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| TO: | Becky Phillips, DODD |
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| FROM: | OPRA |
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| DATE: | December 14, 2015 |
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| RE: | Comments - Ohio Department of Developmental Disabilities ("ODODD") Proposed Licensure Rules and Personal Funds Rule |
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Thank you for the opportunity to provide input on the ODODD proposed Rules. We truly appreciate the changes that were made following the review of pre-clearance comments. We continue to have questions and concerns about several of the rules in this packet. The following comments reflect our internal analysis as well as comments submitted by our members.

**5123:2-3-01 Administration and Operation:**

(D)(2) Although RAPBACK is positively perceived and used by many of our members, it is a new unfunded mandate that will increase both real (as in fees) and administrative costs. It is a system that needs to be monitored and maintained. OPRA was very supportive of RAPBACK through the planning, pilot and implementation phases. Our support was based, in large part, in RAPBACK being voluntary. We appreciate the additional language allowing for a phase in. However, some of our smaller and mid-sized members report that RAPBACK is not cost neutral and will cost several hundred dollars a year more to implement than what they currently have in place. Members who wish to utilize RAPBACK continue to report problems getting signed up and using the portal. The system is not completely functional yet, as evidenced by the problems experienced by providers – many of which DODD have helped to correct. At this point in time, we would like for RAPBACK to remain voluntary. We would be willing to adopt mandatory implementation once the system is fully operational and functioning properly.

In response to our earlier comments, you stated that you “do not understand how providers will incur additional cost.” It is true that RAPBACK costs $5 per year and that by conducting the required background check every 5 years, the cost remains the same at $25. However, we are experiencing turnover at an average rate of 47% annually. Therefore, providers will spend $5, $10, $15 or $20 on employees who terminate employment at year 1 through 4, thereby incurring costs they would not have had if the employee stayed for the full 5 years. This may seem like a small amount on the surface, however the costs will add up.

(F)(d) The high school diploma or GED requirement is new for ICF’s and eliminates potential staff hires in an already extremely tight labor market. The Department’s desire to align staffing requirements across service settings does not recognize the inherent differences in the ICF and waiver systems and is placing additional and unnecessary burdens on ICF’s. While we appreciate the addition of the grandfather clause in the most recent version of the rule, this new requirement will still put additional burdens on hiring in the ICF program. We ask that DODD work with us to address the staffing crisis by promulgating common sense rules that recognize the realities of an extremely tight labor market. ICF’s are staffed with trained professionals in addition to DSP’s – they are structured differently than waiver settings. We ask that ICF’s be exempt from the diploma/GED requirement.

It is worth noting that it is extremely difficult to recruit staff in rural counties with heavy Amish concentrations. Some Amish individuals receiving services would prefer to have a friend or family member provide their direct supports. However, Amish schools educate until the 8th grade, making anyone graduating with an Amish education ineligible to provide services.

(F)(i) Regarding staffing, the Department has increased the timeframe in which employees must be first aid/CPR certified. We appreciate this change. In addition the Department has included language that allows for an ICF with 24/7 nursing to apply for a waiver of the CPR certification. Again, we appreciate the response to our earlier comments. We do ask however, that the criteria for the waiver be included in the body of the rule so that the parameters are clear going forward.

**5123:2-3-04 Provision of Services & Maintenance of Service Records**

(H)(2) As discussed in our pre-clearance comments, under current rules this provision provides an exception for community participation if it would be contraindicated. The proposed rule changes it to medically contra-indicated only, which is a very narrow exception. Community participation is sometimes behaviorally contra-indicated and language is needed that recognizes this. While we appreciate the Department’s response that a psychiatric diagnosis would qualify as a medical diagnosis, this still does not take into account individuals who have behavioral challenges absent a psychiatric diagnosis. We recommend that the current rule language remain and that decisions about community participation/staffing needs be left up to the individuals and their team.

**5123:2-3-05 Admission, Termination and Transfer**

(B)(4) The Department has changed and narrowed the definition of an emergency and has given no explanation for why the current definition is not sufficient. The currently existing section OAC 5123:2-3-05(B)(2) defines an emergency as “any situation creating a significant risk of substantial harm to individuals or staff in the residential facility if action is not taken.” During the pre-clearance process, regarding an emergency, we noted that the new language appears to require the operator to document attempts to provide, obtain, and/or coordinate the services necessary to ensure the health and safety of the resident, other residents and staff at the facility. The requirement for documentation of previous occurrences fails to take into account situations where an emergency may present itself but there were no previous occurrences which lead to the emergency situation. The Department’s response did not address the issue. Since the Department is defining an emergency so narrowly, will the provider be cited or the discharge not upheld if they do what is right and what they see as an emergency but the situation is outside the definition of an emergency? The Department’s definition of emergency is too narrow and suggests that there had to be a previous incident or some previous cause that the provider could control which precipitated the emergency which is not always the case. We suggest that the definition of emergency as it exists in current law be retained. We do not know why the current definition is not sufficient and no explanation has been provided.

**5123:2-3-06 Compliance Reviews, Issuance of Licenses, Adverse Actions**

Total deletion of term license requirements and Department survey tool and tool deleted as an attachment to the rule (now called compliance protocol) – As noted in our comments in the pre-clearance process, under Section 5123:2-3-06, the term license and licensure survey tool have been deleted and the new compliance reviews for licensed facilities will be conducted in accordance with a compliance protocol which takes the place of the licensure survey tool. Today, the license survey tool is promulgated as an attachment to the administrative rule. Accordingly, we believe that the new compliance protocol should remain part of the administrative rule process. The term license and licensure survey tool are currently found at Section 5123:2‑3‑03 and Appendix A of that same rule respectively, but are noticeably absent under the proposal. The Department is proposing to post the protocol on their web site but this is not meaningful due process. The creation of the web site compliance protocol and any subsequent changes will not be subject to notice, public input and due process as is required under the current administrative rule process governing the survey tool. We propose that the Department keep the tool/protocol as an appendix to the rule so that all stakeholders can have meaningful input and due process in the rulemaking process as is the case today with the survey tool.

Surveys will be called "compliance reviews" yet Ohio statutes under which the rules are promulgated require that surveys be conducted – As discussed in our previous comments, in the proposed Section 5123:2-3-06, the Department has changed the terminology from licensure surveys to compliance reviews because the supported living standards are going to be the predominant standards. The section of Ohio statute that governs the licensure of residential facilities, R.C. 5123.19, requires that the Department conduct “surveys,” not compliance reviews. Therefore, this proposed language change violates the first JCARR prong as the proposed language change from surveys to compliance reviews exceeds the Department’s statutory authority under which the rules are promulgated.

Also, we need to understand who will be conducting the compliance reviews as under the law, today, County Boards are prohibited from conducting compliance reviews of residential facilities under OAC 5123:2-2-04(C)(2). In discussions over the past several months, the Department has stated that it believes that County Boards may someday conduct the compliance reviews of residential facilities (both ICF and waiver homes). This is a strong departure from current practice. OPRA has concerns about County Boards taking on this function as this is a State function and is non-delegable. Further, several County Boards are license holders of ICF residential care licenses. This creates a conflict of interest. This needs much more discussion.

With regard to licensed HCBS facilities, currently, County Boards are prohibited from conducting any surveys or compliance reviews regarding licensed facilities. In fact, today it is clear that supported living standards do not apply to licensed facilities. The supported living rule regarding provider supported provider certification Section 5123:2-2-01(a) provides that "this rule does not apply to a person or government entity licensed as a residential facility under Section 5123.19 of the Revised Code." Thus, under today's standards, licensed facilities and certified supported living providers are governed by mutually exclusive laws. This will bring them together all under supported living standards.

Under the new definition section, the "Department" is defined as "the Ohio Department of Developmental Disabilities or its designee." As we mentioned, with regard to licensed facilities, only the Department may conduct surveys or compliance reviews and not any designee. The definition section opens this up and makes it unclear as to whether County Boards will have a role with regard to licensed facilities. This is unacceptable with regard to any licensed facility – including group homes or ICFs.

Second, with regard to ICFs, it is troubling that the supported living standard will be the predominate standard. Many of the supported living standards are inapplicable to ICFs today as is evident from our comments. We ask that the Department reconsider these inconsistencies.

In the Department’s October 29, 2015 comments, the Department states “…the Department has no plans at this time to have county boards conduct reviews of licensed residential facilities that provide waiver services and no plans whatsoever to have county boards conduct reviews of Intermediate Care Facilities. Please explain how these statements jive with the Department’s responses to the Personal Funds rule 5123:2-2-07 also dated October 29, 2015 where the Department states that oversight of personal funds and “requirements of the rule will be incorporated into the compliance review process and monitored by Service and Support Administrators.” They seem contradictory. Please explain with specificity what the role of County Boards will be with regard to personal funds and compliance reviews. Based on recent experiences in certain counties, some County Boards think that they can conduct compliance reviews on licensed providers and unless providers push back with the Department and ask that the activity cease, it will go on.

Also, please explain the distinction between “no plans at this time” and “no plans whatsoever.” What is the timeframe that the Department has in mind for allowing County Boards to conduct compliance reviews of licensed, non-ICF facilities if not “at this time.” It sounds like it is on the table and we need to understand what that means.

**5123:2-3-08 Development of Licensed Residential Beds**

As we noted in our past comments in the pre-clearance process, the Department is making extensive changes to this rule and we are concerned about the impact. No discussion has been had since February on this rule. Most notably, the imposition of the changes regarding the development of licensed beds violates the first JCAAR prong because the proposed changes exceed the Department’s statutory authority. The Department is implementing a Certificate of Need (“CON”) process without the statutory authority to do so.

All of the extensive changes need to be discussed and better understood by stakeholders before this rule is adopted.

a. Specifically, the definition of “development” in Section (B)(5) has been revised to include “renovation” and remove “replacement.”

* + Replacement: Under the current 5123:2-3-26(B)(7) and (F)(4), a “replacement” of assigning licensed beds to a different licensee when a license is revoked, terminated or not renewed or voluntarily surrendered is permitted when the Department determined the beds are needed to provide services to the individuals who reside in the residential facility in which the beds are located. It appears that this option has been eliminated. What will happen to these beds when a license is revoked or a provider voluntarily goes out of business? Can they no longer sell the beds?
  + Renovation – This is new in the draft development rule. The definition of “renovation” in this new rule is what is currently found in 5123:2-3-02(B)(1). While the definition is not new, the process is different. Renovations are currently not subject to development approval by the Department. Currently, under 5123:2-3-02(G), a licensee is just required to notify the Department 30 days prior to its intent to begin a renovation, and the Department is to let the licensee know within 14 days if any new inspections and/or a licensure survey will be needed following the renovations. Although the development proposal process for renovations is separate for the process for modifications (see Section (H)) and mirrors the language from 5123:2-3-02(G), renovations will presumably now be subject to the Department’s discretion and approval as part of the broad development process and standards in the development rule. Further, since “renovation” is defined so broadly, providers could be burdened with submitting a development proposal for almost any renovation. This could be very cumbersome on providers and the Department in reviewing the proposals as well.
  + The new rule also includes “non-extensive” renovations under 5123:2-7-25 as part of the renovations requiring development approval at Section (H). 5123:2-7-25 is for non-extensive renovations for ICFs only, and this rule pertains to cost reporting, not Department approvals for the renovations. Moreover, no discussions were had with stakeholders regarding adding “renovations” to the development process and rule. We ask that the Department reconsider such a broad change.

1. “Feasibility Requirements” have been added as Section (E). These “feasibility requirements” are just all of the construction and building requirements for licensure under 5123:2-3-10(B)(1)-(7), one fire safety requirement under 5123:2-3-11(C)(3) (requiring two means of exit), two (out of the 8) of the interior and exterior physical condition requirements under 5123:2-3-10(E)(2), and three other building requirements under 5123:2-3-10(H)-(J). Also added were space and usage licensure requirements and requirements for kitchen and dining and bathroom and laundry under 5123:2-3-10(D). So, although a large part of the physical environment requirements in 5123:2-3-10 are present in the draft rule, they are not all included. We ask that the Department explain why some are included and not others.
2. Also, why are the licensure requirements in Sections (E)-(F) included in the development rule? They are not referenced in the standards/what the Department should consider in reviewing development proposals in Section (G). How are they going to be used? Sanctions for violations of these licensure requirements (like suspension of admissions or licensure revocation) give providers Chapter 119 appeal rights under 5123:2-02, but the process to waive requirements under the development rule does not afford providers a Chapter 119 hearing. This is troubling and needs further explanation. 5123:2-3-08(J) provides that the provisions of this rule may be waived pursuant to 5123:2-3-10 (which is predominantly unchanged from the old 5123:2-3-15); this rule offers no due process rights whatsoever as the Director’s decision to grant or deny the waiver is final and not appealable. Please explain the change.
3. Per our previous comments, the bathroom and laundry requirement in (F)(4)(a) requires that the facility provide for toilet and bathing facilities at a minimum of 1:4. It cites 5123:2-3-10(D)(4) as the basis for this requirement. However, 5123:2-3-10(D)(4) does not require the 1:4 ratio, only that they be appropriate in number, size and design to meet the needs of the individuals and on each floor with bedrooms. DODD responded that the Residential Facility Rules Workgroup arrived at the 1:4 ratio after discussion. While we believe that a 1:4 ratio is appropriate in the majority of settings, this change in the requirement does not take into consideration ICF’s who are serving individuals requiring total care. Individuals who need complete and total assistance with bathing, are incontinent/wear Depends and may be non-ambulatory do not need to have bathroom facilities that accommodate a 1:4 ratio. The imposition of this requirement on facilities who currently have bathrooms that accommodate higher ratios will be cost prohibitive. We ask that the current language remain as is or that consideration be given to facilities that provide total care, such as a 1:8 ratio.

More fundamentally, we believe that the imposition of a ratio via the rulemaking process violates the first JCARR prong as it exceeds the Department’s statutory authority. In support of our argument, in the most recent budget bill, the Department felt it necessary to change Ohio statutes, not rules, when imposing ratios for how many individuals may reside in a room in residential facilities. Therefore, the imposition of ratios must be adopted in statute and is not appropriate for the rulemaking process. The requirement in (E)(1) (first of the “Feasibility Requirements”) is new language not present in any current rule. It requires the interior and exterior of the facility to be configured in a manner that is (a) accessible to residents, (b) can accommodate the assessed needs and degree of ability of the residents, and (c) provides for service delivery that is age-appropriate. There are no definitions as to what these requirements mean. Please clarify.

1. As we have mentioned before, the Department’s “development proposal process” imposes Certificate of Need (CON)-like criteria to DD licensed beds.  This draft rule even further expands the Department’s authority to grant and deny development proposals by including renovations, even non-extensive renovations, in Section (H). There is no CON requirement for residential beds, nor any statutory authority for the Department to impose a CON process to the development and renovation of licensed beds. The imposition of a CON-like standard on licensed residential beds through this rule violates the first JCARR prong because it exceeds the Department’s statutory authority.

The Department has denied that this is a CON-like process because they are “not allocating resources or permits based on availability of existing facilities or cost limitations.” We question the accuracy of this statement in light of the proposed rule and the recent state budget changes. There is a bed moratorium for licensed residential beds, so there is an allocation of resources based on only existing resources. Further, with the Department making decisions based on “feasibility” in this rule and in the state budget bill relative to financial viability, bed capacity, and bedroom capacity, we question how Department decisions are not being based on cost limitations. Clearly, as this proposal and the state budget language demonstrate, over the past several years, the Department believes it has a role in the development process that differs from its role previously. If the Department is going to impose a CON for licensed beds in the DD system, this is a significant systemic shift in policy and one that must be discussed with stakeholders and authorized by the General Assembly in statute.

**5123:2-2-07 Personal Funds of the Individual**

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OPRA initiated the drafting of this rule in order to provide best practice standards in personal funds management and to provide for consistency in reviews by DODD and county boards. We continue to have concerns about the content of the rule, including the lack of delineation of representative payee duties vs. H/PC money management tasks and how these specific services will be paid for and by whom. We appreciate the clarification on funding for representative payee services, however our comments concerning payment under H/PC have not been addressed. A continuing concern continues to be the lack of inclusion of a standardized review process and protocol. Current practice is that each county board (or each individual reviewer) has their own format for reviewing the personal funds service. This is because no rule currently exists. The promulgation of this rule is a great first step but does not go far enough in that there is no standardized means of assessing a provider’s compliance. This will not change current review practice, which is chaotic at best. In addition, this rule provides no usable data for the field and gives little useful direction to reviewers. Providers need to know what the standards are and by what metrics they will be reviewed. Individuals and family members should be aware of the standards so that they know what to reasonably expect from their provider. We again request that DODD re-convene the Personal Funds workgroup and in conjunction with stakeholders, address the money management vs. representative payee issues and develop a standardized protocol for the review of the personal funds service, such as the one used by the Social Security Administration for the review of representative payees. Until such a protocol is developed, we do not consider this rule complete and ask that it be pulled from the clearance process. We understand that DODD is exploring the development of a distinct money management service under the waiver program. We thinks this strengthens our argument to pull this particular rule from the Clearance process, as this clearly requires additional work and may be evolving into a separate billable service.