Oklahoma Health Care Authority

The Oklahoma Health Care Authority (OHCA) values your feedback and input. It is very important that you provide your comments regarding the proposed rule change by the comment due date. Comments can be submitted on the OHCA's Proposed Changes Blog.

OHCA COMMENT DUE DATE: February 18, 2020

The proposed policy is a Permanent Rule. The proposed policy was presented at the November 5, 2019 Tribal Consultation. Additionally, this proposed change will be presented at a Public Hearing scheduled for February 19, 2020. This proposed change will also be presented to the Medical Advisory Committee on March 12, 2020 and the OHCA Board of Directors on March 18, 2020.

Reference: APA WF 19-35

SUMMARY:
Developmental Disabilities Services (DDS) — The proposed changes to the DDS policy amend the rules to implement changes recommended during the annual Oklahoma Department of Human Services (OKDHS) DDS rule review process. The proposed changes to the DDS policy will allow for self-directed services to now be an option under the Community waiver. Policy changes will also add language to note the daily hourly limits on services provided by the self-directed habilitation training specialist. Finally, changes will clean up grammatical mistakes and formatting.

LEGAL AUTHORITY
The Oklahoma Health Care Authority Act, Section 5007 (C)(2) of Title 63 of Oklahoma Statutes (O.S.); The Oklahoma Health Care Authority Board.

RULE IMPACT STATEMENT:

STATE OF OKLAHOMA
OKLAHOMA HEALTH CARE AUTHORITY

TO: Maria Maule
Legal Services

FROM: Carmen Johnson
Federal and State Authorities

SUBJECT: Rule Impact Statement
APA WF # 19-35

A. Brief description of the purpose of the rule:

Proposed policy changes will allow for self-directed services (SDS) as an option under the Community waiver. Other changes establish that nine (9) hours per day will be allowed as the average daily hourly limits on services provided by the self-directed habilitation training specialist (SD-HTS). Other changes will clarify that the employer of record must enroll and complete the DDS sanctioned self-directed training course within forty-five (45) calendar days of SDS training enrollment. Further, proposed changes will remove the requirement that restrictive or intrusive procedures are not implemented by SD-HTS. Finally, changes will clean up grammatical mistakes and formatting.

B. A description of the classes of persons who most likely will be affected by the proposed rule, including classes that will bear the cost of the proposed rule, and any information on cost impacts received by the agency from any private or public entities:

The class of persons most affected by the proposed rule will most likely be personal care service providers and those individuals receiving DDS services. No information on any cost impacts were received from any entity.

C. A description of the classes of persons who will benefit from the proposed rule:

The proposed rule changes will benefit members, with critical support needs that cannot be met through the In-Home Support waivers and must be served under the Community waiver, by increasing their access to care. SD-HTS providers will benefit as the rules clarify the average number of hours they are allowed to provide services. The proposed changes will also provide members who receive SDS, clarification on the specific timeframe a member or member's representative (the employer of record) has to complete the DDS-sanctioned self-direction training course. By being in accordance with these changes, providers will contribute to the health and safety of vulnerable Oklahomans.

D. A description of the probable economic impact of the proposed rule upon the affected classes of persons or political subdivisions, including a listing of all fee changes and,

whenever possible, a separate justification for each fee change:

There is no probable economic impact, and there are no fee changes associated with the rule change for the above classes of persons or any political subdivision.

E. The probable costs and benefits to the agency and to any other agency of the implementation and enforcement of the proposed rule, the source of revenue to be used for implementation and enforcement of the proposed rule, and any anticipated affect on state revenues, including a projected net loss or gain in such revenues if it can be projected by the agency:

Agency staff has determined that the proposed rule change will be budget neutral.

F. A determination of whether implementation of the proposed rule will have an economic impact on any political subdivisions or require their cooperation in implementing or enforcing the rule:

The proposed rule changes will not have an economic impact on any political subdivision or require their cooperation in implementing or enforcing the rule changes.

G. A determination of whether implementation of the proposed rule will have an adverse effect on small business as provided by the Oklahoma Small Business Regulatory Flexibility Act:

The agency does not anticipate that the proposed rule changes will have an adverse effect on small businesses.

H. An explanation of the measures the agency has taken to minimize compliance costs and a determination of whether there are less costly or non-regulatory methods or less intrusive methods for achieving the purpose of the proposed rule:

The agency has taken measures to determine that there are no other legal methods to achieve the purpose of the proposed rule. Measures included a formal public comment period and tribal consultation.

I. A determination of the effect of the proposed rule on the public health, safety and environment and, if the proposed rule is designed to reduce significant risks to the public health,

safety and environment, an explanation of the nature of the risk and to what extent the proposed rule will reduce the risk:

The proposed rule brings the rules into compliance with federal and state law, thereby increasing program effectiveness positively impacting the health, safety, and well-being of individuals receiving DDS services.

J. A determination of any detrimental effect on the public health, safety and environment if the proposed rule is not implemented:

The agency does not anticipate any detrimental effect on the public health, safety or environment if the proposed rule is not implemented.

K. The date the rule impact statement was prepared and if modified, the date modified:

Prepared date: October 29, 2019

RULE TEXT:

TITLE 317. OKLAHOMA HEALTH CARE AUTHORITY
CHAPTER 40. DEVELOPMENTAL DISABILITIES SERVICES

SUBCHAPTER 1. GENERAL PROVISIONS

SUBCHAPTER 9. SELF-DIRECTED SERVICES

317:40-9-1. Self-directed services (SDS)
(a) **Applicability.** This Section applies to SDS provided through Home and Community-Based Services (HCBS) Waivers operated by the Oklahoma Department of Human Services (DHS) Developmental Disabilities Services (DDS).
(b) **Member option.** Traditional service delivery methods are available for eligible members who do not elect to self-direct services.
(c) **General information.** SDS are an option for members receiving HCBS through the In-Home Supports Waiver for Adults (IHSW-A), In-Home Supports Waiver for Children (IHSW-C), and the Community Waiver when the ~~adult~~ member lives in a non-residential setting. SDS provides a member the opportunity to exercise choice and control in identifying, accessing, and managing specific Waiver services and supports in accordance with his or her needs and personal preferences. SDS are Waiver services ~~DHSDDS~~DHS DDS specifies may be directed by the member or representative using employer and budget authority.

(1) SDS may be directed by:

(A) ~~an~~AN adult member, when the member has the ability to self-direct;

(B) ~~a~~A member's legal representative including a parent, spouse or legal guardian; or

(C) ~~a~~A non-legal representative freely chosen by the member or his or her legal representative.

(2) The person directing services must:

(A) ~~be 18~~Be eighteen (18) years of age or older;

(B) ~~comply~~Comply with DDS and Oklahoma Health Care Authority (OHCA) rules and regulations;

(C) ~~complete~~Complete required DDS training for self-direction;

(D) ~~sign~~Sign an agreement with DDS;

(E) ~~be~~Be approved by the member or his or her legal representative to act in the capacity of a representative;

(F) ~~demonstrate~~Demonstrate knowledge and understanding of the member's needs and preferences; and

(G) ~~not~~Not serve as the ~~SDS-HTS~~Self-Directed (SD) Habilitation Training Specialist (HTS) for the member ~~her~~ whom he or she is directing services.

(d) **The SDS program includes:**

(1) The SDS budget. A plan of care is developed to meet the member's needs without SDS consideration. The member may elect to self-direct part or the entire amount identified for traditional ~~Habilitation Training Specialist (HTS)~~HTS services. This amount is under the control and discretion of the member in accordance with this policy and the approved plan of care, and is the allocated amount that may be used to develop the SDS budget. The SDS budget details the specific plan for spending.

(A) The SDS budget is developed annually at the time of the annual plan development and updated as necessary by the member, case manager, parent, legal guardian, and others the member invites to participate in the development of the budget.

(B) Payment may only be authorized for goods and services (GS) not covered by SoonerCare or other generic funding sources and must meet criteria of service necessity, per ~~OAC~~Oklahoma Administrative Code (OAC) 340:100-3-33.1.

(C) The member's SDS budget includes the actual cost of administrative activities including fees for services performed by a financial management services (FMS) subagent, background checks, ~~workers'compensation~~workers' compensation insurance, and the amount identified for ~~SD-HTS and SD-GS.~~SD-HTS and Self-directed goods and services (SD-GS).

(D) The SDS budget is added to the plan of care to replace any portion of traditional HTS services to be self-directed.

(2) The ~~SD-Habilitation Training Specialist (SD-HTS)~~SD-HTS supports the member's self-care, and the daily living and leisure skills needed to reside successfully in the community. Services are provided in community-based settings in a manner that contributes to the member's independence, self-sufficiency, community inclusion, and well-being. SD-HTS services must be included in the approved SDS budget. Payment is not made for routine care and supervision that is normally provided by a family member or the member's spouse. SD-HTS services are provided only during periods when staff is engaged in purposeful activity that directly or indirectly benefits the member. SD-HTS services are limited to a daily average of no more than nine (9) hours per day, per OAC 340:100-5-35. At no time are SD-HTS services authorized for periods during which ~~the~~ staff ~~are~~is allowed to sleep. Legally responsible persons may not provide services, per OAC 340:100-3-33.2. Other family members providing services must be employed by provider agencies per OAC 340:100-3-33.2. For the purpose of this ~~policy,~~rule, family members include parents and siblings, ~~including~~ step- and ~~half-siblings~~half-parents and siblings, and anyone living in the same home as the member. Payment does not include room and board, maintenance, or upkeep or improvements to the member's or family's residence. A SD-HTS must:

(A) ~~be 18~~Be eighteen (18) years of age;

(B) ~~pass~~Pass a background check, per OAC 340:100-3-39;

(C) ~~demonstrate~~Demonstrate competency to perform required tasks;

(D) ~~complete~~Complete required training, per OAC 340:100-3-38 et seq.;

(E) ~~sign~~Sign an agreement with DDS and the member;

(F) ~~be~~Be physically able and mentally alert to carry out the duties of the job;

(G) ~~not~~Not work more than ~~40~~forty (40) hours in any week in the capacity of a SD-HTS;

(H) ~~not~~Not implement ~~restrictive or intrusive~~prohibited procedures, per OAC ~~340:100-5-57;~~340:100-5-58;

(I) ~~provide~~Provide services to only one (1) member at any given time. This does not preclude services from being provided in a group setting where services are shared among members of the group; and

(J) ~~not~~Not perform any job duties associated with other employment including on-call duties at the same time they are providing ~~SD-HTS~~SD-HTS services.

(3) ~~Self-directed goods and services (SD-GS).~~ SD-GS are incidental, non-routine goods and services that promote the

member's self-care, daily living, adaptive functioning, general household ~~activity,~~activities, meal preparation, and leisure skills needed to reside successfully in the community and do not duplicate other services authorized in the member's plan of care. These ~~goods and services~~SD-GS must be included in the individual plan and approved SDS budget. SD-GS must meet the requirements listed in (A) through (F).

(A) The item or service is justified by a recommendation from a licensed professional.

(B) The item or service is not prohibited by ~~Federal~~federal or ~~State~~state statutes and regulations.

(C) One (1) or more of the following additional criteria are met. The item or service would:

(i) ~~increase~~Increase the member's functioning related to the disability;

(ii) ~~increase~~Increase the member's safety in the home environment; or

(iii) ~~decrease~~Decrease dependence on other SoonerCare funded services.

(D) SD-GS may include, but are not limited to:

(i) ~~fitness~~Fitness items that can be purchased at retail stores;

(ii) ~~personal emergency monitoring systems;~~Short duration camps lasting fourteen (14) consecutive calendar days or less;

(iii) ~~a~~A food catcher;

(iv) ~~a~~A specialized swing set;

(v) ~~toothettes~~Toothettes or an electric toothbrush;

(vi) ~~a~~A seat lift;

(vii) ~~weight~~Weight loss programs~~;~~ or gym memberships when:

~~(viii) gym memberships when:~~

(I) ~~there~~There is an identified need for weight loss or increased physical activity;

(II) ~~justified~~Justified by outcomes related to weight loss, increased physical activity or stamina;

nd

(III) ~~in~~In subsequent plan of care year requests, documentation is provided that supports the member's progress toward weight loss or increased physical activity or stamina~~.~~; or

(viii) Swimming lessons.

(E) SD-GS may not be used for:

(i) ~~co-payments~~Co-payments for medical services;

(ii) ~~over-the-counter~~Over-the-counter medications;

(iii) ~~items~~Items or treatments not approved by the Food and Drug Administration;

(iv) ~~homeopathic~~Homeopathic services;
(v) ~~services~~Services available through any other funding source, such as SoonerCare, Medicare, private insurance, the public school system, rehabilitation services, or natural supports;
(vi) ~~room~~Room and board including deposits, rent, and mortgage payments;
(vii) ~~personal~~Personal items and services not directly related to the member's disability;
(viii) ~~vacation~~Vacation expenses;
(ix) ~~insurance;~~Insurance;
(x) ~~vehicle~~Vehicle maintenance or other transportation related expense;
(xi) ~~costs~~Costs related to internet access;
(xii) ~~clothing;~~Clothing;
(xiii) ~~tickets~~Tickets and related costs to attend recreational events;
(xiv) ~~services,~~Services, goods, or supports provided to, or benefiting persons other than the member;
(xv) ~~experimental~~Experimental goods or services;
(xvi) ~~personal~~Personal trainers;
(xvii) ~~spa~~Spa treatments; or
(xviii) ~~goods~~Goods or services with costs that significantly exceed community norms for the same or similar goods or services.

(F) SD-GS are reviewed and approved by the DDS director or designee.

(e) **Member Responsibilities**. When the member chooses the SDS option, the member or member's representative is the employer of record and must:

(1) ~~enroll~~Enroll and complete the DDS-sanctioned self-direction training course ~~in self-direction.~~within forty-five (45) calendar days of SDS training enrollment. Exceptions to this timeframe may be approved by the DDS director or his/her designee. The training must be completed prior to the implementation of self-direction and covers:

(A) ~~staff~~Staff recruitment;
(B) ~~hiring~~Hiring of staff as an employer of record;
(C) ~~staff~~Staff orientation and instruction;
(D) ~~supervision of staff~~Staff supervision including scheduling and service provisions;
(E) ~~staff~~Staff evaluation;
(F) ~~staff~~Staff discharge;
(G) ~~philosophy~~Philosophy of self-direction;
(H) OHCA policy on self-direction;
(I) ~~individual~~Individual budgeting;
(J) ~~development~~Development of a self-directed support plan;

(K) ~~cultural~~Cultural diversity; and
(L) ~~rights,~~Rights, risks, and responsibilities~~;~~.
(2) ~~sign~~Sign an agreement with DDS;
(3) ~~agree~~Agree to utilize the services of a FMS subagent;
(4) ~~agree~~Agree to pay administrative costs for background checks, FMS subagent fee, and workers' compensation insurance from his or her SDS budget;
(5) ~~comply~~Comply with federal and state employment laws and ensure no employee works more than ~~40~~forty (40) hours per week in the capacity of an SD-HTS;
(6) ~~ensure~~Ensure that each employee is qualified to provide the services for which he or she is employed and that all billed services are actually provided;
(7) ~~ensure~~Ensure that each employee complies with all DDS training requirements per OAC 340:100-3-38 et seq.;
(8) ~~recruit,~~Recruit, hire, supervise, and discharge all employees providing self-directed services, when necessary;
(9) ~~verify~~Verify employee qualifications;
(10) ~~obtain~~Obtain background screenings on all employees providing SD-HTS services per OAC 340:100-3-39;
(11) ~~send~~Send progress reports per OAC 340:100-5-52.
(12) ~~participate~~Participate in the Individual Plan and SDS budget process;
(13) ~~immediately~~Immediately notify the case manager of any emergencies or changes in circumstances~~ or emergencies~~ that may require modification of the type or amount of services provided for in the member's Individual Plan or SDS budget;
(14) ~~wait~~Wait for approval of budget modifications before implementing changes;
(15) ~~comply~~Comply with DDS and OHCA administrative rules;
(16) ~~cooperate~~Cooperate with DDS monitoring requirements per OAC 340:100-3-27;
(17) ~~cooperate~~Cooperate with FMS subagent requirements to ensure accurate records and prompt payroll processing including:
(A) ~~reviewing~~Reviewing and signing employee time cards;
(B) ~~verifying~~Verifying the accuracy of hours worked; and
(C) ~~ensuring~~Ensuring the appropriate expenditure of funds;
(18) ~~complete~~Complete all required documents within established timeframes;
(19) ~~pay~~Pay for services incurred in excess of the budget amount;
(20) ~~pay~~Pay for services not identified and approved in the member's SDS budget;
(21) ~~pay~~Pay for services provided by an unqualified provider;

(22) determine staff duties, qualifications, and specify service delivery practices consistent with SD-HTS Waiver service specifications;
(23) ~~orient~~Orient and instruct staff in duties;
(24) ~~evaluate~~Evaluate staff performance;
(25) ~~identify~~Identify and train back-up staff, when required;
(26) ~~determine~~Determine amount paid for services within ~~Plan~~plan limits;
(27) ~~schedule~~Schedule staff and the provision of services;
(28) ~~ensure~~Ensure SD-HTS do not implement ~~restrictive or intrusive~~prohibited procedures per OAC ~~340:100-5-57;~~340:100-5-58; and
(29) ~~sign~~Sign an agreement with ~~DDS and~~ the SD-HTS.

(f) **~~Financial management services (FMS) subagent responsibilities.~~FMS.** The FMS subagent is an entity designated as an agent by DDS to act on behalf of members who have employer and budget authority for the purpose of managing payroll tasks for the member's employee(s) and for making payment of SD-GS as authorized in the member's ~~Plan.~~plan. FMS subagent duties include, but are not limited to:
(1) ~~compliance~~Compliance with all DDS and OHCA administrative rules and contract requirements;
(2) ~~compliance~~Compliance with DDS or OHCA random and targeted audits ~~conducted by DDS or the OHCA~~;
(3) ~~provision of financial management support to the member by tracking~~Tracking individual expenditures and monitoring SDS budgets;
(4) ~~processing~~Processing the member's employee payroll, withholding, filing and paying of applicable federal, state, and local employment-related taxes and insurance;
(5) ~~collection~~Collection and process of employee's time sheets and making payment to member's employees;
(6) ~~processing~~Processing and payment of invoices for SD-GS as authorized in the member's SDS budget;
(7) ~~providing~~Providing each member with information that assists with the SDS budget management;
(8) ~~providing~~Providing reports to members/representatives, as well as monthly to DDS and to OHCA upon request;
(9) ~~providing~~Providing DDS and OHCA authorities access to individual member's accounts through a web-based program;
(10) ~~assisting~~assisting members in verifying employee citizenship status;
(11) ~~maintaining~~Maintaining separate accounts for each member's SDS budget;
(12) ~~tracking~~Tracking and reporting member funds, balances, and disbursements;

(13) ~~receiving~~Receiving and disbursing funds for SDS payment per OHCA agreement; and

(14) ~~executing~~Executing and maintaining a contractual agreement between DDS and the SD-HTS (employee).

(g) **DDS case management responsibilities in support of SDS.**

(1) The case manager develops the member's ~~Plan~~plan per OAC 340:100-5-50 through 340:100-5-58;

(2) The DDS case manager meets with the member, member's representative, or legal guardian, when applicable, to discuss the ~~following~~Waiver service delivery options in ~~the HCBS Waiver~~(A) and (B) of this paragraph:

(A) ~~traditional~~Traditional Waiver services; and

(B) ~~self-directed~~Self-Directed services including information regarding scope of choices, options, rights, risks, and responsibilities associated with self-direction.

(3) When the member chooses self-direction, the case manager:

(A) ~~discusses~~Discusses with member or representative the available ~~amountin~~amount in the budget;

(B) ~~assist~~Assists the member or representative with the development and modification of the SDS budget;

(C) ~~submits~~Submits request for SD-GS to the DDS director or designee for review and approval ~~prior to the case manager's approval of the SDS budget~~;

(D) ~~approves~~Develops the SDS budget and modifications;

(E) ~~assists~~Assists the member or representative develop or revise an emergency back-up plan;

(F) ~~provides the FMS subagent a copy of the member's authorized SDS budget and any modifications;~~

~~(G) monitors~~Monitors implementation of the ~~Plan~~plan per OAC 340:100-3-27;

~~(H)~~ (G) ~~ensures~~Ensures services are initiated within required time frames;

~~(I)~~(H) ~~conducts~~Conducts ongoing monitoring of ~~Plan~~plan implementation and the member's health and welfare; and

~~(J) specifies additional employee qualifications in the Plan based on the member's needs and preferences when such qualifications are consistent with approved Waiver qualifications;~~

~~(K) specifies in the Plan how services are provided;~~

~~(L) refers potential SD-HTS providers to the FMS subagent for enrollment;~~

~~(M) assists in locating and securing services and other community resources that promote community integration and independence as provided in the member's Plan; and~~

~~(N)~~ (I) ~~ensures restrictive or intrusive~~Ensures prohibited procedures, per OAC ~~340:100-5-57~~340:100-5-58 are not implemented by the SD-HTS. If the Team determines

restrictive or intrusive procedures are necessary~~, SD-HTS is not appropriate to meet the member's needs and traditional services must be used.~~ to address behavioral challenges, requirements must be met, per OAC 340:100-5-57.

(h) **Government fiscal/employer agent model.** DDS serves as the Organized Health Care Delivery System (OHCDS) and FMS provider in a Centers for Medicare and Medicaid Services (CMS) approved government fiscal/employer agent model. DDS has an interagency agreement with OHCA.

(i) **Voluntary termination of self-directed services.** Members may discontinue self-directing services without disruption at any time, provided traditional Waiver services are in place. Members or representatives may not choose the self-directed option again until the next annual planning meeting, with services resuming no earlier than the beginning of the next plan of care. A member desiring to file a complaint must follow procedures per OAC 340:2-5-61.

(j) **Involuntary termination of self-directed services.**

(1) Members may be involuntarily terminated from self-direction and offered traditional Waiver services when it has been determined by the DDS director or designee that any of the following exist:

(A) ~~immediate~~Immediate health and safety risks associated with self-direction, such as, imminent risk of death or irreversible or serious bodily injury related to Waiver services;

(B) ~~intentional~~Intentional misuse of funds following notification, assistance and support from DDS;

(C) ~~failure~~Failure to follow and implement policies of self-direction after receiving DDS technical assistance and guidance;

(D) ~~fraud;~~Fraud;

(E) ~~it is determined that restrictive or intrusive procedures are essential for safety; or~~A member no longer receives a minimum of one (1) SDS Waiver service per month and DDS is unable to monitor the member; or

(F) ~~reliable~~Reliable information shows the employer of record or SD-HTS engaged in illegal activity.

(2) When action is taken to involuntarily terminate the member from self-directed services, the case manager assists the member access needed and appropriate services through the traditional Waiver services option, ensuring that no lapse in necessary services occurs for which the member is eligible.

(3) The Fair Hearing process, per OAC 340:100-3-13 applies.

(k) **Reporting requirements.** While operating as an ~~Organized Health Care Delivery System,~~OHCDS, DDS provides OHCA reports detailing provider activity in the format and at times OHCA requires.