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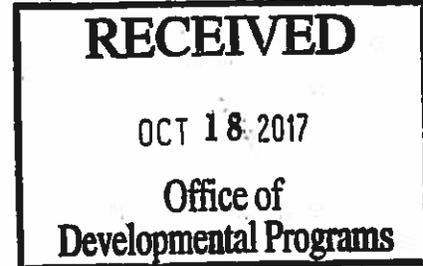


Pennsylvania Advocacy and Resources
Autism and Intellectual Disability
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October 18, 2017



Nancy Thaler, Deputy Secretary
Office of Developmental Programs
Department of Public Welfare
P.O. Box 2675
Harrisburg, PA 17105-2675

Re: Questions and Suggestions on Implementation of Unofficial Final Form Chapter 6100 Select Sections relating to Program Regulations

Dear Deputy Secretary Thaler:

Thank you for releasing the select sections of the Unofficial Final Form Chapter 6100 regulations to ODP's 6100 Regulatory Workgroup for questions and suggestions regarding implementation. In reviewing the sections, the standard we used was how to implement the proposed regulations within the framework provided by ODP as published in its *Everyday Lives: Values into Action* document.

Within that context, we identified draft regulatory language that is aligned with ODP's stated goals as well as language that, when implemented in practice, appears to be in conflict with ODP's stated goals.

Agency regulations do matter and profoundly impact the way people are supported. The Chapter 6100 regulations will either enhance and support ODP's and PAR's shared vision of assuring the reality of Everyday Lives or they will weaken - if not impede - the fulfillment of that goal. Our comments below are provided within the spirit of enhancing ODP's and PAR's shared vision of supporting individuals with autism or intellectual disability to live Everyday Lives.

PAR acknowledges and appreciates ODP's efforts to appropriately modify and streamline certain regulations and we support and endorse the following 26 regulations as revised in this Unofficial Final Form draft. We believe the following provisions can be implemented within the Everyday Lives framework:

- §6100.45 Quality Management
- §6100.56 Children's Services
- §6100.183 Additional rights of the individual in a residential service location
- §6100.184 Negotiation of choices
- §6100.185 Informing of rights
- §6100.222 Individual plan process
- §6100.225 Support coordination, base-funding support coordination and TSM
- §6100.341 Definition of a restrictive procedure
- §6100.342 Written policy

§6100.343	Appropriate use of restrictive procedure
§6100.344	Human rights team
§6100.346	Staff training
§6100.348	Physical restraint
§6100.349	Emergency use of a physical restraint
§6100.402	Incident Investigation
§6100.403	Individual needs
§6100.404	Final incident report
§6100.405	Incident analysis
§6100.444	Size of service location
§6100.462	Medication administration
§6100.463	Storage and disposal of medication
§6100.464	Prescription medications
§6100.465	Medication records
§6100.466	Medication errors
§6100.467	Adverse reaction
§6100.468	Medication administration training

The following sections are ones in which we register concern regarding implementation as not being fully aligned with the Everyday Lives vision:

In PAR's extensive review of how the select proposed regulations would be implemented, we draw the Department's attention to the following critical observations and key areas of concern in an effort to urge you to read further through PAR's questions and recommendation regarding implementation of regulations whose language does not appear to align with Everyday Lives.

- **§6100.142** inadvertently conveys employee vs independent contractor status. If ODP intends Lifesharing to remain a financially viable opportunity for individuals, much care needs to be taken that the regulatory language not potentially threaten the independent contractor status of Lifesharing providers. An active lawsuit is currently looking to regulations to defend a wage and hour status which if successful will undermine the future viability of the program. Therefore, it is critical that the language in these regulations support the independent contractor status of Lifesharers that can withstand court challenge.
- **§6100.221** individuals should have the independent right to request a review of their ISP. To assure that right, "and" must change to "or" in 6100.221(d).
- **§6100.226** when implemented would triple documentation for billing by requiring shift documentation rather than daily documentation. This appears in conflict with on-going ODP efforts to reduce documentation to what is necessary. Shift documentation is fine and appropriate for progress notes to assure that one shift has information from the prior shift but for billing purposes moving from daily to shift documentation triples the required documentation unnecessarily and increases audit risk.

§ 6100.3. Definitions. Clarity is needed in the definition of “support” to enable the recruitment and retention of volunteers, use of natural supports and to facilitate community engagement activities involving community members. The clarity needed is assurance that they are not subject to the training or orientation requirement cited elsewhere including 6100.141+. Not only would the training requirements for community members be cost prohibitive, they would thwart the very goal of community integration that the federal home and community based rule advances.

Recommendation: *Support*—An unpaid activity or assistance provided to an individual that is not planned or arranged by a provider and is exempt from orientation and annual training requirements in 6100.141.

§ 6100.55. Reserved capacity. Provisions of this section should be required rather than optional, and the word “medical” should be added to (b) to clarify that reserving an individual’s residential placement extends to additional types of medical leave.

(PAR also notes that at the point that ODP wants to put into regulation the capacity for providers to offer real choice, a minimum 1% reserved capacity factor would be necessary to facilitate maximum choice for individuals who wish to become more and more engaged with family and community. This is a real factor in implementation of Everyday Lives and choice. Thus our recommended (d) below in the recommendation box.)

In this section, the use of “may” and “shall” is questioned and should be made consistent. This is not wordsmithing, but substantive. PAR has been told that the department cannot regulate itself and so regulations cannot impose obligations on the department, but only obligations on the provider community. However, here are the facts as we know them. The Legislative Reference Bureau’s “Pennsylvania Code and Bulletin Style Manual” explains that when formulating regulations, in expressing a duty on a person or non-governmental entity, the word “shall” is used. (See Manual at section 6.7 (a)). Similarly, the word “will” is used to indicate “that the Commonwealth pledges to act.” *Id.*, at (c) (See attachment). So, for example, apart from the proposed regulatory provisions that relate to licensure and reflect how providers “shall” comply with enumerated requirements, PAR expects that regulatory text involving ODP’s legal duty and obligation to establish valid payment rates correspondingly includes the word “will.” Within that context, the following is provided which relates to what ODP and providers would be expected to do in implementation.

Recommendation: (a) The provider ~~may~~ shall not limit an individual’s leave days.

(b) The provider shall reserve individuals’ residential placement during ~~his~~ their hospital, medical or therapeutic leave not to exceed 180 days from ~~his~~ their departure from the residential service location.

(c) The Department ~~may~~ will approve an adjustment to the provider’s program capacity for the length of the individual’s absence, not to exceed 150 days.

(d) The Department will provide a one percent reserve capacity factor to promote therapeutic leave and individual choice.

§ 6100.141. Training records. PAR recommends that ODP clarify that both electronic and paper records will meet regulatory compliance for verifying documentation, in accordance with evolving CMS standards.

Recommendation: (a) Electronic or paper Records of orientation and training, including the training source, content, dates, length of training, copies of certificates received and persons attending, shall be kept.
(b) The provider shall keep a paper or electronic training record for each person trained.

§ 6100.142. Orientation. Subsection (a)(4) needs to be incorporated into (a)(7) to make clear that Lifesharers are independent contractors (subcontractors) and not employees. Clarification regarding the independent status of Lifesharers is essential to avoiding ambiguity and misunderstanding about the actual status of Lifesharers under the regulations. PAR also recommends that orientation training provided to a Direct Support Professional or subcontractor by one provider be accepted by another provider, if that training was delivered by a provider otherwise required to adhere to the provisions of § 6100 and can be verified by electronic or written record.

Recommendation:

(a)(3) Direct ~~service~~ support professionals including full-time and part-time staff persons.

~~(a)(4) Life sharers.~~

(a) (7) Consultants and other subcontractors who are paid or contracted by the provider and who will work alone with individuals, except for consultants who provide an HCBS or a base-funded service for fewer than 30 days within a 12-month period and who are licensed, certified or registered by the Department of State in a health care or social service field.

~~(b)(5) Job-related~~ Knowledge and skills about the provision of services and support.

(b)(8) Orientation training provided to a direct support professional or subcontractor by another provider may be accepted, if that training was delivered by a provider otherwise required to adhere to the provisions of § 6100 and can be verified by electronic or written record.

§ 6100.143. Annual training. PAR recommends that person-centered values-based principles training be specified as applicable to other subcontractors consistent with ODP's Everyday Lives document, enhancing ODP's efforts to apply value-based principles.

Recommendation:

(a)(1) Direct ~~service~~ support professionals and ~~life sharers or other subcontractors~~ who provide an HCBS or base-funded service to the individual.

(a)(2) Direct supervisors of direct ~~service~~ support professionals.

(c)(1) The application of person-centered practices and values-based principles, community integration, individual choice and assisting individuals to develop and maintain relationships.

§ 6100.181. Exercise of rights. PAR recommends the use of gender neutral language throughout the regulations. While this may not seem to be an earthshaking recommendation, PAR works to push the envelope toward full inclusion at every opportunity and inclusive language in regulations is one of those opportunities. Examples are in the recommendation below:

Recommendation:

(b) The provider shall educate, assist and provide the accommodation necessary for individuals to make choices and understand his their rights.

(c) ~~AN~~ Individuals may not be reprimanded, punished or retaliated against for exercising his their rights.

§ 6100.182. Rights of the individual. PAR endorses this section with gender neutral language and editing correction in (b) replacing "or" with "and" after the word "choice". PAR recommends that 6100.186 "Facilitating personal relationships" be incorporated into 6100.182 as a right of the individual, added as subsections (p) (q) and (r) below.

Recommendation: (b) ~~An individual has~~ Individuals have the right to civil and legal rights afforded by law including the right to vote, speaking freely, practicing the religion of his their choice ~~and or~~ practicing no religion.

(p) ~~AN~~ Individuals have the right to visit with whom they choose, at the direction of the individual.

(q) ~~AN~~ Individuals may designate persons of their choice to assist in decision making, planning and activities at the direction of the individual.

(r) ~~AN~~ Individuals have the right to involve any of their relatives and friends to be involved, under the direction of the individual.

§ 6100.186. Facilitating personal relationships. To remove redundancy PAR recommends this section be incorporated into 6100.182.

Recommendation: See 6100.182

§ 6100.221. Development of the individual plan. PAR recommends this section be modified (d) to reflect the need to review and revise an individual's plan as needed to accommodate the changing needs of an individual when circumstances warrant it or as requested by the individual.

Recommendation: (d) The individual plan shall be reviewed and revised as needed when an individual's needs or service system changes ~~and or~~ upon the request of an individual.

§ 6100.223. Content of the individual plan. PAR supports this provision to promote increased flexibility in the individual plan process to meet the changing needs of the individual. PAR recommends the following modification for consistency with ODP's definition of support with support having been defined as unpaid.

Recommendation: (5) The provider of the service ~~and support.~~

§ 6100.224. Implementation of the individual plan. PAR concurs with the intent of this section, the obligation of the state to provide the necessary resources to implement the plan.

§ 6100.226. Documentation of claims. PAR recommends the deletion of subsections (b)(1) and (b)(3) to accommodate practical reporting of documentation for claims; otherwise shift documentation for the purposes of claims/payment triples the current requirement and unnecessarily increases audit risk. Shift documentation belongs in 6100.227 "Progress notes", not in 6100.226 "Documentation of claims." PAR requests that ODP reduce duplication in reporting by deleting (5) noting this is already disclosed in 6100.227 under progress notes. Item (e) is already addressed as a CMS requirement and is recommended to be deleted.

Recommendation:

(b) The provider shall document service delivery ~~on the date the service is delivered.~~

~~(2) A new service note shall be completed when there is an interruption of service within a 24-hour period, if service is reinitiated within that 24-hour period.~~

~~(3) If there is a change in the staff person providing the service or a change in shift involving multiple staff persons during a 24-hour period, a new service note shall be completed.~~

(c)(4) The date, name and signature or electronic signature of the person completing the documentation.

(5) Identification of the service delivered and the total number of units of service delivered from the beginning to the end of the service on the specified date.
~~, the nature or description of the activities involved in the service, who delivered the service and where the service was delivered.~~

~~(6) The total number of units of service delivered from the beginning to the end of the service on the specified date.~~

(d) The provider shall maintain claims documentation including a record of the time worked or the time that a service was delivered to support the claim.

~~(e) The amount, frequency and duration of the service delivered shall be consistent with the individual plan.~~

~~(f) Documentation of claims including supporting documentation, shall be kept.~~

§ 6100.227. **Progress notes.** PAR supports this provision, with the following deletions in (a) noting that needed material will not be impacted by these recommended deletions, nor will the content of the notes be enhanced by their inclusion. Modification to (a) will help align the various entities and give options. PAR also recommends reducing redundancy with deletion of (d) and wrapping those concerns into (c).

Recommendation:

(a) The provider, ~~in cooperation with the support coordinator, base funding support coordinator or targeted support manager, and the individual,~~ shall review the documentation of service delivery in § 6100.226 (relating to documentation of claims) and document the progress made to achieve the desired outcome of the service provided, at least every 3 months beginning with the date of the initial claim relating to service for the individual.

(c) The documentation of progress in subsection (a) shall be maintained to include the following:

~~(d) Documentation of progress notes shall be kept.~~

§ 6100.345. **Behavior support component of the individual plan.** PAR's recommendation clarifies that staff other than a credentialed staff member may provide a description of the behavior, and enhances the timeliness and proximity of the reporter to the behavior that has occurred and is being noted.

Recommendation: (c) (2) ~~An assessment~~ detailed description of the behavior including the suspected likely reason for the behavior.

§ 6100.347. **Prohibited procedures.** The following modifications have been added for clarity with regard to applicable situations:

Recommendation: (5) A mechanical restraint, defined as a device that restricts the movement or function of an individual or portion of an individual's body. A mechanical restraint includes a geriatric chair that restricts movement, a bedrail that restricts the movement or function of the individual, handcuffs, anklets, wristlets, camisole, helmet with fasteners, muffs and mitts with fasteners, restraint vest, waist strap, head strap, restraint board, restraining sheet, chest restraint and other similar devices. A mechanical restraint does not include the use of a seat belt during movement or transportation or a helmet used during sports and recreation. A mechanical restraint does not include a device prescribed by a health care practitioner for the following use or event:

§ 6100.350. **Access to or the use of an individual's personal property.** Subsection (b)(3) is modified so as not to be limited to providers and further extend protections for individuals.

Recommendation: (b)(3) ~~The provider may not coerce the~~ The individual shall not be coerced to provide consent.

§ 6100.445. **Locality of service location.** PAR notes the need of this section to be compliant with the HCBS Final Settings Rule, and would appreciate ODP clarification with regard to other human service provider programs, e.g. halfway houses, within the locality of the ODP funded support or service, and the potential impact on HCBS Final Settings Rule and 6100.445.

Recommendation: ODP should provide additional clarity on HCBS Final Settings compliance with regard to 6100.445 and other human service venues under the jurisdiction of another provider or funded by a related state authority.

§ 6100.461. **Self-administration.** Change in (c) to remove financial burden from the provider to provide and pay for assistive technology to avoid the creation of an unfunded mandate.

Recommendation: (c) The ~~provider-ISP team~~ shall provide or arrange for assistive technology to assist the individual to self-administer medications.

§ 6100.469. **Exceptions.** PAR is concerned that this provision may inadvertently serve as a disincentive in recruiting life-sharers and thus requests that the exemption apply to both licensed and unlicensed life sharing homes.

Recommendation: (a)(3) Licensed or unlicensed life sharing home.
~~(b)(2) An unlicensed life sharing home.~~

Thank you for considering our questions and recommendations regarding implementation and changes that can be made to the proposed regulatory language to better align with Everyday Lives.

Sincerely,



Shirley Walker
President and CEO