In-home Mitigation and Due Process Guide

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Introduction

Policy Transmittal APD-PT-17-058 provides an overview of mitigation strategies and due process procedures for in-home individuals who:

1) Fail to manage their Consumer-Employer (CE) Responsibilities (Service Plan or paid providers),

2) Fail to minimize dangerous conditions in the service setting that jeopardize the health, safety and welfare of paid providers (OAR 411-030-0040(4)(a)(G), OAR 411-030-0050(2)(c)), or

3) Fail to ensure the workplace is safe and free from abuse and harassment.

In addition, APD-PT-21-034 and Article 20, Section 1 of the Collective Bargaining Agreement describes a case manager's (CM's) responsibility to notify homecare workers (HCWs) seeking employment with an in-home individual, if immediately threatening or dangerous health or safety risks exist. CMs are not to knowingly authorize a HCW or In-Home Care Agency (IHCA) caregiver to work in an in-home service setting when there is a known risk to their health, safety or wellbeing.

Individuals receiving services in their home who fail to manage their employer responsibilities and who do not have a designated consumer-employer representative (CE Rep) may be made ineligible to receive APD in-home services (OAR 411-030-0040(4)(b)(A)) from a HCW or agency caregiver after receiving due process.

Individuals receiving services in their home when the setting has serious health and safety risks (OAR 411-030-0050(2)(c)(D)), may be made ineligible to receive

services from an in-home provider after receiving due process. This includes individuals receiving services through the Consumer-Employer Provider Program (CEP), Independent Choices Program (ICP), and State Plan Personal Care (SPPC).

For Oregon Project Independence (OPI), the processes described in this guide may also be used. However, information regarding notices is not applicable to OPI, requiring additional consultation with Central Office.

Explanation of due process

The Fifth Amendment and Fourteenth Amendments of the U.S. Constitution established the requirement for due process. Due process requires an established course of action for individuals who participate in government programs and judicial proceedings to safeguard their legal rights by providing fair and impartial treatment under the law.

Due process for APD Medicaid Long Term Services and Supports (LTSS) refers to the commitment to apply established Oregon Administrative Rules (OARs) and APD polices to all individuals equally and impartially, to protect their rights and ensure fair and just treatment of all individuals. When in-home service options are closed for an individual through due process, other Medicaid service options in community-based care (CBC) facilities or nursing facilities (NF) are made available to address an individual's care needs.

CE responsibilities

OAR 411-030-0040(4), OAR 411-030-0050(2)(c) (In-Home Services rule) and OAR 411-034-0040(4), OAR 411-034-0070(3) (SPPC rule), describe the responsibilities

CEs must meet to remain eligible for APD in-home service program benefits. For SPPC cases see OAR 411-034-0040(4)).

OAR 411-030-0040(4)(a)(A-G)

(4)(a) To be eligible for in-home services provided by a homecare worker, an individual must be able to, or designate a representative to:

(A) Locate, screen, and hire a qualified homecare worker.

(B) Supervise and train the homecare worker.

(C) Schedule the homecare worker's work, leave, and coverage.

(D) Track the hours worked and verify the authorized hours completed by the homecare worker (Note: task now done by the OR PTC DCI system).

(E) Recognize, discuss, and attempt to correct any performance deficiencies with the homecare worker.

(F) Discharge an unsatisfactory homecare worker; and

(G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment.

Mitigation and due process scenarios

1) When a CE fails to manage their consumer-employer responsibilities (OAR 411-030-0040(4)(a)(A-F))

Overview

If an individual receiving APD in-home services fails to meet their CE responsibilities (OAR 411-030-0040(4), SPPC OAR 411-034-0040(9)), appropriate mitigation and due process procedures will be pursued. CMs work in partnership with local office (LO) supervisors and CO policy analysts (PAs) during due process. If due process procedures do not help the individual adequately address the issue, the individual may be made ineligible for in-home services from a HCW and may include an In-Home Care Agency (IHCA) caregiver.

Mitigation strategies

When an individual fails to manage their CE responsibilities, the CM must utilize available resources, supports and services to mitigate issues affecting the management of their services. The CM should communicate known concerns with the individual and narrate pertinent information along with the individual's response to the CM's efforts in OA. If these issues are not resolved, the CM must help the individual address deficiencies in the management of their services.

The following mitigation activities must be followed when a CE cannot, or is not willing, manage their CE responsibilities. LO staff and management should pursue the following strategies and document all pertinent information for each action taken in case narration. Staff should consult with Central Office (CO) before addressing urgent concerns affecting an individual's successful management of their in-home services.

1) **Conversation:** Staff should have a serious, in-person conversation with the individual (and/or their CE Representative), to explain their CE responsibilities and review specific concerns about their inability to manage their service plan. Staff should provide clear and specific

information to the individual about their responsibility to appropriately manage their CE duties as outlined in OAR 411-030-0040(4)(a).

CMs should document specific concerns with the individual about their failure to manage their service plan. This conversation should cover concerns that have been expressed by HCWs, agency caregivers or others, as well as the CE's response to this information and the date(s) the concerns were discussed. The results of each conversation should be documented (summarized) in Oregon ACCESS (OA).

2) **Employee Resource Connection (ERC) Referral:** Staff should consider referring the individual to an ERC Specialist.

- The ERC Specialist should be informed by the CM of the reason for the referral, including any specific and relevant information.
- The CM should contact the ERC Specialist after the referral is completed to document the outcome. The ERC specialist may also document the result if they have appropriate rights to OA.
- If the individual refuses to participate in an ERC referral, document their response in narration and follow other mitigation steps needed.
- If the individual participates in an ERC referral, however concerns continue, LO staff should consult a CO PA to determine what further action may be needed.

Note: If staff believe other factors are contributing to the issue(s) being addressed (i.e., significant cognitive decline, mental or emotional health concerns, behavioral concerns, undue influence of others, or an Adult Protective Services (APS) abuse or exploitation concern, etc.),

they should take appropriate action to address these issues with available services and supports.

3) **Consumer-Employer Representative (CE Rep):** CMs should encourage the individual to appoint a CE Rep (737 form) to manage their CE responsibilities (OAR 411-030-0020(48), OAR 411-030-0040(4)(b-e), OAR 411-030-0040(5)).

- This representative must be approved by the Department or AAA staff. To be approved, the representative must:
    - Live close enough to the individual to be able to complete CE responsibilities (as their representative);
    - Have regular contact with the individual and be able to monitor the work of paid providers;
    - Participate in annual assessments;
    - Have good understanding of the individual's service plan and task list;
    - Participate in Waivered Case Management Services (WCM) direct contacts;
    - Assist the individual in risk mitigation and management;
    - Be willing and able to perform all CE duties outlined in rule;
    - Not have a record of or credible allegations of abuse or harassment, and
    - Not have criminal, protective service, credible allegations of fraud or collusion (or conflict of interest) that impact their reliability as a representative.
- The representative must **not** be the individual's paid caregiver (HCW/PSW) (OAR 411-030-0040(5)(d)).

    - In addition, a paid caregiver may not be a decision-maker or assume control for service planning related duties, **even if the caregiver is a family member**).
- LO staff may speak to the HCW about the individual, their service plan, unmet needs or concerns about their care, etc., without involving the HCW in service planning decisions on behalf of the CE.
- A court-appointed guardian may designate themselves as the individual's CE Rep (OAR 411-030-0040(5)(c)). If the guardian does designate themselves as the individual's representative, they cannot also be the individual's HCW. In addition, a guardian cannot appoint someone to act as the CE (act on the individual's behalf) without discussing this matter with the courts.
- Conversations with the individual about appointing a CE Rep and their response to this discussion should be documented in OA.
- If mitigation efforts implemented by a CE Rep are successful (CE Rep begins to manage consistently the individual's CE responsibilities), staff should continue to monitor the CE Rep's efforts to ensure their ongoing success.

4) **IHCA Provider Involvement**: Individuals who are no longer eligible to employ HCWs (or PSWs with ICP), should be given the option of **only** using IHCA services. IHCA providers may be a viable option for individuals who are unable to manage/supervise HCWs. Note: IHCA services are **not** appropriate for individuals with severe cognitive impairments who cannot ensure that their needs are being met safely, unless there is someone who is willing and able to check regularly on the individual and act as a representative for service planning purposes.

Considerations for recommending an IHCA provider for in-home services:

- LO staff must determine if the individual is able or willing to safely receive services through an IHCA.
- Individuals using an IHCA may appoint a representative to participate in service planning on their behalf or a natural support with longstanding involvement in assuring their health, safety, and welfare (OAR 411-033-0010(44)). A 737 form is not used to designate a representative when an individual uses an IHCA caregiver. A CE Rep is only used when an individual's services are provided by a HCW.
- IHCAs reserve the right to decline providing services if they determine they cannot serve an individual or, if based on prior negative experiences with the individual, they decide not to offer services to the individual.
- Individuals without in-home services through a HCW or IHCA, should receive WCM Services (direct contacts) from their CM and be offered other service options described in APD-PT-18-023.

5) **CBC Service Options:** When it is determined by Central Office that an individual is not eligible for in-home services (from a HCW and an IHCA) the individual should be informed of CBC service options in their area. Document the individual's response in OA to the idea of receiving CBC services.

6) **Adult Protective Services (APS) Referral:** CM should submit a referral to APS if there are concerns about abuse or self-neglect. Note: In most

cases, mitigation and due process should be pursued even when APD is conducting an investigation.

7) **Decision to Begin Due Process:** If mitigation steps to address known concerns are unsuccessful, LO staff and CO PA will determine what additional actions should be taken. A CO PA should approve of the decision to begin following due process procedures.

Note: In **urgent situations** where the safety and health of a HCW or IHCA caregiver is in immediate and serious jeopardy, CO and LO staff may take immediate action to limit a provider's entry to the home and possibly close in-home services once due process is completed. These situations should be staffed immediately with CO.

Due process procedures

If the actions to mitigate identified concerns are unsuccessful, the procedures below must be taken and the outcomes documented in OA prior to removing an in-home service option from a CE (APD-PT-17-058).

Step one: Staff the issue with the LO supervisor and CO PA to discuss the details of the case. The CO PA must support the decision to take additional mitigation and due process steps.

Step two: A CE Rep should be appointed by the individual if the Department determines they are failing to manage their CE responsibilities. The Department may designate a CE Rep to manage these responsibilities (using the priority order list for Client Representatives on the 737 form). Staff should document on the Contacts tab in OA when a CE Rep is appointed and should add this information to case narration. If there is no one who is able, willing and

qualified to serve as a CE Rep, LO staff should consult with a CO PA to determine the next steps.

Step three: If the individual is clearly unwilling (or unable) to manage their CE duties, the CM should have a conversation with the individual. This conversation (preferably in person) should include a **verbal warning** to ensure the individual understands their CE duties and that fulfilling these duties is a requirement to be eligible to receive in-home services.

1) A verbal warning should include information and specific examples of the individual's failure to manage their CE responsibilities. Explain potential consequences for their eligibility to receive in-home services if further incidents occur (i.e., they may be made ineligible to receive in-home services by a HCW or IHCA caregiver).

2) Ask the individual if they understand the shared information, answer any questions they may have and document their response to the verbal warning in OA.

3) Offer options, resources, and supports, such as an ERC referral, behavioral support services, the designation of a CE Rep, and/or other community-based service settings to meet their care needs.

4) When documenting the verbal warning in OA, include information about the concerns addressed and any pertinent details, the date the conversation occurred, etc., in OA.

Step four: If issues continue to occur after the individual receives the verbal warning, the CM should immediately send a **written warning** to the individual via the steps below:

1) Inform the individual of ongoing or new concerns that have been received related to their inability or unwillingness to manage their CE responsibilities.

2) Include citations of appropriate sections from the In-Home Services rule or other OARs that address these concerns. Include the date(s) the individual was instructed by staff to address issue(s).

3) The letter should provide a clear warning that further incidents regarding their failure to manage their service plan may result in being made ineligible to receive in-home services from a HCW or agency caregiver. If appropriate, the CM may include a reasonable timeframe (date) for the individual to demonstrate they are able and willing to manage their service plan and providers. A reasonable timeframe will allow LO staff to determine if required changes that have been communicated to the individual have been implemented and are consistently observed.

4) A draft of the warning letter should be sent to a CO PA to review prior to being mailed to the individual. An example letter is found below. Details should be adapted to address the particular situation.

5) Staff should provide further guidance to the individual of changes needed to properly manage their CE responsibilities.

6) The letter should be printed on Department (local office) letterhead and signed by a LO manager or supervisor. The letter may be delivered in person (preferred) or by registered U.S. mail.

7) Document in OA that the letter was sent and the individual's response, if applicable.

8) Uploaded a copy of the letter to Laserfiche and sent a copy to the involved CO PA.

9) Staff should monitor the individual's response to the warning letter and any actions taken to mitigate the recorded concerns. If the concerns are fully mitigated, due process to address those concerns have ended.

Step five: If concerns continue, the final step is to end in-home services from a HCW.

1) Staff the concern with a PA in CO to ensure all appropriate mitigation strategies and due process procedures have been followed.

2) Offer the individual other service options. Assist the individual to pursue an IHCA caregiver or to consider CBC service options. Document a change in service setting if CBC placement occurs.

3) Individuals who are determined ineligible for in-home services (from a HCW and or an IHCA), and who do not seek CBC placement, may receive other services and monthly Waivered Case Management contacts from a CM as described in APD-PT-18-023.

4) Send a Notification of Planned Action (SDS 540) to close in-home services. Consult with a CO PA for appropriate language for this decision notice.

- Cite specific issues the individual failed to correct/address, appropriate OAR citations, and the dates staff addressed known

concerns and instructed the individual to address these issues (include dates of verbal and written warnings).

- Once the 540 notice has been approved and sent to the individual:
    - Upload a copy of the 540 to Laserfiche. Send a copy of the 540 to the CO in-home PA.
    - Forward any hearing requests to APD Hearings.

Sample warning letter (CE Fails to manage their employer responsibilities)

(Adapt information to address the specific concerns, Use Agency letterhead)

Date _ _/_ _/202_

Dear (Name of individual and CE Rep if applicable):

This letter is to inform you about ongoing issues and concerns regarding your inability to manage your Medicaid in-home service plan and caregivers. To be eligible to receive Medicaid in-home services you are required to complete your consumer-employer responsibilities. Information about your employer responsibilities is found in Oregon Administrative Rule (OAR) 411-030-0040, (**or cite other rules/sections that apply to concerns related to this individual**)

(a) To be eligible for in-home services provided by a homecare worker, an individual must be able to, or designate a representative to:

(A) Locate, screen, and hire a qualified homecare worker;

(B) Supervise and train the homecare worker;

(C) Schedule the homecare worker's work, leave, and coverage;

(D) Track the hours worked and verify the authorized hours completed by the homecare worker;

(E) Recognize, discuss, and attempt to correct any performance deficiencies with the homecare worker;

(F) Discharge an unsatisfactory homecare worker; and

(G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment.

Our staff spoke with you on __/__/____ (**list all dates** these concerns were discussed) about your failure to manage your Consumer-Employer Responsibilities and the changes you need to make to correct and address these concerns. These concerns include: (**list specific failures and concerns, provide a bullet point list below**).

You were encouraged to receive additional training from an Employer Resource Connection consultant on (date and results, cite this information **if applicable**). You were also informed on (cite date(s)) that you needed to designate a representative who can help manage your service plan and homecare workers on your behalf (cite this information **if applicable**). (Record any other action taken).

As of this date, you have continued to fail to consistently manage your consumer-employer responsibilities as outlined in the rule above. To remain eligible for services from a homecare worker or in-home care agency caregiver, you or an appointed representative must begin to consistently manage your employer responsibilities You must be able to (**list specific CE requirements** using simple language).

This is the final warning about managing your Consumer-Employer responsibilities.

If we receive additional information that indicate you have continued to fail to manage these responsibilities, you may be made ineligible to receive Medicaid in-home services provided by a homecare worker or agency caregiver. However, if your in-home services are ended, you will continue to be eligible to receive Medicaid services in a community-based care setting, such as an Assisted Living Facility or Adult Foster Home. We want to support your choices and independence while providing appropriate Medicaid services to meet your health and care needs.

Please call me or your case manager (name) with any questions about this letter.

Sincerely,

Name Supervisor or Manager

Aging and People with Disabilities (Office info)

Office Phone number: ____

Name of CM

Phone number: _____

2) When a CE fails to minimize dangerous conditions in the service setting (OAR 411-030-0050(2)(c))

Overview

An important eligibility requirement for individuals receiving Medicaid in-home services is their responsibility to maintain a safe work environment, which includes minimizing dangerous conditions in the home environment that could jeopardize the health and safety of the individual and their service providers.

Based on the individual's functional needs assessment (per OAR 411-030-0050(1) and OAR 411-030-0050(2)(b)), and according to OAR 411-030-0050(2)(c)(A-D), the Department will not authorize a service setting with dangerous conditions the jeopardize the health and safety of the individual or paid providers, when appropriate safeguards cannot be taken to improve the setting and minimize the dangers (see OAR 411-034-0070(3)(a) for SPPC).

Dangerous conditions that jeopardize the health or safety of the individual or paid providers in an in-home service setting include (but are not limited to):

- An unsafe or unhealthy workplace environment (leaking roof, rotting floorboards, lack of electrical, gas or other services, unsafe egress, rot or mounting debris, rodent infestation, toxic mold, etc.).
- Threatening or dangerous behavior from the individual or from others residing in or visiting the home.
- Dangerous or aggressive animals.
- Domestic violence.
- Criminal activity, illegal drug activity, etc.
- Unsafe display of firearms or other potentially dangerous items.

When dangerous conditions jeopardize the health or safety of a paid provider and necessary safeguards cannot be taken to minimize the dangers, or the individual or their representative refuses to or is unable to minimize these dangers, that individual is ineligible for APD in-home services (OAR 411-030-0050(2)(c)(C)).

Mitigation strategies to help an individual address and lower dangerous conditions in the home are described below.

Dangerous conditions in the home do not only include deteriorating conditions of the physical structure, they may also include dangerous individuals, animals or activities in the home. In addition, if staff believe factors such as the individual's significant cognitive decline, mental, emotional health or behavioral concerns, undue influence of others, or an abuse or neglect concern, may be contributing to a dangerous work environment, staff should assist the individual access available services, supports and resources to mitigate these concerns.

Mitigation strategies

CMs and LO staff should complete and document mitigation strategies used to assist the individual. It is important to document pertinent details throughout this process, including any information from providers or other sources. Depending on the situation, not all the strategies mentioned below apply.

1) **Conversation:** Have a conversation with the individual (or their representative), to describe their responsibility to remove any dangerous conditions in the workplace. Clearly explain why the situation or condition is considered dangerous and what must be done to mitigate the concern. Specific dates and pertinent details, including the individual's response to the conversation and information given by paid providers or others, should be documented.

2) **Employer Resource Connection (ERC) Referral:**

- The CM should assist the individual to make an ERC referral and notify the ERC Specialist of the reason for the referral so that they understand specific and relevant concerns.
- The CM should follow-up with the ERC Specialist after the referral is completed to understand and record the individual's response to the consultation.
- The outcome of the ERC referral should be documented by the CM in narration. The ERC specialist may also document the result if they have appropriate rights to OA.
- If the individual refuses to participate, document this information and proceed to the next steps.
- If the individual participates in an ERC referral but concerns continue, LO staff should consult a PA in CO to determine what further action may be needed.

3) In some cases, an APS (OAR 411-020) referral should be made to determine if dangerous conditions are due to potential abuse or self-neglect of the individual. APS may involve appropriate law enforcement agencies if necessary.

4) **CE or Client Representative:** Individuals should be encouraged to appoint a CE Rep to manage their in-home service plan or a Client Representative (737 form) to assist with making long-term care decisions. Designating a CE Rep may be needed to assist an individual in mitigating dangerous conditions in the home (however, is some cases, appointing CE Rep may not be appropriate decision or provide

appropriate support for the consumer to mitigate known concerns). It is important to note that unless the individual has a guardian, the individual's decisions and preferences are considered above the CE or Client Representative's decisions (when the individual has decision-making capacity).

5) **K-State Plan Ancillary Services** (OAR 411-035, OAR 411-030-0050(2)(b)) **and Crisis Support Program Services** (APD-PT-22-014, OAR 411-017)**:** A CM may help the individual request assistance through these programs to mitigate dangerous conditions in the home. Some of the services include chore services, an entrance ramp, home repairs, pest control services, an electronic backup system, etc.

6) **CBC Setting Options:** Individuals should be informed of CBC service options in their area. The individual's willingness to pursue available community service options should be documented in OA.

Decision to begin due process: If an individual does not make required changes to mitigate identified dangerous conditions or issues in the workplace, the CM should staff the case with their local office (LO) supervisor and then with a CO PA. The CM, LO supervisors and CO PAs will determine how to pursue due process.

Note: If deemed necessary to address a dangerous situation that puts the safety, health and welfare of the individual or provider in **serious and imminent risk of harm or jeopardy**, CO has the discretion to waive certain mitigation strategies and close in-home services while providing monthly Waived Case Management contacts and offering CBC service setting options to the individual.

Due process procedures

If mitigation strategies are unsuccessful, with CO approval, LO staff should follow the steps below prior to taking any action that would result in making an individual ineligible for APD in-home services.

> **Note: Cognitive capacity concerns:** If the individual does not have the ability to make an informed decision and has not appointed a CE Rep to make decisions on their behalf (with a 737 form), and necessary safeguards cannot be taken to protect the safety, health, and welfare of the individual or providers, the individual is ineligible to receive in-home services and the in-home setting should not be authorized (OAR 411-030-0040(4)(a)(b), OAR 411-030-0050(2)(c)(D)). In these cases, due process should be followed and placement in a CBC facility should be pursued.

Step one: If the CM determines the health and safety concerns can be mitigated by appointing a representative, the Department may designate a CE or Client Representative (if an approved individual is available). A healthcare professional should be consulted to determine if the individual is unable to manage their care and make decisions related to their service needs. Staff should use the priority order list on page 3 of the form 737, to identify a potential representative. The CM should document in narration if a CE or Client representative is/is not appointed to serve in this role. The individual's preferences (if they have capacity), are still considered above the representative's preferences unless the representative is the individual's legal guardian.

Step two: If the individual is unwilling or unable to address dangerous conditions in the home, the CM should have a formal (serious) conversation (i.e.,

verbal warning) with the individual to ensure they understand the serious nature of the concern(s).

1) The conversation should focus on the individual's responsibility to put necessary safeguards in place to minimize known dangers in the workplace to protect the safety, health, and welfare of the individual and their providers (OAR 411-030-0050(2)(c)). The CM should provide specific examples of identified dangerous conditions and ensure the individual understands that they may be made ineligible to receive in-home services if these concerns are not mitigated.

2) The CM should ask the individual if they understood the information shared about the concerns and if they have any questions. The verbal warning and the individual's understanding and response should be documented in OA.

3) The CM should offer options, resources and supports (including what may have already been suggested during the mitigation phase) to help the individual successfully mitigate the dangerous conditions in the home.

If dangerous conditions persist following the verbal warning, the CM should document pertinent information in OA and take the next step in coordination with CO PA staff.

Step three: The CM should send a **written warning** (letter) to the individual using the process below.

1) Inform the individual of ongoing concerns and that safeguards to minimize and address the dangerous conditions have not been successfully implemented.

2) Cite relevant sections of the In-Home Services Rule (OAR 411-030-0050(2)(c)). Include information describing any actions taken (including dates), and that the individual was instructed by staff to address the concerns but have failed to successfully do so.

3) The letter should provide a clear warning so that the individual understands that failure to maintain a safe work environment may likely result in being made ineligible to receive APD in-home services. Note: If necessary, include a reasonable timeframe for the individual to provide time for them to minimize the dangerous conditions in the home, and to allow staff to determine if the dangerous conditions have been mitigated.

4) CM should send a draft copy of the letter to the in-home PA at CO to review prior to being mailed to the individual. A sample warning letter is found below. Once finalized, the letter should be printed on Department letterhead and signed by a LO supervisor and may be delivered in person or by registered U.S. mail.

5) The letter should briefly describe known concerns and provide guidance to the individual about how to mitigate identified dangerous conditions in the home.

6) The sending of the letter, the date sent, the individual's response, etc., should be documented in case narration.

7) A copy of the letter should be uploaded to Laserfiche and sent to the CO PA assisting in due process.

8) The CM should monitor the individual's response to the warning letter and any actions taken to mitigate the recorded concerns. If the concerns are sufficiently mitigated so that dangerous conditions are no longer present in the home, due process addressing these concerns has ended.

Step four: If dangerous conditions are not mitigated, the final step in due process involves making the individual ineligible to receive in-home services from an in-home hourly provider.

1) Staff with CO PA and provide an update on the case, to ensure all appropriate mitigation strategies and due process procedures have been followed.

2) Staff should again offer the individual other service options, such as CBC service settings.

3) A Notification of Planned Action (SDS 540) should be sent to close in-home services. Working with the CO PA, the notice should include the following information:

    - Specific issues and concerns the individual failed to mitigate.
    - Appropriate OAR citations.
    - The dates the individual was instructed by staff to address known concerns (including dates of verbal and written warnings).

4) A copy of the 540 should be uploaded to Laserfiche and sent to the CO PA.

5) The CM should assist the individual to find appropriate CBC placement if desired. Document a change in service setting if CBC placement occurs.

6) Individuals who do not receive in-home services from a HCW or IHCA and do not seek CBC placement, may receive other services in their home, including monthly WCM contacts as described in APD-PT-18-023.

7) Document all pertinent information.

Sample warning letter to minimize dangerous conditions in the home (use agency letterhead)

Date _ _/_ _/202_

Dear (Name of individual):

This letter is to inform you about ongoing issues and concerns regarding your responsibility to maintain a safe workplace and to minimize dangerous conditions in your home. To be eligible to receive Medicaid in-home services you are required to maintain a safe home environment as a consumer employer of in-home services. Information about maintaining a safe home environment can be found in the following Oregon Administrative Rule (OAR 411-030-0050(2)(c)(A-D))

(c) The Department or AAA may not authorize a service provider (or) service setting . . . when

(A) The service setting has dangerous conditions that jeopardize the health or safety of the individual and necessary safeguards cannot be taken to improve the setting;

(B) Services cannot be provided safely or adequately by the service provider based on:–

(i) The extent of the individual's service needs; or

(ii) The choices or preferences of the eligible individual or the individual's representative;

(C) Dangerous conditions in the service setting jeopardize the health or safety of the service provider that is authorized and paid for by the Department, and necessary safeguards cannot be taken to minimize the dangers; or

(D) The individual does not have the ability to make an informed decision, does not have a designated representative to make decisions on his or her behalf, and the Department or AAA cannot take necessary safeguards to protect the safety, health, and welfare of the individual.

Our staff spoke with you on __/__/____ (**list dates** when these concerns were discussed with the individual and documented in OA), about unsafe conditions in your home and your responsibility to mitigate these concerns. Unsafe conditions include: (**list specific dangerous conditions** – possibly with a bullet-point list).

Although staff have advised you to address these concerns, as of this date, you have failed to do so. To remain eligible to receive Medicaid in-home services

from a paid provider, you must demonstrate that unsafe conditions in your home have been fully mitigated and removed.

This is your final warning about your responsibility to ensure a safe workplace!

If the dangerous conditions in your home, cited above, are not adequately addressed by __/__/____ (**Date**), you will no longer be eligible to receive Medicaid services in your home by a homecare worker or agency caregiver. To remain eligible for in-home services, you or your appointed representative must remove the dangerous conditions in your home (as mentioned above). You must be able to (using simple language, include a bullet-point list to record specific CE requirements related to a safe and healthy workplace).

If your Medicaid in-home services are ended, you will continue to be eligible to receive Medicaid services in a community-based care setting, such as an Assisted Living Facility or Adult Foster Home. We want to support your choices and independence while providing appropriate Medicaid services to meet your health and care needs. Please call me or your case manager (name) at our office if you have any questions about this letter.

Sincerely,

Name

Supervisor

Aging and People with Disabilities (Office info)

Office Phone number: ____

Name of CM

Phone number: _____

3) Failure to maintain a safe and harrassment-free workplace

Overview

Consumer-employers (CEs) are responsible for ensuring the workplace, their home, is safe and free from abuse and harassment. CEs may not verbally abuse or harass, physically assault, sexually harass or abuse, threaten, humiliate, or intimidate, etc., their paid providers. The following OARs apply to a CE's responsibility.

- OAR 411-030-0040(4)(a)(G) "To be eligible for in-home services provided by a homecare worker, an individual must be able to or designate a representative to . . . (G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment".
- OAR 411-030-0050(2)(c)(B)(ii) "Services cannot be provided safely or adequately by the service provider based on… the choices or preferences of the eligible individual or the individual's representative".
- OAR 411-030-0050(2)(c)(B)(ii) If, based on the CMs assessment, per OAR 411-030-0050(1) and OAR 411-030-0050(2)(b), the individual cannot or does not address known and serious health and safety concerns or safely manage their service plan, the LO should staff with CO as outlined below.

The Department considers the abuse or harassment of a paid provider to be a health and safety risk and a violation of Medicaid rule. In addition, abusive and harassing conduct in the workplace is considered a violation of federal and state labor laws. Harassment includes any unwelcome conduct, verbal or physical, that interferes with or creates a hostile or abusive work environment. It includes

verbal, emotional, physical or sexual abuse or harassment that jeopardizes the safety, health and welfare of a paid provider.

Note: Abuse and harassment of a paid provider may occur even though an individual has an appointed CE Representative who may not be aware of or able to mitigate the individual's conduct.

Mitigation strategies and due process procedures

Note: Mitigation strategies and due process for alleged abuse and harassment situations are described below. A shorter timeframe to conduct due process may be appropriate to address perceived imminent and serious health and safety risks to paid providers. As a result, verbal and written warnings or other due process procedures may be accelerated and completed in a shorter timeframe, if needed.

A service provider, service setting, or a combination of services selected by a individual or representative will not be authorized when an individual does not make decisions to protect the safety, health, and welfare of paid providers. The information in OAR 411-030-0050(2)(c)(D) (i.e., a service setting will not be authorized when a individual does not have the ability to make an informed decision), should be broadly interpreted to include cognitive limitations impacting an individual's informed decision-making capacity, self-neglect, their inability to mitigate potential risks or their ability to remove themselves from abusive or exploitive situations.

When staff observe or are made aware that a safety or harassing conduct issue exists in the workplace, the CM must immediately initiate mitigation strategies and due process. The following procedures should be followed but may be modified based on the severity of the situation.

Step one: Staff should clarify the safety or harassment of risk concerns by talking **directly with** paid providers.
LO staff should speak with the HCW or agency caregiver to understand the nature and details of the alleged unsafe, abusive, or harassing conduct. This information should be documented in a **separate file** (**not recorded in OA** or saved in Laserfiche), to protect the privacy rights and confidentiality of the individual.

Step two: The CM and LO staff should meet with the individual to discuss the allegation(s) of abusive or harassing conduct.

A LO supervisor may choose to be present, along with the CM, when meeting with the individual to ensure safety concerns are communicated clearly and the individual's perspective and response is understood. Staff should maintain a neutral and unbiased perspective as they determine if the allegations of unsafe and harassing conduct seem credible and if mitigation and due process procedures are needed.

Note: Staff should take necessary precautions to not put themselves at risk when working with individuals who have allegedly displayed abusive or harassing conduct. If the CM is concerned about their personal safety when meeting with the individual in their home, they should have an office supervisor accompany them or if needed, communicate with the individual over the phone.

- Staff should review with the individual their CE responsibilities so that they understand what behavior is required to remain eligible for Medicaid in-home services. The individual should understand they are responsible, according to federal and state labor laws and Medicaid

rules (OAR 411-030-0040(4)(a)(G)), to ensure the home environment is safe and free for harassment..

- Staff should inform the individual that the Department will evaluate their in-home services home environment based on allegations of abuse and harassment. The individual should understand that the Department may initiate mitigation and due process procedures to assist the individual in the management of their in-home services. However, due process may also result in ending the individual's in-home services if **recent or future** allegations regarding abuse or harassment of paid providers are **verified or determined to be credible**.
- If it is believed the individual's unsafe or harassing conduct is due, in part, to cognitive decline or a mental or behavioral health concern, action should be taken to provide needed services and supports for the individual. This support could include offering a MED review, Behavioral Support Services (BSS), an updated assessment, or referral to the local county mental health office.

Step three: Verbal and written warnings

(1) The CM must issue a clear **verbal warning** to the individual regarding abuse or harassment concerns. This warning should be given to help the individual understand that allegations of abuse or harassment have been made and to clarify that **any** further instances of alleged abuse or harassment may result in the immediate loss of HCW services and potentially all Medicaid in-home services. When documenting the verbal warning, staff should follow these guidelines.

- **General information** regarding the verbal warning (summary, general details) should be documented in OA. Example: “This CM discussed with the consumer concerns regarding inappropriate topics and demeaning speech they frequently try to share with their HCW.”
- **Specific (more detailed) information** shared in the verbal warning, including the individual’s response, should be documented in a **separate file** (not in OA or Laserfiche), to protect the rights and privacy of the individual.

(2) Staff should issue a **written warning within five business days of the verbal warning**. The written warning reinforces the information communicated in the verbal warning and should clearly state that **any verified report of additional or ongoing abusive or harassing conduct** will likely result in making the individual ineligible for Medicaid in-home services from paid providers.

- The written warning should be personally delivered or sent via certified U.S. mail.
- If applicable and if a male caregiver is recommended in light of alleged harassment, an IHCA may choose to send only male caregivers to serve an individual. If the IHCA makes that provision and the individual agrees, the individual may retain their in-home services if no further incidents of abuse or harassment occur.
- Staff should offer the individual other service options in a CBC or NF care setting.

A copy of the letter should be uploaded to Laserfiche and sent to the CO PA assisting with the case for their records.

Step four: Closure of in-home services

(1) For situations involving **imminent risk of injury or harm** to the health and physical safety of paid providers, staff may immediately suspend or end all in-home service options for the individual after consulting with CO. The immediate closure of in-home services should only occur when clear risk of **serious and immediate** harm, abuse or injury exists to a HCW or IHCA provider and when the workplace is determined to be too dangerous to allow a caregiver to return. "Risk of serious and immediate harm" means that without intervention, the HCW or agency caregiver is likely to experience substantial physical or emotional injury, trauma, or loss.

- Narrate **general information** in OA related to the closure of in-home services options for the individual. Specific and detailed information about this issue should be **recorded in a separate file** and should not be recorded in OA narration.
- The CM should follow procedures for closing in-home services by issuing a 540 Closure Notice (see below) and should assist the individual to find placement in a CBC facility, if desired.

(2) **Situations not involving risk of imminent injury or harm**, but that still involve unsafe, abusive, or harassing conduct that creates an unsafe work environment, should include Step 3 above **(verbal and written warnings)** before other due process actions are taken.

However, if subsequent credible allegations of abuse or harassment are made by paid providers and are verified by staff, the CM and LO staff should suspend or close in-home service options for this individual.

- Individuals receiving APD in-home services or SPPC in-home services, when those services are closed through due process, should receive a Notification of Planned Action (SDS 540).
- Appropriate language to include in the 540 notice should be staffed with CO before being sent to the individual.
- CM should offer and assist the individual to find another service setting option to meet their care needs.
- Send a copy of the 540 to the CO PA assisting with due process and upload copy of 540 form to Laserfiche.

It is important to note, depending on the circumstances, that the LO may decide to remove for an individual the option of receiving in-home services from a HCW, however, it may be allowed for this individual to receive these services through an IHCA.

Note: Individuals who have substantiated allegations of abuse and harassment but have chosen not to seek placement in a CBC setting, continue to be eligible to receive monthly WCM contacts and may receive other services as described in APD-PT-18-023.

- **General information** regarding the closing of in-home services should be documented in OA (ex. “The individual’s eligibility for in-home services ended on _ _/_ _/_ _ _ _ through due process, due to their failure to maintain a safe and harassment-free

workplace. The individual was offered other service setting options to address their care needs and received a 540 in-home services closure notice").

- Specific Information containing details of unsafe, abusive or harassing conduct (with appropriate dates, details, people involved, etc., and outlining the actions taken and the decision to end in-home service), should be documented in a **separate file** (not in OA or Laserfiche), to not violate the individual's privacy rights, choices, or confidentiality.

Sample warning letter (for failure to maintain a safe and harassment-free workplace)

(Adapt information to address specific situation. Use agency letterhead)

Date _ _/_ _/202_

Dear **(Name of individual):**

This letter is to inform you about ongoing issues and concerns regarding your failure to maintain a safe and harassment-free workplace for caregivers providing Medicaid services to you in your home. To remain eligible to receive in-home services, you are required by federal and state law and Medicaid rules to maintain a healthy and safe environment for caregivers who are authorized to provide in-home services.

Information about maintaining a safe home environment can be found in the following Oregon Administrative Rules:

OAR 411-030-0040(4)(a)(G),

(a) To be eligible for in-home services provided by a homecare worker,

(G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment.

And in OAR 411-030-0050(2)(c)(C),

(2)(c) The Department or AAA may not authorize a service provider, service setting, or a combination of services selected by an eligible individual or the individual's representative when,

(C) Dangerous conditions in the service setting jeopardize the health or safety of the service provider that is authorized and paid for by the Department, and necessary safeguards cannot be taken to minimize the dangers

Our staff spoke with you on __/__/____ (list dates when these concerns were discussed) about failing to provide a safe and harassment-free work environment and your responsibility as an employer of in-home services to ensure your treatment of caregivers is professional and appropriate. However, according to recent reports, you have continued to demonstrate abusive or harassing conduct toward your paid caregivers. To remain eligible for Medicaid in-home services from a homecare worker or in-home care agency caregiver, you must stop: (add bullet-point list of abusive and harassing behaviors).

Further failure to maintain a safe and harassment free work environment will result in being made ineligible to receive Medicaid services in your home.

This is the final warning about ensuring a safe and harassment-free workplace!

If the Department takes action to close your in-home services from a homecare worker, you may continue to receive in-home services by hiring an In-Home Care

Agency or you may move to a community-based care setting, such as an Assisted Living Facility or Adult Foster Home. **(Adapt the preceding information to fit the circumstances).**

Please call me or your case manager (name) if you have any questions about this letter.

Sincerely,

Name

Supervisor (position)

Aging and People with Disabilities (office info.)

Office ohone number: ____

Name of CM

Phone number: _____

Documenting mitigation and due process actions

When documenting the individual's failure to manage their CE responsibilities or to maintain a safe and harassment-free workplace, it is important to protect the individual's rights, choices, privacy and confidentiality.

- Oregon ACCESS case narration should **not be used** to record details describing abusive or harassing conduct. Narration should include general details to summarize an issue and any actions taken (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 for their paid providers").

- Specific information that includes more detailed information about the concerns should be recorded in a **separate file** that is not uploaded to Laserfiche or OA. Information recorded in a separate file may provide greater detail regarding the individual's abusive or harassing behavior than what is recorded in OA case narration ("A female HCW stated that the individual repeatedly made leud and sexually suggestive comments to her and inappropriately touches her body while she attempts to provide ADL care."

Supporting HCW's and IHCA caregivers health and safety

CMs should notify potential or current HCWs when credible allegations are known related to potentially dangerous conditions in the home or abusive and harassing conduct toward paid providers by the individual. Minimum information regarding serious health and safety risks may be shared, while not violating the individual's privacy rights, personal choices, or confidentiality. Additional information regarding HCW safety is found in APD-PT-21-034 (see Article 20, Section 1).

Minimum information that **may be** shared with prospective HCWs includes allegations of:

- Bodily harm and physical abuse
- Threatening or dangerous behavior
- Sexual harassment and abuse
- Verbal, mental, or emotional abuse
- Domestic Violence

- Illegal drug or other criminal activity
- Unsafe or unhealthy work environments: toxic mold, rotting floorboards, rodent infestation, aggressive animals, unsafe exit, etc.
- Unsafe handling of firearms or other potentially dangerous objects in the workplace.
- Any situation that threatens HCW health or safety: environments that violate state and federal worker protection laws.

Information that **should not be shared** with prospective HCWs or IHC agencies includes:

- Medical diagnosis or condition
- Previous incarcerations
- Details on how needs are to be met as this should be communicated by the individual. CMs should only share the individual's task list.
- Any previously identified health and safety risks that are no longer an active concern
- Any opinions or thoughts regarding the individual
    - For example, it is inappropriate to say that the individual is "difficult", "has a history of going through providers", "is rude and unreasonable, "is mean", "is estranged from family members", etc.
- Concerns regarding the individual's ability to manage the CE responsibilities unless those concerns relate directly to current health and safety issues in the home.

Local APD/AAA offices should not knowingly authorize a HCW or IHCA to work for an individual or in an in-home service setting when there are serious known concerns regarding ongoing health and safety risks and concerns a caregiver's health, safety or wellbeing.

Staffing cases with central office (CO)

CO PAs can staff cases and provide support to CMs and LO staff with the need for mitigation and due process with in-home individuals. Emails requesting a case staffing should be sent to the APD Medicaid Policy Box (apd.medicaidpolicy@odhsoha.oregon.gov). Include the following information:

- "In-Home Individual Case Review" in the subject line (indicate if the situation is urgent)
- Individual's name, prime number, and a summary in the body of the email.

Sample language for a 540 closure notice

The 540 notice provides a summary of the CE's failure that led to the decision to close their in-home services. The notice should include a summary of the individual's failures to manage their in-home services, appropriate rule sections, actions taken to close in-home services from a HCW and/or IHCA, and information about other service options available to the individual. Information in the notice should be adapted to the situation and circumstances surrounding this decision. Below is an example 540 closure notice.

The reasons for this action (including the Oregon Administrate Rule numbers) are: OAR 410-120-0006, OAR 411-030-0040(4)(G), OAR 411-030-0040(4)(a)(G), and OAR 411-030-0050(2)(c). **(Cite appropriate rule sections)**

1.) Summary of CE Failure) The (local office) has been trying to help you successfully manage your in-home services. Unfortunately, you have not (choose appropriate reason for closure – (1) managed your service plan (state issue(s)), or (2) taken appropriate safeguards to remove/minimize the dangers conditions in the home (state issue(s)), (3) managed your specific consumer-employer responsibilities, specifically (list duties that have not been managed properly*),* Or (4) taken action to ensure that your home environment is safe and free from abuse and harassment of your paid providers.

2.) Mitigation and Due Process Actions) Our staff worked with you to address this or these concern(s) on (cite dates) and provided both verbal and written warnings to you on (cite dates) to help you understand (summarize issue that was addressed. Example, "to help you understand what changes were needed in the management of your service plan to maintain your eligibility for Medicaid in-home services provided by a homecare worker").

3.) Decision to Remove In-Home Services) Because you have not ___ (cite issue being addressed) you are no longer eligible to receive in-home services from a HCW (or in-home care agency caregiver).

4.) Availability of other in-home or CBC Services) This decision does not mean that you are ineligible for other Medicaid services in other care

settings. You continue to be eligible for community-based care services such as in an Adult Foster Home, an Assisted Living Facility, or a Residential Care Facility. You may also receive case management services in your own home.

Mitigation and due process resources

- Comparison of In-Home Service Plan Assistance Types/Roles
- Failure to Minimize Dangerous Conditions

APD hearings unit information and due process

LO and CO staff who make the decision(s) to end an individual's in-home service benefits will need to be available to the APD Hearings Unit to:

- Provide an explanation and documentation for the mitigation and due process steps taken to the APD Hearings team
- Take part in staffing the case with the Hearing Rep before the hearing.
- Take part in a witness preparation session before the hearing.
- Be available to testify at the individual's hearing.

If local office staff have questions related to the hearing process and expectations noted above, they can contact the hearings rep assigned to the case, or contact the general hearings mailbox apd.hearings@odhsoha.oregon.gov if a CM or staff are unsure who to contact related to a specific case.

Available resources:

- Local Office Hearing Instructions
- Decision Notice – Service Decision Notice Preparation Tips
- Worker Guide with Sample Notice Language

You can get this document in other languages, large print, braille or a format you prefer free of charge. Contact the Aging and People with Disabilities at apd.ltss@odhs.oregon.gov or 503-945-5600. We accept all relay calls.

OREGON DEPARTMENT OF
Human Services

Aging and People with Disabilties
Medicaid Services and Supports
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