

Core Values of Home and Community-Based Long Term Care Service Delivery Systems

Principles and Guidelines for Service
Delivery Concepts of

Reasonableness of Care and Legal Risk

White Paper

Ethic of Care

OKDHS ADvantage Administration

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Ethic of Care

**Reasonableness of
Care and Legal Risk**

Expected Outcome: Using the concepts of Reasonableness of Care and Legal Risk as a basis, these practice guidelines for service delivery Ethic of Care clarify fundamental values and promote improved practice of all health care Providers.



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DEFINITIONS

Ethic of Care¹

- ▶ Ethic of Care based Service Delivery is:
 - The “right service” (appropriate, least intrusive intervention);
 - In the “right amount” (to meet the Consumer’s need);
 - Delivered by the “right Provider” (qualified and competent);
 - To the “right person” (a Consumer that needs service);
 - In the “right setting” (least restrictive, most integrated setting as appropriate to the person’s needs);
 - At the “right time” (a balance between Consumer preference and Provider ability);
 - For “the right price” (a balance between Provider prosperity and payer affordability);
 - To achieve a “right outcome” (Consumer directed/Provider supported).

- ▶ The Ethic of Care principle of “Reasonableness of Care” dictates that the interdisciplinary team (IDT) which includes the Consumer consensually decide, based on analysis and evaluation of the information available at the moment, on the particulars of what “right” means in terms of the “Consumer”, the “setting”, the “service”, the “Provider”, the “timing” of service events, the “cost” and the “outcomes”. This consensus is documented on the service plan that becomes the agreement between IDT members.

Reasonableness of Care

- ▶ **"Reasonableness" is a legal standard of care** which lies somewhere between "neglect" and "absolute," and is **distinguished** from both **by the use of informed analysis in making decisions**. Informed Choice is a pre-condition of Informed Consent.

Legal Risk

- ▶ “Legal risk” is the risk of legally imposed penalty that may result from a breach of Ethic of Care practice to provide “reasonable care” as defined by the plan of care.

- ▶ The concept of “legal risk”² originates from the legal concepts of causation, responsibility and liability. The context for legal risk is the

¹ Ethic of Care Concepts of Reasonable Care and Legal Risk, OK DHS ADvantage Administration, March 2002.

relationship of responsibility for harm by which the action, or inaction, of some person or legal entity was a condition sine qua non (without which the harm would not have occurred).

- ▶ Conscientious pursuit of practice consistent with Ethic of Care principles is not “business best practice”, but is “business essential practice” for Providers of long term care services.

² Rehmman-Sutter, C. “Involving Others: Towards an Ethical Concept of Risk”, Risk: Health, Safety & Environment, Vol. 119, Spring, 1998.

OVERVIEW

Purpose and Guidelines

- ▶ Help Providers achieve quality health care service delivery, of which Ethic of Care is an essential aspect;
- ▶ Provide guidance for the development, practice, and assessment of Ethic of Care policy and practice within all health care services;
- ▶ Identify the requirements involved in Ethic of Care service delivery and who is responsible for carrying them out.
 - Ethic of Care derived procedures and processes provide a framework for gathering and evaluating information from pertinent sources to make an informed, consensual decision about what “right” means for every aspect of long term care services.
 - The Ethic of Care principle of “Reasonable Care” dictates that the interdisciplinary team (IDT) which includes the Consumer consensually decide, based on analysis and evaluation of the information available at the moment, on the particulars of what “right” means in terms of the “Consumer”, the “service”, the “Provider”, the “timing” of service events, the “cost” and the “outcomes”. This consensus is documented on the service plan that becomes the agreement between IDT members.
 - The agreement commits the participants to the proposition that the plan of care is “right” in terms of appropriateness (meets the Consumer’s health needs) and reasonableness (does not exceed the Consumer’s needs and is doable by the Provider) for this Consumer in these circumstances.
 - The agreement involves an understanding by all parties (Provider, Funder and Consumer/Family) that each has responsibilities and obligations that are necessary to support and maintain the health and safety of the Consumer.

Ethic of Care Service Delivery Expectations

- ▶ Health care Providers have the desire and capacity, as well as the relevant knowledge, skills, and competence, to deliver services as agreed to on each service plan;
- ▶ Consumer/family understand and cooperatively assume roles and responsibilities consistent with service plan agreement;
 - 1. Providers and funders proactively educate Consumer/family on each participant’s respective roles and responsibilities in implementation of the service plan;
- ▶ Delivery system funders and their administrative agents commit adequate resources to reimburse Providers and to provide oversight to support Ethic of Care service delivery;
- ▶ If any of the above, A through C, Ethic of Care Service Delivery expectations is not met, all parties commit resources to correct.

Benefits of Understanding and Application of Ethic of Care Guidelines

- ▶ Minimizes inappropriate care and adverse risk to all parties;
- ▶ Promotes respectful appreciation of each partner's role and responsibility to achieve appropriate, quality care;
- ▶ Enhances Consumer satisfaction and Quality of Care.

Ethic of Care Infrastructure:

- ▶ Curriculum and training that incorporates Ethic of Care concepts and principles into all long term care service delivery levels: Funder, Provider, and Consumer/family;
- ▶ Quality Assurance/Quality Improvement (QA/QI) systems at Funder and Provider levels based on Ethic of Care principles of "right care" as defined by individual care plans appropriately developed and implemented using "reasonable care" procedures to achieve Consumer directed/Provider supported outcomes;
- ▶ Ethics committees intrinsic to Funder and Provider QA/I systems that have Consumer or Consumer advocate representation and are charged with the responsibility and empowered to:
 - Systematically review situations in which disagreement exists on Ethic of Care principles being followed and to evaluate failures to provide the "informed choice/informed consent" service delivery;
 - Discover reasons for failure and
 - Make recommendation for policy, procedure and/or personnel changes to prevent future failures.

Criteria for Development of Guidelines

- ▶ Are defined, relevant and attainable;
- ▶ Are subject to continuing evaluation and revision;
- ▶ Respect the individual, including their race, culture, religion, gender, sexual orientation, level of ability and age, regardless of ability to pay or pay source for health care;
- ▶ Facilitate partnership between health service Providers/planners and health service Consumers;
- ▶ Comply with the Federal and State laws and regulations.

foundational concepts of ethic of care

Guidelines for Compliance with “Reasonable Care” Requirements

- ▶ "Reasonableness" is a legal standard of care which lies somewhere between "neglect" and "absolute," and is distinguished from both by the use of informed analysis in making decisions.
- In ADvantage and State Plan Personal Care Programs, the Uniform Comprehensive Assessment Tool (UCAT) and the Nurse Evaluation provide Consumer health and safety assessment information.
- The service plan development process, which uses the UCAT, Nurse Evaluation, clinical experience of health care professionals and the knowledge of the Consumer, family and other caregivers, is the "informed analysis" and the service plan incorporates the decisions regarding services and frequency of care that are deemed "reasonable".
- When a Provider fails to staff a case as prescribed by the service plan they leave themselves open for legal action (from the Consumer, federal or state government) by being out of compliance with "reasonableness of care" requirements.
 - The service plan obligates the Provider in a legal sense as a responsible party in the Ethic of Care to monitor and appropriately address the health and safety needs of the Consumer while honoring Consumer preference and choice of service setting, service provider, and the Consumer's right to intelligently assume risk;
 - The Case Manager is obligated to monitor and see that service Provider and informal support responsibilities as specified in the plan are honored;
 - When services authorized by the service plan are not being delivered, the Case Manager is responsible for taking appropriate action to achieve service delivery in accordance with the plan in the Consumer's service setting of choice including assisting the Consumer to register complaints about service delivery failure;
 - Through the assessment and service plan development process, the Case Manager is responsible for identifying risks to Consumer health and safety, counseling the Consumer about these risks and, as appropriate, developing with the Consumer a Risk Management Plan to eliminate, reduce and/or manage the risk remaining even with service plan services in place.

The Concept of Legal Risk Applied to Long Term Care Service Delivery

- ▶ The concept of "legal risk" originates from the legal concepts of causation, responsibility and liability. The context for legal risk is the relationship of responsibility for harm by which the action, or inaction, of some person or legal entity was a condition sine qua non (without which the harm would not have occurred).

- ▶ The concept of legal responsibility tries to resolve the problem of whether, in a case involving harm, the harm is within the risk of a certain behavior, or of a failure to act as obligated, or whether the harm is not within the risk of the behaviors involved in the case.
- ▶ Liability for harm is not restricted to those harms that could be foreseen or predicted with certainty by the wrongdoer whose behavior, or failure to act, contributed to the harm that occurred.³
- ▶ When a Provider does not deliver the “right” care – service not by the “right” caregiver, not at the “right” time, or not the “right” type or amount of care – with reference to “Reasonableness of Care” as agreed to through the care plan, the Provider may be exposing themselves to “legal risk”, if the Consumer suffers harm. Within the concept of legal risk and legal responsibility is the concept that a “risk assessment”, a well-established evaluation process, can expand the range of foresee ability for harm.
 - Within the health care professions, the moral ethic of care requires that responsibility not be restricted to those consequences that can be foreseen in the presenting “state of knowledge”, but must include those that could be foreseen if the health care professional would make enough effort to reveal their potential by performing an assessment. This assessment, a form of risk assessment, is intended to inform the care professional of harms that can be anticipated.
 - In ADvantage and State Plan Personal Care Programs the following assessments serve this function:
 - Uniform Comprehensive Assessment Tool (UCAT); and,
 - ADvantage Nurse Evaluation.
- ▶ Providers use other assessment tools as necessary based on Consumer condition or need; other tools include, but are not limited to:
 - Mental Health Evaluation;
 - PT, OT, SpT, RT evaluation;
 - Dietitian consultation;
 - OASIS assessment.
- ▶ Based upon the assessment, the care professional in concert with other caregivers and the Consumer is obligated to develop a plan of treatment and care that includes appropriate actions, or precautionary measures, necessary to avoid harm to the person entrusted to their care.
 - In ADvantage and State Plan Personal Care Programs this is the Service Plan.
- ▶ The development of a plan of care is necessarily a deliberative process. Care or treatment cannot be provided without the **informed choice**,

³ LaPolla & LaPolla vs All Metro Health Care, January 3, 2001.

informed consent and cooperation of the Consumer and others involved in the plans execution.

- This process determines the “range of risk” to be addressed by the plan and the shared responsibilities of each participant, including the Consumer.
 - The resulting plan of care is what the team of health care professionals, cooperating other caregivers and the Consumer agree to be necessary for providing an amount, duration and scope of care to the Consumer that is “reasonable” for assuring the health and safety of the Consumer.
- ▶ In agreeing to provide services in accordance with the service plan, the Provider commits to serve the Consumer, adjusting the plan to meet needs as they arise or as they are revealed over time;
- Providers may not “abandon” Consumers because they decide they are “difficult”;
 - Providers are obligated to make “good faith” efforts to make appropriate adjustments in the service plan and services to meet Consumer needs, yet to avoid inappropriate service delivery (over-serving);
 - The service plan is not intended to eliminate all “risk” for a Consumer with a chronic health care condition – service plans are developed and executed to reduce “risk” to a “reasonable” level as determined by those involved, including the Consumer, family, informal caregivers and service Providers;
 - Due to Consumer preferences and the differing levels of tolerance for “risk” by individual Consumers and Providers, what is determined “reasonable” will differ between Consumers having almost identical chronic health conditions;
 - When Provider and Consumer disagree on acceptability of a health and safety risk associated with the Consumer responsibly assuming risk, the Provider is obligated to work with the Consumer to develop a plan, separate from the service plan, to identify and manage risk to Consumer health and safety;
 - “Responsible assumption of risk” means that the person that assumes the risk has informed and indicates understanding of the risk, the options to eliminate, reduce or minimize the risk and has made a deliberate, conscientious decision to accept the risk as preferable to agreeing to the presented options/constraints intended to ameliorate risk.