

MSC E-VISORY

Issue #23-11

August 19, 2011

State of New York Office for People With Developmental Disabilities
Courtney Burke, Commissioner
Distributed by: Division of Policy and Enterprise Solutions
Suzanne Zafonte Sennett, Deputy Commissioner

The MSC E-Visory is an electronic advisory which provides pertinent and timely information about programs and services available to individuals receiving MSC. Announcements about MSC training, conferences and meetings appear regularly. **MSC Supervisors: Please share this issue with all MSC Service Coordinators and others as appropriate.** In order to receive an email notification when a new MSC E-Visory is posted, please sign up for our mailing list (listserv). Listserv information and past issues can be accessed via the following link: http://www.opwdd.ny.gov/wt/publications/wt_publications_mscevisories_index.jsp

In This Issue:

Identifying OPTS (Options for People Through Services) General DD Services in the ISP

Attached is a letter, dated August 11, 2011, that was sent to OPTS Providers with current contracts that included one or more General DD Service. The letter provides information about how OPTS services are now listed in the ISP, based upon the ISP format that was streamlined on October 1, 2010. This letter informs providers that “frequency, duration and effective date” are not required in the “Other Services or 100% OPWDD Funded Supports and Services” section of the ISP to be in compliance with the OPTS Contract Appendix B. The provider is required to provide the Service Coordinator with the complete OPTS General DD Service name, and are responsible for informing the Service Coordinator of the approved service start date. The letter is also accessible on the OPWDD website at:

http://www.opwdd.ny.gov/opts/images/OPTS_LETTER_MSC_2011_08.pdf

Oversight of Individuals in Our Care

Attached is a letter, dated August 12, 2011, that was sent to Executive Directors of Voluntary Agencies and DDSO Directors. This letter provides information on the safety and well-being of individuals receiving services from OPWDD and provider agencies. The letter discusses transportation safety, oversight of individuals attending day programs and oversight of individuals on community outings. The letter also states that individuals must not be left unattended in a vehicle unless their Individual Protective Oversight Plan (IPOP) specifically states that the individual has the capacity to do so in a safe and time restricted manner.

OPWDD Protocol for Reporting Potential Crimes to Law Enforcement

OPWDD, in consultation with the New York State Police, has established protocol for reporting potential crimes to law enforcement. Attached to this e-visory is a letter, dated August 18, 2011, that was sent to Voluntary Provider Agency Executive Directors, DDSO Directors and others, along with the protocol. Pursuant to the New York State Mental Hygiene Law, every provider of services, whether state-operated or non-state operated, must make a report to law enforcement if it appears that a crime (misdemeanor or felony) may have been committed against an individual who receives services from the provider.

Fiscal & Administrative Solutions

James R. Kiyonaga, Acting Deputy Commissioner

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August 11, 2011

Dear OPTS General DD Service Provider,

This is to communicate a change in requirement to the Frequency, Duration and Effective Date service block of the "Other Services or 100% OPWDD Funded Supports and Services" on the ISP for General DD Service contracts provided through Options for People Through Services (OPTS). With the restructuring of Medicaid Service Coordination (MSC) that became effective October 1, 2010, the Individualized Service Plan (ISP) was streamlined to eliminate the requirement for certain details in service blocks for non-HCBS Waiver services. Previously Frequency, Duration and Effective Date were required to be listed in the service block for "Other Services or 100% OPWDD Funded Supports and Services" in section 2 of the ISP. The streamlined ISP no longer requires the Frequency, Duration and Effective Date be listed for "Other Services or 100% OPWDD Funded Supports and Services" in Section 2.

If the Appendix B of your OPTS contract states that the "Frequency, Duration and Effective Date" be listed in the "Other Services or 100% OPWDD Funded Supports and Services" section, these components may continue to be under a subheading titled "Additional Information" in the "Other Services or 100% OPWDD Funded Supports and Services" section of the October 1, 2010 version of the ISP, if the Service Coordinator chooses to include this detail. Continued compliance with using the full General DD Service name under "Type of Service" is **still required** (e.g., OPTS General DD Hourly Services with parenthetical if applicable, etc.).

It is your responsibility to insure the Service Coordinator is informed of the DDSO approved effective date for service start so it can include this information under the "Additional Information" subheading if the Service Coordinator chooses to include it.

If you have any questions about this change, please contact Karla Smith of Central Operations at (518) 402-4333.

Sincerely,



Karla J. Smith
Director of Central Operations

cc: J. Kiyonaga H. DeSanto
S. Sennett M. Iyer
J. Gentile J. Pettinger
E. Pasternak C. Diehl
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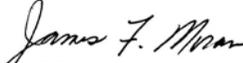
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The following information supersedes that contained in the August 3rd, 2011 memorandum entitled “Accounting for Individuals in the Care of Day Program”.

TO: Executive Directors of Voluntary Agencies
DDSO Directors

FROM: James F. Moran 
Division of Quality Management

DATE: August 12, 2011

SUBJECT: Oversight of Individuals in Our Care

The safety and well-being of individuals receiving services from the Office for People With Developmental Disabilities (OPWDD) and provider agencies is of paramount importance. DDSOs and providers must have policies and procedures in place to ensure that individuals in their care receive the appropriate level of supervision to safely meet their protective oversight needs. Moreover, in accordance with OPWDD regulations [14 NYCRR § 633.8(a) (1)], DDSOs and providers must ensure that all staff responsible are trained in these procedures. In order to effectuate these responsibilities, DDSOs and provider agencies must comply with the following:

Transportation Safety:

DDSOs and providers must have policies and procedures in place to ensure that individuals being transported arrive safely at their destination. All applicable staff must be trained on these policies and procedures, including reinforcing with staff the serious life-threatening risks of failing to follow the required procedures. Policies and procedures must include, at a minimum, the following:

- Individuals must not be left unattended in a vehicle unless their Individual Protective Oversight Plan (IPOP) specifically states that the individual has the capacity to do so in a safe and time restricted manner;
- All drivers must perform on-board inspections to ensure that no individual remains in the vehicle, including the use of an on-board back to front inspection for all mini-vans, vans and buses;
- As an alternative, or in addition to on-board inspections, electronic sensor devices may be used in mini-vans, vans and buses, designed to minimize the possibility that an individual may be inadvertently left on the vehicle;
- For every transportation trip that involves a mini-van van or bus, documentation must be maintained to confirm that the vehicle was checked to ensure that all individuals boarded and exited the vehicle as intended;
- Where electronic sensor devices are used as an alternative to on-board inspections, documentation must be maintained to confirm that such devices have been inspected, maintained and are periodically tested to ensure that they are in good working order;

- In addition to compliance with all State licensing and traffic laws, drivers and all staff accompanying individuals during transportation should be familiar with the individuals being transported and their individual protective oversight needs and take appropriate precautions when transporting these individuals;
- Drivers must use seatbelts for all passengers and the driver (including the use of wheelchair securing straps and tie downs).
- DDSOs and agencies which contract with another entity for the provision of transportation services must ensure that the transportation provider has policies, procedures and training in place consistent with the requirements set forth in this section.

Oversight of Individuals Attending Day Programs:

DDSOs and agencies must have policies and procedures in place to ensure that individuals attending day programs receive adequate protective oversight in accordance with their needs as set forth in each individual's IPOP. All appropriate staff must be trained on these policies and procedures, including reinforcing with staff the serious life-threatening risks of failing to follow the required procedures. Policies and procedures must include, at a minimum, the following:

- Attendance must be verified at the beginning of each day program to determine when an individual is absent from a scheduled program or activity and policies and procedures must be in place to determine how to verify that individual's whereabouts in the event of an unscheduled absence;
- Such policies and procedures must include a requirement that the individual's residence be contacted if an individual has an unscheduled absence from a day program and must address instances in which appropriate law enforcement authorities will be contacted in an effort to locate the individual;
- Agencies must have emergency contact information for all individuals receiving services in their programs and policies and procedures must address when such contact information should be used in an attempt to locate an individual with an unscheduled absence;
- Once it is determined that an individual's whereabouts are unknown, the provider must comply with the reporting requirements of Part 624 procedures for missing persons.

Oversight of Individuals on Community Outings:

DDSOs and providers must have procedures in place to ensure that staff are aware of the whereabouts of the individuals in their care and follow reasonable steps for ensuring the whereabouts and safety of each individual throughout the outing.

- DDSOs and provider agencies must have in place policies and procedures in accordance with this directive no later than October 1, 2011. Staff must be trained no later than November 1, 2011.

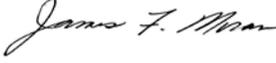
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To: Provider Associations
Voluntary Provider Agency Executive Directors
DDSO Directors
IBR Director
Commissioner's Advisory Council
DDPC Consumer Caucus
OPWDD Required Regulations Mailing List

From: James F. Moran 
Acting Executive Deputy Commissioner

Kerry A. Delaney 
Deputy Commissioner and General Counsel

Date: August 18, 2011

Re: Protocol for Reporting Potential Crimes to Law Enforcement

Suggested distribution:

Agency Administrators
Incident Coordinators
Quality Assurance Staff
Investigators

Background:

Sections 13.21(b) and 16.13(b) of the New York State Mental Hygiene Law require that providers notify law enforcement officials if it appears that a crime may have been committed against an individual who receives services from the provider.

14 NYCRR Section 624.6(d) requires that in the case of any reportable incident, serious reportable incident or allegation of abuse where a crime may have been committed, law enforcement officials must be notified.

The Federal Centers for Medicare and Medicaid Services (CMS) issued a memorandum on June 17, 2011, entitled, "Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility (LTC): Section 1150B of the Social Security Act" (Ref: S&C: 11-30-NH). This memorandum applies to ICF/DD facilities in the OPWDD system, and establishes requirements for reporting to law enforcement officials. (It does not apply to other services in the OPWDD system.) The memorandum was revised August 12, 2011.

In addition, it should be noted that A.8325 passed both houses of the New York State Legislature and will be sent to the Governor for his approval or veto in the near future. This bill amends the provisions of the Mental Hygiene Law cited above to change the required timeframe for reporting certain potential crimes to law enforcement.

Purpose: New York State Law has required providers to report potential crimes against individuals receiving services to law enforcement for more than 25 years. This requirement is also mirrored in longstanding OPWDD regulations. However, OPWDD has become aware that DDSOs and providers may not be consistently reporting all potential crimes to law enforcement. OPWDD is issuing the attached guidance document to give providers additional guidance regarding this responsibility to report to law enforcement as a part of its efforts to improve compliance with the requirement to report.

OPWDD developed the attached Protocol in consultation with the New York State Police in a series of meetings over the past several months.

In developing this document, OPWDD compared the definitions of abuse in Part 624 with the definitions of various crimes in the New York State Penal Law. The Protocol identifies the events and situations that meet the criteria for abuse that might also constitute a crime. Reporting all of the events or situations specified in the Protocol will allow the law enforcement officials receiving the notification to determine what law enforcement response may be necessary.

Please note that the Protocol supersedes any contradictory guidance formerly issued by OPWDD.

Recent memoranda issued by OPWDD directed the field to report potential crimes immediately (May 13, 2011 memo from James Moran, March 11, 2011 memo from Sheila McBain, and March 13, 2011 memo from Sheila McBain). The timeframe specified in the memoranda is superseded by the Protocol in only one limited respect, regarding the timeframe in which a necessary sexual consent determination may be completed. (See paragraphs 7 & 8 in the Protocol.) Otherwise, in accordance with the recent memoranda, notification to law enforcement must be made immediately for all situations specified in the protocol.

As noted above under “Background,” there have been several recent developments related to the timeframe for reporting potential crimes – the directive issued by CMS and the legislation which has passed in both houses. OPWDD expects to send future guidance about the timeline for reporting to law enforcement in conformance with the CMS directive and pending legislation, should it be enacted into law. However, until future guidance is issued, providers must continue to comply with the provisions of the three memoranda cited in the preceding paragraph.

OPWDD also wants to make providers aware that the OPWDD Incident Management Unit can serve as a resource for questions about reporting potential crimes to law enforcement. If questions arise, please email incident.management@opwdd.ny.gov or call (518) 474-3625.

Thank you.

Office for People With Developmental Disabilities Protocol for Reporting Potential Crimes to Law Enforcement

Developed in Consultation with the New York State Police

August 18, 2011

Pursuant to the New York State Mental Hygiene Law, every provider of services, whether state-operated or non-state-operated, must make a report to law enforcement if it appears that a crime (misdemeanor or felony) may have been committed against an individual who receives services from the provider.

Abuse reported pursuant to 14 NYCRR Part 624 may also be a crime which must be reported to law enforcement. The following is to be used as a guideline for those allegations of abuse which must be reported to law enforcement by the Developmental Disabilities Services Offices (DDSO) or other agencies. Many of the terms used in the following are taken from definitions of crimes in the New York State Penal Law and are not found in OPWDD regulations in Part 624.

1. Any intentional hitting, slapping, pinching, kicking, hurling, strangling or shoving of an individual receiving services by a staff member, intern, contractor, consultant or volunteer of a DDSO or provider entity, except for those instances in which the action was taken to prevent injury to the individual receiving services or any other person, whether or not such action causes injury, may be a crime and must be reported to law enforcement.
2. Any intentional hitting, slapping, pinching, kicking, hurling, strangling or shoving of an individual receiving services by another individual receiving services, where the individual who performs the abusive action intends to cause physical injury to the other individual and causes such physical injury, may be a crime and must be reported to law enforcement. Physical injury is defined as impairment of physical condition or substantial pain.
3. Any unauthorized or unnecessary use of restrictive personal intervention techniques, including the use of more physical force than is necessary for the safety of the individual receiving services, by a staff member, intern, contractor, consultant or volunteer, where the staff member, intern, contractor, consultant or volunteer knowingly acts in a manner likely to cause injury to the physical or mental welfare of the person receiving services, may be a crime and must be reported to law enforcement.

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4. Any unauthorized or inappropriate use of restraint where the staff member, intern, contractor, consultant or volunteer knowingly acts in a manner likely to cause injury to the physical or mental welfare of the person receiving services may be a crime and must be reported to law enforcement. This includes the use of mechanical restraining devices or medication to control a person's behavior without the necessary permissions (see paragraph 624.4(c)(5)).
5. Any sexual abuse, as defined by 14 NYCRR Part 624.4(c)(2), between a person receiving services and an employee, intern, consultant, contractor or volunteer of an agency may be a crime and must be reported to law enforcement. An exception is made when "a person with a developmental disability who was a service recipient becomes an employee of a service provider organization and already has a relationship with another service recipient of the same or another service provider organization."¹
6. Any sexual contact between two persons receiving services in which one person receiving services uses force or coercion may be a crime and must be reported to law enforcement.
7. Any sexual contact between two persons receiving services, in which at least one person has not been determined to be capable of consenting to sexual contact may be a crime and must be reported to law enforcement. A sexual consent determination is completed to determine whether an individual is legally capable of consenting to sexual contact. If a sexual consent determination has not been completed for an individual, or if an individual's condition has changed such that there is any question as to the individual's ability to consent, clinical staff should be immediately consulted to complete a sexual consent determination. If a sexual consent determination cannot be completed within 24 hours, the agency must report to law enforcement as soon as it is evident that the sexual consent determination cannot be completed within that timeframe. If force or coercion is not involved, and both individuals have been determined to be capable of consenting to sexual contact no report would be made to law enforcement. In addition, if force or coercion is not involved, and both individuals have been determined to be incapable of consenting to sexual contact, no report would be made to law enforcement. If one person is determined to be capable of consenting to sexual contact, and one person is determined to be incapable of consenting to sexual contact, a crime may have occurred and must be reported to law enforcement.

¹ As used throughout this document, sexual abuse is defined in OPWDD regulations (paragraph 624.4(c)(2)) as sexual contact in specific circumstances. Sexual contact is defined as the "touching or fondling of the sexual or other intimate parts of a person, not married to the actor, for the purpose of gratifying the sexual desire of either party, whether directly or through clothing. Sexual contact also includes causing a person to touch anyone else for the purpose of arousing or gratifying personal sexual desires."

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8. Any sexual contact between a person receiving services and a person not receiving services who is not an employee, intern, consultant, contractor or volunteer of an agency, where the person receiving services has not been determined to be capable of consenting to sexual contact may be a crime and must be reported to law enforcement. A sexual consent determination is completed to determine whether an individual is legally capable of consenting to sexual contact. If a sexual consent determination has not been completed for an individual, or if an individual's condition has changed such that there is any question as to the individual's ability to consent, clinical staff should be immediately consulted to complete a sexual consent determination. If a sexual consent determination cannot be completed within 24 hours, the agency must report to law enforcement as soon as it is evident that the sexual consent determination cannot be completed within that timeframe. If force or coercion is not involved, and the individual receiving services has been determined to be capable of consenting to sexual contact no report would be made to law enforcement. If the person receiving services is determined to be incapable of consenting to sexual contact, a crime may have occurred and must be reported to law enforcement. However, an exception is made if force or coercion is not involved, and both individuals have been determined to be incapable of consenting to sexual contact. No report would be made to law enforcement in that situation.
9. Engaging in a pattern of conduct (more than an isolated incident of misconduct) which may include the use of verbal threats, screaming, taunting or shouting at a person receiving services by a staff member, intern, contractor, consultant or volunteer, with the intent of causing ridicule, humiliation, scorn, contempt, pain or dehumanization to an individual or individuals receiving services which causes emotional pain to such individual(s) may be a crime and must be reported to law enforcement.
10. Any situation in which a staff member, intern, contractor, consultant or volunteer knowingly acts, or fails to act, in a manner likely to be injurious to the physical or mental welfare of an individual unable to care for himself or herself may be a crime and must be reported to law enforcement.

In addition to reporting allegations of abuse to law enforcement as noted above, potential crimes against individuals receiving services which may not meet the definitions of abuse must also be reported to law enforcement. These include but are not limited to:

1. Any instance in which an individual dies in a manner in which the cause of death is unknown, or in which the individual is not under the care of a physician and the death is not due to natural causes must be reported to law enforcement.
2. Theft and property crimes against individuals receiving services.

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Furthermore, OPWDD regulations require that possible criminal acts by individuals receiving services also be reported to law enforcement (See subdivision 624.6(d)).

DDSOs must and voluntary agencies are strongly encouraged to reach out to the law enforcement entities to which they report crimes to develop procedures for reporting the above incidents to law enforcement. OPWDD would encourage that these conversations include such matters as the process for reporting incidents, the procedures for investigating incidents and the identification of specific persons to act as a liaison with the law enforcement entity. For additional information on establishing such procedures, see the commentary for Subdivision 624.6(d) in the Part 624 Handbook.

If any questions arise as to whether a report to law enforcement is required, please contact the OPWDD Incident Management Unit at incident.management@opwdd.ny.gov or (518) 474-3625.