

## Comments of the Independent Regulatory Review Commission



### Department of Human Services Regulation #14-538 (IRRC #3176)

### Outpatient Psychiatric Services and Psychiatric Outpatient Clinics

October 11, 2017

We submit for your consideration the following comments on the proposed rulemaking published in the August 12, 2017 *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 Human Services (Department) to respond to all comments received from us or any other source.

#### **1. Determining whether the regulation is in the public interest; Consistency with other statutes; Reasonableness; Protection of public health, safety and welfare; Clarity.**

This proposal updates the Department's existing regulations on outpatient behavioral health services and psychiatric outpatient clinics. As noted in the Regulatory Analysis Form (RAF) and the Preamble, two of the goals of the rulemaking are to allow licensed professionals to work within their scope of practice in psychiatric outpatient clinics and to increase access to medically necessary behavioral health treatment services. Commentators have expressed support for the Department's efforts to update its regulations and have offered suggestions that would assist the Department in achieving its goals.

A recurring theme in the comments relates to the availability of psychiatrists to provide services and whether other licensed mental health care practitioners are being used to the fullest extent allowed by the laws and regulations that govern their practice. For example, it has been suggested that psychologists, certified registered nurse practitioners and physician assistants be permitted to sign initial treatment plans and the annual review of those plans. Another issue raised by commentators relates to the working relationship between physicians/psychiatrists and certified registered nurse practitioners. Commentators point out that, under the Nurse Practice Act and its regulations, certified registered nurse practitioners work in collaboration with physicians and psychiatrists, not under their supervision. Commentators also ask the Department to consider the concept of integrated care, in which a facility offers both medical and behavioral health services. We agree that the public would benefit from a rulemaking that expands services to those in need. At the same time, we recognize the importance of ensuring that those providing services under these regulations are qualified to do so.

The RAF explains that the Department has been working on this proposal with the regulated community since 2013. It will be approximately five years from the time the Department started

working on this proposal until it is delivered for final consideration. We encourage the Department to continue to work with the regulated community as it develops the final-form rulemaking and to address the comments described above. In addition, the Department should ensure that the final regulation represents the most up-to-date law and best practices as it pertains to scope of practice for all licensed mental health care practitioners and the concept of integrated care.

Commentators have asked the Department to clarify certain provisions relating to children receiving behavioral health services. The proposed regulation does not specifically address situations where a child is the individual receiving services. Since this rulemaking authorizes psychiatric outpatient clinic services, MMHT services, telepsychiatry and psychiatric outpatient partial hospitalization to eligible individuals which includes both adults and children, the Department should make certain that age of consent requirements are clear to the individual, families and service providers and that they are consistent with other regulations and laws.

We also ask the Department to ensure that eligible individuals are not inadvertently excluded from the services authorized by this rulemaking. One commentator pointed out that partial hospitalization services for persons older than age 14 and up to age 18 appears to have been omitted when restating the definitions for “Adult” and “Children and youth partial hospitalization program.” The Department should explain its intent or include a definition for this population of children receiving these services.

## **CHAPTER 1153. OUTPATIENT BEHAVIORAL HEALTH SERVICES**

### **2. Section 1153.2. Definitions. – Clarity.**

*Adult* – This term is defined as “An individual 21 years of age or older.” A commentator has stated that by most standards, adults are considered those over the age of 18. What is the rationale for the age noted in the definition? Is it consistent with the law in the Commonwealth?

*Family psychotherapy, group psychotherapy and individual psychotherapy* – These definitions have been amended by deleting the minimum time required for each session. What is the rationale for deleting the time requirements from each of these definitions?

*MMHT – Mobile Mental Health Treatment* – This new definition allows one or more of the following services to be provided in an individual’s residence or approved community site: assessment; individual, group or family therapy; and medication visits. Commentators have asked several questions related to how the Department intends to implement this type of service. For example, will it include telepsychiatry? What is expected during medication visits? Does it require prior authorization? We ask the Department to provide a more detailed explanation of how it intends to implement the services that fall under this definition in the Preamble to the final-form regulation. Any clarifications to the delivery of MMHT should also be set forth in the regulation.

*Psychiatric evaluation* – This definition is being amended to allow an evaluation to be done via “real-time, two-way interactive audio-video transmission with prior written approval from the

Department.” A commentator has asked if any privacy or security standards would apply to evaluations done through audio-video transmission. We ask the Department to explain in the Preamble to the final-form regulation if any such standards would apply. If privacy or security standards apply, the regulation should address those standards. In addition, how would Department approval for an evaluation done through audio-video transmission be obtained? Would the approval be granted in writing? We recommend that the process for obtaining approval be included in the body of the final-form regulation.

### **3. Section 1153.14. Noncovered services. – Clarity; Reasonableness; Need; Implementation procedures.**

This existing section lists the types of services that are not eligible for payment. We have the following concerns with the amendments being proposed.

A commentator believes that the amendments to Paragraph (6) would preclude individuals from receiving telepsychiatry services in their homes and this would be at odds with the Department’s states goals of expanding this type of service. Has the Department considered allowing payment for this type of service?

Paragraph (9) states that psychiatric outpatient clinic services, MMHT and psychiatric partial hospitalization provided on the same day to the same individual are noncovered services. Similarly, proposed Paragraph (20) reads that MMHT provided on the same day as other home and community-based behavioral health services to the same individual are noncovered services. The Department should explain the need and rationale for these provisions.

Paragraph (21) states that MMHT services provided as a substitute for transportation to the psychiatric outpatient clinic are noncovered services. How will that be determined? The Department should clarify its intent with this provision.

### **4. Section 1153.52. Payment conditions for various services. – Clarity; Reasonableness.**

The description in the Preamble for this section states that the proposed amendments will allow a psychiatric clinic medication visit to be provided by an “advanced practice professional” licensed by the Commonwealth. That term is not used in this section, nor is it defined in Chapter 1153. However, the term is defined in Chapter 5200. If the intent of the Department is to allow an “advanced practice professional” to provide a psychiatric clinic medication visit, that term should be added to this section and the term should be defined in Chapter 1153.

Under existing Subsection (b)(2)(v), a commentator has recommended adding physician assistants and certified registered nurse practitioners to be consistent with the amended definition of “psychiatric clinic medication visit.” We agree and ask the Department to amend the final-form rulemaking as recommended.

Subsection (d) establishes the conditions and limitations for MMHT services. A commentator has suggested that this subsection be amended to reflect the criteria found in the Provider Handbook attached to the OMHSAS Bulletin 08-06-18 and to add the need for specialized transportation to the Handbook and regulations. We ask the Department to explain why

specialized transportation is not included as an eligible service in the Preamble to the final-form regulation.

## **CHAPTER 5200. PSYCHIATRIC OUTPATIENT CLININCS**

### **5. Section 5200.3. Definitions. – Clarity.**

*Assessment* – This section adds a definition for this term. The term is also used in Chapter 1153, but it is not defined in that chapter. We believe adding this definition to Chapter 1153 would improve the clarity of this proposal. In addition, a commentator has stated that the terms “assessment,” “evaluation” and “diagnostic evaluation” appear to be used interchangeably. They recommend the inclusion of one consistent definition throughout the chapters. If these terms are used interchangeably, we agree with the commentator and ask the Department to use the defined term of “assessment” throughout the rulemaking. If these terms have distinct meanings, the definitions of “evaluation” and “diagnostic evaluation” should be defined in the regulation.

*LPHA—Licensed practitioner of the healing arts* – This term is included in the Definitions section of proposed Chapter 5200, however it does not appear in the actual text of that chapter. We note that in §§5200.42 (a)(1) and (b)(1) the term “licensed practitioner” is used. Should the term “LPHA” be used instead of “licensed practitioner?” If so, the Department should use the term consistently throughout the regulation or delete it and define “licensed practitioner” in the regulation.

*Telepsychiatry* – In the Preamble, the Department explains it has been demonstrated that individuals receiving services can be reliably assessed, diagnosed and treated with pharmacology in outpatient clinics through telepsychiatry. A commentator has noted that providing telepsychiatry to consumers in their homes is cost effective and reliable. They believe telepsychiatry is better suited to meet the needs of consumers in rural areas than MMHT services. As the final-form rulemaking is being developed, we ask the Department to consider expanding the use of telepsychiatry to provide greater access to individuals in a manner that is supported by the most recent scientific data or literature on this topic.

### **6. Section 5200.22. Staffing pattern. – Clarity; Implementation procedures.**

Commentators have raised several questions related to the clarity of Subsections (a) and (b). We ask the Department to address the following questions. First, are there any qualifications to be considered “treatment staff?” Second, what is meant by “psychiatric time,” and would qualified certified registered nurse practitioners and physicians assistants be able to provide it? Third, are there qualifications associated with meeting the standard of “specializing in behavioral health?”

In addition, we question how the Department will implement Subsection (b) and the requirement to obtain “prior written approval from the Department” for the use of telepsychiatry. What criteria will the Department use to determine if telepsychiatry is appropriate? How would outpatient psychiatric clinics obtain written approval from the Department? The Department should include these details in the final-form regulation.

## **7. Miscellaneous**

Question #29 of the RAF submitted with the proposed rulemaking indicates that the expected date of delivery for the final-form regulation will be October of 2017. When the final-form regulation is delivered, we ask the Department to update Question 29 of the RAF to reflect the date of delivery.