

HUMAN SERVICES

DIVISION OF DISABILITY SERVICES

Personal Assistance Services Program

Readoption with Amendments: N.J.A.C. 10:140

Proposed: March 7, 2016, at 48 N.J.R. 362(a).

Adopted: June 9, 2016, by Elizabeth Connolly, Acting Commissioner, Department of Human Services.

Filed: July 26, 2016, as R. 2016 d.100, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 30:4G-21.

Effective Dates: July 26, 2016, Readoption;
September 6, 2016, Amendments.

Expiration Date: July 26, 2023.

Summary of Public Comments and Agency Responses:

The following is a summary of the comments received from the public and the Division's responses. Each commenter is identified at the end of the comment by a number that corresponds to the following list:

1. Patricia Butler, RN, CCM, CDMS, Director, Laurel Rehabilitation
2. Neil Frigand
3. Vincent Reilly
4. Susan Coyle
5. Debbie Hehir, PASP Consultant
6. Susan Seidal, Legal Director, Disability Rights NJ

7. Ronald Moore
8. Community Access Unlimited (CAU)
9. Laura Ramos

COMMENT: The commenter asked for clarification regarding the language in N.J.A.C. 10:140-3.2(a), which discusses how visits must be completed as part of the Personal Assistance Services Program (PASP) assessment and reassessment process. The commenter stated that some consumers are requesting that their assessments be made over social media and other technical applications and the commenter felt the language to clarify needed to be added to reflect whether that would be acceptable. (1)

RESPONSE: Thank you for your comment. Language will be added to clarify that visits are meant to be completed in person to provide the assessor with an opportunity for an in person assessment of the consumer and their needs. The Division believes that it is vital to meet consumers in order to best assess their needs and functional abilities for the program. Social media and other technical media applications do not sufficiently allow for that type of interaction to take place. The Division feels that in person interaction is a critical component of the assessment process and, therefore, the Division will clarify this upon adoption.

COMMENT: The commenter stated that he felt it was unfair that overnight and short trips are included in the new regulation that limits out-of-State travel. The commenter requests that overnight or short trips be exempt from the 30-day rule as proposed in new N.J.A.C. 10:140-3.5(d)4. (2)

RESPONSE: The Division believes that the commenter misunderstood the rule as it was proposed. The rule permits consumers to travel out-of-State for up to 30 consecutive days for any purpose, such as a vacation or an extended stay at an alternative residence with notification. The 30-day rule as proposed does not apply to short overnight trips. The Division will proceed with the new rule as proposed.

COMMENT: The commenter stated that he felt the requirements at N.J.A.C. 10:140-1.5 requiring proof of volunteer activity are difficult and in some cases impossible to meet. The commenter's current volunteer activity is difficult to prove given it is internet-based and he was concerned that participants could become ineligible for the program given the standards proposed in the rule. (3)

RESPONSE: The Division thanks the commenter for his comment. The comment has been taken into consideration, but the Division believes that the rule is necessary, fair, and comparable to the standards set for those who are employed. Internet-based volunteering is acceptable, as long as it can be verified. The county and State have successfully been able to verify and document program activity in similar situations, therefore, the Division does not anticipate a substantial impact caused by the rule. The rule, as proposed, provides for a standardized operating procedure for every member Statewide. The Division believes that proof of volunteer activity is necessary because program activity is a vital part of program eligibility. The Division's intention is to move forward with the rule as proposed.

COMMENT: The commenter is concerned about the minimum income requirement of \$400.00 for consumers who considered themselves employed for their program activity as discussed in

N.J.A.C 10:140-1.4. The commenter believes that minimum is too high for consumers in the program. (4)

RESPONSE: The Division thanks the commenter for her comment. The comment has been taken into consideration but the Division believes that the rule is necessary to comport with the IRS Standard Guidelines regarding employment. The program has been criticized for not having a standard, so the Division opted to use the IRS standard as it mirrors an individual's requirement to pay taxes. This standard is the minimum established by the Federal government, so as to not be considered arbitrary; the Division adopted that standard as well. The Division's intention is to move forward with the rule as proposed.

COMMENT: The commenter stated that she is concerned about the requirements described in the proposed regulations under N.J.A.C. 10:140-1.5 for consumers who are working. The requirement for consumers to secure a letter from their employer on letterhead seems inconsistent given the consumer-directed nature of the PASP program and highly invasive as it would indicate that they are participating in a personal care assistance (PCA) program which goes against their rights under Health Insurance Portability and Accountability Act (HIPAA). She feels that the additional "proof of employment" lends a hint of distrust that could be an unintended consequence. She believes that the production of a tax return/W-2 or a pay stub as proof of employment should be more than sufficient. (5)

RESPONSE: The Division thanks the commenter for her comment. Language will be added to clarify the intention of the provision, as suggested by the commenter. The rule requires that the consumer provide proof of employment by providing documentation from a third-party. This proof can come in the form of a W-2, a tax return, or a pay stub, as it always has. However,

those who are self-employed may need to go to a second level to provide proof of their employment in order for their program activity to qualify. The Division believes that this rule is necessary and fair in order to maintain programmatic integrity and eligibility standards.

COMMENT: The commenter is concerned with the 20-hour minimum for volunteers in N.J.A.C. 10:140-1.5(b)3i. The commenter believes that the rule places a different burden on those who volunteer than those who are employed or attending school. (6)

RESPONSE: The Division thanks the commenter for her comment. The Division believes that the minimum 20 hours of volunteer service is necessary as a qualifying standard for program activity and is comparable to the standards established for those who are employed in the program. The volunteer standard was developed in 2012, with the assistance of the Advisory Council and has not presented any undue hardship. Moreover, this amendment does contain qualifying standards for employment also developed with the assistance of the Advisory Council. There must be a minimum standard for programmatic efficiency and the Advisory Council felt that 20 hours per month was more than fair for consumers. The rule will continue as proposed.

COMMENT: The commenter is concerned that N.J.A.C. 10:140-3.3, for allowing suspension of consumers for failure to utilize their cash allowance in excess of a 60-day period, does not allow for extenuating circumstances, such as short-term hospitalizations. (6)

RESPONSE: The Division thanks the commenter for her comment. The Division believes for programmatic efficiency, it is within its purview to exclude individuals who fail to utilize their program benefit within a 60-day period. The program has a set budget that allows for a set number of participants Statewide, so Division must ensure that consumers on the program are

utilizing the program. Individual circumstances will be considered, but the intent is to remove habitual nonusers from the program. Consumers who are hospitalized for a short period of time are suspended from the program during that time but are reenrolled once they are discharged to home and are not impacted by this provision of the rule. The Division will proceed as proposed.

COMMENT: The commenter believes that N.J.A.C. 10:140-3.5(d)1, requiring consumers to notify the county designated agency within 48 hours when planning to leave the State regardless of circumstances, is onerous. The concern is the section fails to provide for notification in emergency situations when advance notice is not possible. (6)

RESPONSE: The Division thanks the commenter for her comment. N.J.A.C 10:140-3.5(e) clearly states failure to provide requested information as described in (d)1 above may result in a participant's worker(s) not being paid and/or possible termination, due to an inability to verify location and performance of duties under the cash management plan. Individual circumstances will be considered in emergency situations. The rule was created to provide a clear direction for how out-of-State vacations and family visits are handled. The Division feels that it is necessary to provide a standard for travel out-of-State in order to maintain programmatic integrity. The intention of the rule is to provide uniform rules concerning a very common situation. The rule will continue as proposed.

COMMENT: The commenter is concerned that N.J.A.C 10:140-3.9(g) allows DDS to terminate services before an administrative review has been completed and that fraud or misrepresentation has been properly confirmed. (6)

RESPONSE: The Division thanks the commenter for her comment. This situation is an extremely rare circumstance and one that is never taken lightly. In the 30 years of program operation, this situation has occurred only once and fraud was confirmed externally to the program. The rule clearly states in N.J.A.C. 10:140-3.9(g)3 that this is at the discretion of the Commissioner of Human Services, not DDS, and this was done to ensure objectivity in the event that the situation occurs again where a decision would be required. The Division created the rule to close a loophole that made the program vulnerable since the switch to cash model. The program is heavily dependent on participant integrity. Due to the serious nature of the circumstance, the Division feels that the rule is necessary and fair and will continue as proposed.

COMMENT: The commenter commented on N.J.A.C. 10:140-4.1(b)3, regarding the prohibition of “routine utility bills” and believes that a blanket prohibition of utility bills is contrary to the controlling court opinion established in *L.R. v. Division of Disability Services*, 434 N.J. Super 430 (2014). (6)

RESPONSE: The Division thanks the commenter for her comment. The Division recognizes the *L.R.* decision but believes that that case does not apply to the rule as written. *L.R.* was a case involving the use of cellular, landline, and internet service in order for a consumer to successfully participate in their program activity. In that type of situation, it stands to reason that those types of bills would be reimbursable by the program. The intention of the rule states that “routine” utility bills are not reimbursable because they are outside the scope of the program. The Division believes that the rule is necessary and fair and will continue as proposed.

COMMENT: The commenter did not feel that it was fair to impose a minimum income standard on disabled individuals as proposed in N.J.A.C. 10:140-1.4. The commenter believes that the standard is meant to only apply to able bodied individuals who have full wage earning and work production capabilities. (7)

RESPONSE: The Division thanks the commenter for his comment. The comment has been taken into consideration, but the Division feels that the rule is necessary and fair based on the rules established by the IRS Standard Guidelines regarding employment. The program has been criticized for not having a standard, so the Division opted to use the IRS standard as it cleaves to an individual's requirement to pay taxes. This standard is the minimum established by the Federal government, so as to not be considered arbitrary; the Division adopted that standard as well. The IRS makes no distinction for disability so, therefore, neither does PASP. The Division's intention is to move forward with the rule as proposed.

COMMENT: The commenter believes that N.J.A.C. 10:140-1.5(b)1 places an unfair burden on a working consumer in the program to obtain documentation to prove employment as a program activity. He felt that a pay stub should suffice as proof of employment. (7)

RESPONSE: The Division thanks the commenter for his comment. The rule requires that the consumer provide proof of employment by providing documentation from a third party. This proof can come in the form of a W-2, a tax return, or a pay stub as it always has. Those who are self-employed may need to go to a second level to provide proof of their employment in order for their program activity to qualify but the Division feels that this rule is necessary and fair in order to maintain programmatic integrity and maintain eligibility standards. As noted in response to a prior comment, the Division is making this change upon adoption.

COMMENT: The commenter believes that it is unfair that consumers who are purchasing personal care services from an agency are not permitted to use the same agency for purposes of their program activity, such as employment or volunteering as discussed in N.J.A.C 10:140-1.5(b)3iii. (7)

RESPONSE: The Division thanks the commenter for his comment. The Division believes that the rule is necessary and fair because it would be a clear conflict of interest if a consumer is working or volunteering for the same agency from which they are obtaining services. The Division's intention is to move forward with the rule as proposed.

COMMENT: The commenter asked for clarification on N.J.A.C. 10:140-1.4, in regard to the income requirements for employment as a program activity and what documentation will be required to support the income requirement. (8)

RESPONSE: The Division thanks the commenter for its comment. N.J.A.C. 10:140-1.4 states that "an individual who identifies themselves as self-employed must have net earnings of at least \$400.00 annually in accordance with requirements of the Internal Revenue Services under Title 26 of the USC and file taxes accordingly." A tax return or W-2 form from the employer is required to be submitted to the program annually to meet this requirement. The Division is proposing language to clarify the point, as discussed in response to a comment above.

COMMENT: The commenter asked for an explanation on N.J.A.C. 10:140-1.4, in regards to how transportation is handled in PASP. They asked if transportation services would be allowed

in PASP when they are bundled with other personal assistance services when alternative transportation services are unavailable. (8)

RESPONSE: The Division thanks the commenter for its comment. Transportation services are not a stand-alone service under PASP because the program is primarily a personal assistance program, not a transportation program. If other personal assistance services are included, transportation could be included, but if transportation is the only service the consumer is looking for, they are not eligible for PASP and would be directed to seek out other transportation programs within the State.

COMMENT: The commenter suggested adding language in N.J.A.C. 10:140-2.1(f)4iii that the county designated agency be given set time frames for submitting notice to the Division and the fiscal intermediary. (8)

RESPONSE: The Division thanks the commenter for its comment. However, as the comment pertains to the PASP Operational Protocol, it is beyond the scope of the rulemaking.

COMMENT: The commenter suggested that consumers not be retroactively reenrolled when their reenrollment crosses over calendar years as described in N.J.A.C. 10:140-2.1(f)5. (8)

RESPONSE: The Division thanks the commenter for its comment. However, as the comment pertains to the PASP Operational Protocol, it is beyond the scope of the rulemaking.

COMMENT: The commenter suggested that language be added to N.J.A.C. 10:140-3.9(g) that discusses the part that the FISO will play in the process for when a consumer is disenrolled in the program when fraud or misrepresentation occurs. (8)

RESPONSE: The Division thanks the commenter for its comment. However, as the comment pertains to the PASP Operational Protocol, it is beyond the scope of the rulemaking.

COMMENT: The commenter suggests that the functions between the county designated agency and the FISO be clearly defined under N.J.A.C. 10:140-7.2. (8)

RESPONSE: The Division thanks the commenter for its comment. However, as the comment pertains to the PASP Operational Protocol, it is beyond the scope of the rulemaking.

COMMENT: The commenter made comments that the program does not adhere to the rules established by the Americans with Disabilities Act (ADA) and due process. (9)

RESPONSE: The Division thanks the commenter for her comment. The Division believes that the commenter has misapplied the intent of the ADA. The ADA was designed to promote equal access to individuals with disabilities and remove barriers to access. Given that the program serves people with disabilities and endeavors to satisfy the need for personal care assistants, the Division is compliant with the ADA. Further, the Division believes the program provides consumers with due process for all adverse agency actions. The purpose behind the amendments is to standardize practice across the State and provide each consumer with guidelines for successful participation in the program. The Division intends to continue with the amendments as proposed.

COMMENT: The commenter expressed concerns about the proposed amendment requiring 48-hour notice for out-of-State travel as defined in N.J.A.C. 10:140-3.5(d)1. The commenter believes that the rule is prohibitive for medical appointments. (9)

RESPONSE: The Division thanks the commenter for her comment. The Division believes the program required a standard to remedy a common problem that was frequently encountered. Certainly extraordinary circumstances will be evaluated on a case-by-case basis, but given that PASP is a self-directed program, the Division's expectation is that consumers in the program be responsible for notifying the program of their intended travel. Specifically, the Division does not believe this rule is punitive or prohibitive to medical appointments as it does not apply to single-day events. The Division intends to continue with the amendment as proposed.

COMMENT: The commenter questioned how reassessments would be handled if a consumer was away within the 30-day window as defined in N.J.A.C. 10:140-3.5(d)4. (9)

RESPONSE: The Division thanks the commenter for her comment. The Division believes that reassessments are planned and scheduled events and it is the consumer's responsibility to comply with the reassessment process defined by the rule to remain eligible. The Division intends to continue with the amendment as proposed.

COMMENT: The commenter inquired as to if personal care assistant services could continue for out-of-State travel during the 30-day window as defined in N.J.A.C. 10:140-3.5. (9)

RESPONSE: The Division thanks the commenter for her question. Yes, the Division intends for consumers to utilize their PASP services while out-of-State, if needed, but a consumer will need to limit travel to the 30-day window for the purposes of program integrity and operation. Similar limits already exist in other PCA programs; therefore, the Division believes having such a limit for PASP is both fair and appropriate. The Division intends to continue with the amendment as proposed.

COMMENT: The commenter expressed some concerns about the implementation of the *L.R.* decision and the ramifications of the new amendments proposed. (9)

RESPONSE: The Division thanks the commenter for her concern. The Division believes that the amendments as proposed are in accordance with the *L.R.* decision in that they allow for the payment of telephone, internet, and other services where it can be linked to successful completion of program activity. The program, however, limits payments of such services to a link between program activity and payment, as it is not the intent to incur financial peril of paying every utility bill for every consumer. The Division intends to continue with the rule as proposed.

COMMENT: The commenter believes that the definition of goods and services is too vague in the rule as defined in N.J.A.C. 10:140-1.4. (9)

RESPONSE: The Division thanks the commenter for her comment. The Division's intention was for the rule to apply to as many things as possible given the individual needs and circumstances of each consumer. Each year, the Division receives many requests and each is evaluated based on the consumer's ability to link the request as a necessary part of the successful completion of their program activity and to clinically document the need as appropriate. The Division intends to continue with the rule as written.

COMMENT: The comment questioned the 2012 regulatory revision that removed parenting as a qualifying program activity. (9)

RESPONSE: The Division thanks the commenter for her question. The Division believes that the commenter misread the rule. Parenting remains as a qualifying program activity, as long as the child is under five years of age. The intent was to allow a participant to continue eligibility while caring for an infant or toddler, which could impact their ability to have outside program activity. The intent of the rule is that once the child turns five and starts school, outside program activity could resume. The Division intends for the rule to continue as written.

COMMENT: The commenter thinks it is unfair to terminate those who are not working from the program as discussed in N.J.A.C. 10:140-2.1(f)5. (9)

RESPONSE: The Division thanks the commenter for her comment. The intention of the program is to assist and provide guidance to consumers when program activity ends for whatever reason. Guidelines are discussed in the rules, so that program eligibility can be maintained given that program activity is a vital part of program eligibility. The intent is for the program to assist the consumer to get back on their feet to regain program compliance. The rule was vetted by the Advisory Council and the Division believes that the regulation is fair given the framework the Division provides. The Division intends to continue with the amendment as proposed.

COMMENT: The commenter made several comments about the overall operation of the program and its leadership. (9)

RESPONSE: The Division thanks the commenter for her comment. The Division found that the comments were immaterial to the rules. The amendments were created with the consent and approval of the Advisory Council and are intended not to be punitive but to allow the program to be managed uniformly Statewide.

Federal Standards Statement

A Federal standards analysis is not required because the rules readopted with amendments are not subject to any Federal requirements or standards. However, both the rules and Program operations are in compliance with the Americans with Disabilities Act of 1990.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 10:140.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

10:140-1.5 Target population and priority for services

(a) (No change)

(b) Prioritization for service delivery shall be determined by the county designated agency in the following order of priority, for consumers who are:

1. Employed in a paid occupation (in accordance with the definition of “employment” at N.J.A.C. 10:140-1.4).

i. A consumer shall be employed and provide supporting documentation upon request of the Program. Documentation of employment activities must be provided in writing by an independent third-party, on company/organization letterhead and/or approved/signed by an official of the company/organization attesting to the hours worked.

***[The] *A W-2, pay stub, or other recognized tax form is acceptable proof. For those who**

are unconventionally employed or self-employed, the* documentation shall include a job description indicating the specific tasks performed under the *[assignment]* ***employment arrangement***.

ii. Existing consumers who claim employment as their Program activity shall meet this requirement by *[(30 days from the effective date of this amendment)]* ***October 6, 2016***, in order to remain *[complaint]* ***compliant*** in the Program.

2.-3. (No change from proposal.)

(c)-(d) (No change.)

10:140-3.2 Assessment

(a) The county designated agency shall arrange for a qualified assessor to perform an ***in person*** assessment within 30 days upon receipt of the application package, which includes the following:

1. -4. (No change.)

(b)-(c) (No change.)