JOINT COMMENTS TO THE OFFICE OF DEVELOPMENTAL PROGRAMS

On Proposed Family Caregiver Payment, Provider Agreement, and Related HCBS Waiver Changes

The Alliance of Community Service Providers | The Provider Alliance (TPA) | MAX | Rehabilitation and Community Providers Association (RCPA) | The Arc of Pennsylvania | PAR

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Introduction and Purpose

The undersigned organizations, The Alliance of Community Service Providers, The Provider Alliance (TPA), MAX, the Rehabilitation and Community Providers Association (RCPA), The Arc of Pennsylvania, and PAR, jointly submit the following comments regarding the Office of Developmental Program's (ODP's) proposed changes affecting family caregiver payment, out-of-state travel by individuals receiving waiver services, and related provider agreement revisions.

We recognize that ODP is operating under significant federal pressure to preserve access to home and community-based services (HCBS) funding. We share the Department's interest in protecting Pennsylvania's HCBS system for the individuals and families who rely on it. Several states, including Idaho, Maryland, Ohio, and Colorado, are already planning disruptive cuts to family caregiver compensation, and our organizations do not wish to see Pennsylvania follow that path. It is precisely because we share ODP's objective of preserving Pennsylvania's HCBS system that we offer an alternative approach that we believe better balances federal compliance with continued access to services.

Process Concerns: Implementation Through Provider Agreement Revision

Our organizations' foremost concern is procedural, and it is separate from our concerns about the substance of any individual policy change.

The recent Dunkelberger court ruling found that ODP's prior process, not the underlying policy goal, was legally deficient. In response, ODP has proposed implementing sweeping changes to family caregiver payment, travel, and related program requirements through revisions to the provider agreement (contract) form, rather than through formal regulatory rulemaking under the Commonwealth Documents Law.

We respectfully, but firmly, object to this approach for the following reasons:

- It bypasses public process. Contract form revisions do not require public notice, a comment period, or Independent Regulatory Review Commission (IRRC) review. These are the very procedural safeguards the Dunkelberger ruling was concerned with. Implementing substantive programmatic changes this way risks repeating the process failure the court identified, just in a different form.
- It is inconsistent with existing waiver terms. The proposed contract language is, in our view, inconsistent with the terms of the currently approved waivers and existing regulations. A contract provision cannot lawfully supersede the waiver and regulatory framework it operates under.
- A legal challenge would offer only a short-term remedy. Even if the contract revision were successfully challenged, ODP has indicated its intent to separately amend the waivers to achieve the same result, meaning a procedural win would not resolve the underlying concern and would simply delay it.

- It sets a precedent beyond this administration. Allowing significant program policy to be set unilaterally through contract revision, without prior rulemaking, establishes a precedent that a future administration could invoke to make equally significant changes, including changes that reduce services with no public process at all. We do not believe this is in the best interest of the individuals ODP serves, regardless of which administration is in office.

We urge ODP to pursue these changes through formal rulemaking. We further recommend that the Intellectual Disability/Autism Services Advisory Committee (ISAC) be used as the substantive oversight body for regulatory consistency that it was intended to be, rather than a body that receives changes after they have already been operationalized through contract language.

Issue One: The 40/60 Rule

We understand the proposed 40/60 rule is expected to apply across all waiver programs and would cap the number of hours a family caregiver may be scheduled and paid to provide services. We raise the following concerns as a distinct issue from both the process concerns above and the travel restrictions addressed below:

- **It creates a coverage gap.** For individuals whose approved plan includes more service hours than a capped family caregiver may deliver, there is frequently no alternative direct support professional (DSP) available to cover the remaining hours. This is especially true in rural and workforce-shortage areas where family caregivers exist precisely because no outside workforce is available. The 13-week exception is not always adequate.
- **It creates potential Department of Labor exposure.** Capping a family caregiver's scheduled hours while the individual's authorized plan hours remain unchanged creates ambiguity and potential liability issues regarding who is responsible for the uncovered hours and how those hours are documented. This is an issue that has not been resolved in the materials shared with providers and families to date.
- **It significantly impacts In-Home and Community Supports (IHCS) services.** Individuals and families who utilize IHCS and the providers who support them will be most affected, and we are concerned this policy could push individuals toward more restrictive and costly service settings rather than supporting them to remain at home.

While we understand the intent of the proposed 40/60 rule, we are concerned that applying it uniformly to all relatives and in all circumstances will unintentionally reduce access to services without advancing the underlying policy objective.

We respectfully request that ODP incorporate two important modifications into the final policy:

First, establish a variance process. Individuals, families, and providers should be permitted to request a variance from the 40/60 limitation when application of the rule would leave an individual without authorized services because qualified DSPs are unavailable. The variance should recognize documented workforce shortages, rural service areas, specialized medical or behavioral support needs, continuity of care considerations, and other circumstances where denying the exception would jeopardize the individual's health, safety, or ability to remain in the community. The variance should be permanent but with regular reviews to assess continued need. ODP should also publish clear criteria and procedures for requesting, reviewing, approving, and renewing variances.

Second, narrow the definition of "family." For the purposes of applying the 40/60 rule, we recommend that the definition of “family" be limited to:

- a parent;

- a spouse;
- a sibling, or
- a family member or guardian who resides in the same household as the individual.

All other family members who maintain separate residences should not be subject to the same limitation, as they often function as members of the broader workforce rather than household family caregivers.

These two recommendations work together. A narrower definition focuses the policy on those caregiving relationships that are most analogous to members of the household, while a variance process provides ODP the flexibility to address exceptional situations where strict application of the rule would leave an individual without needed services. Together, these modifications preserve person-centered planning, support continuity of care, and reduce the risk that individuals will require more restrictive or costly service settings simply because no replacement workforce exists.

Additionally, we ask that ODP:

- Use stakeholder input to create and publish a methodology for covering authorized service hours when no replacement workforce exists.
- Provide an analysis of Department of Labor compliance implications on employers before implementation.
- Confirm that families and providers will not be required to pay for any hours that are in an individual's approved Individual Support Plan (ISP) and delivered according to the ISP.

Issue Two: Out-of-State Travel Restrictions

We are concerned that the proposed restrictions on travel outside Pennsylvania and contiguous states are broader than necessary and may unintentionally limit opportunities for community participation, family engagement, and person-centered living.

As it currently stands, the proposed policy is likely to have the following unintended consequences:

- **Create reduced access to family and community life.** Many individuals travel outside Pennsylvania to visit family members, participate in vacations, attend educational or recreational opportunities, receive specialized medical care, or participate in significant life events. Individuals who require staff support to travel safely should not be denied these opportunities solely because of geographic limitations that are unrelated to their assessed needs or person-centered goals.
- **Administrative barriers may become a de facto prohibition.** If the approval process is unclear, overly burdensome, or lacks predictable timelines, providers may determine that supporting out-of-state travel presents excessive administrative or financial risk. The practical result could be that travel opportunities are routinely denied even when they would otherwise be appropriate.
- **Impact on person-centered planning.** Many current Individual Support Plans (ISPs) include goals related to maintaining family relationships, community inclusion, recreational participation, or travel experiences. ODP should clarify how these goals are to be addressed when implementation of the policy would limit opportunities previously available to the individual.

We respectfully request that ODP incorporate greater flexibility into the final policy by establishing a clearly defined exception process that allows out-of-state travel when it is consistent with an individual's assessed needs, ISP, and person-centered goals.

Specifically, we recommend that ODP:

- Establish a standardized exception process that permits providers to request approval for out-of-state travel when the travel supports the individual's health, welfare, family relationships, employment, education, community participation, or other person-centered outcomes.
- Publish objective approval criteria, documentation requirements, timelines for review, and an appeal process so that providers and individuals can make travel plans with reasonable certainty.
- Identify an appropriate funding mechanism for approved travel, including clarification regarding the use of state-only funding or other available funding sources when Medicaid reimbursement is unavailable.
- Provide guidance to Support Coordinators regarding documentation expectations and any necessary revisions to ISPs when travel outside Pennsylvania or contiguous states is anticipated.

We respectfully request that ODP incorporate these recommendations into the final policy so that individuals continue to have meaningful opportunities to participate fully in family and community life while maintaining compliance with applicable HCBS requirements.

Additional Concern

Single-Person Licensed Homes

We understand ODP has, for the past six to seven months, been increasing its focus on reducing the number of single-person licensed homes in response to a sharp increase in this setting type over the past three years. We ask that ODP clarify the policy basis for this focus, including whether individuals and families will retain the ability to choose a single-person home where that setting best meets the individual's needs and preferences, consistent with person-centered planning principles.

Summary of Requests

- Immediately halt the implementation of policies that have not gone through the formal rulemaking process and CMS approval, such as the changes made to the employer agreements, until the rulemaking process is complete and CMS approval is granted, as applicable.
- Empower ISAC to serve as a substantive regulatory oversight body prior to implementation, not after.
- Incorporate a variance process into the final regulations and waiver requirements allowing exceptions to the 40/60 rule when necessary to prevent interruptions in authorized services.
- Narrow the definition of "family" for purposes of the 40/60 rule to an individual's parent, spouse, sibling, guardian, or family member residing in the same household.
- Publish clear criteria and procedures for requesting, timely reviewing, approving, and renewing variances.
- Use stakeholder input to create and publish a methodology for covering authorized service hours when no replacement workforce exists.
- Provide an analysis of Department of Labor compliance implications before implementation.
- Using stakeholder input, establish a standardized exception process that permits providers, individuals, and families to request approval for out-of-state travel when the travel supports the individual's health, welfare, family relationships, employment, education, community participation, or other person-centered outcomes.

- Publish objective approval criteria, documentation requirements, timelines for review, and an appeal process so that providers and individuals can make travel plans with reasonable certainty.
- Identify an appropriate funding mechanism for approved travel, including clarification regarding the use of state-only funding or other available funding sources when Medicaid reimbursement is unavailable.
- Provide guidance to Support Coordinators regarding documentation expectations and any necessary revisions to Individual Support Plans when travel outside Pennsylvania or contiguous states is anticipated.
- Complete the formal rulemaking process, including the consideration of stakeholder input, for any changes impacting the licensing of and access to single-person licensed homes.

Conclusion

Our organizations remain committed to working collaboratively with ODP to protect Pennsylvania's home and community-based services system against federal funding threats. We believe that the goal is best achieved through a transparent, lawful process that brings providers, families, and self-advocates into the conversation *before* changes are finalized, not after. We welcome the opportunity to discuss these comments further and to participate in any workgroup ODP convenes on these issues.

Respectfully submitted,

The Alliance of Community Service Providers

The Provider Alliance (TPA)

MAX

Rehabilitation and Community Providers Association (RCPA)

The Arc of Pennsylvania

PAR