NYS Office of Mental Retardation and Developmental Disabilities
Putting People First

David A. Paterson, *Governor*
Diana Jones Ritter, *Commissioner*

Quality Management
Sheila McBain, Ph.D., *Deputy Commissioner*

44 Holland Avenue
Albany, NY 12229-0001

TEL: 518-474-3625
FAX: 518-486-1728
TTY: 866-933-4889

www.omr.state.ny.us

ADMINISTRATIVE MEMORANDUM #2009-03

TO: **Executive Directors of Voluntary Provider Agencies**
DDSO Directors

FROM: **Sheila McBain**
Deputy Commissioner, Division of Quality Management

SUBJECT: **Gender-specific Staff Assignments**

DATE: **October 29, 2009**

Suggested Distribution:

Agency human resources management/staff
Agency managers

Applicability:

This Administrative Memorandum applies to all services certified, operated, authorized or funded by OMRDD, including both state and voluntary operated programs, which have occasion to provide intimate care services to individuals with developmental disabilities. Specific requirements in this ADM may not be applicable to both DDSOs and voluntary agencies. The applicability will be indicated when requirements are discussed.

Background:

Working within the context of our values and guiding principles, services in the OMRDD system are provided in a way that honors and respects the dignity of every individual. In some cases individuals require assistance with bathing or toileting. These individuals (or their advocates) may express a preference that services be performed by staff of a specific gender. For example, females may express a preference for intimate care assistance to be delivered by female staff.

In other cases, even when a preference is not expressed, there may be forensic or behavioral reasons for the delivery of intimate care services on a gender-specific basis to a particular individual.

Providers in the OMRDD system, like all employers, must comply with Federal and state laws against employment discrimination on the basis of gender. However, it is OMRDD's position that

providers may lawfully make certain direct care assignments gender-specific when necessary to safeguard the legitimate and lawful privacy interests of individuals being served.

In 2002, OMRDD settled a class action lawsuit which alleged employment discrimination in the designation of gender-specific staff assignments. (Duryea vs. OMRDD). The provisions of this Administrative Memorandum are in conformance with the settlement.

OMRDD considers that this ADM generally clarifies existing requirements. OMRDD recognizes that most agencies are already providing services in a manner that respects and affirms the choices of individuals receiving services and their advocates, including the choice of a staff person of a specific gender delivering intimate care services. For these providers, OMRDD anticipates that minimal changes in procedures will be necessary to conform to the provisions of this Administrative Memorandum.

Individual preference:

In some instances, a person who requires intimate care assistance may express a preference that services be delivered by a staff person of a particular gender. For example, an individual who is female may express a preference that intimate care services be delivered by a female staff member. Alternatively, the preference may be expressed by a guardian, parent, family member or advocate on behalf of the person.

Clinical considerations:

In some instances, an individual's documented forensic or behavioral history indicates that the delivery of intimate care services by staff of a specific gender is required for the health, safety or protection of the individual or those around him or her. In this circumstance, a clinical assessment must be made by a professional level clinician. The clinician must develop a recommendation for consideration by the individual's program planning team.

Agency requirements (DDSO & voluntary agency):

When a preference is expressed, or upon the recommendation of the clinician, the individual's program planning team shall assess the advisability of requiring intimate care by staff of a specific gender. In the event that the team determines that the individual requires such intimate care by a specific gender, it shall communicate such determination to the supervisor(s) responsible for setting staff work assignments in the residence or service.

In these situations, providers must make every effort to assign staff of the appropriate gender to deliver intimate care services to that individual.

OMRDD recognizes that in unforeseen circumstances it may be not be possible for intimate care services to be provided by staff of the preferred gender. Agencies must take appropriate steps to minimize the provision of intimate care services by someone who is not of the preferred gender.

Gender-specific staff assignment procedures (DDSO-required, Voluntary agency-recommended):

To make gender-specific staff assignments in accordance with federal and state laws against employment discrimination on the basis of gender, OMRDD recommends that the following procedures, at a minimum, be followed prior to the implementation of a gender-specific staff assignment. DDSOs are required to follow these procedures.

1. A review of the environment, equipment, home or program practices and circumstances surrounding the delivery of intimate care services;

2. A review of the individual's history leading to the making of the request or recommendation for gender-specific intimate care assistance;

3. Substantiation of the need for gender-specific services within the individual's Individual Program Plan, Residential Habilitation Plan, Plan for Protective Oversight, Risk Management Plan or any other similar document;

4. Documentation of efforts made to avoid the gender-specific assignment, including completion of the attached checklist (required for DDSOs, other providers may substitute a similar document); and

5. Written approval of the gender-specific assignment indicating review by an appropriate senior manager as designated by the DDSO Director or Chief Executive Officer of the agency.

Posting of positions (DDSO-only)

DDSOs who post employment opportunities involving gender-specific staff assignments must do so in conformance with requirements as specified in the Duryea vs. OMRDD settlement agreement.

Documentation (DDSO & voluntary agency):

The provider must maintain documentation of the request of the individual or advocate or the recommendation of the clinician, and the determination of the program planning team. For DDSOs and agencies utilizing the recommended procedures for making gender-specific staff assignments, the approval of senior management and other gender-specific staff assignment procedures should also be documented.

Contact information:

Please contact your local DDSO Director's Office if you have any questions. Contact information for the DDSOs can be found on the OMRDD website at www.omr.state.ny.us.