

Level of Need Review Workgroup

Stakeholder Report

**DADS Response to Stakeholder
Recommendations
August 2007**

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Introduction and Purpose

In compliance with the Settlement Agreement *Charles Wilson, et al., v. Texas Department of Aging and Disability Services (DADS), et al.*,¹ signed on July 29, 2005, no later than 60 days from the effective date of the agreement, the DADS Commissioner appointed members of a workgroup to review the rules and process for assigning Level of Need (LON) 9 in the Home and Community Based Services (HCS) program, and make recommendations to DADS regarding improving processes. The workgroup was composed of members who represent stakeholders such as providers, advocacy groups, consumers and family members, and DADS resource staff². The scope of the workgroup's review included consideration of how consumers and their legally authorized representatives may participate in the process of assigning a LON. At the request of the DADS Commissioner, the scope of the workgroup was expanded to include a review of the rules and processes for all LON determinations and Utilization Review (UR) of Individual Plans of Care (IPC) in the HCS, Texas Home Living (TxHmL) and Intermediate Care Facility for Persons with Mental Retardation (ICF/MR) programs. The settlement agreement required the workgroup to complete its study and make final recommendations no later than 210 days from the effective date of the agreement.

Workgroup Charge

As per the settlement agreement, the workgroup will review the rules and process for assigning a LON and make recommendations to DADS regarding improving processes. At the request of the DADS Commissioner, the scope of the workgroup expanded to include a review of the rules and processes for all LON (1, 5, 8, 6 and 9) determinations and UR in the HCS, TxHmL and the ICF/MR programs. The workgroup will also consider how consumers and/or their legally authorized representatives may participate in the process for assigning a LON.

¹ See Appendix A, Settlement Agreement *Charles Wilson, et al., v. Texas Department of Aging and Disability Services, et al*

² See Appendix B, Workgroup Membership

Summary

The workgroup met on six different occasions to complete its charge. Members reviewed the rules³ and processes⁴ for assigning a LON and utilization review of an IPC. In addition to receiving all of the applicable rules and process - related documents, the workgroup members requested and were given information including, but not limited to: available aggregate data regarding consumers assigned a LON 9 across the HCS, ICF/MR and State Mental Retardation Facility (SMRF) programs, including the number of requests, approvals and denials and the reasons for the denial of a LON 9 assignment; a copy of the Inventory for Client and Agency Planning (ICAP)⁵ assessment tool; the MR/RC assessment; IPC Cost Ceilings; IPC Utilization Review Guidelines and the HCS Service Definitions and Billing Guidelines.

During the review, the workgroup discussed the appropriateness of the use of the ICAP assessment instrument and documentation required by DADS when an increase in a consumer's LON or a LON 9 is requested; the utilization review of an IPC and service justification required by DADS; and the appeals process when a LON is denied or services are reduced. Out of those discussions, stakeholder members of the workgroup developed the following recommendations for improving the process. The workgroup members recognize some of the recommendations, if implemented, may require rule changes, legislative direction, and/or have a fiscal impact.

Stakeholder Positions and Recommendations

The recommendations included in this report reflect the views and opinions of a consensus of the stakeholders representing advocacy groups, consumers and family members and public and private providers of the Level of Need Review Workgroup. The recommendations in this report do not necessarily reflect the current policy of DADS or the views and opinions of any DADS resource staff supporting the Workgroup.

In accordance with the charge, the following positions and recommendations represent the workgroup's discussions related to the LON rules and processes. In identifying the components of the LON process that require change and/or clarification, the workgroup's goal was to eliminate the unintended consequences of a consumer not receiving the services and supports he/she may need as the result of a requested LON being denied.

³ See Appendix C, Related HCS, TxHmL and ICF/MR Rules

⁴ See Appendix D, Related Department Processes

⁵ See Appendix E, ICAP Assessment Instrument

Unless otherwise noted, the text in the issues and recommendations refers to every LON (1, 5, 8, 6 and 9) in ICF/MR and HCS programs and, when applicable, to the TxHmL program.

Position 1: The expectations and requirements of the LON process must allow for clarity, consistency and standardization in implementation across all programs for all stakeholders (i.e., consumers and families, advocates, service providers and agency staff).

Recommendations:

1A. Review and revise rules and processes for assigning a LON to ensure operating procedures and guidelines are transparent, consistent, standardized and accessible to all stakeholders (i.e., consumers, families, providers, and DADS staff) and support objectivity in the review and determination process. Examples include:

- i. The LON classifications (1, 5, 8, 6 and 9) are not sequentially numbered resulting in confusion for many stakeholders. The workgroup agrees there may not be a way to change the LON classification numbers, however, recommends stakeholders are better educated regarding LON including an explanation of the LON categories.
- ii. Ensure the IPC Cost Ceiling information is available to all interested stakeholders and is user friendly. Language should be added to the document to explain its purpose. This recommendation is not intended to alter any of the cost figures noted on the document.

DADS Response:

1A. DADS staff have reviewed the rules and processes for consistency and will propose rule revisions to ensure uniformity between HCS and ICF/MR rules. Provider information and policy clarification letters will be posted on the DADS website to be accessible for all stakeholders.

i. LON classification numbers and an explanation of the LON categories are routinely discussed with providers and other stakeholders during the ICAP training offered by DADS throughout the year.

ii. The IPC cost ceiling document will be revised to be more user friendly and posted on the DADS website with language to explain its purpose.

1B. Establish notification and training requirements related to the rules and processes for reviewing, assigning, and appealing a LON.

- i. Notify stakeholders of any changes to rules, interpretation of existing rules, and processes for assigning a LON.
- ii. Offer joint training between agency staff and providers on new adopted rules and any substantive changes to existing rules, and processes for assigning a LON and invite families, consumers and other interested stakeholders.

DADS Response:

1B. DADS staff provide notification and ongoing training opportunities related to the rules and processes for reviewing, assigning, and appealing a LON. Provider and stakeholder participation in training is not mandatory, although highly encouraged.

i. DADS staff provide notification to stakeholders related to changes in rules, policies, and LON processes through the DADS website, training opportunities, and provider information letters. In March 2007, DADS notified providers they would no longer receive hard copies of information letters and began posting provider letters and other news and information on the website. Registered providers and other stakeholders are notified via e-mail when new information is posted. Web-based training options are also being considered.

ii. DADS staff will continue to offer training on newly adopted rules and any substantive changes to existing rules and processes for assigning a LON through training opportunities either through DADS sponsored or private sponsored conferences. Consumers, family members and other stakeholders are not prohibited from attending training sessions. Web-based training is being considered as another option to communicate changes to stakeholders on existing rules and processes.

Position 2: The internal LON review/determination and reconsideration processes must be objectively applied to assure consumer needs are consistently recognized.

Recommendations:

2A. Prohibit the re-scoring of an ICAP by DADS staff based on desk reviews only.

DADS Response:

2A. The DADS Utilization Review (UR) staff receive initial and ongoing training in the use and scoring of the ICAP. Staff hired in the UR unit must have work experience in the field of mental retardation and be classified as Qualified Mental Retardation Professionals (QMRPs). For continued training purposes, at least annually, each UR staff will conduct an on-site program provider review that will include face-to-face assessments of the program's consumers along with review of those individuals' ICAPs. The UR staff will also provide on-site consultation and technical assistance.

2B. Revise the review and reconsideration process for LON to ensure consumers are assessed in a fair and objective manner.

Regarding the LON 9 process, the following suggestions should not be considered mutually exclusive. Both could be options offered by DADS in the LON 9 review process.

- i. Require a face-to-face observation of a consumer (by qualified staff who are trained in assessing consumer needs, skill levels and behaviors) whose LON 9 is denied during the review process.
- ii. Establish an expert panel independent from the department to conduct the LON 9 reconsideration process. The panel should have the discretion to conduct face-to-face observations with the consumer.

DADS Response:

2B. The review and reconsideration process for assigning a LON is reviewed on a regular basis and revised as needed. The informal reconsideration process will be modified and standardized to include both the initial review and reconsideration review be completed by the same UR staff person. If issues are not resolved at the reconsideration phase, the UR staff person will consult with another UR staff person (i.e., either the designated Team Lead or the Unit Manager) who were not involved in the original LON determination.

i. DADS staff have in the past and will continue to utilize face-to-face observation of a consumer as necessary on a case by case basis.

ii. DADS staff have established an expert panel of psychologists independent from the department and will retain the option to utilize the panel for technical assistance in the LON 9 reconsideration process.

2C. Consider using current HCS survey staff to complete all HCS LON 9 renewals.

DADS Response:

2C. As discussed in response 2A, UR staff receive initial and ongoing training and at least annually, each UR staff will conduct an on-site program provider review that will include face-to-face assessments of the program's consumers. UR will continue to coordinate with survey staff utilizing the inter-unit referral process to refer those individual cases found during the on-site survey to have questionable levels of supervision and vice versa.

Position 3: The LON assignment process must ensure consistency in implementation within the MRA UR Unit and across other DADS Sections and Divisions.

Recommendations:

3A. Establish coordination and communication mechanisms between the DADS Regulatory, Waiver Survey & Certification Division and the MRA UR Unit in order to prevent a LON being denied by UR when surveyors have cited a provider for not providing the appropriate level of staff supervision.

DADS Response:

3A. UR staff will continue to coordinate with WS & C staff and use the inter-unit referral process to refer those individual cases found during the on-site survey to have questionable levels of supervision and vice versa. Upon receipt of the referral, UR will review the case and provide feedback to WS & C regarding the level of supervision and the LON assignment.

3B. Establish a fair and equitable LON review process that include the following:

- i. A LON 9 assignment is not reviewed on a more frequent basis than any other LON, unless individual circumstances warrant such follow-up reviews.
- ii. Follow-up issues noted on HCS LON approvals are done in conjunction with the DADS HCS survey process by survey staff.

DADS Response:

3B.

i. DADS staff do not review LON 9 on a more frequent basis than any other LON unless individual circumstances warrant additional review.

ii. UR will continue to coordinate with WS & C survey staff utilizing the inter-unit referral process to refer those individual cases found during the on-site survey to have questionable levels of supervision and vice versa.

Position 4: The LON process must assure the behavioral needs of an individual are adequately met to ensure the health and safety of the individual and others with whom he/she lives and/or interacts, to avoid risk of institutionalization for the person in need of the supports, and to allow for the least intrusive method of management and oversight.

Recommendations:

4A. Revise rules to continue a LON 9 assignment during the time when behaviors are improving and intervention techniques and supervision levels have shown to be effective management tools. (As intended, one-on-one supervision generally yields improvement in behavior and a reduction in the frequency of behavioral incidents. When a LON 9 is denied as the result of behavior improvement, supervision is reduced resulting in a return of the inappropriate behavior, incidents rise, and the health and safety of the individual and those around him are placed at risk. For the individual who engages in the behavior, this risk includes the risk of institutionalization).

DADS Response:

4A. DADS will not automatically deny a LON 9 when behavior improves. In making the determination to continue a LON 9, staff will consider the diagnosis, extent of the disability, and any other factors which will clinically affect the determination, including the likelihood the condition contributing to the behavior is not likely to change.

4B. Allow certified Behavior Analysts to be reimbursed for developing behavior management plans.

DADS Response:

4B. DADS agrees to revise the rules to include a Board Certified Behavior Analyst as a qualified provider of psychological services in the HCS program.

4C. Document and analyze LON 9 assignments to identify trends in “cycling” individuals in and out of LON 9 and/or to identify individuals who are at imminent risk of institutionalization.

DADS Response:

4C. As discussed in response 4A, DADS will not automatically deny a LON 9 when behavior improves. For individuals identified as “cycling” in and out of LON 9 , DADS will request the program provider that serves the individual to submit documentation of the individual’s history of “cycling behaviors” to substantiate the continued need for intervention in order to prevent the reoccurrence of the behavior(s).

4D. Revise the current ICF/MR rule definition of “arm’s length” such that the required 1:1 supervision necessary to manage the behavior of a person with a LON 9 assignment is neither jeopardized nor overly intrusive to cause engagement in the targeted behavior. The definition developed should be contained in both the ICF/MR and HCS rules.

DADS Response:

4D. DADS will review and revise ICF/MR and HCS rules to be consistent and to include a definition of “arm’s length” such that the required 1:1 supervision necessary to manage the behavior of a person with a LON 9 assignment is neither jeopardized nor overly intrusive to cause engagement in the targeted behavior.

4E. Revise/develop rules to allow for a 90-day provisional LON assignment (initial or current) for new enrollments regardless of the setting from which the persons came. This would include development of rules, procedures and/or processes related to:

- i. MRA verification of an ICAP/LON: During the enrollment process, address issues the MRA may experience in obtaining or receiving all necessary information to either verify or determine an individual’s LON.
- ii. Provider assessment of an individual: The provisional period allows the provider sufficient time to gather data to verify the LON and to develop and implement, if necessary, appropriate behavioral supports and interventions.
- iii. Provider reimbursement: If during the provisional period it is determined that the LON assignment is not correct, recoupment of provider funds will not occur.

DADS Response:

4E. i., ii., & iii. The current UR enrollment process allows the provider to be paid at the LON identified by the MRA without penalty or recoupment for approximately 60 to 90 days. During this time, the provider can develop/gather the data he/she will need to support the continued LON assignment. Currently, ICAP LON assignments recommended by the MRAs at the time of enrollment are authorized by UR.

4F. When a provider requests a renewal of a LON increase, the consumer's current LON is maintained until DADS renders the final decision (including through the appeal process, if applicable). The new LON is effective either the date of the expiration of the current LON (i.e., the LON in effect prior to the renewal date) or the date of the LON review and final determination/confirmation of the denial, whichever is later.

DADS Response:

4F. Regarding renewal of a LON increase, DADS agrees to maintain the previously authorized LON until the date of the notification of the final DADS reconsideration decision. If the provider appeals the DADS decision, the LON approved by DADS will remain in effect until the outcome of the appeal. If the DADS decision is reversed, the new LON effective date is retroactive to the initial renewal date.

Position 5: The LON assessment process and accompanying tool(s) must assure they: (a) are used to evaluate/determine a consumer's service needs and LON assignment; (b) are appropriate to the population for which they are intended and modified as needs change; (c) are appropriate for children if used for children; (d) adequately identify and assess all aspects of a consumer's needs, including ongoing medical, behavioral, and/or physical needs; and (e) do not allow a consumer's LON to be lowered because the provider is not providing services consistent with the assigned LON.

Recommendations: The recommendations that follow include both short and long term options.

5A. Short Term

- i. Replace DADS ICAP Service Levels with the ICAP Service Scores developed by the author of the ICAP - Brad Hill (<http://www.cpinternet.com/~bhill/icap/>)
- ii. Develop criteria for medical needs to allow the assignment of a LON 9 to individuals with extremely high medical needs with appropriate corresponding cost caps at the highest LON.

- iii. Establish a LON category between the LON 6 and the LON 9 to support management of behaviors that do not meet the criteria for a LON 9 assignment, yet present a threat to the individual and others at a level beyond the supports offered by a LON 6 assignment.

DADS Response:

5A. i, ii. & iii. DADS will consult with HHSC rate analysis staff to determine the feasibility of implementing these recommendations and the implications for the reimbursement methodology.

5B. Long Term

- i. Research, analyze, and compare effectiveness of Texas' current LON assessment tool to those used in other states for this population, making recommendations accordingly. If the ICAP is determined to be the most effective assessment tool when coupled with the revisions noted under short term solutions as well as the other revisions outlined in this report, explore options for enhancing the assessment process to ensure appropriateness and effectiveness in assessing the needs of children.
- ii. Explore ways to achieve and maintain provider justification/ documentation of provision of LON 9 services rather than reducing an individual's LON assignment.

DADS Response:

5B.

i. DADS staff will review and analyze the effectiveness of the ICAP, research and compare other assessment tools available, and make recommendations to executive staff.

ii. DADS staff continue to assist providers to maintain justification for LON 9 through the provision of technical assistance and consultation, formal training and written policy clarifications and remain open to exploring additional alternatives, rather than reducing the LON 9. The utilization of on-site reviews and face-to-face consumer observations, when necessary, will afford the program providers with opportunities for additional consultation and technical assistance in this area.

Position 6: The rules and processes for determining a LON must include timeframes to ensure accountability on behalf of both the provider and the agency and clarity and consistency with regard to provider submission of required information and receipt of responses from DADS/UR.

Recommendations:

6A. Review all LON and UR rules and policies to ensure that as appropriate, reasonable and clear timeframes for the completion of certain processes are established.

DADS Response:

6A. The UR unit will continue its review and evaluation of internal policies and procedures to ensure, as appropriate, reasonable and clear timeframes for the completion of certain processes are established and/or maintained. The LON review process will be modified and standardized to include both the initial review and reconsideration review be completed by the same UR staff person. If issues are not resolved at the reconsideration phase, the UR staff person will consult with another UR staff person (i.e., either the designated Team Lead or the Unit Manager) who were not involved in the original LON determination.

6B. Incorporate a provision to allow that if the provider does not receive DADS notification regarding the requested LON within 21 days, on 22nd day the provider is eligible for allowable billing for LON requested.

DADS Response:

6B. DADS has modified its LON notification process giving the provider more timely notification via fax of a LON denial, thus allowing DADS to comply with the 21 day timeframe in most cases. If there is additional information needed to make the determination, UR staff contacts the provider and the LON review timeframe is extended.

6C. Expand the MR/RC submission timeframe from 45 to 60 days prior to expiration, to be consistent with the submission timeframe of the IPC.

DADS Response:

6C. DADS will expand the MR/RC submission timeframe from 45 to 60 days in consultation with IT regarding the modifications necessary to the Client Assignment and Registration (CARE) system and will notify providers when the change in process occurs.

Position 7: The requirements for documentation to support a LON assignment must assure the review process is consistently applied, the rules and/or processes to which providers must adhere are clear and support a balance between ease in implementation and sufficient safeguards to protect against abuse. The current requirements are complex, overly burdensome, punitive, and rely on the documentation of direct support staff that are unable to meet the complex requirements to support a LON determination.

Recommendation:

7A. Examine the current documentation requirements to support a requested LON and the subsequent agency compliance review processes to address the issues identified as barriers to receiving a LON assignment with the goal of streamlining and simplifying the process, documentation requirements, etc.

DADS Response:

7A. As discussed in response 6A, UR staff will continue to review its LON processes and seek ways to streamline and simplify the process, where applicable.

Position 8: The appeals process must be accessible/available to all affected persons and assure that the hearing is conducted in an objective manner by independent hearing officers free from conflict of interests.

Recommendations:

8A. Allow the consumer/Legally Authorized Representatives (LAR) to appeal a LON denial. This rule change should not eliminate the provider's current right to appeal and may require a statutory change.

DADS Response:

8A. DADS will consult with HHSC Appeals Division and DADS legal services to determine the feasibility of allowing the consumer/Legally Authorized Representatives (LAR) to appeal a LON denial by requesting a Fair Hearing.

8B. Allow the consumer/LAR to attend the hearing and provide testimony, whether written or oral and/or documentation to support their position.

DADS Response:

8B. DADS agrees to allow an individual/ LAR to offer testimony or other evidence in an administrative hearing requested by the provider. Currently, this is a common practice and is not prohibited.

8C. Ensure the administrative law judges and hearing officers are not employed by HHSC or any other HHS enterprise agency.

DADS Response:

8C. The recommendation is not within DADS scope of authority. DADS will refer the recommendation to HHSC.

Position 9. IPC Utilization Reviews must be objectively applied to assure consumer needs are consistently recognized. Review of the IPC for individuals who have ongoing severe disabilities and routinely require more services in one or more service components in order to gain, maintain, or delay regression in functioning should not be more frequent than any other review.

Recommendations:

9A. Revise current rules and processes regarding IPC service justification to allow for continuation of services to a consumer with severe disabilities (ongoing medical, behavioral, and/or physical needs) who routinely requires more services in one or more service components for at least 36 months.

DADS Response:

9A. Federal rules require an annual review and assessment of needed services. UR staff provide consultation and technical assistance regarding service justification to providers who serve individuals with chronic, severe disabilities. As resource information is developed which might prove beneficial to the providers, DADS will post this information on the website.

9B. Review and consider revision to the rules regarding the requirement that providers must submit letters/documentation of denial of services available from alternative payment sources.

DADS Response:

9B. DADS is willing to modify its review procedures to accept a written statement from the provider indicating the provider has explored all alternate service options rather than requiring letters of service denial from each alternate payment source.

Position 10. Meaningful stakeholder input must be obtained early in the process of proposing changes to rules, processes and/or procedures that effect service access, planning and delivery.

Recommendations:

10A. Meaningful stakeholder input must continue (via this workgroup or a similarly constituted group) in order to ensure effective implementation of the recommendations included in this report.

DADS Response:

10A. Stakeholder input continues through the public rule making process, Medical Care Advisory Committee, Advisory Council and other standing and/or ad hoc committees where stakeholder input is obtained.

10B. Replicate this workgroup process to address other major DADS policy issues.

DADS Response:

10B. DADS remains committed to ensuring stakeholder input through the public rule making process, Medical Care Advisory Committee, DADS Advisory Council and other standing and/or ad hoc committees where stakeholder input on DADS major policy issues is obtained.

Appendices

(Hard copy available upon request.)

Appendix A

**Settlement Agreement *Charles Wilson, et al., v. Texas
Department of Aging and Disability Services, et al***

Appendix B

Workgroup Membership

Appendix C

Related HCS, TxHmL and ICF/MR Rules

Appendix D

Related Department Processes

Appendix E

ICAP Assessment Instrument

HCS Rules

TXHML Rules

ICF/MR Rules