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**Authorized Signature**

**Number:** APD-PT-16-018  
**Issue date:** 5/13/2016

**Topic:** Developmental Disabilities

**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 type="checkbox"/> Area Agencies on Aging                          | <input type="checkbox"/> Health Services  |
| <input type="checkbox"/> Aging and People with Disabilities              | <input checked="" 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 checked="" type="checkbox"/> County DD Program Managers           | <input checked="" type="checkbox"/> Stabilization and Crisis Unit (SACU)  |
| <input checked="" type="checkbox"/> ODDS Children’s Residential Services | <input checked="" type="checkbox"/> Other ( <i>please specify</i> ): OLRO; 24-Hour Residential Setting Providers, DD Adult & Children’s Foster Home Providers; Supported Living Providers |
| <input type="checkbox"/> Child Welfare Programs                          |   |

|                        |  |             |  |
|------------------------|--|-------------|--|
| Policy/rule title:     | Use of Variances in Residential Program Settings |             |  |
| Policy/rule number(s): |  | Release no: |  |
| Effective date:        |  | Expiration: |  |
| References:            |  |             |  |
| Web address:           |  |             |  |

**Discussion/interpretation:** Situations that arise where a licensed or certified service provider is unable to comply with an Oregon Administrative Rule (OAR), a temporary variance (exemption to compliance with a specific rule) may be appropriate. This policy provides the guidance to case management and licensing entities on when a variance for a residential service setting provider may be an appropriate action.

A variance may be requested when a provider is unable to meet a regulatory requirement of Oregon Administrative Rules (OAR). The variance is a temporary

exemption to rules in OAR chapter 411 and must be granted by the Department prior to implementation.

**Implementation/transition instructions:**

A variance is often used to address the structure or operations of a residential service setting. The use of a variance is driven by the provider needing an exemption due to the provider's inability to meet a requirement of the administrative rules necessary to obtain or maintain licensed or certified status.

The variance submission must address how the granted exemption meets the safety or functional intent of the rule. For example, a variance request may be submitted for a bedroom in an adult foster care home that is 60 square feet. (The DD adult foster care rule requires 70 square feet). The intent of the rule identifying bedroom square footage is for the individual to have a functional bedroom space with adequate personal space. In this request, the provider would present how the smaller space functionally provides the individual with adequate usable floor space.

A variance will not be granted if the exemption proposed results in a behavior, situation, or practice that violates state or federal law, or results in an adverse impact to the welfare, health, safety, or rights of individuals.

Variance requests must be submitted on the DHS Variance Request form (DHS 6001). Instructions are included on form DHS 6001 to aid in the completion of the document. Variance requests must be submitted to the Community Developmental Disabilities Program (CDDP) responsible for service coordination in the county in which the service setting is located. The CDDP must make a recommendation of support for approval or denial of the request and forward the request to the Office of Licensing and Regulatory Oversight (OLRO). OLRO makes the final determination of approving or denying a variance request.

A variance should not be necessary to support individual support planning or the use of strategies, tools, or technology to support an individual. Unconventional or less traditional strategies to meet identified support needs do not require a variance if a rule does not restrict such practices.

When a proposal is to apply a tool or strategy to address a specific, current health and safety need of an individual, this situation should be addressed through the individual support plan process.

Practices or proposed support strategies which would require a variance and are driven by provider convenience or provider-desired service delivery are not appropriate and are not in alignment with the spirit of Home and Community-Based services.

Examples of determining whether a situation should be addressed via a variance request or the ISP process:

Example 1:

Situation: A 24-hour residential service setting has a bedroom where the window sill height is higher from the ground than the rule requirement. (The window sill is 46 inches from the ground and the rule requires no more than 44 inches from the ground).

Action: **Variance-** The provider is unable to meet the licensing requirement because of the physical structure of the home. The provider would need to address the safety purpose driving the rule (which is safe fire exiting). The variance proposal may include a solution to address a safe fire exit by agreeing to have furniture located in front of the window to allow individuals to reach the window to exit.

Example 2:

Situation: A provider proposes storing an individual's clothing outside of the bedroom due to the individual's behavioral challenges. (Individual destroys clothing and/or causes harm to self with the clothing items).

Action: **ISP-** The individual's support planning team should be addressing the situation through the ISP process. If the team determines that the storing of clothing outside the individual's bedroom is the most appropriate and least restrictive approach to addressing the health and safety issue(s), then the strategy should be documented in the ISP.

Example 3:

Situation: A provider is requesting an exemption to injury reporting due to an individual who bruises easily. The provider would like to formally report less frequently with a protocol in place to determine a threshold for when bruising requires formal reporting (such as size of bruising)

Action: **ISP-** the individual's ISP team would need to evaluate whether the proposed course of action is appropriate for the individual. This would include weighing risks of the proposed action. **AND**

**Variance-** The provider would also need a variance for an exemption to the formal reporting requirements for bruising of the individual. The provider is proposing an exemption to a specific action requirement in rule and would need to present a case on how the less frequent formal reporting of bruising would continue to address the safety and provide adequate monitoring of the individual's physical condition.

Example 4:

Situation: An individual demonstrates an increase in self-injurious behaviors following the installation of a lock on their bedroom door. Various approaches to address the issue have been tried, including the engagement of a behavior consultant. The consultant recommends removal of the lock as it appears to be an identified trigger for

the behavior and no less restrictive alternative to addressing the issue can be identified.

**Action: ISP-** the proposed removal of the lock must be addressed through the ISP process. As new Home and Community-Based Settings (HCBS) rules are implemented, the removal of the lock will also need to be addressed as an Individually-Based Limitation which accompanies the ISP process. AND

**Variance-** In this situation the provider will also need a variance because the identified strategy to meet the support needs of the specific individual result in the provider's inability to meet the rule requirement (the provision of a locking door). The provider's variance will need to address that the removal of the lock is the least restrictive, most appropriate approach to supporting the individual and should demonstrate how the individual's privacy is being honored.

**Training/communication plan:**

**Local/branch action required:**

**Central office action required:**

**Field/stakeholder review:**       Yes       No

**If yes, reviewed by:**      CDDP Policy; ORA; CPAO

**Filing instructions:**

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

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|--------------------|--|-------------|--|
| <b>Contact(s):</b> | Rose Herrera/Kirsten Collins                               |             |  |
| <b>Phone:</b>      | (503)947-5201 / (503)947-1142                              | <b>Fax:</b> |  |
| <b>Email:</b>      | Rose.K.Herrera@state.or.us / Kirsten.G.Collins@state.or.us |             |  |

**References:**

**OAR 411-317-000 (170) General Definitions: Definitions for Developmental Disabilities Services**

**OAR 411-325-0110 24-Hour Residential Settings for Children and Adults with Intellectual or Developmental Disabilities: Variances**

**OAR 411-360-0030 Adult Foster Homes for Individuals with Intellectual or Developmental Disabilities: Variance**

**OAR 411-346-0210 Foster Homes for Children with Intellectual or Developmental Disabilities: Variance**

**OAR 411-328-0620 Supported Living Settings for Adults with Intellectual or Developmental Disabilities: Variances**