



OPRA Comments to Ohio's Common Sense Initiative on DODD's Proposed Rules

Comments on Proposed Rules:

5123:2-3-26 Development of Licensed Beds

5123:2-3-15 Procedures to Waive Licensure Rule Requirements

Current Department of Developmental Disabilities efforts to redesign Ohio's ICF/DD system highlight the importance of the proposed rules 5123:2-3-26 (Development of Licensed Beds) and 5123:2-3-15 (Procedures to Waive Licensure Rule Requirements). Regulations governing the Departments' publically stated goals of downsizing large ICF/DDs and conversion of ICF/DD beds to home and community based waivers fall in large measure, under the parameters of these two rules. As such, it is particularly important that these rules offer a clear, consistent process to follow.

The rules as proposed seem to reflect the Department's operational preference for as much unilateral decision making authority as is possible. We have seen this in previous budget initiatives and in draft rules. Proposed rule 5123:2-3-15 allows for a permanent rule waiver and the prohibition of any appeal process. Given the historic nature of the current system redesign and the ongoing diversity of service provision within our statewide system, it is understandable that the Department wants flexibility. It is also true that the desire for unlimited decision making authority on the part of Ohio DD Department Directors is not new and has historically been met with caution or outright opposition from stakeholders, including OPRA (for obvious reasons).

If the Department wants enhanced situational flexibility in its approval/denial authority then OPRA believes it very important that both rules (5123:2-3-06 and 5123:2-3-15) include language requiring DODD to respond to each request in writing with specific rationales explaining the decision. Particularly in light of the significance and scope of the current downsizing initiative and the latitude the Department will have in its approval process, a written record outlining the thoughts behind the decision will benefit all involved.

Because broad authority has the potential to be inconsistent in application, a written rationale would aid in highlighting both consistencies and inconsistencies. In addition it can supply needed detail that will help guide a provider's proposed course of action. The goal is to build a historical record or body of work that will serve as a road map of previous decisions and help inform stakeholders and as well as future administrations. It has the added benefit of offering complete transparency.

Specific to language included in the proposed rules we have three comments:

Rule 5123:2-3-15 (Procedures to Waive Licensure Rule Requirements)

We propose that Paragraph (D) which prohibits an appeal of the decision of the Department be deleted. We believe an appeal process is fully warranted given the expanded authority of the Department.

Rule 5123:2-3-26 (Development of Licensed Residential Beds) Paragraph (D)(8)

New Section (D)(9) gives the Department wide discretion to not approve the development of licensed beds funded through a HCBS waiver program if the department determines that the development does not meet the definition of a “home and community-based setting” in accordance with the guidelines established by CMS. There is no current definition in law of a “home and community-based setting.” The CMS guidelines are only proposed regulations at this time and there is much debate about their meaning. Given that the proposed definition is in conflict with the CMS waiver technical guide this DODD proposed rule language is confusing in interpretation.

Rule 5123:2-3-26 (Development of Licensed Residential Beds) Paragraph (D)(7)

There are a number of good service models in existence today where the number of individually licensed beds within an apartment building or complex exceed the 20% threshold as provided in rule. One could readily argue that in addition to the increased administrative efficiencies inherent in these models the opportunity for integration and socialization of the individuals served is in practice increased. Before the Department finalizes this provision within the rule we would hope that these existing models are effectively reviewed by DODD for individual outcomes to determine if indeed there is a desire to prohibit future replication.

Further Question(s)

We have a question regarding how ODODD will treat those beds that are currently licensed by ODH as NHs but certified as ICFs. Under H.B. 487 as passed, all operators of these types of beds will have to be licensed by ODODD under 5123.19 by July 1, 2013. These soon to be converted beds will be considered a modification under (B)((7)(g). The conversion of these beds appear to be subject to the new CON-like test described in division (E). We would appreciate clarification as to how these beds will be treated considering they have never been subject to Department and development rule requirements before.

Also, how will the grandfathering provision work for the ODH NH/ICFs as many of these facilities have more than 8 beds. The definition in the grandfathering provision only includes licensed beds (see (D)(1)) and licensed beds means those licensed under 5123.19 (see (B)(5)). These beds will not be licensed under 5123.19 until they apply to be licensed and that licensure is approved, so how are they grandfathered in when the rule becomes effective and how will they be in the future? Please clarify.

Though not specifically germane to rule language the desired movement to downsize large ICFs when appropriate is decidedly complex and costly. The integration and coordination of effort by many parties (provider, multiple regulatory agencies, etc.) is essential if the transition is intended to be seamless and without additional financial penalty to the provider. The costs associated with the move can be substantial. Because of all the moving parts and the scale in which DODD intends to proceed, it is imperative that all stakeholders continue to have input and that resulting policies support and incentivize the system’s realignment.