

In-home Mitigation and Due Process Guide

Contents

INTRODUCTION	1
EXPLANATION OF DUE PROCESS	1
CE RESPONSIBILITIES	2
MITIGATION AND DUE PROCESS SCENARIOS	2
1) WHEN A CE FAILS TO MANAGE THEIR EMPLOYER RESPONSIBILITIES (OAR 411-030-0040(4)(a)A-F)).....	2
Mitigation Strategies.....	3
Due Process Procedures.....	5
Sample Warning Letter.....	7
2) WHEN A CE FAILS TO MINIMIZE DANGEROUS CONDITIONS IN THE SERVICE SETTING (OAR 411-030-0050(2)(c)).....	9
Mitigation Strategies.....	10
Due Process Procedures	11
Sample Warning Letter	13
3) FAILURE TO MAINTAIN A SAFE AND HARASSMENT-FREE WORKPLACE....	15
Mitigation Strategies and Due Process Procedures	15
Sample Warning Letter.....	18
DOCUMENTING MITIGATION AND DUE PROCESS ACTIONS	20
SUPPORTING HCWS' HEALTH AND SAFETY	20
STAFFING CASES WITH CO.....	21
SAMPLE LANGUAGE FOR A 540 CLOSURE NOTICE	22
MITIGATION AND DUE PROCESS RESOURCES	22
APD HEARINGS UNIT INFORMATION AND DUE PROCESS.....	23

INTRODUCTION

Policy Transmittal [APD-PT-17-058](#) assists case managers (CMs) with mitigation strategies and due process procedures for in-home consumers who:

- 1) Fail to manage their CE Responsibilities (Service Plan/providers),
- 2) Fail to minimize dangerous conditions in the service setting that jeopardize the health, safety and welfare of paid providers ([OAR 411-030-0040\(4\)\(a\)\(G\)](#), [OAR 411-030-0050\(2\)\(c\)](#)), and/or
- 3) Fail to ensure the workplace is safe and free from harassment.

In addition, [APD-PT-21-034](#) and Article 20, Section 1 of the Collective Bargaining Agreement describes a CM's responsibility to notify homecare workers (HCWs) seeking employment with an in-home consumer, if immediately threatening or dangerous known health or safety risks exist. CMs are not to knowingly authorize a HCW to work in an in-home service setting that could constitute an immediate threat to their health or safety.

Individuals receiving services in their home who fail to manage their employer responsibilities and not have a consumer-employer representative may no longer receive services from a HCW after receiving due process.

Individuals receiving services in their home who have conditions where the setting has health and safety risks may no longer receive services from any provider after receiving due process.

This includes consumers receiving services through the Consumer-Employer Provider Program (CEP), an In-home Care Agency (IHCA), Independent Choices Program (ICP), and State Plan Personal Care (SPPC).

For Oregon Project Independence (OPI), the processes described in this guide may also be used. However, information regarding notices is not applicable to OPI, requiring additional consultation with Central Office.

EXPLANATION OF DUE PROCESS

The Fifth Amendment and Fourteenth Amendments of the U.S. Constitution established the requirement for due process. Due process requires that an established course of action for individuals who participate in government programs and judicial proceedings to safeguard individual legal rights through fair and equal treatment under the law.

Due process for APD Medicaid Long Term Services and Supports (LTSS) refers to the commitment to equally apply established OARs and APD policies to protect and ensure the rights of consumers. When in-home service options are closed for a consumer through due process, other service options in community-based care (CBC) facilities or nursing facilities (NF) are made available.

CE RESPONSIBILITIES

OAR [411-030-0040\(4\)](#), [OAR 411-030-0050\(2\)\(c\)](#) (In-Home Services rule) and [OAR 411-034-0040\(4\)](#), [OAR 411-034-0070\(3\)](#) (SPPC rule), describe the responsibilities CEs must meet to remain eligible for in-home service program benefits.

[OAR 411-030-0040\(4\)\(a\)\(A-G\)](#)

(4)(a) To be eligible for in-home services provided by a homecare worker, an individual must be able to, or designate a representative to:

- (A) Locate, screen, and hire a qualified homecare worker;
- (B) Supervise and train the homecare worker;
- (C) Schedule the homecare worker's work, leave, and coverage;
- (D) Track the hours worked and verify the authorized hours completed by the homecare worker (Note: task now done by the OR PTC DCI system);
- (E) Recognize, discuss, and attempt to correct any performance deficiencies with the homecare worker;
- (F) Discharge an unsatisfactory homecare worker; and
- (G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment.

(For SPPC cases, [OAR 411-034-0040\(4\)](#)).

MITIGATION AND DUE PROCESS SCENARIOS

1) WHEN A CE FAILS TO MANAGE THEIR EMPLOYER RESPONSIBILITIES (OAR 411-030-0040(4)(a)A-F)

Overview

If a consumer receiving in-home services fails to meet their CE responsibilities (OAR [411-030-0040\(4\)](#), SPPC ([OAR 411-034-0040\(9\)](#)), appropriate mitigation and due process attempts are made. CMs work in partnership with local office (LO) supervisors and CO policy analysts (PAs) during due process. If this is not successful, the consumer is ineligible for in-home services from a HCW.

Mitigation Strategies

When a consumer fails to manage their CE responsibilities, the CM must utilize resources and services to mitigate these issues. The CM should communicate known concerns with the consumer and narrate the information in OA along with the consumer's response. If these issues are not resolved, the CM should help the consumer address deficiencies in their employment management.

The following mitigation activities must be followed when a CE cannot, or is not willing, to manage their CE responsibilities. LO staff and management should pursue the following strategies and document all pertinent information for each action taken in case narration. Consult central office (CO) before making any adjustments when addressing an urgent situation.

- 1) Conversation: Staff should have a serious, in-person conversation with the consumer (and/or their CE Representative), to explain their CE responsibilities and review specific concerns about the inability to manage their service plan. Provide clear and specific information to the consumer about what actions they should do to manage their CE responsibilities appropriately.

CMs should document specific concerns about a consumer's failure to manage their service plan, including the dates the issue discussed, the providers or others involved and the CE's response. The results of each conversation should be documented in Oregon ACCESS (OA).

- 2) Employee Resource Connection (ERC) Referral: Staff should refer the consumer to an ERC Specialist.
 - The ERC Specialist should be informed by the CM of the reason for the referral, including any specific and relevant information.
 - Contact the ERC Specialist after the referral is completed to document the outcome. The ERC specialist may also document the result if they have appropriate rights to OA.
 - If the consumer refuses to participate in an ERC referral, document their response in narration and follow other mitigation actions.
 - If the consumer participates in an ERC referral, however concerns continue, LO staff should consult a CO PA to determine what further action may be needed.

Note: If staff believe other factors contribute to the issue(s) being addressed (i.e., significant cognitive decline, mental or emotional health concerns, behavioral concerns, undue influence of others, or an Adult Protective Services (APS) abuse or exploitation concern, etc.), they should take appropriate action to address these issues.

- 3) Consumer-Employer Representative (CE Rep): Encourage the consumer to appoint a CE Rep (737 form) to manage their CE responsibilities ([OAR 411-030-0020\(48\)](#), [OAR 411-030-0040\(4\)\(b-e\)](#), [OAR 411-030-0040\(5\)](#)).
- This representative must be approved by the Department or AAA. To be approved, the representative must:
 - Be in the consumer's community;
 - Have regular contact with the consumer and HCWs;
 - Have good understanding of the consumer's service plan and task list;
 - Participate in Waivered Case Management Services (WCM) (Direct/Indirect);
 - Assist the consumer in risk mitigation and management;
 - Be willing and able to perform all CE duties in rule; and
 - Not have criminal, protective service, credible allegations of fraud or collusion (or conflict of interest) that impact their reliability as a representative.
 - The representative must not be the consumer's paid caregiver (HCW/PSW).
 - In addition, a paid caregiver may not be a decision-maker or assume control for service planning related duties, even if the caregiver is a family member).
 - LO staff may speak to the HCW about the consumer, their service plan, unmet needs or concerns about their care, etc., without involving the HCW in service planning decisions on behalf of the CE.
 - A court-appointed guardian may designate themselves as the consumer's CE Rep ([OAR 411-030-0040\(5\)\(c\)](#)) but may not also be the consumer's HCW. In addition, a guardian cannot appoint someone to act as the CE (act on their behalf) without discussing this matter with the courts.
 - Conversations with the consumer about appointing a CE Rep and their response to this discussion should be documented in OA.
 - If mitigation efforts implemented by a CE Rep are successful (CE Rep begin to manage consistently the consumer's CE responsibilities), staff should continue to monitor the CE Rep's efforts to ensure their ongoing success.
- 4) IHCA Provider Involvement: Consumers who are no longer eligible to employ HCWs (or PSWs with ICP), should be given the option of only using IHCA services. IHCA providers may be a viable option for consumers who are unable to manage/supervise HCWs. Note: IHCA services are not appropriate for consumers with severe cognitive impairments who cannot ensure that their needs are being met safely, unless there is someone who is willing and able to check regularly on the consumer and act as a representative for service planning purposes.

Considerations for recommending an IHCA provider for in-home services:

- LO staff must determine if the consumer is able or willing to safely receive services through an IHCA.
 - Consumers using an IHCA may appoint a representative to participate in service planning on their behalf or a natural support with longstanding involvement in assuring their health, safety, and welfare ([OAR 411-033-0010\(43\)](#)). This is *not* a CE Rep, a 737 form is not needed. This representative is not authorized to make decisions on the behalf of the consumer.
 - IHCA's reserve the right to decline providing services if they determine they cannot serve a consumer or, if based on prior negative experiences with the consumer, they decide to not offer services to the consumer.
 - Consumers without in-home services through a HCW or IHCA, should receive WCM Services from a CM and be offered other service options described in [APD-PT-18-023](#).
- 5) CBC Service Options: Consumers not eligible for in-home services through an IHCA should be informed of CBC options in their area. Document their response to available service options in OA.
- 6) Decision to Begin Due Process: If mitigation steps are not successful, LO staff and CO PA will determine what additional actions should be taken. A CO PA should approve of the decision to begin following due process procedures.

Note: In urgent situations where the safety and health of a HCW and/or IHCA caregiver is in immediate jeopardy, CO and LO staff may take prompt action to close in-home services.

Due Process Procedures

If the actions to mitigate identified concerns are unsuccessful, the procedures below must be taken and the outcomes documented in OA prior to removing an in-home service option from a CE ([APD-PT-17-058](#)).

Step #1: Staff the issue with the LO supervisor and CO PA to discuss the particular details of the case. The PA must support the decision to take additional mitigation steps.

Step #2: A CE Rep should be appointed if the Department determines the consumer's failure to manage their CE responsibilities can be addressed by appointing one. The Department may designate a CE Rep to manage these responsibilities (using the priority order list on the Client Representative section of the 737 form). Document in narration if a CE Rep is/is not appointed.

If there is no one who is able, willing and qualified to serve as a CE Rep, LO staff should consult with a CO PA to determine the next steps.

Step #3: If the consumer is clearly unwilling (or unable) to manage their CE duties, the CM should have an in-person conversation. This should include a **VERBAL WARNING**, to ensure the consumer understands the duties are required to remain eligible for in-home services.

- 1) A verbal warning should provide specific examples of the failure to manage CE responsibilities. Explain potential consequences to their eligibility to receive in-home services if further incidents occur (i.e., they may be made ineligible to receive in-home services by a HCW).
- 2) Ask the consumer if they understand the information and answer any questions. This interaction should be documented in OA.
- 3) Offer options, resources, and supports, such as an ERC referral, behavioral support services, the designation of a CE Rep, and/or other service settings.
- 4) After the verbal warning is documented, document the nature of the incident(s) and any other pertinent details and dates in OA.

Step #4: If issues continue to occur of receiving the verbal warning, the CM should immediately send a **WRITTEN WARNING** to the consumer per the steps below:

- 1) Inform the consumer of ongoing or new concerns related to their inability or unwillingness to manage their CE responsibilities have been reported.
- 2) Include appropriate sections from the In-Home Services rule or other OAR that address these concerns. Include date(s) the consumer was instructed by staff to address issue(s).
- 3) The letter should provide a clear warning that further incidents/failure to manage their service plan will result in becoming *ineligible* to receive services by a HCW. If appropriate, the CM may include a reasonable timeframe/date for the consumer to make required changes to manage their plan. A reasonable timeframe will allow LO staff to determine if required changes are consistently observed.
- 4) A draft of the letter should be sent to a CO PA to review *prior* to being mailed to the consumer. An example letter is found below. (Adapt the letter to address the particular situation).
- 5) Provide further guidance to the consumer of changes needed to manage their CE responsibilities.
- 6) The letter should be printed on Department letterhead and signed by a LO manager or supervisor. The letter may be delivered in person or by registered U.S. mail.
- 7) Document the letter was sent and the consumer's response in case narration.
- 8) Uploaded a copy of the letter to EDMS and send to the involved CO PA.

Step #5: If concerns continue, the *final step* is to end in-home services from a HCW.

- 1) Staff the concern with a PA in CO to ensure all appropriate mitigation strategies and due process procedures have been followed.
- 2) Assist the consumer to pursue an IHCA or to consider CBC service options. Document a change in service setting if CBC placement occurs.
- 4) Consumers without in-home services through a HCW or IHCA and who do not seek CBC placement, may receive other services and monthly WCM Service from a CM as described in [APD-PT-18-023](#).
- 5) Send a *Notification of Planned Action* (SDS 540) to *close in-home services with a HCW*.
 - Consult with a CO PA appropriate language for this decision notice.
 - Cite specific issues the consumer failed to correct/address, appropriate rule citations, and the dates staff instructed the consumer to address these issues (include dates of verbal and written warnings).
 - A copy of the 540 should be uploaded to EDMS.
 - A copy of the 540 should be sent to the CO PA.
 - Forward hearing requests to APD Hearings.

Sample Warning Letter

(CE Fails to Manage their Employer Responsibilities. Adapt to address specific situation)

Agency Letterhead

Date __/__/202__

Dear (Name of consumer):

This letter is to inform you about ongoing issues with your in-home services. We continue to have serious concerns about your inability to manage your service plan and caregivers. This is required as a recipient of Medicaid in-home services.

Information about your employer responsibilities is found in Oregon Administrative Rule (OAR) [411-030-0040](#), (or cite other rules/sections that apply to the consumer)

- (a) To be eligible for in-home services provided by a homecare worker, an individual must be able to, or designate a representative to:
 - (A) Locate, screen, and hire a qualified homecare worker;
 - (B) Supervise and train the homecare worker;
 - (C) Schedule the homecare worker's work, leave, and coverage;
 - (D) Track the hours worked and verify the authorized hours completed by the homecare worker;

- (E) Recognize, discuss, and attempt to correct any performance deficiencies with the homecare worker;
- (F) Discharge an unsatisfactory homecare worker; and
- (G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment.

Our staff spoke with you on ____ (list two or three dates these concerns were discussed) about failing to manage your Consumer-Employer Responsibilities as well as changes you need to make to correct these issues. You were encouraged to receive additional training from an Employer Resource Connection consultant on (date/results). You were also informed (cite date(s)) that you needed to designate a representative who can help manage your service plan and home care workers on your behalf (if this recommendation applies to this consumer). (Cite any other action taken) You have shown that you continue to not manage your required employer responsibilities consistently as described above. You must be able to (list specific failures using simple language).

To remain eligible for services from a homecare worker, you or an appointed representative must manage your employer responsibilities by __/__/__ (record a date to appoint a CE Rep – i.e., within 14 days). The person you name must be approved by the Oregon Department of Human Services. (If appropriate in this case, include the following): If you do not name a representative, you will receive a notification that you are no longer allowed to employ homecare workers.

**This is the final warning about managing your
Consumer-Employer responsibilities.**

Further failure to manage these responsibilities will result in becoming ineligible to receive Medicaid in-home services provided by a homecare worker. If this occurs, you may continue to receive Medicaid services by hiring an In-Home Care Agency or a community-based care setting, such as an Assisted Living Facility or Adult Foster Home. We want to support your choices and independence while providing appropriate Medicaid services to meet your health and care needs.

Please call me or your case manager (name) with any questions about this letter.

Sincerely,

Name

Supervisor or Manager

Aging and People with Disabilities (Office info)

Office Phone # _____

Name of CM

Phone # _____

2) WHEN A CE FAILS TO MINIMIZE DANGEROUS CONDITIONS IN THE SERVICE SETTING ([OAR 411-030-0050\(2\)\(c\)](#))

Overview

One eligibility requirement for in-home service consumers is the responsibility to minimize dangerous conditions in the home environment that could jeopardize the health and safety of the consumer and/or service providers.

- Based on the consumer's functional needs assessment (per [OAR 411-030-0050\(1\)](#) and [OAR 411-030-0050\(2\)\(b\)](#)), according to [OAR 411-030-0050\(2\)\(c\)\(A-D\)](#), the Department will not authorize a service setting with dangerous conditions that jeopardize the health and safety of the consumer or paid providers, when appropriate safeguards cannot be taken to improve the setting and minimize the dangers. (SPPC [OAR 411-034-0070\(3\)\(a\)](#)).

Dangerous conditions that jeopardize the health or safety of the consumer or paid providers in an in-home service setting include:

- An unsafe or unhealthy workplace environment (leaking roof, rotting floorboards, lack of electrical, gas or other services, unsafe egress, rot or mounting debris, rodent infestation, toxic mold, etc.).
- Threatening or dangerous behavior from the consumer or from other persons (residents or guests).
- Dangerous or aggressive animals.
- Domestic violence.
- Criminal activity, illegal drug activity, etc.
- Unsafe display of firearms or other potentially dangerous items.

When dangerous conditions jeopardize the health or safety of a paid provider and necessary safeguards cannot be taken to minimize the dangers, or the consumer or their representative refuses to or is unable to minimize these dangers, that consumer is ineligible for in-home services provided by a HCW ([OAR 411-030-0050\(2\)\(c\)\(C\)](#)).

Mitigation strategies to help a consumer address dangerous conditions in the home are described below.

Note: If staff believe *other factors* may be contributing to a dangerous work environment, like significant cognitive decline, mental or emotional health concerns, behavioral concerns, undue influence of others, or an APS concern, they should assist the consumer to address the issue(s).

Mitigation Strategies

CMs and LO staff should complete and document mitigation strategies that are taken. Depending on the situation, not all the strategies mentioned below will be applicable.

- 1) Conversation: Have a conversation with the consumer or their representative), to describe their responsibility to remove any dangerous conditions in the workplace. Clearly explain why the situation or condition is considered dangerous and what must be done to address the issue.

Specific dates and pertinent details, including the consumer's response and information given by paid providers, should be documented.

- 2) ERC Referral:
 - The CM should notify the ERC Specialist of the reason for the referral and share specific and relevant information.
 - The CM should contact the ERC Specialist after the referral to understand and record the consumer's response to the consultation.
 - The outcome of the ERC referral should be documented by the CM in narration. The ERC specialist may also document the result if they have appropriate rights to OA.
 - If the consumer refuses to participate, document this information and proceed to the next steps.
 - If the consumer participates in an ERC referral but concerns continue, LO staff should consult a PA in CO to determine what further action may be needed.
- 3) In some cases, an APS ([OAR 411-020](#)) referral should be made to assess if dangerous conditions are due to potential abuse or self-neglect of the consumer. APS may involve appropriate law enforcement agencies if necessary.
- 4) Client Representative: Encourage the consumer to appoint a Client Representative (737 form) to assist with making long-term care decisions, which may include assisting with mitigating any dangerous conditions. It is important to note that unless the consumer has a guardian, the consumer's decisions are considered above the client representative's decisions.
- 5) K-State Plan Ancillary Services ([OAR 411-035](#), [OAR 411-030-0050\(2\)\(b\)](#)) or the Crisis Support Program ([APD-PT-22-014](#)): These programs may help the consumer mitigate dangerous conditions in the workplace. Some of the services include chore services, an entrance ramp, home repairs, pest control services, an electronic backup system, etc. CMs should help consumers make requests to these programs as needed.

- 6) CBC Setting Options: Consumers should be informed of CBC service options in their area. The consumer's response to available service options should be documented in OA.

Decision to Begin Due Process: If a consumer does not make required changes to mitigate identified dangerous conditions in the workplace, the CM, The CO PA should review and make the decision for the LO to pursue due process.

Note: If deemed necessary to address a dangerous situation that puts the safety, health and welfare of the consumer or provider in serious and imminent harm or jeopardy, CO has the discretion to waive mitigation strategies and close in-home services while providing CBC options to the consumer.

Due Process Procedures

If mitigation strategies are unsuccessful, with CO approval, LO staff should follow the steps below prior to removing an in-home service option from a consumer.

Note: Cognitive Capacity Concerns

- If the consumer does *not* have the ability to make an informed decision and does not have a client representative to make decisions their behalf, and necessary safeguards cannot be taken to protect the safety, health, and welfare of the consumer or providers, the in-home service setting will not be authorized ([OAR 411-030-0050\(2\)\(c\)\(D\)](#)). In these cases, due process should be pursued.

Step #1: If the CM determines that the concerns can be mitigated by appointing a client representative, the Department may designate a client representative (if a qualified individual is available) to address this concern if a health professional determines the consumer is unable to make decisions (using priority order from Client Representative section of the 737 form). Document in narration if a client representative is/is not appointed to serve in this role. The consumer's preferences are still considered above the client representative's preferences unless the representative is a guardian.

Step #2: If the consumer is unwilling or unable to address dangerous conditions in the home, the CM should have a formal conversation (**VERBAL WARNING**) with the consumer to ensure the consumer understands the serious nature of the concern.

- 1) The conversation should focus on the consumer's responsibility to put necessary safeguards in place to minimize known dangers in the workplace to protect the safety, health, and welfare of the consumer and providers ([OAR 411-030-0050\(2\)\(c\)](#)). The CM should provide specific examples of identified dangerous

conditions and ensure the consumer understands they may be made ineligible to receive in-home services from a provider if these concerns are not addressed.

- 2) Ask the consumer if they understood the information and if they have any questions. The verbal warning and the consumer's understanding and response should be documented in OA.
- 3) Offer options, resources and supports (including what may have already been suggested during the mitigation phase) to help the consumer successfully remove dangerous conditions in the home.

If dangerous conditions persist following the verbal warning, document pertinent information in OA. The following step should be taken in coordination with CO PA staff.

Step #3: The CM should send a **WRITTEN WARNING** (letter) to the consumer using the steps below.

- 1) Inform the consumer of ongoing concerns and that safeguards to minimize and address the dangerous conditions have not been taken.
- 2) Cite relevant sections from OAR 411-030-0050(2)(c). Include information describing the actions, including dates, the consumer was instructed by staff to address these concerns and the failure to follow through.
- 3) The letter should provide a clear warning that failure to maintain a safe work environment will result in becoming ineligible to receive services by providers. Note: If necessary, include a reasonable timeframe for the consumer to act to minimize the dangerous condition(s) and to allow staff to determine if dangerous conditions have been mitigated.
- 4) A draft copy of the letter should be sent to the in-home PA at CO to review prior to being mailed out. An example letter is found below. Once finalized, the letter should be printed on Department letterhead and signed by a LO supervisor and may be delivered in person or by registered U.S. mail.
- 5) Provide any guidance to address dangerous conditions in the home.
- 6) Issuing the letter, date sent, the consumer's response, etc., should be documented in case narration.
- 7) A copy of the letter should be uploaded to EDMS and sent to the CO PA assisting in this process for their records.

Step #4: If dangerous conditions continue, the final step in due process is ending the consumer's option to receive in-home services from an in-home provider.

- 1) Staff with the in-home CO PA to ensure all appropriate mitigation strategies and due process procedures have been followed.
- 2) A Notification of Planned Action (SDS 540) should be sent to close in-home services. Working with the CO PA, the notice should include the following language:
 - Specific issues the consumer failed to address

- Appropriate rule citations
 - The dates the consumer was instructed by staff to address these issues (include dates of verbal and written warnings)
 - Information regarding the ability to access other service options such as CBC settings
- 3) A copy of the 540 should be uploaded to EDMS and sent to the CO PA.
 - 4) Assist the consumer to find appropriate CBC placement if desired. Document a change in service setting if CBC placement occurs.
 - 5) Consumers that do not receive in-home services through a HCW or IHCA and do not seek CBC placement, may receive other services and monthly WCM from a CM as described in [APD-PT-18-023](#).
 - 6) Document all pertinent details.

Sample Warning Letter

Agency Letterhead

Date __/__/202__

Dear (Name of consumer):

We need to inform you about ongoing issues you are having to maintain a safe workplace and to minimize dangerous conditions in your home. You are required to maintain a safe home environment as a consumer employer to continue receiving Medicaid in-home services.

Information about maintaining a safe home environment can be found in the following Oregon Administrative Rule:

[OAR 411-030-0050\(2\)\(c\)\(A-D\)](#)

- (c) The Department or AAA may not authorize a service provider (or) service setting . . . when --
 - (A) The service setting has dangerous conditions that jeopardize the health or safety of the individual and necessary safeguards cannot be taken to improve the setting;
 - (B) Services cannot be provided safely or adequately by the service provider based on --
 - (i) The extent of the individual's service needs; or

- (ii) The choices or preferences of the eligible individual or the individual's representative;
- (C) Dangerous conditions in the service setting jeopardize the health or safety of the service provider that is authorized and paid for by the Department, and necessary safeguards cannot be taken to minimize the dangers; or
- (D) The individual does not have the ability to make an informed decision, does not have a designated representative to make decisions on his or her behalf, and the Department or AAA cannot take necessary safeguards to protect the safety, health, and welfare of the individual.

Our staff spoke with you on ____ (list dates when these concerns were discussed with the consumer and documented in OA) about unsafe conditions in your home and your responsibility to address these concerns. Unsafe conditions include: (list dangerous conditions – possibly in bullet-list form)

Although staff have advised you to address these concerns, you have failed to do so as of this date. To remain eligible to for in-home services from a provider, you must demonstrate that unsafe conditions in your home have been addressed.

This is the final warning about your responsibility to ensure a safe workplace!

If the dangerous conditions cited above are not addressed, by (Date), you will no longer be eligible to receive services in your home by a provider.

If your in-home services are closed, you continue to be eligible to receive Medicaid services by moving to a community-based care setting, such as an Assisted Living Facility or Adult Foster Home. Our goal is to support your choices and independence for Medicaid services while safely meeting your health and care needs.

Please call me or your case manager (name) at our office if you have any questions about this letter.

Sincerely,

Name

Supervisor

Aging and People with Disabilities (Office info)

Office Phone # _____

Name of CM

Phone # _____

3) FAILURE TO MAINTAIN A SAFE AND HARASSMENT-FREE WORKPLACE

Overview

Consumer-employers (CEs) are responsible to ensure the workplace is safe and free from harassment. CEs may not physically assault, sexually harass or verbally abuse their paid providers.

- [OAR 411-030-0040\(4\)\(a\)\(G\)](#) states: “To be eligible for in-home services provided by a homecare worker, an individual must be able to or designate a representative to . . . (G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment”.
- [OAR 411-030-0050\(2\)\(c\)\(B\)\(ii\)](#) states: “Services cannot be provided safely or adequately by the service provider based on... the choices or preferences of the eligible individual or the individual's representative”.
- [OAR 411-030-0050\(2\)\(c\)\(B\)\(ii\)](#) If, based on the CMs assessment, per [OAR 411-030-0050\(1\)](#) and [OAR 411-030-0050\(2\)\(b\)](#), the individual cannot or does not address known and serious health and safety concerns or safely manage their service plan, the LO should staff with CO as outlined below.

The Department considers abusing and harassing a paid provider to be a health and safety risk. In addition, abusive and harassing conduct in the workplace is considered a violation of federal and state labor laws. Harassment includes any unwelcome conduct, verbal or physical, that interferes with or creates a hostile or abusive work environment. It includes verbal, emotional, physical or sexual abuse or harassment that jeopardizes the safety, health and welfare of a paid provider.

Note: Abuse and harassment of a paid provider may occur even though a consumer has an appointed CE Representative who may not be aware of the consumer’s conduct.

Mitigation Strategies and Due Process Procedures

NOTE: Mitigation strategies and due process for alleged abuse and harassment situations are below. A shorter timeframe for due process may be appropriate to address potentially imminent and serious health and safety risks to paid providers. As a result, verbal and written warnings may be given during in a shorter timeframe.

A service provider, service setting, or a combination of services selected by a consumer or the representative will not be authorized when a consumer does not make decisions to protect the safety, health, and welfare of paid providers. The information in [OAR 411-030-0050\(2\)\(c\)\(D\)](#) (i.e., a service setting will not be authorized when a consumer does not have the ability to make an informed decision) should be broadly

interpreted to include cognitive limitations impacting an consumer's informed decision-making capacity, self-neglect, their inability to mitigate potential risks or their ability to remove themselves from abusive or exploitive situations.

When staff are made aware that a safety or harassing conduct issue exists in a workplace, the CM must immediately initiate the following mitigation strategies and due process.

The following procedures should be followed but may be modified based on the severity of the situation.

Step #1: Clarify the safety or harassment risk concern with paid providers.

- LO staff should speak with provider(s) to understand the nature and details of the alleged unsafe, abusive, or harassing conduct. This information should be documented in a separate file (not recorded in OA or saved in EDMS) to protect the rights and confidentiality of the consumer.

Step #2: CM and LO staff should meet with the consumer to discuss the allegation of abusive or harassing conduct.

A LO supervisor may choose to be present, along with the CM, when meeting with the consumer to ensure concerns are communicated clearly and the consumer's perspective and response is accurately understood. Staff should maintain a neutral and unbiased perspective as they determine if there is reasonable cause to accept allegations of unsafe and harassing conduct and if mitigation and due process procedures are needed.

- Staff should review their CE responsibilities to remain eligible for Medicaid in-home services ([OAR 411-030-0040\(4\)\(a\)\(G\)](#)). The CE should understand they are responsible, according to federal and state labor laws, to ensure a safe and harassment-free work environment.
- Inform the consumer that the Department will initiate procedures that could result in ending the consumer's in-home service options if recent or future allegations regarding abuse and/or harassment of paid providers are verified or determined to be credible.
- If it is believed the consumer's unsafe or harassing conduct is due to cognitive decline or a mental health related issue, action should be taken to support the consumer and address these issues, such as offering Behavioral Support Services (BSS), an updated assessment, or referral to the local county mental health office.

Step #3: VERBAL AND WRITTEN WARNINGS

- (1) The CM must issue a clear **VERBAL WARNING**. This warning must clarify that ANY further instances of alleged abuse or harassment will result in the immediate loss of HCW services and potentially all in-home service options.
 - General information regarding the verbal warning should be documented in OA.
 - Specific information shared in the verbal warning, including the consumer's response, should be documented in a separate file (not in OA or EDMS) to protect the rights and privacy of the consumer.
- (2) Issue a **WRITTEN WARNING** within five business days of the verbal warning. The written warning reinforces the information communicated in the verbal warning and should clearly state that any verified report of unsafe or harassing conduct will result in the termination of in-home services from HCWs and potentially all providers.
 - The written warning should be personally delivered or sent via certified U.S. mail.
 - If applicable, an IHCA may be willing to only send caregivers of a specific gender to serve a consumer. If the IHCA makes that provision and the consumer agrees, the consumer may retain in-home services through an appropriate IHCA caregiver as long as no further incidents of abuse or harassment occur.
 - Offer the consumer other service options in a CBC or NF care setting.
 - General information regarding the written warning should be documented in OA.

A copy of the letter should be uploaded to EDMS and sent to the CO PA assisting in this process for their records.

Step #4: CLOSURE OF IN-HOME SERVICES

- (1) For situations involving **IMMEDIATE JEOPARDY or HARM to the health and physical safety of paid providers**, staff may immediately terminate all in-home service options for the consumer with consultation from CO. The immediate closure of in-home services should only occur when clear risk of serious and immediate harm, abuse or injury exists to a HCW or IHCA provider and when the workplace is determined to be too dangerous to allow a caregiver to return. "Risk of serious and immediate harm" means that without intervention, the HCW or agency provider is likely to incur substantial injury, trauma, or loss.
 - Narrate general information in OA related to the closure of in-home services options for the consumer. Specific and detailed information about this issue should be recorded in a separate file and not recorded in OA.

- The CM should follow procedures for closing in-home services by issuing a 540 (see information below), assisting the consumer to find placement in a CBC facility if desired.
- (2) Situations ***NOT involving immediate jeopardy or harm***, but still involves unsafe, abusive, or harassing conduct that creates an unsafe work environment, must include Step 3 of this process first.

If a subsequent abuse or harassment incident occurs and is verified by staff, LO staff should close in-home service options for this consumer from a HCW and/or IHCA.

- Consumers receiving services through in-home services or SPPC, a Notification of Planned Action (SDS 540), must be sent to the consumer.
- Appropriate language for the 540 should be staffed with CO before the notice is sent to the consumer. Please see information below.
- CM should offer and assist the consumer to find another service setting option to meet their care needs.
- Upload copy of 540 form to EDMS.

It is important to note that depending on the circumstances, the local office may decide to remove the HCW option, however, allow the consumer to access services through an IHCA.

Note: Consumers whose in-home services are closed and who do not seek CBC placement, may receive other services and monthly WCM from a CM as described in [APD-PT-18-023](#).

- General information regarding the closing of in-home services should be documented in OA (ex. “The consumer’s eligibility for in-home services ended on __/__/__ due to their failure to maintain a safe and harassment-free workplace. The consumer was given other service setting options to address their care needs and received a 540 in-home services closure notice”).
- Specific Information containing pertinent details of the unsafe, abusive or harassing conduct (with appropriate dates, details, people involved, etc. and outlining the actions taken, and the decision to end in-home service options for the consumer), should be documented in a separate file (not in OA or EDMS), to not violate the consumer’s rights, choices, or confidentiality.

Sample Warning Letter

(Adapt to address specific situation: Abusive or Harassing Conditions in the Workplace)

Agency Letterhead

Date __/__/202__

Dear (Name of consumer):

We need to inform you about ongoing concerns about your inability to maintain a safe and harassment free workplace for caregivers providing Medicaid services in your home. To remain eligible to receive in-home services you are required by federal and state law and Medicaid rules to maintain a healthy and safe environment for caregivers who are authorized to provide in-home services.

This information can be found in Oregon Administrative Rule [OAR 411-030-0040\(4\)\(a\)\(G\)](#),

- (a) To be eligible for in-home services provided by a homecare worker,
- (G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment.

And in [OAR 411-030-0050\(2\)\(c\)\(C\)](#),

- (2)(c) The Department or AAA may not authorize a service provider, service setting, or a combination of services selected by an eligible individual or the individual's representative when,
 - (C) Dangerous conditions in the service setting jeopardize the health or safety of the service provider that is authorized and paid for by the Department, and necessary safeguards cannot be taken to minimize the dangers

Our staff spoke with you on (list dates these concerns were discussed) about failing to provide a safe and harassment-free work environment and how to ensure your treatment of caregivers is professional and appropriate.

You have continued abusive or harassing conduct toward your paid caregivers. To remain eligible for in-home services from a homecare worker (or in-home care agency caregiver), you must (add appropriate actions steps) You must stop doing . . . (list corrective measures needed using clear language).

This is the final warning about ensuring a safe and harassment-free workplace!

Further failure to maintain a safe and harassment free work environment will result in being made ineligible to receive services in your home. However, if the Department takes action to close your in-home services from a homecare worker, you may continue to receive in-home services by hiring an In-Home Care Agency or by moving to another care setting, such as an Assisted Living Facility or Adult Foster Home. (Adapt the preceding information to fit the circumstances).

Please call me or your case manager (name) if you have any questions about this letter.

Sincerely,

Name

Supervisor (Position)

Aging and People with Disabilities (Office info)

Office Phone # _____

Name of CM

Phone # _____

DOCUMENTING MITIGATION AND DUE PROCESS ACTIONS

When documenting the consumer's failure to manage their CE responsibilities or to maintain a safe and harassment-free workplace, protect the consumer's rights, choices, and confidentiality.

- OA should NOT be used to record details describing abusive or harassing conduct. Narration should include general details to summarize an issue and the action taken ("The consumer's in-home service options were closed by the Department due to their failure to maintain a safe and harassment-free workplace").
- Specific information describing the situation should be documented in a separate file that is not uploaded to EDMS. Information recorded in a separate file may provide greater detail than what is appropriate in OA case narration ("A female HCW stated a male consumer/employer inappropriately touched her [body part]").

SUPPORTING HCWS' HEALTH AND SAFETY

CMs should notify potential or current HCWs when the consumer has known and serious health and safety risks, while not violating the consumer's rights, choices, or confidentiality. This is per [APD-PT-21-034 and Article 20, Section 1 of the current Collective Bargaining Agreement](#).

Information that **should be** shared includes:

- Bodily harm and physical abuse
- Threatening or dangerous behavior
- Sexual harassment and abuse
- Verbal, mental, or emotional abuse
- Domestic Violence
- Illegal drug or other criminal activity

- Unsafe or unhealthy work environments: toxic mold, rotting floorboards, rodent infestation, aggressive animals, unsafe exit, etc.
- Unsafe handling of firearms or other potentially dangerous objects in the workplace.
- Any situation that threatens HCW health or safety: environments that violate state and federal worker protection laws.

However, information that **should not be** shared includes:

- Medical diagnosis or condition
- Previous incarcerations
- Details on how needs are to be met as this should be communicated by the consumer. Only share the task list.
- Any previously identified health and safety risks that are no longer an active concern
- Any opinions or thoughts regarding the consumer
 - For example, it is inappropriate to say that the consumer is “difficult”, has a history of going through providers, is very demanding, has financial concerns, etc.
- Concerns regarding the consumers ability to manage the CE responsibilities unless it directly relates to current health and safety concerns.

CMs should discover the issues of concern and pursue mitigation and due process strategies when there are credible reports involving a health and safety risk for providers, including:

- CE unable to manage their service plan,
- Dangerous conditions in the workplace, and
- Unsafe or harassing workplace environment.

Local APD/AAA offices should not knowingly authorize a HCW or IHCA to work in an in-home service setting that could constitute an immediate and serious threat to a caregiver’s health or safety.

STAFFING CASES WITH CO

CO PAs can staff cases and provide support to CMs and LO staff with the need for mitigation and due process with in-home consumers. Emails requesting a case staffing should be sent to the APD Medicaid Policy Box (apd.medicaidpolicy@odhsoha.oregon.gov). Include:

- “In-Home Consumer Case Review” in the subject line (indicate if the situation is urgent)
- Consumer’s name, prime number, and a summary in the body of the email.

SAMPLE LANGUAGE FOR A 540 CLOSURE NOTICE

The 540 notice provides a summary of the CE's failure that led to the closure, appropriate rule sections, actions taken to close in-home services from a HCW and/or IHCA, and information about other service options available to the consumer. Information in the notice should be adapted to the situation and circumstances surrounding this decision. Below is an example 540 notice.

The reasons for this action (including the Oregon Administrative Rule numbers) are: OAR 410-120-0006, OAR 411-030-0040(4)(G), OAR 411-030-0040(4)(a)(G), and OAR 411-030-0050(2)(c). **(Cite appropriate rule sections)**

(1. Summary of CE Failure) The (local office) has been trying to help you successfully manage your in-home services. Unfortunately, you have not *(choose appropriate reason for closure – (1) managed your service plan (state issue(s)), or (2) taken appropriate safeguards to remove/minimize the dangers conditions in the home (state issue(s)), (3) managed your specific consumer-employer responsibilities, specifically (list duties that have not been managed properly), Or (4) taken action to ensure that your home environment is safe and free from abuse and harassment of your paid providers.*

(2. Mitigation and Due Process Actions) Our staff worked with you to address this/these concern(s) on **(cite dates)** and provided both verbal and written warnings on **(cite dates)** to help you understand **(summarize issue that was addressed, example, “to help you understand what changes were needed in the management of your service plan to maintain your eligibility for Medicaid in-home services provided by a homecare worker”)**.

(3. Decision to Remove In-Home Services) Because you have not **(cite issue being addressed)** you are no longer eligible to receive in-home services from a HCW **(or in-home care agency caregiver)**.

(4. Availability of Other In-Home or CBC Services) This decision does not mean that you are ineligible for other Medicaid services in other care settings. You continue to be eligible for community-based care services such as in an Adult Foster Home, an Assisted Living Facility, or a Residential Care Facility. You may also receive case management services in your own home.

MITIGATION AND DUE PROCESS RESOURCES

- [Consumer-Employer Responsibilities & Indicators for Intervention](#)
- [Consumer Health & Safety – Red Flags](#)
- [Comparison of In-Home Service Plan Assistance Types/Roles](#)

- [Safety Manual for Homecare Employers](#)
- [The Employers' Guide](#)

APD HEARINGS UNIT INFORMATION AND DUE PROCESS

LO and CO staff who make the decision(s) to end a consumer's in-home service benefits will need to be available to the APD Hearings Unit to:

- Provide documentation created at each step to the APD Hearings team.
- Take part in staffing with the Hearing Rep before the hearing.
- Take part in witness preparation before the hearing.
- Be available to testify at the consumer's hearing.

If local office staff have questions related to the hearing process and expectations noted above, they can contact the hearings rep assigned to the case, or contact the general hearings mailbox APD.HEARINGS@odhsoha.oregon.gov if a CM or staff are unsure who to contact related to a specific case.

Available Tools:

- [Local Office Hearing Instructions](#)
- [APD Hearings Referral Sheet](#)
- [Worker Guide with Sample Notice Language](#)