

POSITIVE SUPPORTS RULE

WRITTEN COMMENT

March 18, 2015

- 1. Email and attachment from Tim Schmutzer (5 pages)**

Sullivan Hook, Karen E (DHS)

From: *OAH_RuleComments.OAH
Sent: Thursday, March 19, 2015 8:39 AM
To: Lipman, Eric (OAH); Sullivan Hook, Karen E (DHS)
Subject: FW: Proposed Rule 9544 Written Testimony
Attachments: Proposed Rule 9544 MOHR Testimony FINAL.pdf

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From: Tim Schmutzer [<mailto:tschmutzer@pinehab.org>]
Sent: Wednesday, March 18, 2015 4:30 PM
To: *OAH_RuleComments.OAH
Subject: Proposed Rule 9544 Written Testimony

Please see the attached follow-up written testimony regarding Proposed Rule 9544.

Thank you,

Tim Schmutzer & Dan Rietz
245D Sub-Committee Co-Chairs, MOHR

MOHR
Minnesota Organization for
Habilitation and Rehabilitation
"Together We Do More..."

March 9, 2015

The Honorable Eric L. Lipman
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55164-0620

Dear Judge Lipman:

The Minnesota Organization for Habilitation and Rehabilitation (MOHR) is a statewide member-network of over one-hundred licensed providers of employment-based and day-treatment-and-habilitation services. Its members serve nearly 19,000 Minnesotans with developmental/intellectual disabilities (I/DD). MOHR submits the following comments regarding the Proposed Adoption of Rules Governing Positive Support Strategies, Person-Centered Planning, Limits on Use of Restrictive Interventions and Emergency Use of Manual Restraint, and Repeal of Rules Governing Aversive and Deprivation Procedures in MN Rules 9525.2700 to 9525.2810.

MOHR endorsed specific positions and actions aimed at enhancing the quality of service delivery to individuals with I/DD. MOHR, in meetings with the Minnesota Disability Law Center, the Ombudsman's Office, and ARC Minnesota, focused on two items of importance relating to the proposed rule: the establishment of a minimum threshold of Emergency Use of Manual Restraints (EUMR) to trigger the required development of a Positive Support Transition Plan (PSTP), and concern that the proposed rule, as written, would segregate and isolate individuals with certain characteristics, namely dementia and brain injury.

This written testimony highlights the Department of Human Services (DHS) failure to demonstrate that it has complied with the substantive requirements for rulemaking, as required as part of the Statement of Need and Reasonableness.

MOHR recognizes the movement by the DHS to repeal an outdated, and often times ineffective, model of service provision supported under "Rule 40". This is truly a monumental moment that carries the potential to significantly and systematically improve supports and services to individuals, if implemented thoughtfully, comprehensively, and expertly. Alternatively, there is a potential risk being lost to

mediocrity, if propelled by hastiness, complexity, removal of DHS from the actual service they intend to change, or the failure to fund this extraordinary change. The primary objective of the proposed Rule is to "improve the quality of life of persons..." Repealing Rule 40 is a necessary, but not sufficient action needed to realize this objective. Proposed Rule 9544 reflects a needed step toward the objective, but many provisions of the proposed rule fail to effectively support DHS's objective, and will negatively affect service recipients if approved in its current form.

MOHR recommends modification to the proposed rule language, to exclude from its definition of a mechanical restraint under 9544.0020, Subpart 28, "...use of an auxiliary device to ensure a person does not unfasten a seat belt in a vehicle, as ordered by a health care professional, for a person who reasonably poses an imminent risk of serious injury to self or others due to memory loss caused by dementia or brain injury".

The service of transportation is, simply and inherently, dangerous. Adequate and effective safeguards are necessary. Nowhere else are the consequences of one's own actions, compounded by the actions of others, nature and physics, so significant and potentially deadly. Because of this, it is crucial to the safety of every passenger that the driver is focused, unobstructed by passenger behavior, and free from distraction. According to providers, the vast majority of the times, rides are peaceful, comfortable and safe. When behavioral disruptions occur, there is typically a staff member on-board to assist. There are very real situations when a behavioral disruption on a vehicle threatens the safety of everyone on the vehicle, along with pedestrians and other vehicles nearby. In these situations, almost all service providers in our network explained how they utilized additional staffing and positive programming to alleviate threatening behavior.

Sometimes this is not enough. These are the rare and incredibly dangerous situations in which positive support strategies and additional staffing fails to achieve safety. For example, individuals with memory loss due to brain injury, dementia or other neurological degenerative diseases that may not remember they need to wear their seat belt in a vehicle, or may not remember they are even in a moving vehicle, and will attempt to exit the vehicle while it is moving. Alternative interventions have been attempted, such as redirection, positive reinforcement, or reminding the individual they are in a moving vehicle. Attempts to eliminate the underlying cause of the behavior are unsuccessful, as the cause is due to a loss of short or long-term memory. Using an emergency use of manual restraint in a vehicle is both dangerous to the individual and to the staff attempting the restraint, and is often ill-advised in that setting. An auxiliary device to prevent unfastening of the seat belt is the least restrictive intervention to protect the safety of the individual during transportation in rare cases. The proposed rule not only fails to provide for an exceptions process for these very rare, but very consequential circumstances, but it actually goes so far as to specifically identify and preclude the use of an auxiliary device within the "mechanical restraint" definition. Service providers will demit, or refuse to transport individuals in these circumstances, as it is the only responsible and ethical action to take under the tenets of the proposed rule as written.

One MOHR provider member detailed a situation in which an individual repeatedly unbuckled their seat belt, aggressed toward others, and often fell down while the vehicle was in transit. Despite positive reinforcement programs, strategic seating assignments, and increased supervision, the provider was compelled to discontinued transportation services to the individual after they unbuckled their seat belt over 100 times in two months. The rigidity of the proposed rule virtually ensures this individual will become more socially isolated and less integrated in her community. The provision of the proposed rule that creates such a consequence certainly fails to rationally relate to the State's Olmstead Plan.

Another MOHR member described the use of a seat belt guard when an individual they supported experienced progressively worse confusion brought on by Alzheimer's disease. This allowed uninterrupted and continued safe service. Under the proposed rule, this will be prohibited.

One provider explained the results of discontinuing the use of a seat belt guard with an individual they transported. Even when positive programming and environmental modifications resulted in partial success, near misses still occurred, such as when an individual unbuckled repeatedly causing the driver to have to pull over multiple times in heavy traffic, or when the individual unbuckled and attempted to elope from the moving vehicle. Unfortunately, the only prudent action this provider was able to take was to discontinue transportation services to the individual. Again, the failure to allow for a mechanism within the proposed rule to properly and responsibly allow for exceptions when warranted will, and already has, resulted in needless restrictions to service and community access for individuals with I/DD.

In addition to the recommendation to modify language in the definition of "mechanical restraint", MOHR recognizes the need to establish proper, effective and thorough oversight of proposals to use seat belt auxiliary devices. The proposed rule must allow for an exception for the use of auxiliary seat belt devices, in limited circumstances, in order to protect the rights, the safety of, and access to the community for individuals. This is accomplished by modifying 9544.0130 Subpart 3, to read that the external program review committee shall, "...review requests for the use of an auxiliary device used to ensure a person does not unfasten a seat belt in a vehicle. The auxiliary device shall only be used to protect the person or others from imminent risk of serious injury." While it is advisable to avoid the use of restraints as much as possible through the systematic and regulated initiative to transition to a more positive model and practice of service provision, it is simply irresponsible to fail to accommodate those limited circumstances when a targeted, specific and monitored exception is warranted. Service recipients have already lost access to their community and services because an exceptions process is not in place. Modifying the proposed Rule will fix that.

Finally, MOHR recommends an amendment to the proposed Rule, which identifies when a PSTP must be developed as a response to repeated EUMRs. Under the current DHS publications, a PSTP is "required when a person and their team identify a need for the therapeutic fading of a prohibited procedure", or if a "person requires multiple uses of a EUMR in a given year". The latter threshold has already placed an undue burden on providers, and forced inappropriate interventions with individuals. For example, requiring a PSTP when more than one EUMR occurs within a given year forces individuals who do not require a plan change to be the subject of intense, and misapplied, planning sessions. In fact, many

individuals who experience a periodic spike in behavioral symptoms due to a mental illness may periodically threaten the safety of themselves or others, and a EUMR is implemented. Because PSTPs are currently being required at an unreasonable, unsustainable and ineffective rate, providers must devote enormous resources required to develop the PSTPs for individuals who may not need this level of support. This requirement detracts from the supports that would otherwise be available to those who are truly in need of PSTPs.

In support of the Minnesota Disability Law Center's position, MOHR recommends adding the statement in proposed Rule 9544.0070, "subp. 3...the license holder must develop a positive support transition plan, in accordance with Minnesota Statutes, section 245D.06, subdivision 8, for a person who has been subjected to three episodes of emergency use of manual restrain within 90 days or less, or four episodes within 180 days or less." Reducing the timeframe from one year to 90-days, and providing a reasonable occurrence rate that recognizes the vast symptomatic and behavioral cycles of the individuals supported under licensed services, will provide for an improved system of developing high quality positive support transition plans aimed to assist those who truly need, and will benefit from them.

Respectfully submitted by:

Dan Rietz, MOHR 245D Sub-Committee Co-Chair

Tim Schmutzer, MOHR 245D Sub-Committee Co-Chair