NYC FAIR
FAMILY ADVOCACY INFORMATION RESOURCE

Comments of NYC FAIR on Proposed Administrative Memoranda
HCBS Residential Settings
Occupancy Agreements

NYC FAIR appreciates this opportunity to present comments on the draft Administrative Memoranda (ADM) and accompanying draft agreement template which sets forth requirements and guidelines mandated by federal regulations for occupancy agreements between residents and providers of OPWDD-certified residences funded through the Home and Community Based Services (“HCBS) Waiver.

NYC FAIR is glad to see that the draft ADM addresses many of the concerns expressed by individuals and families about provisions in the agreements drafted to date including language in agreements which may be counter to the letter and spirit of rights and process protections in existing state laws and regulations governing the provision of HCBS waiver services. (ADM, III. – “Occupancy agreements may not contain policies or support practices that are inconsistent with individual rights under current laws and regulations . . .”). The draft guidelines make clear that the agreements should not contain provisions which run counter to existing protections, nor should they be used to leverage
participation with a provider’s HCBS or other programs or be used to reference behavioral or rights modifications.

Importantly, the ADM states that OPWDD will not approve or review draft occupancy agreements prepared by providers before an individual and their support is requested to sign them. The Template contains suggested language. So, it is important that clear guidance be given in that Template, consistent with the ADM. In keeping with the ADM’s provision that a failure or inability to sign an occupancy agreement should not place the individual’s residential service placement in jeopardy – we suggest two changes to Template language which, as drafted, is incompatible with this provision of the ADM.

We also have additional concerns which we outline below related to the compliance issues surrounding the occupancy agreements and to the important issue of the Care Manager’s role in assisting individuals and families understand the occupancy agreements they will be asked to sign.

**Suggested Changes to the Template Language**

Importantly, the draft ADM states that “[p]roviders may not treat a failure or inability to sign an occupancy agreement as a basis to terminate an individual’s services, initiate or propose a discharge or relocation, or to ask an individual to move out of a residence.” (ADM, IV.).

First, under the Section “If I, or someone on my behalf (legal guardian or representative), end this Agreement:” , the following language should be deleted or clarified: “If I end this Agreement, I understand that I will have to move, and I will work with my Care Manager to plan the move.” This language could allow a termination in service for a decision to “end” the Agreement. Since, the ADM provides that no
adverse consequences will result from a failure to sign an agreement, a decision to “end” the Agreement” should not result in a direction that the individual making this decision “will have to move”. If the intention is to describe, as set forth in the draft ADM, that “when an individual decides to leave a residence, the occupancy agreement will end, and the individual understands that they will have to move.” (ADM, II (D)), then the language should be revised to so state. If there are other circumstances surrounding a direction to the individual to move – those circumstances are covered in the next section of the Template and are accompanied by language which makes clear the request to move must be accompanied by protections for the individual.

Second, under the section: “How long does this Agreement last?”, the following language should be deleted or modified. – I understand that I will need to sign a new agreement if I move into a new residence, and I agree to sign that agreement as soon as possible after I move in.” That language should be eliminated or changed to – I understand that I will be asked to sign a new agreement if I move into a new residence.

Compliance

As noted, the draft ADM makes clear that “OPWDD is not requiring providers to use a particular template for an occupancy agreement” and that providers will not be “required to submit signed occupancy agreements to OPWDD . . .” The draft is silent however as to whether the agreements will be subject to audit, or if subject to audit, how those audits will be conducted. With the requirements in the draft ADM that the agreements not conflict with individual rights, or federal, state and local laws and regulations, while steering clear of prohibited terms, despite the best of intentions, there is a risk that those documents will contain provisions which violate some of the principles outlined in the draft ADM. We urge OPWDD to make plain that audits will be conducted and to encourage providers to at least submit any
provisions which they might have concerns about to OPWDD for review before they are inserted into the agreement. If a decision is made not to conduct audits, then a more thorough review of documents is essential and should be undertaken.

**Care Managers**

It is anticipated that the occupancy agreements are being drafted by providers with assistance of their counsel and then the agreements are being presented to individuals and families for signature – many of whom should not be expected to decide, without assistance, why they are being asked to sign these documents, or whether they should object to a term(s) in the agreements, or in some circumstances, decline to sign. Care Managers have an important role in assisting individuals with housing placements. The Care Manager may well be an advocate for the individual during that placement process. The draft ADM is silent, however, on the role of the Care Manager. We urge OPWDD to amend the ADM or issue other materials which will make plain to Care Coordination Organizations their role in the process and will assist individuals and families in understanding the role of the Care Manager in their review of these agreements.

Again, NYC FAIR welcomes the ADM’s language to make sure that the federally mandated occupancy agreements remain faithful to state and local protections for individual rights while moving forward with the federal settings requirements.

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for
NYC FAIR