

STATEMENT OF CONSIDERATION RELATING TO  
907 KAR 7:005

Department for Medicaid Services  
Not Amended After Comments

(1) A public hearing regarding 907 KAR 7:005 was not requested and; therefore, not held.

(2) The following individuals submitted written comments regarding 907 KAR 7:005:

<u>Name and Title</u>	<u>Organization/Agency/Other Entity</u>
William S. Dolan, Staff Attorney Supervisor	Protection & Advocacy; Frankfort, KY
No name provided	Kentucky Association of Private Providers (KAPP); Somerset, KY

(3) The following individuals from the promulgating agency responded to comments received regarding 907 KAR 7:005:

<u>Name and Title</u>	<u>Organization/Agency/Other Entity</u>
Claudia Johnson, Acting Director	Cabinet for Health and Family Services, Department for Behavioral, Developmental and Intellectual Disabilities, Division of Development and Intellectual Disabilities
Alice Blackwell, Assistant Director	Cabinet for Health and Family Services, Department for Behavioral, Developmental and Intellectual Disabilities, Division of Development and Intellectual Disabilities
Stuart Owen, Regulation Coordinator	Cabinet for Health and Family Services, Department for Medicaid Services

(1) Subject: Consumer Directed Option Providers

(a) Comment: William S. Dolan, Staff Attorney Supervisor of Protection & Advocacy, stated the following:

“Subsection 5 defines “certified waiver provider.” Please clarify whether a consumer directed option provider – see <http://www.lrc.ky.gov/kar/907/001/835.htm> Section 8(11)

and <http://www.lrc.ky.gov/kar/907/001/145.htm> Section 5(11) - would be required to become a certified waiver provider under this new regulation.

(b) Response: The requirements do not apply to consumer directed option (CDO) providers except regarding a CDO provider in the Supports for Community Living (SCL) services program regarding a specific requirement. Section 5(2) of the SCL services administrative regulation – 907 KAR 12:010 – requires an individual who is providing participant-directed services (the new name for consumer-directed option services) to more than three (3) participants in the same household or different households to complete the SCL provider training requirements (established in Section 3 of 907 KAR 12:010.) So if a participant-directed services provider failed to meet the training requirement in 907 KAR 12:010, the provider could be issued a citation and corrective action plan required pursuant to 907 KAR 7:005.

(2) Subject: Positive Step

(a) Comment: William S. Dolan, Staff Attorney Supervisor of Protection & Advocacy, stated the following:

“This new regulation in general is a positive step toward providing an increase in accountability and oversight of community-based services. Kentucky needs to have a strong provider supervision system as more and more consumers choose to live a life beyond institutionalization.

(b) Response: The Department for Medicaid Services (DMS) and the Department for Behavioral, Developmental and Intellectual Disabilities (DBHDID) thank Mr. Dolan for his comments and concur.

(3) Subject: Definition of Moratorium

(a) Comment: The Kentucky Association of Private Providers (KAPP) stated the following:

“Would moratorium affect the ability to provide services to Michelle P participants as well?”

(b) Response: Yes, as established in Section 5(1)(d)1 of this administrative regulation which states the following:

“If a certified waiver provider undergoes a voluntary moratorium, the provider shall not accept any new 1915(c) home and community based waiver services participant to their program until the department determines that the provider has completed all of the actions required within the timeframe established pursuant to the corrective action plan referenced in paragraph (c)3.a. of this subsection.”

(4) Subject: Corrective Action Plans

(a) Comment: KAPP stated the following:

“What will be the expected timeframe for an agency to receive a approved CAP? At present these documents take considerable to time to be reviewed and approved by DDID personnel and this could cause considerable delay in an agency initiating change.”

(b) Response: The review and turnaround timeframe for a corrective action plan is thirty (30) days.

(5) Subject: Voluntary Moratorium Pending Investigation

(a) Comment: KAPP stated the following:

“What constitutes „reliable evidence“ that leads the dept to „believe“ that a certified waiver provider has committed a violation that threatens the health, safety or welfare of a participant. This seems vague and subjective?”

(b) Response: Reliable evidence would be found through the certification/investigation process conducted by Cabinet for Health and Family Services (CHFS) staff. This information would be gathered from provider records which would include - and is not limited to - daily notes, incident reports, medication administration records, the provider’s internal investigation information as well as witness statements, findings by other departments, and complaint information gathered by CHFS staff.

(c) Comment: The Kentucky Association of Private Providers (KAPP) stated the following:

“The dept shall offer the provider an opportunity to undergo a „voluntary moratorium“ during investigation. Is the provider given a time frame that the investigation must be completed in?”

(d) Response: No. Upon completion of the investigation, DBHDID staff will prepare the findings report and provide the report to the provider and to DMS within 30 days.

(e) Comment: The Kentucky Association of Private Providers (KAPP) stated the following:

“If the agency refuses to undergo voluntary moratorium, why wouldn’t the next step be „department imposed moratorium?“ What would be the difference? Why jump straight to termination?”

(f) Response: The provider agency is expected to cooperate with CHFS requirements. The voluntary moratorium is a favorable action taken by the provider agency to limit the health, safety, and welfare risks to people receiving waiver services.

(g) Comment: The Kentucky Association of Private Providers (KAPP) stated the following:

“There is no clear definition of what would „warrant termination,” what is the regulation standard that defines warranting termination?”

(h) Response: Section 5(1)(c)4 states the following:

“If the findings report indicates that the certified waiver provider committed a violation that threatened the health, safety, or welfare of a recipient that warrants termination, the department shall terminate the provider in accordance with Section 4(2) of this administrative regulation.”

There is no way to define any and all violations that would adversely impact the health, safety, or welfare of an individual and lead to a recommendation for termination.

(6) Subject: Exclusion Due to Employee, Volunteer, or Contractor

(a) Comment: KAPP stated the following:

“Please define „unacceptable practice.” Where does the department obtain that information? Is this referring specifically to illegal practices, charges filed, substantiation of A,N, or E., personnel issues, termination of employment or contract?”

(b) Response: “Unacceptable practice” is defined in Section 1(18) – the definitions section of the administrative regulation - as follows:

“(18) "Unacceptable practice" means conduct which constitutes:

- (a) Fraud;
- (b) Provider abuse;
- (c) Neglect;
- (d) Exploitation;
- (e) Willful misrepresentation;
- (f) An action resulting in an exclusion, sanction, finding of fact, moratorium, suspension, or termination by:
  - 1. The licensing entity with jurisdiction over the provider’s license;
  - 2. The certifying entity with jurisdiction over the provider’s certification; or
  - 3. The department;
- (g) Failure to disclose required information in accordance with 907 KAR 1:671, 907 KAR 1:672, or this administrative regulation;
- (h) Making, causing to be made, inducing, or seeking to induce a false, fictitious, or fraudulent statement or misrepresentation of material fact when providing information to the department; or
- (i) A restriction.”

Reliable evidence of an unacceptable practice would be found through the

certification/investigation process conducted by CHFS staff.

(c) Comment: KAPP stated the following:

“Is consideration given if a volunteer or contractor was shrewd and/or acted in direct contradiction of the agency’s policies and procedures?”

(d) Response: Yes.

(7) Subject: Additional Actions

(a) Comment: KAPP stated the following:

“3. (d) if the department determines that renewing the provider’s participation would not be in the best interest of: current or future recipients; or the department? Vague and subjective.”

(b) Response: CHFS staff will gather reliable evidence to support the decision to not renew the provider’s certification through the certification/investigation process.

(c) Comment: KAPP stated the following:

“2. (6) (a) The provider engages in „unacceptable practice“ Again, Where does the department obtain that information? Is this referring specifically to illegal practices, charges filed, substantiation of A,N, or E., personnel issues, termination of employment or contract?”

(d) Response: “Unacceptable practice” is defined in Section 1(18) – the definitions section of the administrative regulation - as follows:

“(18) "Unacceptable practice" means conduct which constitutes:

- (a) Fraud;
- (b) Provider abuse;
- (c) Neglect;
- (d) Exploitation;
- (e) Willful misrepresentation;
- (f) An action resulting in an exclusion, sanction, finding of fact, moratorium, suspension, or termination by:
  1. The licensing entity with jurisdiction over the provider’s license;
  2. The certifying entity with jurisdiction over the provider’s certification; or
  3. The department;
- (g) Failure to disclose required information in accordance with 907 KAR 1:671, 907 KAR 1:672, or this administrative regulation;
- (h) Making, causing to be made, inducing, or seeking to induce a false, fictitious, or fraudulent statement or misrepresentation of material fact when providing information to the department; or

(i) A restriction.”

(e) Comment: KAPP stated the following:

“A system or process creating a deficiency in more than 1 area can lead to termination from the waiver during a certification, recertification or investigation if it is a repeat citation regardless of it being related to health, safety & welfare? Any repeat citation without a time frame defined within the regulation is concerning.”

(f) Response: “Repeat citation” is defined in Section 1(15) – the definitions section of the administrative regulation - as follows:

“(15) „Repeat citation“ means a citation that was previously issued by the department within the past two (2) years that did not result in a sustainable correction.”

(8) Subject: Applicability of Actions Across All 1915(c) Home and Community Based Service Waiver Programs

(a) Comment: KAPP stated the following:

“If a certified waiver provider „is given a moratorium due to behavior demonstrated in the supports for community living waiver program, the department shall impose the same moratorium.“ Agree with the action of moratorium across all waivers, but again, if the moratorium is voluntary, why is it worded this way and how can it be imposed? Are there indeed 2 different types of moratorium, voluntary and imposed?”

(b) Response: A provider agrees to a moratorium. The word “imposed” is not used in the context of a voluntary moratorium.

(9) Subject: Appeals

(a) Comment: KAPP stated the following:

“What is appealable?”

(b) Response: A sanction or exclusion is appealable.

(c) Comment: KAPP stated the following:

“Also mentions that a voluntary moratorium is not appealable. If it is voluntary, you can come off of it at your discretion?”

(d) Response: When a corrective action plan has been accepted by DBHDID and successfully implemented by the provider, the moratorium may be lifted.

(e) Comment: KAPP stated the following:

“Why would a citation not be appealable if there is good rationale or indication that the finding may be incorrect?”

(f) Response: Citations are not appealable as reliable evidence is gathered by CHFS staff to support the citation prior to CHFS issuing a citation.

(10) Subject: Additional Comments/Questions

(a) Comment: KAPP stated the following:

“Please provide further clarification as to how certification length is determined?”

(b) Response: Certification duration is outside of the scope of this administrative regulation.

(c) Comment: KAPP stated the following:

“Suggest eliminating certification review for agencies with 1 year certification and going to a Quality Improvement program with QA? Would only revert to certification review if issues arise.”

(d) Response: Thank you for the suggestion.

(e) Comment: KAPP stated the following:

“Need greater clarification of terms as proposed regulations are still far too vague.”

(f) Response: Section 1 - the definitions section of the administrative regulation - defines terms in the administrative regulation to help clarify the provisions and requirements.

(g) Comment: KAPP stated the following:

“Can we have a KAPP Representative on certification length committee?”

(h) Response: This administrative regulation does not address requirements or provisions related to a certification length committee.

(i) Comment: KAPP stated the following:

“If a provider has a Quality Improvement plan that addressed needed areas and is using it to improve systems to support quality, what else is needed to stop punitive actions?”

(j) Response: The voluntary moratorium is not intended as a punitive action but as an opportunity to work together to resolve identified health and safety issues and avoid punitive action.

SUMMARY OF STATEMENT OF CONSIDERATION  
AND  
ACTION TAKEN BY PROMULGATING ADMINISTRATIVE BODY

The Department for Medicaid Services (DMS) has considered the comments received regarding 907 KAR 7:005 and is not amending the administrative regulation.