



Putting People First

Memorandum

To: Provider Associations
 Voluntary Provider Agency Executive Directors
 DDSO Directors
 IBR Director
 Commissioner's Advisory Council
 DDPC Consumer Caucus
 OPWDD Required Regulations Mailing List

From: Barbara Brundage, Director *BB*
 Regulatory Affairs Unit

Date: October 10, 2012

Re: Revised Proposed Regulations – Person-Centered Behavioral Intervention

Comments Due: Friday, November 16, 2012

Suggested distribution:

- Agency administrators
- Quality/compliance administrators
- Incident coordinators
- Psychologists
- Members of behavior management/human rights committees
- Individuals involved in the development of public comments on the proposed regulations

Background:

OPWDD filed proposed regulations concerning behavioral intervention in December, 2011.

Public comment on the proposed regulations:

Over 100 individuals submitted comments to OPWDD concerning the proposed regulations. OPWDD wishes to thank the many individuals who took the time to submit comments.

OPWDD conducted a thorough analysis of the comments received and issues raised and developed an Assessment of Public Comments. The assessment contains a summary of the issues raised and OPWDD’s response. Due to the length of the document, OPWDD also prepared an overall summary of the Assessment of Public Comment.

OPWDD would appreciate the cooperation of recipients of this memorandum in conveying its thanks to those individuals who submitted comments, and in sharing the Assessment of Public Comments with them, along with the other information in this memorandum. Due to the volume and length of comments received, it is not possible for OPWDD to respond to each comment individually. Commenters should note that a response to all comments can be found in the full Assessment of Public Comment.

Many questions were also posed regarding the proposed regulation. In each instance, OPWDD has attempted to provide a response directly to the individual asking the question.

Purpose:

OPWDD has now filed revised proposed regulations concerning person-centered behavioral intervention.

The revised/proposed regulations incorporate many changes based on input from individuals, family members, advocates and providers, including comments received during the public comment period.

A summary of changes in the revised proposed regulations, compared to the proposed regulations, is contained in a separate document that accompanies this memorandum. The assessment of public comment explains the rationale for making many of the changes to the text.

A summary and full text of the proposed regulations, along with the other documents described above, is available at www.opwdd.ny.gov. Look under “Regulations.”

Needs and benefits:

Interventions for challenging behaviors are an important component of the OPWDD system of behavioral supports. Appropriate, person-centered behavioral supports and interventions for challenging behaviors can significantly enrich the lives of individuals with developmental disabilities, and enable them to become more independent, satisfied and successful in many aspects of their lives.

OPWDD is proposing the addition of a new Section 633.16 containing comprehensive requirements for behavioral supports and for interventions in response to challenging behavior and/or symptoms of diagnosed psychiatric disorders. These new requirements will help agencies provide higher quality services and will protect the rights and welfare of individuals receiving services.

The regulation emphasizes that positive approaches, strategies, and supports are always the preferred method of intervention for challenging behavior. In addition, the regulation establishes specific procedures that must be followed in order to actively monitor, limit, and control the use of specific behavioral interventions that limit rights or have potential adverse impacts.

The implementation of the new provisions would require that agencies incur additional expenses and redirect existing staff resources toward compliance activities. OPWDD considers that the additional costs and staff time involved are more than justified by the enhanced protections afforded to individuals receiving services. Further, OPWDD is phasing-in the new requirements so that agencies will have

adequate time to hire the necessary staff and integrate the new required processes into existing agency procedures. OPWDD has also delayed the imposition of the new planning requirements on existing behavior support plans so that the new requirements can be implemented during regularly scheduled reviews of the current plans. OPWDD realizes that some rural areas may be unable to access the full range of staffing qualifications set in the regulations. In an effort to assist providers in those areas, OPWDD has included a hardship waiver in the revised proposed regulations. Voluntary agencies may apply for the waiver, demonstrating and documenting a good faith effort to recruit the necessary qualified staff, and individual requests for waivers will be reviewed by OPWDD. OPWDD will make a decision whether to grant the waiver request.

Among its provisions, the proposed regulations prohibit aversive conditioning. OPWDD considers that the use of behavior modification techniques that involve deliberately inflicting sensations that are uncomfortable, painful or noxious is inappropriate and unnecessary.

The regulations also modify the definitions of abuse in Part 624 to conform to the provisions of the new behavioral intervention requirements and add additional clarity.

The new Section 633.16 also references existing regulations in Section 633.17(a)(18), which requires the review of medications prescribed for and taken by individuals receiving services (including psychotropic medications). The results of the reviews of psychotropic medication must be documented and shared with the prescriber and the program planning team. This will assist healthcare providers and the team to evaluate whether the benefits of continuing the psychotropic medication(s) outweigh the risk inherent in potential side effects.

The provisions of Section 681.13 are phased out in conjunction with the phase-in of the new Section 633.16. These provisions contain requirements for behavioral intervention in Intermediate Care Facilities (ICF/DDs). Since ICF/DDs are required to comply with the provisions of Section 633.16 concerning behavioral intervention, these requirements are duplicative and are therefore being phased out.

Outdated and duplicative requirements contained in Part 81 which concerned review of “untoward incidents” and “extra risk procedures” in “Schools for the Mentally Retarded” have been deleted. These areas are addressed in Part 624 and the new Section 633.16.

Compliance activities:

OPWDD expects to finalize the revised proposed regulations effective January 1, 2013.

Providers should plan to use the time prior to January 1, 2013 to come into compliance with the requirements of the revised/proposed regulations.

OPWDD recognizes that imposing additional requirements concerning behavioral intervention will mean that providers will need to establish new policies and procedures or revise existing documents and practices. In some cases, agencies will need to hire new staff to fulfill the new credentials requirements. Training will also be a critical compliance activity since staff, family care providers and respite/substitute providers will need to be trained in existing behavior support plans and in specific interventions on the planned effective date (see subdivision 633.16(i)). Staff who are responsible for support and supervision

of a person whose plan includes the use of any physical intervention technique (and supervisors of these staff) must also be trained and certified in an approved OPWDD curriculum (SCIP-R or PROMOTE) on the planned effective date. Formation or establishment of behavior management/human rights committees, informed consent committees and pharmacy review practices will also require sufficient lead time for agencies to put into place or arrange for and should be prioritized.

Providers should note that some aspects of the revised proposed regulations are phased in, in order to allow changes to behavior support plans to occur in conjunction with regularly scheduled reviews/updates to individuals' plans.

OPWDD notes that providers were notified of its intention to finalize the similar proposed regulations last December and it expects that much of the work necessary to come into compliance has already been undertaken by providers. OPWDD considers that any remaining changes necessary for providers to come into compliance can be accomplished prior to the planned effective date of January 1, 2013.

Further guidance:

Guidance regarding requirements for reporting the use of restrictive interventions can be found in an Administrative Memorandum which has already been issued by OPWDD. ADM #2012-03 **Review and Reporting Requirements for use of Strategies for Crisis Intervention and Prevention-Revised (SCIP-R) Restrictive Personal/Physical Intervention Techniques**, and information about the **Restrictive Intervention Application** can be found at: <http://www.opwdd.ny.gov/node/2317>.

OPWDD is planning to develop a guidance document to assist providers in complying with the provisions of the new regulations. OPWDD plans to issue this guidance document in the winter or spring of 2013.

Public comments/questions:

The deadline for public comment for these regulations is the close of business on Friday, November 16, 2012.

Written comments about the revised proposed regulations should be addressed to:

Barbara Brundage
Director, Regulatory Affairs Unit
OPWDD
44 Holland Avenue
Albany, New York 12229
Tel. (518) 474-1830
FAX (518) 474-7382
Email: barbara.brundage@opwdd.ny.gov

If you have any questions about the revised proposed regulations please contact Dr. Ann Troy at (518) 474-3558 or by email at opwdd.behavioral.intervention.regulation@opwdd.ny.gov.

October 10, 2012

Page 5

Thank you.

cc: Dr. Pettinger
Dr. Troy
Ms. Mugno
Ms. Zibell
Ms. Matthews
Dr. Partridge