

Mitigation and Due Process for In-home Consumers Questions and Answers

Resources

Documents

- [Mitigation and Due Process Worker Guide](#) (for In-Home Consumers)
- [Representative Choice](#) Form SDS 0737
- [Comparison of In-Home Service Plan Assistance Roles](#)
- [Consumer-Employer Responsibilities & Indicators for Intervention](#)

Rules

- CEP Duties: [OAR 411-030-0040\(4\)\(a\)](#), SPPC: [OAR 411-034-0040\(4\)](#)
- Dangerous Conditions: [OAR 411-030-0040\(4\)\(a\)\(G\)](#), [OAR 411-030-0050\(2\)\(b\)\(c\)](#)
- Abuse/Harassment: [OAR 411-030-0040\(4\)\(a\)\(G\)](#), [OAR 411-030-0050\(2\)\(b\); \(c\)\(B\)\(ii\)\(D\)](#)

Transmittals

- [APD-PT-17-058](#)
- [APD-PT-21-034](#) (Article 20, Sec. 1)

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Identifying Abuse and Harassment

Q: How do I determine when a consumer's behavior falls under the definition of harassing conduct or should be considered abusive?

A: CMs should use their judgment and consult with other LO staff to determine if the consumer's behavior (verbal or physical) constitute abusive or harassing conduct. Staff and LO supervisor determine if abuse or harassment is occurring and to begin mitigation and due process. CO policy analyst are available to staff a case with the CM and LO supervisors.

See Mitigation and Due Process Guide:

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

Q: Are racist comments and prejudice language considered harassment?

A: Yes, based on federal and state labor laws, written or verbal communication referencing an individual's ethnic, racial or cultural background can be considered discrimination (being treated differently because of one's race, sex, age, disability, or other protected characteristics), and would constitute workplace harassment.

Q: How should staff handle and discuss alleged racial or prejudicial comments made by a consumer to a HCW, and what should be documented in case narration?

A: Staff should have a private conversation with the consumer about alleged racial or prejudicial comments made to HCWs. The consumer should be reminded that as an employer, they must follow federal and state anti-discrimination laws and the In-Home Services rule that describes the consumer-employer's responsibility to ensure the workplace be safe and free from harassment. Case narration should provide a general summary of the concern, the consumer's response, and any action taken by staff.

See Mitigation and Due Process Guide:

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

Q: What if a HCW considers the behavior of the consumer inappropriate and harassing but the consumer denies that such behavior has occurred?

A: If abusive or harassing conduct is alleged or suspected, the CM (with LO staff) should look into the issue immediately with the consumer. If the consumer does not consider their behavior to be inappropriate (not harassing or abusive), staff should first talk with the HCW (or agency provides if applicable), to understand the nature of the concerns and then talk with the consumer to understand their perspective. CM and LO staff should exercise discretion to determine if mitigation and due process is needed.

See *Mitigation and Due Process Guide*:

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

Mitigation Strategies

Unsafe Home Environment

Q: How can staff determine that a home environment is not safe for providers to the extent that mitigation and due process procedures should be pursued with the consumer?

A: When conditions in the home are unsafe and could jeopardize the health and wellbeing of a provider, staff should visit the home (with another CM or LO supervisor), to examine the home's condition. Staff should explain to the consumer why the conditions are considered to be dangerous for providers (Note: the consumer may not agree that a dangerous condition to the provider exist). Staff should determine 1) if the consumer has the cognitive ability to address the concern, 2) if the consumer is able to put necessary safeguards in place to remove the concern, and 3) if the consumer is willing to and has the resources to address the concern. If deemed necessary, the CM, LO staff should contact the CO to begin mitigation and due process.

See *Mitigation and Due Process Guide*:

(2) WHEN A CE FAILS TO MINIMIZE DANGEROUS CONDITIONS IN THE SERVICE SETTING

Q: What if the individual is unable or unwilling to address dangerous conditions and make appropriate repairs to the service setting?

A: Consumers can make informed decisions and choices that result in jeopardizing their health and safety or that of others. An "informed decision" means the individual understands the benefits, risks, and consequences of the service choice selected. Staff should recommend services and options to order to minimize the risks. Staff can also explore the possibility of using K-Plan Ancillary Services or Crisis Program Funds to address and improve a dangerous condition. If needed safeguards are not taken to address the dangerous conditions and improve the setting, mitigation and due process should be pursued.

See *Mitigation and Due Process Guide*:

(2) WHEN A CE FAILS TO MINIMIZE DANGEROUS CONDITIONS IN THE SERVICE SETTING

Q: What if a HCW considers the workplace unsafe but the consumer does not? How does the Department determine that the workplace is unsafe?

A: A HCW (or IHCA) has the right to not accept employment or stop working for a consumer if they feel unsafe or that their health and wellbeing are in jeopardy. HCWs should report their concerns to the CM. A CM may involve other LO staff to help evaluate the home environment. The CM and LO management have the authority to determine that a home environment is unsafe based upon their judgment. K-plan or Crisis Program support funding could be used to address the issues and to document the unsafe conditions. They may consult with the CO for advice. If safeguards cannot be taken to improve the setting, mitigation and due process should be pursued.

See *Mitigation and Due Process Guide*:

(2) WHEN A CE FAILS TO MINIMIZE DANGEROUS CONDITIONS IN THE SERVICE SETTING

Abuse or Harassment

Q: Should any mitigation or due process procedures be followed when a HCW states they are willing to “put up with” a consumer’s inappropriate speech or conduct (stating it “does not bother me,” etc.)?

A: The Department is responsible to ensure that a workplace is safe and free from harassment and abuse for consumers, providers and staff. Although one HCW may feel they can “put up with” a consumer whose speech or behavior is unwelcomed or offensive, another HCW may find the consumer’s conduct highly inappropriate and a threat to their safety and wellbeing. The standard for determining if a consumer’s conduct is considered serious and pervasive enough to create a hostile work environment is what a “*reasonable person*” would judge to be hostile, offensive or abusive. CM and LO staff are authorized to make this determination but may consult with a CO policy analyst for their input.

See *Mitigation and Due Process Guide*:

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

Q: Can mitigation and due process procedures be pursued if the consumer demands that HCWs do things not on the task list?

A: Yes. Consumer-employers are responsible to supervise their HCW’s activities as recorded on the task list. If a consumer demands that a HCW do things not on the task list that make the HCW feel uncomfortable, or that the worker considers are intimidating, threatening, or humiliating, the HCW should immediately report their concerns to the CM. These concerns should be looked in to by the CM as they may be considered abuse or harassment and may require mitigation and due process.

See *Mitigation and Due Process Guide*:

(1) WHEN A CE FAILS TO MANAGE THEIR EMPLOYER RESPONSIBILITIES

Due Process

Q: If a due process step resolves the concerns, staff should monitor the situation to ensure there are no additional or reoccurring issues. If the consumer starts harassing the HCW again or begins harassing a new HCW, will the process start over?

A: It depends on the situation. If the consumer's behavior puts the HCW's health and safety in jeopardy, then staff should immediately act to address the situation, pursue mitigation and due process, and document the issues.

LO staff can make this determination to initiate due process, however, in most cases, due process would continue from the point in the process where it was previously stopped. If the concern does not present an immediate and serious health or safety concern, then staff may choose to continue with due process and issue a new written warning that indicates that any further incident will result in the termination of in-home services.

See *Mitigation and Due Process Guide*:

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

Q: Shouldn't due process rest with CO? The thought of having a CM track and document all this is uncomfortable. If a HCW gets hurt and the CM wasn't following the steps or something bad happened, that could be a big deal.

A: No one individual should be addressing these types of concerns by themselves. When due process is needed, local office staff (including supervisors or managers) need to be involved. CMs and other staff should seek the support and involvement of their LO supervisor and CO policy analysts. CMs should receive all the support they need and desire as they work with consumers and pursue due process.

The *Mitigation and Due Process Guide* and training on this topic was created to provide clarity, guidance, and support for LO staff. The best way to ensure the health and safety of consumers, their providers and LO staff is to prioritize communication and mutual support for all involved, to address known issues and ensure that consumers receive due process. The safest way to address concerns with consumers is to carefully follow mitigation and due process procedures and seek support from other staff when doing so.

Verbal Warning

Q: Should more than one verbal warning be given prior to sending a warning letter? APD-PT-17-058 states, “If issues continue to persist within 12-months of the verbal warning, provide a written warning”

A: One formal verbal warning to the consumer and documented, is an essential step in due process. The goal in due process is to provide information, guidance and support to the consumer and give them as much assistance and opportunities as possible to successfully manage their services. However, if a verbal warning is given so that the consumer clearly understands what is required related to the management of their services, no additional verbal warning is required. It is recommended that a verbal warning be given in person to the consumer, unless staff believe a safety concern exist in doing so.

It is common for staff to have more than one conversation with the consumer (or their representative), to 1) remind them of their CE responsibilities, 2) describe the changes needed in the management of their service plan, and 3) warn them about the potential of being made ineligible to receive in-home services provided by a HCW.

Q: After a verbal warning is issued, how many additional incidents need to occur before issuing a written warning? Also, how much time should be given between the verbal warning and a written warning?

A: The rate in the application of due process procedures depends on the severity of the issue(s) addressed. The Department seeks to provide the support, resources and assistance needed by the consumer to address known failures in the management of their service plan. When addressing abuse or harassment allegations, a shorter due process timeframe should be used, particularly if it is felt the provider’s health and safety is in immediate jeopardy. CO is available to discuss a case and help determine when it’s appropriate to move past a verbal warning in situations where it may be unclear, or a more objective view is needed.

CMs, coordinating with LO staff, determine the appropriate time needed between verbal and written warnings, depending on the circumstances of the case. We want to ensure that the consumer receives due process while doing what is needed to protect a provider’s health, safety, and wellbeing.

Q: How much time should be given after a verbal warning for a consumer to prove they have made required changes to address a known concern? (Service plan failures, dangerous conditions, or abuse /or harassment)?

A: After a verbal warning, staff should monitor the situation to ensure the CE is successfully addressing the concern. Monitoring means checking regularly with the

consumer (and possibly with HCW(s), natural supports, LTCCN RNs, etc.), to discover if the consumer is successfully addressing known concerns.

CMs and LO staff should implement mitigation and due process on a case-by-case basis, with a pace that matches the severity of the concern and the potential for injury or harm to the consumer or a provider. CO should be consulted for counsel and to support LO staff with mitigation and due process procedures.

Written Warning

Q: How many additional incidents can occur after the written warning before making an individual ineligible for services from a HCW?

A: The goal is to ensure the safety of the consumer and provider when implementing due process. The timing of the steps taken in due process may vary depending on the details and severity of the concern(s). It is important that the written warning describe clearly what the results will be if action is not taken by the consumer or their representative to resolve the concerns addressed.

In cases where the consumer's behavior puts a provider's health, safety and wellbeing in serious jeopardy, any additional incident that occurs after the written warning should result in the termination of in-home services from a HCW and agency providers (if needed).

In cases where the consumer's inability or refusal to manage their CE responsibilities and the consumer's or provider's safety is not in immediate or serious jeopardy, if additional incidents occur, staff can determine the timing related to the closing of HCW services.

Staffing Cases

Q: At what point should I discuss a concern with my manager and with CO about a consumer's inability or unwillingness to manage their service plan or maintain a safe workplace, to determine what actions should be taken?

A: We want to do all we can to ensure and support a consumer's and provider's health and safety. We want to "err" on the side of caution when health and safety concerns are known.

CMs and LO managers must address concerns regarding a consumer's service plan management, dangerous conditions in the home or harassing conduct that have created an unsafe or dangerous workplace for paid providers. The CM and LO management can initiate mitigation and due process procedures and staff the concerns with CO for support and guidance.

See the *Mitigation and Due Process Guide*:

(1) WHEN A CE FAILS TO MANAGE THEIR EMPLOYER RESPONSIBILITIES

Communicating Known Concerns to HCWs

Q: If I'm not going to authorize a service plan when there are known concerns in the service setting that jeopardize the health and safety of the consumer and/or HCW, (APD-PT-21-034), how do I communicate this concern to the consumer and HCW? Does a conversation about known health and safety concerns happen only at intake and annual reviews?

When communicating information about a known health or safety concern, we must not share information that violates the consumer's rights, choices, or confidentiality ([APD-PT-21-034](#) Art. 20, Sec. 1).

A: With the Consumer: A CM should have a face-to-face conversation with a consumer to help them understand the specific concern(s) and why their service plan is not authorized. If the consumer's conduct is jeopardizing the health and safety of a provider, the CM (supported by LO staff), should pursue mitigation strategies with the goal of helping the consumer, when possible, to correct known health and safety concerns.

With the HCW: CMs should inform HCWs of known health or safety risks with the consumer or in the workplace, whether the HCW is seeking employment or is working currently for the consumer. CMs should provide the minimum necessary information needed, to inform the HCW of these concerns, while not violating the consumer's rights, choices, or confidentiality.

A HCW who is aware of health and safety concerns may decide to work for or continue working for a consumer if they desired to do so. This decision is the HCW's prerogative (see [APD-PT-21-034](#), Sec. 20), unless it is believed that the HCW is exerting undue influence over the consumer, or some type of illegal activity is occurring in the home.

The Mitigation and Due Process Guide includes information about what should and should not be shared with a HCW. CMs should staff any concerns they have about communicating these concerns with LO supervisors.

See the *Mitigation and Due Process Guide*:
SUPPORTING HCWS' HEALTH AND SAFETY

Consumer-Employer and Client Representative Support

Q: There is a thin line between the Consumer Employer (CE) Representative and Client Representative roles. What's the difference between them? Can the Client Representative appoint a Consumer Employer Representative?

A: The Consumer-Employer Representative (CE Rep) role supports for In-home consumers who employ HCWs. A consumer may voluntarily or because of their needs and inability to manage CE duties (i.e., decline in cognition), may appoint an individual to manage these responsibilities on their behalf ([OAR 411-030-0040\(4\)\(b\)\(5\)\(a\)](#)). Even when a consumer selects a CE Rep, the consumer is still to be the decision maker and communicated with related to their in-home services that are overseen by the CE Rep.

The Client Representative role is a *broader designation* than the CE Rep. A Client Rep helps a consumer with LTSS future decision-making needs (i.e., help consumer decide where to live, choose a provider, care setting, etc.). A Client Rep helps with service plan decisions when the consumer is no longer able to do so for themselves. A Client Rep is designated by the consumer using the priority order list (0737), if a physician or other healthcare professional determines that the individual can no longer make LTSS decisions.

A Client Rep may be designated to fill both CE Rep and Client Rep roles (sign for both representative roles on the 0737 form), or as a Client Rep, may appoint another qualified individual to fill the CE Rep role. Consumers who have the cognitive ability to make LTSS decisions, can revoke a representative designation at any time.

Nether a CE or Client Representative can act as a substitute for a consumer's court-appointed legal guardian. A guardian is a court-appointed individual who is authorized to make personal, health or other care decisions for a functionally incapacitated individual.

See: [Comparison of In-Home Service Plan Assistance Role](#)

Q: In mitigation steps, when the Department or AAA appoint a Client Rep, what does that process look like and when is it appropriate? Can the CM or other staff appoint the Client Rep?

A: The consumer (at intake and recertifications), should be encouraged to list up to three Client Rep choices on the 0737 form (pg. 4) for future LTSS needs. If the consumer does not choose a representative (or is unable to do so), the Department may appoint a Client Representative using the "priority order" (pg. 3) of the 0737. Department staff will use a medical professional's input and the priority list to identify a Client Rep who is willing to serve the consumer to make long-term care decisions.

If a consumer is unable to make LTSS decisions and cannot designate a Client Representative, and no medical doctor is available to make this determination, staff can use a community nurse as a qualified health professional to determine if a Client Representative is needed.

Q: When approving a CE Representative, how can a CM know if they don't have a criminal record, protective service, credible allegations of fraud or collusion in fraudulent activities involving a public assistance program? Can we ask the consumer or potential CE Rep?

A: There is no policy or rule that requires a background check before a consumer appoints a representative. Individuals with a criminal history, protective services history, or credible allegations of fraud or collusion in fraudulent activities involving a public assistance program are not qualified to serve in these roles ([OAR 411-030-0040\(4\)\(d\)](#)). Good guidance for recognizing characteristics of a representative that is found in [OAR 411-028-0000\(13\)](#).

If staff have reason to suspect that the potential representative is not qualified, staff may ask general questions of the individual related to their capability and fitness to manage the representative responsibilities. Staff may have the individual review the information in rules cited above and read the 737 form so that the individual is aware of the requirements of this designation.

Q: How can I find someone to be a consumer's CE Rep when no family or friends live nearby or are interested in helping in this way?

A: This is a challenging issue. Although the information on pages 3-4 of the 0737 form describe the Client Representative's role, the process outlined on the 0737 form can also be used to identify a CE Rep.

If no one is identified after following the process on the 0737, staff can 1) seek to discover if any community or service organizations have any individuals who are involved in their programs who may be willing to serve as the consumer's CE Rep, or 2) assist the consumer to pursue guardianship (for individuals who lack decision-making capacity, see Public Guardianship, [Program Referral Information](#)).

Q: What should be done if the consumer cannot manage their service plan, no person can be found to serve as a CE Rep, and the HCW is managing the consumer's service plan?

A: To address the fact that the HCW is managing the service plan, the HCW Program Policy Analyst in CO should be alerted of the HCW's and conduct an administrative review of the worker ([OAR 411-031-0040\(1\)](#) and [OAR 411-031-0050\(4\)](#)).

To assist the consumer, the CM may contact the Oregon Public Guardian's office to pursue public guardianship for the consumer.

See the *Mitigation and Due Process Guide*:

(1) WHEN A CE FAILS TO MANAGE THEIR EMPLOYER RESPONSIBILITIES

Presenting Service Setting Options

Q: What factors should be considered when suggesting an IHCA service option when as a result of due process, it is determined that a consumer is no longer eligible to hire HCWs?

A: In-home care agencies (IHCAs) are a viable option for individuals who are unable to manage their CE responsibilities. However, IHCAs are **not** an appropriate option for individuals with severe cognitive decline who cannot ensure that their needs are being met or make care-related decisions unless there is someone living close to and involved in the consumer's life to act as general representative (described in [OAR 411-033-0010\(43\)](#)) for service planning purposes. This representative (**not a "CE Representative"**). A CE Rep is used only for consumers in the CE Program employing HCWs, must live close by (i.e., living in the same community as the consumer), be knowledgeable and involved in the life of the consumer, be able to check on the consumer and manage their service plan.

Q: What should be done if there are no IHCAs able or willing to provide services for an individual who is made ineligible for in-home services from a HCW?

A: A Notification of Planned Action (SDS 540) should be sent to close all in-home services and community-based service options should be presented to the consumer. The 540 should document why the consumer has been made ineligible for all in-home service options.

See the *Mitigation and Due Process Guide*

SAMPLE LANGUAGE FOR A 540 CLOSURE NOTICE

Q: Are we to continue Waivered Case Management (WCM) services if a consumer is made ineligible for in-home services?

A: Yes. If a consumer has their in-home services closed through due process and does not seek placement in a CBC service setting, that individual should continue receiving WCM services as well as the other service options described in this transmittal ([APD-PT-18-023](#)).

Documenting General Information in Oregon ACCESS

Q: What information should be recorded in case narration about a consumer's inability to manage their CE responsibilities, including inappropriate behavior, harassment or physical/verbal abuse?

A: It is important that information documented in a consumer's Oregon ACCESS case narrations record does not violate the consumer's rights, privacy, choices, or confidentiality.

Only *general information* and a summary of the concern and action taken should be recorded in case narration. Ex. “The consumer’s in-home service options were closed by the Department due to their failure to maintain a safe and harassment-free workplace”.

See the *Mitigation and Due Process Guide*:
DOCUMENTING MITIGATION AND DUE PROCESS ACTIONS

Documenting Specific Information in a Separate File

Q: How should the CM or LO set up a “separate file” to capture specific details of a consumer’s inappropriate behavior?

A: A “separate file” should be created to record appropriate and specific details describing a consumer’s inappropriate behavior. This file should be managed by each local office to record relevant information related to due process for hearings or law enforcement purposes, if needed. This information should only be accessible only by designated staff members. A secured local office shared drive is recommended; however, LO management may set up this type of file as they see fit. This specific and detailed information should not be recorded in a public-facing file and should not be uploaded to EDMS.

See the *Mitigation and Due Process Guide*:
DOCUMENTING MITIGATION AND DUE PROCESS ACTIONS

Q: What documents or information should be uploaded to EDMS about this case?

A: Documents uploaded to EDMS include relevant information received from the consumer, providers, medical professionals, notes on phone calls/conversations, ERC consultant reports, warning letters, and the 540 notice. Documents placed in a separate file (with specific details about the case) should not be uploaded to EDMS to maintain consumer confidentiality.

See the *Mitigation and Due Process Guide*:
DOCUMENTING MITIGATION AND DUE PROCESS ACTIONS

Service Closure Notices

Q: In the final step of due process when closing in-home services, is this a 10-day notice?

A: Depending on the situation and issues addressed in a case, staff should choose the appropriate service closure decision notice ([Sample Decision Notices](#), i.e., Closure notices #16. Unable to manage consumer-employer responsibilities, or #17.

Unable to safely deliver services). Whichever notice is used, LO staff should consult with Central Office (CO) for appropriate language for the notice.

Miscellaneous Issues

Q: Maintaining a safe and harassment free workplace would technically be the responsibility of the State or IHCA as an employer, right? We say it is the CE but that isn't who signs the paycheck. The state or IHCA would be the one open to a lawsuit, not the consumer.

A: The consumer is considered the employer of HCWs in the Consumer-Employer Program (OAR 411-030). IHCA's are licensed by the OHA and contracted by the state to provide in-home care services for compensation to a consumer (OAR 411-033). The agency is the employer of caregivers sent to provide care for the consumer.

The consumer is responsible based on federal and state labor laws and Medicaid rule to maintain a safe and harassment-free workplace. The Department's responsibility is to assist the consumer with services and supports related to their Medicaid in-home service plan as required by CMS and conduct due process when the consumer fails to do so.

APD provides a legal process for any disagreements, complaints, or grievances by a consumer (related to service hours, Medicaid rules, due process, etc.), to be addressed in a fair and unbiased process through the APD Hearings Unit.

Q: If a person is made ineligible for in-home services provided by a HCW through due process, are they always ineligible or is there a chance for them to correct deficiencies and again employ HCWs?

A: If an individual was made ineligible for in-home services through due process, in some cases, they may reestablish eligibility according to [OAR 411-030-0040\(4\)\(c\)\(A\)](#) if they can demonstrate the ability to meet their employer responsibilities (managing their service plan and maintaining a safe and harassment-free workplace)

Cases must be staffed with CO before an individual is reopened for in-home services.