicators for Intervention

Rules

- CEP Duties: OAR) 411-030-0040(4)(a), SPPC: OAR 411-034-0040(4)
- Dangerous Conditions: OAR 411-030-0040(4)(a)(G), OAR 411-030-0050(2)(b)(c)
- Abuse/Harassment: OAR 411-030-0040(4)(a)(G), OAR 411-030-0050(2)(b); (c)(B)(ii)(D)

Transmittals

- APD-PT-17-058
- APD-PT-21-034 (Article 20, Sec. 1)

You can get this document in other languages, large print, braille or a format you prefer free of charge. Contact ODHS at apd.medicaidpolicy@odhs.oregon.gov or 503-945-5811. We accept all relay calls.

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