



Oregon

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December 1, 2014



To: Christina Hartman
DD Rules and Policy Analyst

From: Kimberly Colkitt-Hallman, Administrative Rules Coordinator
Aging and People with Disabilities and
Developmental Disabilities

Subject: Hearing Officer's Report
*November 21, 2014 Rulemaking Hearing ODDS - Personal
Support Workers Providing Developmental Disability Home
Care Services*

The purpose of the hearing was to take public testimony regarding the Department of Human Services (DHS), Office of Developmental Disability Services' (ODDS) proposal to adopt rules in OAR chapter 411, division 375 for personal support workers (PSWs) providing home and community-based waiver, state plan, and General Fund home care services to individuals eligible for developmental disability services and receiving supports authorized by DHS, Children's Intensive In-Home Services (CIIS), Community Developmental Disability Programs (CDDPs), or Support Services Brokerages (Brokerages).

The proposed rules make permanent the temporary rule language that became effective on July 1, 2014 that established the standards and procedures governing personal support workers and the fiscal services provided on behalf of individuals who employ or contract with personal support workers.

Public Testimony

Oregon Self Advocacy Coalition (OSAC), Jordan Ohlde, Vice Chair of OSAC – Exhibit #1

The testimony provided by Mr. Ohlde is summarized below.

“Assisting People to Become Independent, Healthy and Safe”
An Equal Opportunity Employer

Mr. Ohlde is from Bend and is on the OSAC Committee and is the Vice Chair of the group. Mr. Ohlde started in this position a couple of weeks ago.

Mr. Ohlde wanted to say his mom provides him and his sister with in-home and community-based support every day. Mr. Ohlde couldn't remember her allotted hours, but he believed they were going from 20 or 25 hours to 63 hours. Mr. Ohlde just wanted to say his mom is his personal care provider and "we should not tread or do very much". Mr. Ohlde said he didn't really know or have a chance to look at the rule and see what is in it, but he wanted to say his mom is his provider and the more personal family care providers there are, even if it is just for a few years, it helps to show the next provider what they need to do and how to handle their client.

Mr. Ohlde thanked the Department for their time and hearing his comments.

***ODDS Response:** ODDS took note of Mr. Ohlde's comments and recognizes the important role of personal support workers who are family members.*

Written Comments

Department of Human Services Background Check Unit, Kelly Myrick-Duckett, Policy Analyst – Exhibit #2

The written comments provided by Ms. Myrick-Duckett are summarized in Attachment A.

SEIU Local 503, Marilyn McManus, Long Term Care Policy Analyst – Exhibit #3

The written comments provided by Ms. McManus are summarized below and in Attachment A.

Ms. McManus stated she saw multiple references (in the rules generally) where "health-related" was not hyphenated. Ms. McManus says it should be hyphenated consistently as it is a compound adjective.

***ODDS Response:** ODDS considered the comments made by Ms. McManus and hyphenated the term "health-related" as suggested.*

Oregon IDD Coalition, Leslie Sutton, Policy Analyst – Exhibit #4

The written comments provided by Ms. Sutton on behalf of the Oregon IDD Coalition are summarized in Attachment A.

Association of Oregon Community Mental Health Programs (AOCMHP), Sarah Jane Owens, Disability Specialist – Exhibit #5

The written comments provided by Ms. Owens are summarized below.

Ms. Owens submitted a chart with various workload impacts due to the rule changes. In regards to OAR chapter 411, division 375, Ms. Owens said eXPRS is a new task that increases the volume of work without additional staff. Entering the "POC for PSWs" takes time and there is an orientation that takes additional time as well. Also, there is a need to track the criminal record check. In regards to workload, there has not been reimbursement for this task as of yet.

***ODDS Response:** ODDS appreciates the efforts to estimate the fiscal impact and workload of the proposed rule changes. The existing caseload model accounts for much of the administrative work efforts and accounts for the context of the work, including any efficiencies that may have been created, work that may be completed simultaneously with other tasks, and other mitigating factors.*

The public comment period closed at 5 p.m. on November 28, 2014.

ATTACHMENT A

Rule Number and Proposed Rule Language	Comment	ODDS Response Permanent Rule Language
411-375-0010 Definitions		
<p>(52) "Unacceptable Background Check" means a check that produces information related to the background of a person that precludes the person from being a personal support worker for one or more of the following reasons:</p> <p>(a) The person applying to be a personal support worker has been disqualified under OAR 407-007-0275;</p> <p>(b) The person was enrolled as a personal support worker for the first time, or after any break in enrollment, after July 28, 2009 and has been disqualified under OAR 407-007-0275; or</p> <p>(c) A background check and fitness determination has been conducted resulting in a "denied" status as defined in OAR 407-007-0210.</p>	<p>Myrick-Duckett - There is no "denied" or "disqualified" (OAR 407-007-0275) in this rule. A subject individual may be found "ineligible due to ORS 443.004."</p> <p>Recommendation: "Unacceptable Background Check" means a check that produces information related to the background of a person that precludes the person from being a personal support worker for one or more of the following reasons::</p> <p>(a) The person applying to be a personal support worker has been disqualified been found ineligible due to ORS 443.004, under OAR 407-007-0275;</p> <p>(b) The person was enrolled as a personal support worker for the first time, or after any break in enrollment, after July 28, 2009 and has been disqualified been found ineligible due to ORS 443.004, under OAR 407-007-0275; or...</p>	<p>ODDS considered the comments made by Ms. Myrick-Duckett's recommendation and made additional edits to the definition of unacceptable background check.</p> <p><i>(53) "Unacceptable Background Check" means an administrative process that produces information related to the background of a person that precludes the person from being a personal support worker for one or more of the following reasons:</i></p> <p><i>(a) Under OAR 407-007-0275, the person applying to be a personal support worker has been found ineligible due to ORS 443.004;</i></p> <p><i>(b) Under OAR 407-007-0275, the person was enrolled as a personal support worker for the first time, or after any break in enrollment, after July 28, 2009 and has been found ineligible due to ORS 443.004; or</i></p> <p><i>(c) A background check and fitness determination has been conducted resulting in a "denied" status as defined in OAR 407-007-0210.</i></p>

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411-375-0020 Provider Enrollment and Personal Support Worker Qualifications and Orientation		
<p>(4) The Department, CDDP, CIIS, or Support Service Brokerage may deny a provider enrollment in the following circumstances:</p> <p>(c) The applicant has committed fiscal improprieties;</p> <p>(e) The applicant has an unacceptable background check and the background check results in a closed case pursuant to OAR 407-007-0325;</p>	<p>IDD Coalition - (4)(c) - How is this being measured? There should be technical guidance.</p> <p>Myrick-Duckett - (4)(e) - Unacceptable background check and closed case are not always the same.</p> <p>Recommendation: (e) The applicant has an unacceptable background check and or the background check results in a closed case...</p>	<p>(4)(c) - ODDS considered the comments made by the IDD Coalition but did not make any additional edits.</p> <p>Fiscal improprieties is defined in OAR 411-375-0010. Specific examples of behavior and information around family relationships are listed in the definition.</p> <p>(4)(e) - ODDS considered the comments made by Ms. Myrick-Duckett's recommendation and made additional edits.</p> <p><i>(4)(e) The applicant has an unacceptable background check or the background check results in a closed case pursuant to OAR 407-007-0325;</i></p>
<p>(5)(a)(A) After conducting a weighing test as described in OAR 407-007-0200 to 407-007-0370, the Department may approve a restricted enrollment for an applicant with a prior criminal record, unless the applicant is disqualified under OAR 407-007-0275.</p>	<p>Myrick-Duckett - Recommendation: (A) After conducting a weighing test as described in OAR 407-007-0200 to 407-007-0370, the Department may approve a restricted enrollment for an applicant with a prior criminal record, unless the applicant is disqualified found ineligible due to ORS 443.004, under OAR 407-007-0275..."</p>	<p>ODDS considered the comments made by Ms. Myrick-Duckett's recommendation and made additional edits.</p> <p><i>(A) After conducting a weighing test as described in OAR 407-007-0200 to 407-007-0370, the Department may approve a restricted enrollment for an applicant with a prior criminal record, unless under OAR</i></p>

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		407-007-0275 the applicant has been found ineligible due to ORS 443.004.
(7)(f) A personal support worker must self-report any potentially disqualifying condition as described in OAR 407-007-0280 and OAR 407-007-0290 to the Department, CDDP, CIIS, or Support Services Brokerage within 24 hours.	IDD Coalition - Should this also include reporting this to the employer? It seems the employer of record should be told by the PSW as well.	ODDS considered the comments made by the IDD Coalition but did not make any additional edits. Nothing prevents a PSW from self-reporting conditions to the employer of record but it is not mandatory. If reported to the Department, CDDP, CIIS, or Support Services Brokerage, termination processes (if applicable), may proceed as outlined in rule.
(8)(a) A personal support worker who wants to be available for referral on the Registry must attend a Personal Support Worker Orientation provided by the Department consistent with OAR 418-020-0020.	IDD Coalition - It needs to be clearer that the orientation for a PSW has to be for everyone. Recommendation: Include how long a person has to complete the PSW Orientation and a link to the SEIU collective bargaining agreement (CBA).	ODDS considered the comments made by the <u>IDD Coalition's recommendation</u> but did not make any additional edits. Activation for referral on the registry remains dependent on completion of the PSW Orientation. Any new or existing PSWs completing orientation within certain timelines is dependent on the language in the CBA. This rule will be consistent with changes in the CBA.

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411-375-0030 Personal Support Worker-Individual Relationship		
<p>(1) A personal support worker may not be:</p> <p>(a) The parent of the individual if the individual is less than 18 years of age;</p> <p>(b) The legal or designated representative of the individual; or</p> <p>(c) The spouse of the individual.</p>	<p>IDD Coalition - A legal representative can be a paid support worker as long as they have appointed a designated representative to oversee support planning for the individual.</p> <p>Recommendation:</p> <p>(1) A personal support worker may not be:</p> <p>(a) The parent of the individual if the individual is less than 18 years of age;</p> <p>(b) The legal representative who has not appointed a designated representative to plan supports for the individual;</p> <p>(c) A designated representative of the individual; or</p> <p>(d) The spouse of the individual.</p>	<p>ODDS considered the comments made by the IDD Coalition's recommendation and made additional edits.</p> <p><i>(1) A personal support worker may not be:</i></p> <p><i>(a) The parent of the individual if the individual is less than 18 years of age;</i></p> <p><i>(b) The legal representative who has not appointed a designated representative to plan supports for the individual;</i></p> <p><i>(c) A designated representative of the individual.; or</i></p> <p><i>(d) The spouse of the individual.</i></p>
411-375-0040 Fiscal and Accountability Responsibility		
<p>(6) ANCILLARY WITHHOLDINGS. For the purposes of this subsection of the rule, "Union" means any labor organization that represents personal support workers in employment or contractor relations.</p> <p>(a) The Department, CDDP, CIIS, Support Services Brokerage, or</p>	<p>McManus - As recommended in an email to Mike Parr, delete section (6). This subject is addressed fully in statute and the CBA. The CBA was modified via a letter on 9/11/14. This provision does not appear in any other OARs that pertain to SEIU providers.</p>	<p>ODDS considered the comments made by Ms. McManus' recommendation and deleted the section for ancillary withholdings.</p>

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<p>contracted fiscal intermediary deducts a specified amount of fair share or dues from the monthly salary or wages of a personal support worker for payment to the Union. (b) In order for the Union to receive payment for the fair share and dues of the personal support worker, the Union must enter into a written agreement with the Department, CDDP, Support Services Brokerage, or designated fiscal intermediary to pay the actual administrative costs of the deductions. A CDDP or Support Services Brokerage who has a written agreement with the Department must have a written agreement with a contracted fiscal intermediary. (c) The Department, CDDP, CIIS, Support Services Brokerage, or contracted fiscal intermediary pays the deducted amount of fair share and dues to the designated Union monthly.</p>		
<p>(7)(b)(A) Personal support workers for a CDDP or Support Services Brokerage must return all applicable IRS forms to the local office of the</p>	<p>IDD Coalition - This makes it sound as if the PSW is working for the CDDP. It should be that the PSW is an employee of the individual they are supporting and</p>	<p>ODDS considered the comments made by the IDD Coalition and made additional edits.</p>

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CDDP or Support Services Brokerage.	not a PSW for the county.	<i>(A) Personal support workers working with individuals receiving services through a CDDP or Support Services Brokerage must return all applicable IRS forms to the local office of the CDDP or Support Services Brokerage.</i>
411-375-0070 Provider Enrollment Inactivation and Termination		
(2) The Department may terminate the provider enrollment for a personal support worker in the following circumstances: (j) The personal support worker has been excluded or debarred by the Office of the Inspector General.	IDD Coalition - Does this only apply for Brokerages and CDDPs? What happens if a family complains and wants to let someone go?	Debarred status checks are part of the initial and renewal background checks for all PSWs. Any PSW that cannot pass this check is not able to be a PSW that is approved to work. Individuals retain the right to choose which approved PSW they would like to work with. Debarred status impacts the qualification of a PSW, not the ability of an individual making employment decisions around a qualified PSW.
(3) NOTICE OF TERMINATION. When the Department terminates the provider enrollment of a personal support worker, the Department must issue a written notice to the personal support worker.	IDD Coalition - Is it ODDS, the Brokerage, or the County doing this? Is this when a PSW did not pass a criminal background check or meet qualifications as a Medicaid provider?	ODDS will be the entity that issues and terminates/inactivates provider numbers. Brokerages and CDDPs will be making the recommendation to ODDS to take an action based on information or documentation that they possess. Termination notices will only be provided to existing PSWs that have been

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		<p>terminated. If a potential PSW doesn't pass initial qualification requirements, they would not be considered a PSW and would not be subject to any of the rules or processes related to PSWs.</p>
<p>(4) IMMEDIATE INACTIVATION. The Department, on the recommendation of the CDDP, CIIS, or Support Services Brokerage, may immediately inactivate the provider enrollment for a personal support worker on the date an alleged violation listed in section (2) of this rule is discovered when the alleged violation presents imminent danger to current or future individuals. The Department must make a determination to terminate or reactivate the provider number within 3 business days from the date of the notice of inactivation as described in OAR 411-375-0080. The personal support worker must file an appeal within 10 business days from the date of the notice of inactivation as described in OAR 411-375-0080.</p>	<p>IDD Coalition - Can they still work even if someone does not want to continue to use them?</p>	<p>Individuals may make the decision to work with or not work with a qualified provider. Hiring or firing a PSW remains the choice of the individual.</p> <p>The rule language refers to the inactivation or termination of the PSW provider number, which impacts the ability of the PSW to possess "approved to work" status to be paid for any Medicaid services to any individual receiving ODDS services.</p>