
POLICY TRANSMITTAL NO. 08-46

DATE: AUGUST 28, 2008

DEVELOPMENTAL DISABILITIES
SERVICES DIVISION

DEPARTMENT OF HUMAN SERVICES
OFFICE OF LEGISLATIVE RELATIONS AND
POLICY

TO: ALL OFFICES

SUBJECT: MANUAL MATERIAL

OAC 340:100-3-5.

EXPLANATION: 340:100-3-5 Instructions to Staff are issued to provide clarification regarding processes for identifying need, obtaining special guardians for service recipients requiring consent for non-emergency medical and dental procedures, and protection of money, property, or assets at risk of loss or exploitation.

Original signed on 8-28-08

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WF # 08-T (NAP)

INSTRUCTIONS FOR FILING MANUAL MATERIAL

OAC is the acronym for Oklahoma Administrative Code. If OAC appears before a number on an Appendix or before a Section in text, it means the Appendix or text contains rules or administrative law. Lengthy internal policies and procedures have the same Chapter number as the OAC Chapter to which they pertain following an "OKDHS" number, such as personnel policy at OKDHS:2-1 and personnel rules at OAC 340:2-1. The "340" is the Title number that designates OKDHS as the rulemaking agency; the "2" specifies the Chapter number; and the "1" specifies the Subchapter number.

The chronological order for filing manual material is: (1) OAC 340 by designated Chapter and Subchapter number; (2) if applicable, OKDHS numbered text for the designated Chapter and Subchapter; and (3) all OAC Appendices with the designated Chapter number. For example, the order for filing personnel policy is OAC 340:2-1, OKDHS:2-1, and OAC 340:2 Appendices behind all Chapter 2 manual material. Any questions or assistance with filing manual material will be addressed by contacting Policy Management Unit staff at 405-521-4326.

REMOVE

340:100-3-5

INSERT

340:100-3-5, pages 1-10, issued 9-1-08

340:100-3-5. Advocacy and guardianship

Revised 5-11-07

(a) **Purpose.** Developmental Disabilities Services Division (DDSD) Advocacy and Guardianship Program identifies the advocacy needs of each service recipient to protect the service recipient's interests, rights, and welfare.

(1) Although a service recipient may have other advocates, only a guardian may act on behalf of his or her ward, per OAC 340:100-1-2, to the extent authorized in the guardianship order and Title 30 of the Oklahoma Statutes (O.S.).

(2) Each guardian is:

(A) responsible for representing the interest of his or her ward as provided by Oklahoma law; and

(B) obligated to involve the ward in decision-making to the extent that the ward is able.

(3) An advocate is responsible for assisting the service recipient to represent the interests of the service recipient.

(b) **Capacity to give informed consent.** Service recipients, age 18 or older, are presumed to have capacity to give informed consent except to the extent adjudicated incapacitated by the court. A service recipient:

(1) is not considered incapacitated solely by reason of his or her diagnosis or admission to:

(A) Northern Oklahoma Resource Center of Enid (NORCE);

(B) Southern Oklahoma Resource Center (SORC); or

(C) Robert M. Greer Center (Greer);

(2) may be adjudicated incapacitated in one area while being fully capable of understanding and exercising his or her rights in other areas; and

(3) has the right to exercise judgment in all areas of capacity.

(c) **Assessment of capacity to give informed consent.** Each service recipient's

current need for advocacy or guardianship services is reviewed at least annually and documented in the Needs Assessment or Individual Plan (Plan).

(1) Form 06MP032E, Capacity Assessment, is:

(A) used to determine the service recipient's capacity to give informed consent and identify the type of assistance, if any, the service recipient needs to make life decisions and be protected from abuse, neglect, and exploitation; and

(B) completed for each:

(i) adult and minor attaining the age of 17 ½ years, who receives residential services through the Community Waiver or Homeward Bound Waiver;

(ii) child in OKDHS custody who receives DDSD services upon reaching the age of 16 per OAC 340:75-8-39; and

(iii) resident older than age 17 ½ residing in:

(I) NORCE;

(II) SORC; or

(III) Greer.

(2) In order for the Assessment Team to meet to complete Form 06MP032E, all members are notified of the meeting at least two weeks in advance and offered the opportunity to provide written input if they cannot attend. The Assessment Team includes:

(A) all members of the Personal Support Team;

(B) the service recipient's primary physician, if the service recipient resides at NORCE, SORC, or Greer; and

(C) a licensed psychologist or psychiatrist, if the service recipient resides at NORCE, SORC, or Greer.

(3) For service recipients who do not receive residential services per OAC 340:100-5-22:

(A) a capacity assessment is not required. If the family or service recipient

wishes to complete a capacity assessment, the DDS case manager includes this assessment as an outcome in the Needs Assessment or Plan, and the family participates in the assessment process; and

(B) a review of the service recipient's legal status must occur annually and be addressed in the Needs Assessment, using Forms 06MP033E, Guardianship, Advocacy, and Capacity Initial Review, and 06MP034E, Guardianship, Advocacy, and Capacity Annual Review. If this review indicates needs in the area of advocacy, the DDS case manager offers a capacity assessment.

(d) **Recommendations of Assessment Team.** DDS supports the use of less restrictive alternatives to guardianship.

(1) The Assessment Team recommends guardianship after they have considered and ruled out less restrictive alternatives to guardianship. Alternatives include, but are not limited to:

(A) guidance and support from family or friends;

(B) volunteer advocate;

(C) modification of the Plan to more effectively meet the service recipient's health, safety, and financial needs;

(D) representative payee;

(E) limited bank accounts;

(F) power of attorney, durable power of attorney, or durable power of attorney with health care powers;

(G) Advance Directive for Health Care;

(H) trust fund; or

(I) conservatorship.

(2) If Form 06MP032E indicates that a guardian is needed, the Personal Support Team recommends an appropriate person to serve.

(A) Priority for persons to serve as guardians is given to:

- (i) any person nominated by the service recipient pursuant to Section 3-102 of Title 30 of O.S. (30 O.S. § 3-102);
 - (ii) a current guardian appointed by an appropriate court in another jurisdiction;
 - (iii) a person nominated by will or other writing of a deceased parent, spouse, or adult child who was serving as the service recipient's guardian pursuant to 30 O.S. § 3-103;
 - (iv) the spouse of the service recipient;
 - (v) an adult child of the service recipient;
 - (vi) a parent(s) of the service recipient;
 - (vii) a sibling of the service recipient;
 - (viii) a person with whom the service recipient has been living for more than six months prior to the filing of the petition for guardianship. OKDHS providers must not be appointed guardian of such service recipient unless the provider is a relative within the second degree of consanguinity, such as mother, father, sibling, child, aunt, uncle, niece, nephew, grandparent, and grandchild;
 - (ix) other relatives of the service recipient, such as grandparent, grandchild, aunt, uncle, niece, or nephew; or
 - (x) other relatives of the service recipient who are not residents of Oklahoma, per 30 O.S. § 4-104.
- (B) If an appropriate relative is not available, a volunteer is sought in accordance with OAC 340:100-3-5.1.

(e) Guardianship eligibility requirements.

(1) A guardian must:

(A) be at least 18 years of age;

(B) be a resident of Oklahoma for at least one year, except as provided in 30 O.S. § 4-104; and

(C) not be under any financial obligation to the proposed ward.

(2) An incapacitated or partially incapacitated person cannot be appointed guardian.

(3) A convicted felon cannot be appointed guardian, except upon:

(A) further review by the court into the nature of the felony; and

(B) court approval.

(f) Responsibilities of a guardian.

(1) The guardian:

(A) is responsible for protecting the rights of the ward per 30 O.S. § 1-103;

(B) files Plan for the Care and Treatment of the Ward, with the court within ten days of appointment as guardian;

(C) files Administrative Office of the Courts (AOC) Form 34, Report on the Guardianship of the Person, AOC Form 34a, Report on the Guardianship of Property, or both, with the court. Assistance in completing these annual reports may be obtained from the DDS case manager or guardianship coordinator. The guardian may also hire an attorney to prepare annual reports for a fee;

(D) has a legal duty to:

(i) know the service recipient, including his or her capabilities, needs, and physical and mental health;

(ii) maintain contact with the service recipient;

(iii) ensure the service recipient is living in the least restrictive environment that meets his or her needs;

(iv) provide necessary consents authorized by the court; and

(v) notify the court if the service recipient's incapacity has ended; and

(E) has limited authority pursuant to 30 O.S. § 3-119 and the guardianship order that sets forth the limitation of powers of a guardian by prohibiting the guardian from consenting on behalf of the ward to the withholding or withdrawal of

life-sustaining procedures except with specific authorization of the court having jurisdiction over the guardianship proceedings. Authorization must be granted in a separate court order and only at such time when the ward is in need of life-sustaining treatment.

(2) When performing duties and exercising authority, the guardian:

(A) ensures the interests, rights, and welfare of the ward are protected;

(B) may act independently, if necessary, from provider agency staff and DDSD staff;

(C) encourages the ward to:

(i) participate to the maximum extent possible in all decisions that affect the ward; and

(ii) act on all matters in which the ward is able to do so within the limitations imposed by the court; and

(D) as appropriate, assists the ward to develop or regain, to the maximum extent possible, his or her capacity to meet the essential requirements for health or safety.

(g) **Changes in guardianship.** The ward, any person interested in the welfare of the ward, or a guardian may make application to the court for:

(1) termination of the guardianship;

(2) removal of a guardian;

(3) imposition of additional restrictions or the removal of existing restrictions; or

(4) a review hearing. 1 ■

(h) **Costs and fees.** Court costs are not charged for filing guardianship petitions and reports for persons who are applicants for or recipients of Social Security, per 56 O.S. § 192.

(i) **Responsibilities of OKDHS Legal Division.** If a guardian cannot be found for a resident of NORCE, SORC, or Greer, OKDHS Legal Division has the authority, per 10 O.S. § 1415, to file a petition for the appointment of a guardian ad litem for the service

recipient.

(1) Legal Division attorneys do not provide any legal services to any other party or potential party in guardianship cases.

(2) The only legal services provided are to ensure compliance with 10 O.S. § 1415. No other legal services in connection with these guardianships are provided directly or indirectly by OKDHS.

INSTRUCTIONS TO STAFF 340:100-3-5

Issued 9-1-08

1. Consent for invasive and intensive procedures and request for special guardianship.

(1) Special guardianship. Special guardianship may be established to obtain consent for non-emergency medical and dental procedures or to protect money, property, or assets at risk of loss or exploitation for a service recipient who:

(A) is assessed as needing a guardian, but for whom a guardian has not yet been appointed and does not have family available to provide consent;

(B) is assessed as not needing a guardian, but the medical, dental, or financial provider will not accept the service recipient's consent and does not have family available to provide consent; or

(C) has a guardian who is unable to give consent due to incapacity, illness, or is otherwise unavailable.

(2) Invasive and intensive procedures. The Personal Support Team (Team) determines the need for consent for invasive and intensive procedures, per OAC 340:100-5-26, and may recommend appointment of a special guardian empowered to give consent only for recommended medical or dental procedures, or financial arrangements.

(3) Considerations before pursuing special guardianship.

(A) The Team determines whether the provider accepts the consent of family members who are not guardians.

(B) If guardianship has not been recommended by the Team, efforts must be taken to locate a medical or dental provider who is willing to:

(i) perform the procedure with the consent of the service recipient; or

(ii) accept a power of attorney (POA) or medical proxy consent. A POA or medical proxy requires that the service recipient understand that he or she is authorizing the other person to act on the service recipient's behalf.

(C) If guardianship has been previously recommended by the Team, every effort must be taken to establish a general or limited guardianship, avoiding the need for special guardianship.

(4) Procedure to identify need for consent and establishment of special guardianship.

(A) The Team discusses the need for medical consent at the review of proposed invasive or intensive procedures, per OAC 340:100-5-26. If money, property, or assets are at risk, the need for intervention is discussed during an interim Team meeting.

(B) The Developmental Disabilities Services Division (DDSD) case manager (CM) invites the guardianship coordinator (GC) to the meeting if consent issues are anticipated or there is a possibility that special guardianship will be recommended.

(C) A proposed action or treatment plan is discussed by the Team, documented by the CM in Client Contact Manager (CCM) and describes:

(i) the plan to remedy the situation;

(ii) the proposed procedure or financial arrangement;

(iii) why the procedure or arrangement is necessary;

(iv) risks and benefits of the procedure or arrangement;

(v) risks of not doing the procedure or arrangement;

(vi) alternatives to the procedure or arrangement; and

(vii) risks of alternatives to the procedure or arrangement.

(D) The Team completes the Consent Checklist in CCM.

(E) If the Consent Checklist indicates a consent is needed, but cannot be obtained or the provider will not accept the consent, the DDS D CM consults with the GC to determine appropriate course of action. The GC refers to the Consent Flowchart to make a determination and provides technical assistance to the Team to develop and implement a plan.

(F) If the GC determines special guardianship is appropriate, the steps in (i) and (ii) are taken.

(i) The CM forwards to the GC the:

(I) proposed plan;

(II) Consent Checklist;

(III) Form 06HM005E, Referral Form for Examination or Treatment, or similar documentation;

(IV) physician or dentist statement;

(V) signature sheet; and

(VI) cover memo requesting special guardianship.

(ii) Within three working days of receipt, the GC:

(I) reviews documentation to ensure it is complete; and

(II) makes a referral to TARC ARCCorps program to recruit a potential special guardian. Referral includes TARC ARCCorps Referral Memorandum and all documentation in OAC 340:100-3-5 Instructions to Staff (ITS) 1(4)(F)(i).

(G) TARC ARCCorps staff expedites the process for recruiting and certifying a volunteer and assists a volunteer to hire an attorney who can immediately handle the case.

(H) The health care coordinator works with the DDSD CM, DDSD nurse, volunteer, and TARC ARCCorps staff to ensure the medical or dental procedure date is coordinated with the date the special guardian is appointed. The scheduling of the medical or dental procedure is coordinated with the term of the special guardian appointment, per Section 3-115 of Title 30 of the Oklahoma Statutes (30 O.S. § 3-115).

(I) TARC ARCCorps staff provides a copy of the documents per OAC 340:100-3-5 ITS 1(4)(F) to the proposed guardian, attorney, or both. If additional documentation is needed, TARC ARCCorps staff obtains such from the DDSD CM.

(J) The legal process to establish guardianship and issuance of voucher proceeds per 30 O.S. § 1-101 et seq. and OAC 340:100-3-5 and 340:100-3-5.1.

(K) The DDSD CM and GC follow up and address issues in an attempt to prevent future need for special guardianship. The discussion and actions are documented in CCM by the DDSD CM and guardianship database by the GC.