

Mike McCormick

**Authorized Signature**

**Number:** APD-PT-16-020

**Issue date:** 5/26/2016

**CORRECTED**

**Topic:** Long Term Care

**Transmitting (check the box that best applies):**

- New policy   
  Policy change   
  Policy clarification   
  Executive letter  
 Administrative Rule   
  Manual update   
  Other: \_\_\_\_\_

**Applies to (check all that apply):**

- |  |  |
|--|--|
| <input type="checkbox"/> All DHS employees                             | <input type="checkbox"/> County Mental Health Directors                      |
| <input checked="" type="checkbox"/> Area Agencies on Aging             | <input type="checkbox"/> Health Services                                     |
| <input checked="" type="checkbox"/> Aging and People with Disabilities | <input type="checkbox"/> Office of Developmental Disabilities Services(ODDS) |
| <input type="checkbox"/> Self Sufficiency Programs                     | <input type="checkbox"/> ODDS Children’s Intensive In Home Services          |
| <input type="checkbox"/> County DD Program Managers                    | <input type="checkbox"/> Stabilization and Crisis Unit (SACU)                |
| <input type="checkbox"/> ODDS Children’s Residential Services          | <input checked="" type="checkbox"/> Other (please specify): OPI              |
| <input type="checkbox"/> Child Welfare Programs                        |  |

Policy/rule title:	Homecare workers acting as consumer representatives		
Policy/rule number(s):	OAR 411-030-0040(8)	Release no:	
Effective date:	June 1, 2016	Expiration:	
References:	OAR 411-030-0020(46); 411-030-0040(8)(b) 42 CFR 441.505		
Web address:	<a href="http://www.dhs.state.or.us/policy/spd/rules/411_030.pdf">http://www.dhs.state.or.us/policy/spd/rules/411_030.pdf</a>  <a href="https://www.gpo.gov/fdsys/pkg/CFR-2012-title42-vol4/xml/CFR-2012-title42-vol4-sec441-505.xml">https://www.gpo.gov/fdsys/pkg/CFR-2012-title42-vol4/xml/CFR-2012-title42-vol4-sec441-505.xml</a>		

**Discussion/interpretation:**

Eligibility

In order to be eligible for in-home services provided through Medicaid or Oregon Project Independence (OPI), consumers must be able to fulfill the duties of an employer OR must appoint a **representative** to fulfill the duties of an employer.

## Representatives

Wherever the term is used throughout OAR Chapter 411, Division 030, 'representative' has the meaning given in OAR 411-030-0020(47):

"Representative" is a person either appointed by an individual to participate in service planning on the individual's behalf or an individual's natural support with longstanding involvement in assuring the individual's health, safety, and welfare.

This meaning is consistent with Federal regulations as well. 42 CFR 441.505 reads, in part:

*"Individual's representative* means a parent, family member, guardian, advocate, or other person authorized by the individual to serve as a representative in connection with the provision of (Community First Choice) services and supports. This authorization should be in writing, when feasible, or by another method that clearly indicates the individual's free choice. An individual's representative may not also be a paid caregiver of an individual receiving services and supports under this subpart.

"Representative", as used in this transmittal and in OAR 411-030-0040(8)(b), does not have the same meaning as:

- "Authorized Representative" as set forth on form #MSC 0231
- "Lawyer or Representative" as found on form #MSC 0443
- "Power of Attorney" (POA)
- Guardian
- Conservator
- Representative Payee for Social Security, Veterans' benefits, etc.

In order to clearly identify a consumer's representative, the consumer and the person who will serve as a consumer's representative should complete a [Form 0737](#) and return it to the consumer's Case Manager. A new 0737 should be completed whenever the consumer identifies a new representative.

## Responsibilities/Duties

Consumers or representatives are responsible to:

- Locate, screen, and hire qualified homecare workers;
- Supervise and train homecare workers;
- Schedule the homecare workers' work, leave, and coverage;
- Track the hours worked and verify the authorized hours completed by homecare workers;
- Recognize, discuss, and attempt to correct any performance deficiencies with the homecare workers; and
- Discharge any unsatisfactory homecare worker.

## Limitations

All consumers must either be able to carry out the responsibilities and duties listed above, or must have a representative do so. Sometimes, a consumer's homecare worker assumes or is given the duties of a consumer's representative. This must not be allowed to happen.

Both rule (OAR 411-030-0040(8)(b)) and Federal Regulation (42 CFR 441.505) are clear that a consumer's representative may not be a homecare worker who is paid to care for that consumer.

Therefore, a homecare worker may never act as any consumer's representative or be responsible for performing the listed consumer or representative responsibilities.

## **Implementation/transition instructions:**

This transmittal updates PT 15-013, which instructed APD/AAA staff to contact Chris Ellis upon becoming aware that a homecare worker was performing the duties of a representative.

This transmittal establishes that, beginning June 1, 2016, APD/AAA Case Managers have the responsibility to bring such cases into compliance with OAR 411-030-0040(8)(b) and 42 CFR 441.505.

Beginning June 1, 2016, no new Medicaid in-home service or OPI case may be opened for any consumer who selects a representative who is also the consumer's homecare worker, regardless of any other relationship the consumer and homecare worker may have. Staff determining initial service eligibility shall deny any application for in-home service benefits, through the consumer-employer program, where the consumer is not capable of carrying out the duties of an employer and has not selected a suitable representative.

Also beginning June 1, 2016, any Medicaid in-home service or OPI case in which the consumer's representative is also the consumer's homecare worker must be brought into compliance with OAR 411-030-0040(8)(b) and 42 CFR 441.505. This process of bringing these cases into compliance should begin during the annual assessment process. If no suitable representative is available to the consumer, Case Managers shall offer the consumer service benefits in other long-term or community-based care settings, and offer the services from in-home agencies (if available).

Consumers shall have 90 days from the last day of the month in which their next assessment takes place to be in compliance with OAR 411-030-0040(8)(b) and 42 CFR 441.505.

For example, if a consumer’s assessment takes place on any day of June 2016, then the case must be in compliance by no later than 09/30/16. Any in-home service case not in compliance with OAR 411-030-0040(8)(b) and 42 CFR 441.505 within these 90 days shall be closed.

When a consumer’s service benefits are closed, a decision notice must be sent at least 10 days before the effective date of the closure. This means that for a case that will close 09/30/16, the closure notice must be sent no later than 09/20/16. Sample language for such notices will be available in the Decision Notice Preparation Tips page in the APD Worker Guide.

OPI workers will need to send the consumer a closure and the AAA’s grievance information.

Consumers whose Medicaid service cases close based on OAR 411-030-0040(8)(b) and 42 CFR 441.505 will not need to complete a 7210, and will not need to be reviewed for MAGI eligibility before the service benefit closure takes place.

**Training/communication plan:**

A “Frequently Asked Questions” (FAQ) sheet and a sample letter that case managers can send to consumers are attached to this transmittal. These will be posted to the [APD Case Management Tools webpage](#).

**Central office action required:** N/A

**Field/stakeholder review:**  Yes  No

**If yes, reviewed by:** APD Operations

**Filing instructions:**

*If you have any questions about this policy, contact:*

<b>Contact(s):</b>	Chris Ellis (Medicaid) or Sandy Abrams (OPI)		
<b>Phone:</b>	503-945-7035 (Chris Ellis) 503-947-2391 (Sandy Abrams)	<b>Fax:</b>	503-947-4245
<b>Email:</b>	<a href="mailto:Christopher.m.ellis@state.or.us">Christopher.m.ellis@state.or.us</a> <a href="mailto:Sandy.H.Abrams@state.or.us">Sandy.H.Abrams@state.or.us</a>		

## Homecare Workers who act as consumers' representatives : FAQs

### **What do the rules say?**

OAR 411-030-0040(8)(b) states “Individuals who are unable to meet the responsibilities in subsection (a) of this section are ineligible for in-home services provided by a homecare worker. Except as set forth in subsection (f) of this section, individuals ineligible for in-home services provided by a homecare worker may designate a representative to manage the individual’s responsibilities as an employer on the individual’s behalf. **A representative of an individual may not be a homecare worker providing homecare worker services to the individual.** Individuals must also be offered other available community-based service options to meet the individual’s service needs, including contracted in-home care agency services, nursing facility services, or other community-based service options.”

OAR 411-030-0020(46) defines “representative” as “...a person either appointed by an individual to participate in service planning on the individual's behalf or an individual's natural support with longstanding involvement in assuring the individual's health, safety, and welfare.”

42 CFR 441.505 states “An individual's representative may not also be a paid caregiver of an individual receiving services and supports under this subpart.”

These rules mean that if you have a consumer whose representative is also a paid homecare worker for that consumer, then you will need to make some changes to the case.

### **Are these new rules?**

These rules are not new. They have been in effect since Oregon began administering its home and community based services. However, APD is emphasizing enforcement of these regulations to strengthen program integrity issues and to meet federal requirements.

### **How do I know whether my consumer has a representative?**

Generally, if a consumer has someone else doing any or all of the following duties, then the consumer has a representative:

- Locate, screen, and hire qualified homecare workers;
- Supervise and train homecare workers;
- Schedule the homecare workers’ work, leave, and coverage;
- Track the hours worked and verify the authorized hours completed by homecare workers (including signing vouchers in the “Employer/Rep Signature” field);

- Recognize, discuss, and attempt to correct any performance deficiencies with the homecare workers; and
- Discharge any unsatisfactory homecare worker.

### **When is a homecare worker acting as a consumer's representative?**

If the homecare worker is carrying out **any** or all of the above duties, then the HCW is acting as the consumer's representative.

### **Who can be a consumer's representative?**

Any person who meets the requirements of OAR 411-030-0020(46) above, who is not a homecare worker who provides paid services to the consumer, who can carry out the responsibilities of an employer, and who the Department approves as set forth in OAR 411-030-0040(8)(d) can potentially be a consumer's representative.

The individual chosen to be a consumer's representative should be in contact with the consumer on a regular basis, and should be familiar with the consumer's service needs. The individual chosen must understand and complete the form 0737.

### **In my case, the HCW / representative is the consumer's daughter. Can the HCW's husband be the consumer's representative?**

If the husband can meet the requirements, yes. However, CMs should pay special attention to these cases to ensure that fraud is not occurring.

### **When does this take effect?**

Beginning June 1, 2016 no NEW cases where the homecare worker is the consumer's representative may be opened.

Also beginning June 1, 2016, any in-home service case in which the consumer has a representative who is also the consumer's homecare worker must be brought into compliance as a part of the assessment process.

### **Are we really going to cut people off of services because of this?**

It is absolutely not APD's intent to make existing in-home consumers ineligible. However, consumers who are not capable of acting as employers and who don't have a suitable representative are not eligible for services through the Consumer Employed Provider (CEP) program. These consumers can still receive service benefits through an in-home agency, adult day program or in other long-term or community-based care settings.

**What if my consumer is not capable of performing the duties of an employer and doesn't have ANYBODY other than a homecare worker who can act as his representative?**

The consumer is not eligible for in-home services provided by a homecare worker.

**Does this include spousal pay providers?**

Yes.

**What options does a consumer have if he /she can't find a representative?**

The consumer can receive services from an in-home agency, or he/she can move to an adult foster home, assisted living facility, residential care facility or a nursing facility. If a consumer has a strong natural support system in place, Adult Day services may be sufficient to meet the consumer's unmet service needs.

**How long does a consumer have, after the assessment, to appoint a new representative or to start receiving services from an Agency or from a community based facility?**

A new representative or a new living arrangement must be selected within 90 days from the last day of the month in which the consumer has an assessment. For example, if a consumer has an assessment on June 8<sup>th</sup> or 18<sup>th</sup> or 28<sup>th</sup>, the consumer must have a new representative in place, or must be receiving services from an agency or community-based facility, by 09/30/16.

**Will consumers have hearing rights if we close their service benefits?**

Yes. In the above example, if a consumer's service benefits are to close 09/30/16, then a closure notice must be sent no later than 09/20/16. Consumers whose service benefits are closed under these rules do not have to complete a 7210 or be assessed by branch 5503 for MAGI eligibility.

**Will consumers have hearing rights if they must move to a facility, or must receive in-home services from an agency, because of these rules?**

No.

**My consumer's homecare worker has Power of Attorney. Can the HCW be both homecare worker and representative?**

No. This is another situation that should receive special attention to protect against abuse and exploitation.

**My consumer has an advanced healthcare directive which allows his/her homecare worker to make all medical decisions. Can the HCW be both homecare worker and representative?**

No.

**My consumer's homecare worker has guardianship and conservatorship of the consumer. Can the HCW be both homecare worker and representative?**

No.

**My consumer's doctor wrote a letter stating that the HCW should be the consumer's representative. Can the HCW be both homecare worker and representative?**

No.

**My consumer said he/she will not allow ANYONE but the HCW to be the representative. Can the HCW be both homecare worker and representative?**

No.

**If the HCW agrees to stop being a paid care provider for the consumer, can he/she still be the representative?**

Yes. A HCW may be a consumer's paid service provider or the consumer's representative, but **never** both. A HCW may provide care to a consumer as a natural support and act as that consumer's representative.

**What kinds of things can a HCW do without being considered a representative?**

- HCWs can contribute to the assessment and service planning process, if the individuals wishes them to be involved.
- They may be consulted for indirect case management contacts.
- They can do things like schedule rides or appointments for consumers at the request of the consumer.
- If a consumer has multiple HCWs, then an experienced HCW can show a new HCW how to perform consumer-specific tasks under the direction of the consumer.
- With the consumer's permission, shop or otherwise spend money (or EBT) for the consumer.