

OPWDD ASSESSMENT OF PUBLIC COMMENT

Implementation of the Protection of People with Special Needs Act and Reforms to Incident Management

This document contains responses to public comments submitted during the public comment period on emergency/proposed regulations concerning implementation of the Protection of People with Special Needs Act (PPSNA) and reforms to incident management.

Comment: A commenter noted that the inclusion of two separate sets of definitions for reportable significant incidents and notable occurrences, with one set of definitions applicable before January 1, 2016 and a different set of definitions applicable on and after January 1, 2016, will cause confusion and make the regulations difficult to reference and comprehend. The commenter recommended removal of the definitions applicable to incidents that occurred prior to January 1, 2016 from the final regulations.

Response: The emergency adoption of the emergency/proposed regulations was effective on September 8, 2015 and will expire on December 6, 2015. Before September 8, 2015, OPWDD worked with the Justice Center for the Protection of People with Special Needs to modify definitions of reportable “significant incidents” and “notable occurrences,” but OPWDD determined that the modified definitions would have to be phased in to allow sufficient time to update OPWDD’s Incident Report and Management Application (IRMA) to accommodate new definitions and to allow sufficient time for provider agencies to train staff on them. OPWDD identified January 1, 2016 as the effective date for the modified significant incident and notable occurrence definitions. Because the final regulations will be effective before January 1, 2016, both sets of definitions (those applicable before January 1, 2016 and those applicable on and after January 1, 2016) must be included in the final regulations. OPWDD may consider amending the regulations to delete the definitions that were applicable before January 1, 2016 in the future.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended elimination of *Conduct between persons receiving services that would constitute abuse* as a reportable significant incident. The commenter noted that providers have been waiting for clarification and guidance from OPWDD and the Justice Center, but that “it still remains ambiguous and inconsistent.” The commenter also noted that any such conduct between individuals receiving services that results from a staff failure would already be reported as abuse or neglect, making this additional type of incident unnecessary and onerous. The commenter added that, at a minimum, guidance is needed.

Response: *Conduct between persons receiving services that would constitute abuse* is defined as a reportable significant incident in statute (PPSNA; Article 11 of State Social Services Law) and cannot be deleted from OPWDD’s incident management regulations.

**Assessment of Public Comment
Implementation of the
Protection of People with Special Needs Act
and Reforms to Incident Management**
Page 2

OPWDD is developing guidance on the final regulations and plans to issue an updated Part 624 handbook in the near future.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended deleting *Choking with no known risk* as a reportable significant incident or restoring it as a notable occurrence (effective January 1, 2016). The commenter noted that *Choking with known risk* should remain a reportable significant incident because custodial supervision could be a factor in these cases, but questioned the benefit of reporting the no known risk incidents to the Justice Center.

Response: OPWDD identified *Choking with no known risk* as a notable occurrence that places individuals receiving services at risk for death or injury, since adoption of the first emergency regulations on implementation of the PPSNA and reforms to incident management on June 30, 2013. However, OPWDD has since determined that choking, with or without known risk, meets the definition of a significant incident, "... an incident, other than an incident of abuse or neglect, that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a person receiving services.....," in accordance with the PPSNA. With this change, OPWDD expects to be better able to identify trends and consider systemic remedies for quality improvement where needed.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended that OPWDD should provide clear written guidance, with examples, for the definitions of *Mistreatment*, *Other Significant Incident*, and *Sensitive Situation* that are effective on January 1, 2016. The commenter specifically noted that:

(1) guidance is needed on the phrase "potential to impair [the health, safety, or welfare of an individual receiving services]" in the definition of *Mistreatment* (a reportable significant incident);

(2) the phrasing "An incident ..., but that does not involve conduct on the part of a custodian, and does not meet the definition of any other incident described in this subdivision, but that because of its severity or the sensitivity of the situation..." in the definition of *Other significant incident* (reportable significant incident) is ambiguous and subjective; and

(3) the phrasing "Those situations involving a person receiving services that do not meet the definitions of other incidents in section 624.3 of this Part or in this

subdivision, but that may be of a delicate nature to the agency...” in the definition of a *Sensitive Situation* (notable occurrence) is subjective and overly broad.

Response: OPWDD is developing guidance on the final regulations and plans to issue an updated handbook on Part 624 in the near future. Providers are advised to contact the OPWDD Incident Management Unit’s regional Incident Compliance Officers with any questions on these definitions in the meantime.

The statutory definition of a significant incident “... shall mean an incident, other than an incident of abuse or neglect, that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a person receiving services, and shall include but shall not be limited to:...” can encompass many sorts of incidents, beyond those specifically identified by type in the PPSNA and OPWDD regulations. OPWDD created the categories of *Mistreatment* (involving action or inaction on the part of a custodian) and *Other significant incident* (incident under the auspices of an agency that does not involve action or inaction on the part of a custodian) so that OPWDD is better able to categorize the incidents for trending purposes.

OPWDD kept the long-standing definition of a *Sensitive situation* as a notable occurrence category, for reporting of events like crimes committed by individuals receiving services, or other incidents an agency chooses to report in accordance with agency policy, that do not meet any other incident definitions in sections 624.3 or 624.4.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended that a custodian or provider should not be charged with *Obstruction of reports of reportable incidents* when that person made a good faith determination that an incident did not meet the definition of a reportable incident. The commenter recommended that OPWDD should work with the Justice Center to amend the definition of *Obstruction of reports of reportable incidents* in section 624.3 accordingly.

Response: *Obstruction of reports of reportable incidents* is defined as a reportable incident in statute (PPSNA; Article 11 of State Social Services Law) and cannot be deleted from or amended in OPWDD’s incident management regulations. Providers are advised to contact the OPWDD Incident Management Unit’s regional Incident Compliance Officers with any questions or concerns regarding specific incidents.

OPWDD is adopting the regulations as proposed.

**Assessment of Public Comment
Implementation of the
Protection of People with Special Needs Act
and Reforms to Incident Management**
Page 4

Comment: A commenter noted that the form OPWDD 150 to report events and situations identified in Part 625, and IRMA, include nine preliminary classifications, which include the category “Other.” The commenter noted that the Part 625 regulations do not include a definition for “other.”

Response: OPWDD is developing guidance on the final regulations and plans to issue guidance on Part 625 in the near future. Guidance will advise that the category “other” was created to enable providers to use the system to report other events and situations that do not meet the definitions of events and situations defined in Part 625, but that providers choose to report to OPWDD.

OPWDD is adopting the regulations as proposed.

Comment: A commenter noted that although the Part 625 regulations require updates on events and situations in IRMA, there is no special tab or other updating mechanism in IRMA to enter the updates.

Response: OPWDD is developing guidance on the final regulations and plans to issue guidance on Part 625 in the near future. The guidance will advise that, although there is no “reporting update” available in IRMA for Part 625, updates are to be entered using the “conclusions” data field on the investigation tab. OPWDD will make a change in IRMA in 2016 to relabel the conclusions data field “Summary and Updates” to avoid confusion in the future.

OPWDD is adopting the regulations as proposed.

Comment: A commenter noted that the form OPWDD 148 is not helpful or meaningful for the families/guardians/advocates of individuals receiving services and noted that the information contained in the form is essentially the same information provided to families/guardians/advocates during the initial required notification.

Response: The OPWDD 148 includes the following information: “This report includes any immediate corrective/protective actions taken in response to an incident to safeguard the health or safety of the person receiving services. This should include, but is not limited to, a general description of any initial first aid, medical/dental treatment, or counseling provided. Please note that the investigation may still be ongoing and additional actions may be taken pending the results and recommendations of the investigation.” The form meets the requirements for the “Report on Actions Taken” in accordance with 14 NYCRR paragraph 624.6(f)(8).

Regulations in paragraph 624.6(f)(4) also require the agency to offer a person's guardian, parent, spouse, adult child, or correspondent an opportunity to meet with the

**Assessment of Public Comment
Implementation of the
Protection of People with Special Needs Act
and Reforms to Incident Management**
Page 5

chief executive officer or designee to discuss the incident further. Additional information can also be made available to eligible requesters in accordance with section 624.8.

OPWDD is adopting the regulations as proposed.