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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 26, 2008

Honorable Estelle B. Richman, Secretary
Department of Public Welfare
333 Health and Welfare Building
Harrisburg, PA 17120

Re: Regulation #14-512 (IRRC #2687)
Department of Public Welfare
Individual Support Plan for Individuals with Mental Retardation

Dear Secretary Richman:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Ted B. Erickson, Chairman, Senate Public Health and Welfare Committee
Honorable Vincent J. Hughes, Minority Chairman, Senate Public Health and Welfare Committee
Honorable Frank L. Oliver, Majority Chairman, House Health and Human Services Committee
Honorable George T. Kenney, Jr., Minority Chairman, House Health and Human Services Committee

Comments of the Independent Regulatory Review Commission



Department of Public Welfare #14-512 (IRRC #2687)

Individual Support Plan for Individuals with Mental Retardation

June 26, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the April 26, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Public Welfare (Department) to respond to all comments received from us or any other source.

The proposed regulation amends four existing chapters. This first portion of our comments relates to general issues. Following this first portion, our comments will focus on specific provisions within the proposed regulation. Comments on two or more similar provisions from different chapters are combined under the same heading that identifies in bold type the specific sections of the proposed regulation that are being reviewed.

1. General – Statutory authority; Fiscal impact; Reasonableness; Feasibility; Implementation procedures; Clarity.

Single plan

Given statements by the Department in the Preamble, it is our understanding that there will be one “individual plan” (IP) for an individual who is covered by two or more of the chapters included in this proposed regulation. Two commentators indicated that this intent was unclear in the proposed regulation. We agree. Even though the proposed regulation uses the term “IP” and practically identical requirements and procedures in the four chapters, there is nothing to indicate that the activities regulated by two or more different chapters must be coordinated and unified into a single IP. This lack of direction raises the following issues and questions.

First, different types of individuals are served by the four chapters. Chapters 6400 and 6500 are limited to clients with mental retardation. Chapters 2380 and 2390, however, cover clients with different types of disabilities, including, but not limited to, mental retardation. Hence, providers and their specialists

may need to determine which clients might be covered by the different chapters. Who would determine whether an individual was covered by services of the different chapters?

Second, since the Preamble indicates that the supports coordinator manages the development of the IP, one might assume that the supports coordinator would take responsibility for arranging one IP involving two or more chapters. However, there is nothing in the proposed regulation that indicates the supports coordinator must do this.

In addition, there are provisions that place the responsibility for the IP on a program or family living specialist when there is no “assigned supports coordinator.” The “specialists” are employees of the providers and there is no indication how they would coordinate a single plan with other providers. If there is one IP for the activities or services governed by two or more of the four chapters, who is responsible for coordinating the IP with the different providers?

Third, along with a single IP, would there be one joint review meeting with the individual and all his or her different providers governed by two or more chapters? Who will be responsible for coordinating the timing and location of such a meeting if there is no assigned supports coordinator?

The Department needs to formalize the process for unifying two or more chapters into one IP. This is necessary to make the process clear to providers and their clients. The final-form regulation should set forth procedures and requirements for unifying the IP when an individual is receiving services covered by two or more chapters.

Fiscal impact

A few commentators indicated that the proposed regulation could impose additional costs on providers and others in the regulated community. One example was a concern with the high turnover rate in “supports coordinators.” This situation could be exacerbated by this proposed regulation since more will be required of specialists and other provider staffs if supports coordinators are missing or in transition.

This raises several questions. How frequently are there situations when there is no “assigned supports coordinator” or the position is in transition? What will be the fiscal impact of the proposed regulation on providers if their specialists must take the lead in developing and writing the IP?

Commentators also expressed concerns with potential cost increases related to giving IP teams control of staff-to-client ratios rather than using the minimum staff requirements in the existing regulations.

In developing the final-form regulation, the Department should include a detailed fiscal impact analysis that addresses the issues and questions noted above.

Articles IX and X of the Public Welfare Code

In their response to Question #9 of the Regulatory Analysis Form, the Department has indicated that its statutory authority for promulgating this regulation stems from Articles IX and X of the Public Welfare Code. In subsequent conversations with the Department, it is our understanding that the Department is specifically relying on 62 P.S. §§ 911 and 1021. With its submittal of the final-form regulation, the Department should clarify its statutory authority, particularly with regard to nonprofit institutions governed under Article IX.

2. Sections 2380.3, 2390.5, 6400.4, and 6500.4. Definitions. - Reasonableness; Clarity.

Document and documentation

The words “document,” “documenting” and “documentation” are used in several provisions in the proposed regulation. However, it is unclear what is entailed in “documenting.” Does this simply entail a staff person making a note or keeping a record, or does it mean gathering evidence and independent verification? The final-form regulation should either define the term or should specify the types or forms of documentation required for each provision.

Outcome

The term “outcome(s)” is used throughout the proposed regulation. It appears to be a “term of art” for mental health professionals with a definition that is somewhat different from the standard definition for this word in most dictionaries. One commentator expressed concern with this term. The final-form regulation should include a definition for the term in each of the four chapters.

Supports coordinator

The use of the term “individual” within this definition is inconsistent with how the term “individual” is defined in the existing provisions of three of the four chapters. As a result, rather than change the existing definition of “individual,” the Department should change the word “individual” in this definition to “person” in the relevant sections of the final-form regulation.

In addition, what are “case management functions?” The term is used in the definition for “supports coordinator” but it is not defined. The final-form regulation should include a definition for this term.

3. Sections 2380.33, 2390.33, and 6400.44. Program specialist; and Section 6500.43. Family living specialist. - Implementation procedures; Clarity.

These sections provide information regarding the different types of specialists and their responsibilities. We raise six issues.

First, subsections 2380.33 (b)(5), 2390.33(b)(5) ,6400.44(b)(5) and 6500.43(d)(5) all indicate that the appropriate specialist shall be responsible for providing the completed assessment and IP prior to the planning meeting, and this information shall be sent to the appropriate persons **“within 30 days following the receipt of notification of the planning meeting.”** (Emphasis added.) However, these subsections do not make clear whether the planning meeting could occur within this 30-day timeframe, and thus, the relevant information may not be received in time. Therefore, the final-form regulation should clarify that the planning meeting would occur **after** the 30-day deadline.

Second, Subsections 2380.33(b)(6)(i) and (ii); 2390.33 (b)(6)(i) and (ii); 6400.44 (b)(6)(i) and (ii); 6500.43 (d)(6)(i) and (ii) use the term “content discrepancy,” however, it is unclear how the Department would determine whether such a discrepancy exists. Therefore, the final-form regulation should include examples of when this would occur.

Third, in Subsections 2380.33(b)(8), 2390.33 (b)(8) and 6400.44 (b)(8) what are “direct support professionals”? The final-form regulation should include a definition for this term.

Fourth, it appears that Subsections 2380.33 (b)(10) and (11); 2390.33 (b)(10) and (11); 6400.44 (b)(10) and (11); 6500.43 (d)(10) and (11) require both monthly **and** quarterly documentation of the “individual’s participation and progress for IP outcomes.” (Emphasis added.) The final-form regulation should explain the need for both types of documentation, in particular, why the regulation “ensures” monthly documentation, but is “providing” quarterly documentation. Furthermore, the Department should explain why the regulation states that quarterly documentation should be submitted to “the supports coordinator, individual, and if appropriate, the individual’s parent, guardian, or advocate,” but does not include the same for monthly documentation.

Fifth, Subsections 2380.33 (c), (d) and (e); 2390.33 (c), (d) and (e); 6400.44 (c), (d) and (e); 6500.43 (e) and (f) mention individuals that do not have supports coordinators. However, the regulation does not indicate how the specialist would determine whether or not there is an assigned supports coordinator. The final-form regulation should clarify this process. In addition, has the Department considered combining these three subsections together?

Finally, Subsection (d) in 2380.33, 2390.33, and 6400.44 provides that without an assigned supports coordinator, “the program specialist shall prepare the IP using **the Department approved format.**” (Emphasis added.) However, the regulation does not describe the approved format or how to obtain copies. The final-form regulation should indicate whether it will be available online or identify the appropriate Bureau or Division to contact with questions regarding the format.

4. Sections 2380.35 and 6400.45. Staffing. - Implementation procedures; Clarity.

The proposed regulation amends both sections by adding language stating that “direct staff support” and “staffing ratios” must “be implemented as written” and “specified in the IP.” However, the existing Subsection (a) in both sections specifies minimum required ratios for staff and individuals. A commentator raised similar concerns regarding Subsection (a) and the new language in Subsections 2380.35(e) and (f). It should be noted that similar language is also included in Subsections 6400.45(d) and (e).

The Department should determine whether the minimum ratios prescribed in Subsection (a) apply to the staff ratios set up by the IPs, or whether the Department should revise Subsection (a). In addition, the final-form regulation should clarify any resulting conflicts including whether the exceptions in the original regulation at Section 2380.35(a) are allowed (i.e., “except while staff persons are attending meetings or training at the facility”).

Finally, what is the difference between the phrase “direct staff support as specified in the IP shall be implemented as written” and the other phrase “staffing ratios specified in the IP shall be implemented as written”?

5. Sections 2380.101 and 2390.91. Program activities and services. - Need; Clarity.

Originally, these sections required that “program activities” shall be provided, as specified in each IP. The proposed regulation adds that “services” must also be provided. However, the regulation does not define “services,” nor does it explain the need for including this term. In order to resolve these issues, a definition for this term should be included in the final-form regulation.

6. Sections 2380.103, 2390.95, 6400.122, and 6500.112. Development of the IP. - Implementation procedures; Clarity.

In Section 2380.103(2), the new time period for completion of the IP is “within 30 days after the individual’s admission date.” Why not use “30 individual attendance days” which is used in the existing regulation, or “60 days” or “90 days,” as proposed in other chapters? Why is the measurement of “attendance days” being dropped in the proposed regulation? What happens if the

individual is absent for a prolonged period? The final-form regulation should explain not only the need for, but also provide for possible exceptions to this deadline.

In Sections 2380.103(9), 6400.122(9) and 6500.112 (8) what type of change to the individual's needs would prompt the planning team to review an IP more frequently?

7. Sections 2380.104, 2390.97, 6400.123 and 6500.113. Review of the IP. - Implementation procedures; Clarity.

Section 2380.104(a) states that the review of each individual's progress can be completed "every 3 months, or more frequently if the individual's needs change." A commentator questioned if the review is moved up before the three month mark, will subsequent reviews be recalibrated to be three months from the earlier date or from the original date for the "three-month" review? The Department should clarify this issue in the final-form regulation.

Sections 2380.104 (c) (1), (2) and (3); 2390.97 (d)(1), (2) and (3); 6400.123(c)(1), (2) and (3); 6500.113(c)(1), (2), and (3) all provide various circumstances for when an IP shall be revised. Who is responsible for making these determinations? Is it the provider, the IP team or the Department? If there is a disagreement between a provider and a client or client's family or representative, what is the process for resolving the difference?

8. Sections 2380.106, 2390.96, 6400.125, and 6500.115. Content of the IP. - Implementation procedures; Duplication; Clarity.

The topics and their sections are not necessarily in the same order in each chapter. For example, the section on "content of the IP" comes before the section on "review" in Chapter 2390, but there is a different order in the other chapters. The Department should review the numerical order of their sections, and if appropriate, make the necessary changes.

In Sections 2380.106(a)(5), 2390.96(a)(5), 6400.125(a)(5), and 6500.115 (a)(6) the phrase "greater level of independence" is vague. It is unclear how specialists determine whether an individual had achieved a greater level. The final-form regulation should provide examples of how this is observed or measured. Also, the final-form regulation should clarify whether the term "assessment" refers to an individual's initial or periodic assessment.

In Sections 2380.106(a)(7) and (8); 6400.125(a)(7) and (8); 6500.115(a)(7) and (8), what is "maladaptive behavior?" Also, in Sections 2380.106(a)(8), 6400.125(a)(8), and 6500.115(a)(8), what are examples of "restrictive procedures"? The final-form regulation should include definitions for both of these terms.

9. Chapter 2390. Vocational Facilities. - Clarity.

Section 2390.94 requires an “initial assessment” of the individual within 20 attendance days of admission. How often will assessments be performed after the first one? Where is this specified in the regulation? Section 2390.97 requires a review of the IP every three months, but it does not specifically mention an assessment. The timing of new assessments or re-assessments should be specified in the final-form regulation.

10. Section 2390.99. Interdisciplinary team responsibility for individual written program plan. - Clarity.

This section is among the existing provisions in Chapter 2390. However, it is not included in the proposed regulation, even though its title includes the term “individual written program plan,” which is being deleted elsewhere in this chapter. The section reads:

The interdisciplinary team is responsible for ensuring that the client needs specified in the plan are met.

If this section is to be retained, should the title be revised and the term “plan” in the text be replaced with the new acronym “IP” in the final-form regulation?

11. Chapter 2390, Appendix A - Clarity.

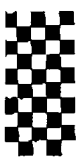
Appendix A is entitled “Vocational Facilities Licensing Inspection Instrument.” In a few places, this appendix refers to the “individual written program plan” or “IWPP.” When will this appendix be updated to refer to the IP rather than an IWPP?

12. Section 6400.127. Copies of the IP. - Clarity

What will happen to the existing language in Subsection (b), which includes the current acronym of “IPP” (individual program plan)? It appears that the proposed regulation would move this existing language to the new Subsection (d) unaltered.

13. Section 6500.43. Family living specialist. - Clarity.

In the new language in Subsection (d)(10), the words “participation progress” appear together. Should there be an “and” between these two words? The phrase “participation and progress” is used in Subsection (d)(11). The Department should review the regulation and make the appropriate changes to the final-form regulation, if necessary.



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INDEPENDENT REGULATORY REVIEW COMMISSION



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To: Ruth D. O'Brien, Senior Assistant Counsel
Jennifer Whare, Assistant Counsel
Lisa Benedetto, Secretary to Ms. O'Brien
Stephanie Schubert

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Phone: 3-2201; 3-2800; 3-2201; 7-4063
Fax: 2-0717
Date: June 26, 2008
Pages: 9

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Public Welfare's regulation #14-512 (IRRC #2687). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Lisa M. Benedetto Date: 6-26-08