



STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

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To: All DDSO Directors
All Agency Executive Directors
All HCBS Waiver Coordinators

From: Peter Pezzolla *Peter Pezzolla*
Associate Commissioner; Upstate Regional Office

Kathy Broderick *Kathy Broderick*
Associate Commissioner; New York City Regional Office

Date: September 28, 2000

Subject: Implementation of Revised Part 633.12
Objection to Provider Initiated Changes to HCBS Waiver Services

Effective October 1, 2000, OMRDD and all providers of Home and Community Based Services (HCBS) must implement the revisions to 14 NYCRR Part 633, section 633.12, Objections to Services Process (Attached). The revised regulations were adopted as final agency action on June 28, 2000. This memorandum provides a summary of the changes required by the new regulations. Included with this memorandum are the forms required to be used in notifying consumers of their right to object when a provider initiates a reduction, suspension or discontinuance of Home and Community Based Waiver Services to a consumer.

The new regulations clarify that the section 633.12 process may be initiated for objections to any plan of services (including ISPs), plans for placement, and proposed discharges. A consumer, and his or her parent, guardian, correspondent or advocate must be advised of the process to resolve objections to services upon admission to a facility or enrollment in the HCBS Waiver program and as changes occur (see paragraphs 633.12 (a) (2) and (5)). Moreover, the regulations require additional written notification (Form #1) by a provider of HCBS Waiver services when such provider proposes a reduction, suspension or withdrawal of waiver services to a consumer (see paragraph 633.12 (a)(5)). The process for objecting to a plan of services, except for provider proposals to reduce, suspend or discontinue HCBS Waiver services, remains substantially the same and is outlined at subparagraph 633.12 (a)(8)(i).

A new process related to provider-initiated reduction, suspension, or discontinuance of HCBS waiver services is set forth at paragraph 633.12 (a)(5) and subparagraph 633.12 (a)(8)(ii). Paragraph 633.12 (a)(5) requires providers of HCBS Waiver services to notify consumers in writing that the provider intends to propose a reduction, suspension or discontinuance of a Waiver service it provides to the consumer. The attached **Form #1** must be used in compliance with this provision. The notice must be issued anytime the provider initiates such a change. Examples of such changes are a reduction in, or suspension of, the number of hours of a Waiver service the provider is willing to provide to the consumer and the discontinuance of a Waiver service initiated by the provider because the provider is no longer willing to serve the consumer. If such changes are to be discussed during the annual review of the ISP, the notice must be given to the consumer, his or her advocate and service coordinator prior to the ISP meeting.

Note: Enrollment and termination from the HCBS Waiver program are actions that can only be taken by OMRDD. The reductions, suspensions, and discontinuances subject to the new regulations relate only to a provider's actions with regard to a waiver service it has committed to providing a consumer. A provider is not authorized to take actions that would adversely affect a consumer's eligibility for HCBS Waiver services.

Subparagraph 633.12 (a)(8)(ii) sets forth the process for resolving an objection to a provider-initiated reduction, suspension or discontinuance. Providers must have an informal resolution process and the results of that process must be documented in the consumer's record. If the parties are unable to resolve the objection, the provider must send a written notice to the consumer advising him or her of the right to request an administrative review (see clause 633.12 (a)(8) (ii) (b)). The written notice required by this provision is attached as **Form #2**. Both Form #2 and clauses 633.12 (a)(8)(ii)(b)-(d) specify the timeframes for requesting an administrative review and responding to such a request. Note that the DDSO shall attempt to mediate the dispute prior to the scheduling of a hearing. The parties may agree to extend the 14-day period for mediating the dispute.

Note: Throughout the administrative review of an objection, the provider may reduce, suspend or discontinue the HCBS at issue only if agreed to by both parties. If no such agreement is reached, the consumer's services must continue as provided by the current ISP.

Expedited Review: The new regulation at clause 633.12 (a)(8)(ii)(f) also provides that either party may request an expedited review when the reduction, suspension or discontinuance of the service is proposed to prevent immediate risk to the health or safety of the consumer or others. Such requests must be sent directly to the Commissioner who will determine whether an expedited hearing is warranted. If it is, a hearing is scheduled within seven days and the hearing officer's recommendation is sent to the Commissioner within 5 days of the hearing. As with the administrative review process, the agency may not reduce, suspend or discontinue the consumer's services during the expedited process unless the parties agree otherwise.

Note: The new regulations relate only to provider-initiated reductions, suspensions or discontinuances of Waiver services. The process is not applicable when a consumer requests changes to his or her Waiver services, including a reduction, suspension or discontinuance of services. However, a consumer may initiate the objection to services process, pursuant to subparagraph 633.12 (a)(8)(i), **anytime** he or she objects to the provision of his or her Waiver services.

We understand the difficulty providers may face in implementing the new process using the required forms with this short notice. Because we anticipate many questions, training sessions on the new process will be offered in November. In the meantime, any questions concerning the revised regulations or the new forms, may be directed to your DDSO, NYCRO or Kevin O'Dell at the Office of Waiver Management at (518) 474-5647.

cc: Gary Lind
Paul Kietzman

FORM #1 -- Notice of Proposed Change (for provider-initiated changes only)

[PROVIDER LETTERHEAD]

To: [Consumer]

From: [Name of provider liaison]

Subject: Proposed Changes to Your Individualized Services Plan

This is to inform you that the following changes are being proposed by [name of provider agency] that will affect the services you receive through the Home and Community Based Services Waiver Program.

The changes to your current Individualized Services Plan will affect your [type(s) of service] which will be [e.g., reduced by _____ hours per week, suspended until _____, or discontinued on _____.] The following changes are proposed [explain reason].

We will discuss these changes with you on [date] and answer any questions you may have. If you do not agree with the proposed changes or we cannot agree on what changes should be made, you may request that the proposed changes and your objections be reviewed pursuant to the Objection to Services process described in OMRDD regulations at Section 633.12. If we cannot agree on a change to your service plan and you make a timely request for a 633.12 review, your services will continue as provided in your current plan.

The 633.12 process provides for a review of your objection by another person in this agency appointed by the [Director/Executive Director], and if no agreement can be reached, a representative of OMRDD will try to help resolve the issues. If there is still no agreement, you may request a hearing where a hearing officer will decide whether the proposed change is reasonable under the circumstances. At any time in this review process, you may have someone you trust, including a lawyer, assist you and ask questions and provide information on your behalf.

If you have any questions about this process or the changes proposed, please contact [name and number of provider contact].

cc: Advocate
Service Coordinator
DDSO

FORM #2 -- Notice of Right to Administrative Review

[PROVIDER LETTERHEAD]

**NOTICE OF RIGHT TO OBJECT TO CHANGES OR DISCONTINUANCE OF
HOME AND COMMUNITY BASED WAIVER SERVICES PROPOSED BY
PROVIDER**

TO: [Consumer]

FROM: [, Agency Director]

SUBJECT: Right to Object to Proposed Changes or Discontinuance of
Home and Community Based Waiver Services

This is to inform you that the following changes are proposed by [name of the agency] that will affect the services you receive through the Home and Community Based Services Waiver Program. **We have discussed these changes with you, your advocate and your service coordinator, but have been unable to agree on the changes.**

Your [type of service(s)] will be: [check all that apply]

- Reduced by _____ hours per week
- Suspended until _____, or
- Discontinued

These changes will take place on [date]. [No sooner than 14 days following receipt of this notice].

These changes are proposed for the following reason(s):

Right to Object: You have the right to object to these proposed changes. You may contact [name of the person to contact at the Agency] at [phone number/address] who will discuss the proposed changes with you and answer any questions you may have. You may want to contact your service coordinator and your advocate for assistance. In addition, OMRDD has established specific procedures to make sure that all formal written objections are given fair consideration. This is a two-step process:

1. A formal written objection is submitted to the DDSO Director designated below, who will arrange for DDSO staff to meet with you and the provider to resolve your objection to the proposed changes.

2. If the matter cannot be resolved within two weeks, a hearing will be scheduled and a hearing officer will decide whether the proposed change is reasonable under the circumstances. You or the provider may appeal the decision of the hearing officer to the Commissioner of OMRDD.

If you wish to make a formal objection to the proposed changes or discontinuance of the plan of service, you must submit a written request for a review within 14 days of receipt of this notice to:

[Name of DDSO Director]
[address]
[phone number]

Continuation of Services: If you request a review prior to the effective date of the proposed changes, your services will continue as provided in the current ISP or in a manner agreeable to you and the provider until your appeal is finally resolved.

Expedited Hearings: If at any time the provider determines that it is necessary to reduce, suspend or discontinue the provision of your home and community based waiver services to prevent immediate risk to your health and safety or to the health and safety of another person, the provider or you may request an expedited hearing. A request for an expedited hearing must be forwarded in writing to the Commissioner of OMRDD. You will receive a separate notice from the provider and instructions from the Commissioner if an expedited hearing is requested.

Summary of Hearing Procedures: If you make a written request for review and the matter is not resolved, OMRDD will designate a hearing officer to hear your objections. You and the provider will be given notice at least (10) ten days in advance of the date on which the hearing will take place.

At the hearing, you may:

-- be assisted by a lawyer or any other representative you choose;

-- make any statement, or refer the hearing officer to any document, evidence or other information in support of your objection to the proposed changes;

-- ask questions of the provider's staff or other witnesses at the hearing, and to request the presence of other Agency employees who can provide necessary information;

-- object to the consideration of documents, evidence, or other information offered at the hearing.

Within 14 days of completion of the hearing, the hearing officer will send the Commissioner a written recommendation whether the proposed changes or termination of HCBS waiver services are reasonable under the circumstances. Copies of the recommendation will also be sent to you and the provider.

You and the provider may submit written replies to the hearing officer's recommendation within 14 days of receiving it. The reply should address any errors of fact that you believe the hearing officer may have made in preparing the recommendation. The Commissioner will issue a final written decision to all parties within 14 days of the last date to submit a reply. The Commissioner may, in his or her discretion, send the matter back to the hearing officer for further review.

You may review clinical records maintained by the provider or any other HCBS waiver service provider that pertain to you. To obtain this information, write or call the Director of the DDSO named on this Notice.

Legal Assistance: You may be able to obtain free legal assistance regarding this matter from the following organizations:

Mental Hygiene Legal Services (MHLS)
Protection and Advocacy for Persons with
Developmental Disabilities (PADD) Offices
Legal Services Offices
Consumer Advisory Board (Willowbrook Class Members)

cc: Consumer's Parent or Advocate
Consumer's Service Coordinator
DDSO
MHLS

§633.12 Objection to services process.

- (a) Principles of compliance.
 - (1) Every agency/facility (see section 633.99) and sponsoring agency (see section 633.99) providing facilities (see section 633.99) or home and community based (HCBS) waiver services (see section 633.99) shall develop policies and procedures which establish mechanisms to resolve objections to services, in conformance with this section.
 - (2) Objections, related to facilities or HCBS waiver services, may be initiated regarding:
 - (i) any plan of services, (including an individualized service plan (ISP) (see section 633.99)), or part thereof and proposed changes thereto;
 - (ii) plans for placement (see section 633.99);
 - (iii) a proposal initiated by the agency/facility to discharge (see section 633.99); and
 - (iv) a proposal to reduce, suspend or discontinue HCBS waiver service(s).
 - (3) Objections to major medical treatment, for which informed consent is necessary, are not governed by the objection processes of this section. Rather, refer to section 633.11 of this Part.
 - (4) The following parties may initiate an objection: adult persons receiving services; parents, guardians, correspondents, and advocates (see section 633.99) of persons receiving services; and the Mental Hygiene Legal Service. Upon such objection, the person or party shall herein be referred to as the objecting party.
 - (5) The person receiving services, and his or her parent, guardian, correspondent and advocate, as applicable, shall be advised of the mechanism to resolve an objection: upon admission to a facility or enrollment in HCBS waiver services, as changes occur, and upon any substantive amendment to this section. In addition, when an agency proposes to reduce, suspend, or discontinue a person's HCBS waiver service(s), the agency shall, in a form and format approved by the commissioner, advise the person, and his or her advocate and service coordinator (see section 633.99) as applicable, of the proposed changes and of the mechanism for resolving an objection to the proposed changes.
 - (6) A capable adult person receiving services may refuse the initiation of an objection or subsequent appeal on his or her behalf.

- (7) A person, and his or her parent, guardian, correspondent and advocate, as applicable, may select a representative of his or her choice to provide assistance and/or representation, including legal counsel.
- (8) The following processes shall be available to resolve an objection:
 - (i) In facilities and HCBS waiver services, unless the objection concerns a proposal to reduce, suspend or discontinue HCBS waiver service(s):
 - (a) There shall be a mechanism available at the agency/facility or the sponsoring agency for informal resolution between the objecting party and relevant staff of the agency, including the chief executive officer or his or her designee. Such process shall include the person's service coordinator and advocate, as applicable.
 - (b) Written confirmation of resolution or inability to reach a resolution shall be sent to the objecting party by the chief executive officer.
 - (c) If, through this informal mechanism, a resolution cannot be reached, the objecting party shall be given the opportunity to submit a formal written objection requesting a hearing to the appropriate DDSO director. Within five days (see section 633.99) of receipt of a formal written objection, a hearing shall be scheduled, to take place before a hearing officer appointed by the DDSO Director, with no less than 10 days notice to the involved parties. A written decision by the hearing officer shall be sent to the involved parties within 14 days of that hearing.
 - (d) If any party to the proceeding is not satisfied with the decision, it may be appealed within 10 days to the commissioner, who will issue a final written decision to all parties within 14 days of receipt of the appeal. The commissioner may, at his or her discretion, send the matter back to the hearing officer for further review.
 - (e) During the period that an objection is undergoing administrative review:
 - (1) A person shall participate in programming mutually agreeable to the objecting party, the agency, the

person, and his or her parent, guardian, correspondent or advocate.

- (2) Every effort feasible shall be made to maintain the person in at least his or her current level of programming.
 - (3) In order to protect a person's health, safety, or welfare or the health, safety, or welfare of others, nothing herein shall preclude a change in programming for, or the relocation or discharge of a person. However, while an objection to placement or discharge is undergoing administrative review, relocation or discharge shall only take place with the commissioner's approval.
- (ii) Related to the reduction, suspension or discontinuance of HCBS waiver services:
- (a) The agency shall have a process available for informal resolution between the objecting party and relevant staff of the agency, including the chief executive officer or his or her designee. Such process shall include the person's service coordinator and advocate, as applicable. The agency shall include documentation of the result of the process in the person's record.
 - (b) Written notice of the parties' inability to resolve the objection shall be sent to the objecting party by the chief executive officer. Such notice shall be in a form and format approved by the Commissioner, and shall be sent by certified mail, return receipt requested, or such other means so that the time of receipt of the information can be documented. The objecting party may submit a written objection to the DDSO Director requesting administrative review of the reduction, suspension or discontinuance, within 14 days after the receipt of the notice. The agency shall not reduce, suspend or discontinue the HCBS waiver service(s) at issue during such 14 day period, unless otherwise agreed to by the parties.
 - (c) Upon receipt of a written objection requesting an administrative review, the DDSO Director or his or her designee shall contact the objecting party and the agency providing the service(s) to

mediate resolution of the objection. If there is no resolution within 14 days of receipt of the objection, a hearing shall be scheduled, with no less than 10 days notice to the involved parties. The hearing shall be conducted by a hearing officer appointed by the DDSO Director. The objecting party and the agency may mutually agree to extend the time periods noted in this clause.

- (d) The hearing officer shall issue a written decision to the objecting party and the agency within 14 days after the conclusion of the hearing. Either party may appeal the decision to the Commissioner and submit a written reply to the decision within 14 days of its receipt. The Commissioner will issue a final written decision to all parties within 14 days of the last date to appeal. The Commissioner may, in his or her discretion, send the matter back to the hearing officer for further review.
- (e) During the period that an objection is undergoing administrative review (including an expedited review), the agency shall not reduce, suspend or discontinue the HCBS waiver service(s) at issue, unless otherwise agreed to by both parties.
- (f) Notwithstanding the provisions of clauses (b), (c) and (d) of this subparagraph, when an agency proposes to reduce, suspend or discontinue the provision of a HCBS waiver service(s) to prevent immediate risk to the health or safety of the person or others: the agency shall make reasonable efforts to alleviate the health and safety risks at issue, and the agency or the objecting party may request an expedited hearing by the following process:
 - (1) A written request for the hearing shall be sent by the agency or objecting party to the Commissioner. An agency shall also immediately notify the person, parent, guardian, correspondent and advocate, as applicable, of such request.
 - (2) If the Commissioner determines that an expedited hearing is warranted, the appropriate DDSO Director will schedule a hearing within 7 days of the

Commissioner's determination. The hearing will be held before a hearing officer appointed by the DDSO Director. Absent good cause, the parties involved in the objection will receive at least 3 days notice of the hearing.

- (3) The hearing officer's recommendation shall be sent to the parties and sent to the Commissioner within 5 days of the conclusion of the hearing. The hearing officer shall advise the parties of their opportunity to send a written reply to the recommendation directly to the Commissioner. The Commissioner will issue a final written decision as soon as practicable thereafter.
 - (9) No person, or objecting party or a representative of either, shall be denied the opportunity to participate in any hearings pursuant to this section. The person or objecting party and or representative may offer information and ask relevant questions of any parties participating in any such hearing.
 - (10) During the period that the objection is undergoing administrative review, there shall be no communication between either the agency or the objecting party and either the hearing officer or the Commissioner, concerning the objection, except on notice and opportunity for all involved parties to participate.
 - (11) The commissioner's decision is the final administrative remedy available and may be appealed in accordance with the provisions of Article 78 of the Civil Practice Law and Rules.
 - (12) Treatment may be given, other than treatment for which informed consent is required by applicable regulation, to a person, despite objection, in a situation where the treatment is deemed necessary to avoid serious harm to life or limb of that person or others, at the discretion of the chief executive officer and in accordance with agency/facility or the sponsoring agency policies/procedures.
- (b) Standards of certification.
- (1) OMRDD shall verify that the agency/facility or the sponsoring agency has advised a person and his or her parent, guardian, correspondent and advocate, as applicable, of relevant objection processes.

- (2) For persons admitted to a facility or enrolled in HCBS waiver services since the last survey, OMRDD shall verify that each person and his or her parent, guardian, correspondent and advocate, as applicable, have been advised on admission, enrollment, or as changes occurred of relevant objection processes.

Revisions and Additions to Part 633.99 Glossary:

Advocate - This term shall have the same meaning as in Section 635-99.1 of this Title.

Agency - The operator of a facility, program or service operated, certified, authorized (see glossary), or funded through contract by OMRDD. In the case of State-operated facilities, the DDSO (see glossary) is considered to be the agency. Family care providers are not considered to be an agency (also see "agency, sponsoring").

Agency/facility - As used in this Part, a term used to indicate that the stated requirement needs to be considered in relation to the administrative structure of both the agency (see glossary) and the site-specific facility (see glossary) and acted upon accordingly. In the case of HCBS waiver and other non-certified services, the stated requirement needs to be considered in relation to the administrative structure of the agency only.

Authorized - Having the formal approval to provide HCBS waiver services pursuant to Subpart 635-10 of this Title or other services through the Medical Assistance Program whereby the provider agreement with the Department of Health requires OMRDD approval of the provider.

DDSO - The Developmental Disabilities Services Office is the local administrative unit of OMRDD. The governing body of a DDSO is the central office administration of OMRDD. The DDSO Director is its chief executive officer.

Coordination, service - The active assistance offered persons as they access and negotiate with the various service systems and the community in pursuit of the necessary and desired services and supports to achieve or maintain their personal goals.

Coordinator, service - An employee of an agency, or an independent contractor or other party, so designated, who provides service coordination (see glossary). A service coordinator may also be referred to as a "case manager".

Day(s) - This term shall mean calendar day(s). Unless otherwise stated, the computation of a period of "days" shall be in accordance with sections 20 and 25-a of the General Construction Law.

Plan, individualized service (ISP) - This term shall have the same meaning as defined in section 635-99.1 of this Title.

Services, home and community-based (HCBS) waiver - This term shall include those services provided in conformance with Subpart 635-10 of this Title.