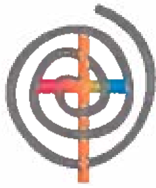

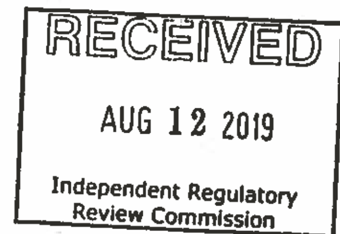

8/12/2019

Via electronic mail submission at: irrc@irrc.state.pa.us and cmalecki@pa.gov

RE: No. 3209 Department of Human Services #14-546: Intensive Behavioral Health Services

To: IRRC and Ms. Malecki

Access Services, Inc. appreciates the opportunity to comment on 3209 Department of Human Services #14-546: Intensive Behavioral Health Services final form regulations. We support the regulations, and would ask the IRRC to consider voting to approve the passage. We appreciate the Department's work on these regulations to improve our system and develop efforts to improve quality, and streamline some aspects. We appreciate how these regulations will now provide consistency across the Commonwealth for licensing and expectations of providers. We also appreciate that these are supplanting the bulletins in the system under which we have previously operated.

However, we have identified a number of questions and concerns that we hope can be resolved through either legal review following the IRRC approval, or by clarification documents and interpretations through a regulatory compliance guide (for example), once regulations have been promulgated. We wanted to make sure we submit comments on these areas of concern for IRRC consideration, and to have as a public document on record.

Thank you for considering the following comments and questions.

Regulatory Analysis Form/Summary of Feedback:

We would like to commend the department for the inclusion of several areas proposed that we feel will benefit the service recipients in the systems, and providers of those services. By developing codified minimum expectations concerning health and safety we can help to further ensure the consistently safe and effective provision of services throughout the state and system. Further, by developing a license mechanism that is separate from operation of an outpatient clinic, as well as clear standards that consolidate the previous bulletins, we believe that the access to a wider array of impactful holistic approaches to treatment. We agree and expect that as the Department stated in the Preamble, that all bulletins will be obsoleted, and we expect that no further bulletins be issued moving forward.

Funding Concerns:

We have serious concerns about the proposed regulations and the impact they will have on service delivery, staffing, and program budgets. It was stated previously that the changes proposed in the new IBHS regulations will be "cost neutral"; however, the unfunded mandates proposed as in these comments will create additional administrative, supervision and staffing costs.

Based on the final form regulations several providers indicated that most likely there will need to be a shift from contracting with independent contractors, to hiring agency staff due to the number of factors. In particular are many areas that the regulations require a more directive approach and requirements, which are not able to be controlled when contracting with independent contractors based on Department of Labor requirements. Staff now being employed by the agency would be a dramatic shift in the system and must be fully evaluated as to the financial impact to agencies which currently utilize contractors which would be significant.

In Preamble "Finally, providers will benefit from the proposed regulations because the regulations clarify that staff do not have to repeat training requirements when working for more than one agency or changing employment."

The assertion that this will reduce training requirements and as such costs associated with those requirements is inaccurate in our opinion. For two decades funding for these types of programs have not kept up with cost of living increases which has resulted in more restricted access to services as providers discontinue programs. We fully support the idea of quality, higher qualifications for staff and increased supervision. The concern is that these requirements do not equate to an increase in funding, which will over time result in less access to services for those with the highest need. The Department also did not identify in response the IRRC and commentators, what costs can be expected, only that they should be taken in to account in rate setting.

Though it is possible for an agency to decide to not provide provider-specific training if a staff or contractor have met the training criteria, we believe most agencies will still be providing their own provider-specific training. With a desire for best practices to be implemented, as well as to help establish the provision of services within the context of the organizational approach and culture for consistency, the provision of training regardless of previous training by another agency is still an expectation our organization would employ. We would not realize any cost savings based on the proposed change, and we feel that for the clinical and service-provision integrity that training by Access Services would still be necessary. We expect most other agencies will follow a similar approach.

In the Preamble response to the IRRC and commentators the Department does acknowledge at least that the potential financial impact is really not able to be determined because of a variety of factors, but that cost increases will be taken in to "consideration when the Department determines future BH-MCO capitation rates." We must stress that this is a critical aspect of our concern and future increases **must be addressed sufficiently in capitation rates for increases that providers will incur.** The following include a breakdown of specific concerns of financial impact.

Supervision requirements:

- Onsite quarterly supervision requirement for all IBHS staff in addition to regular supervision hours – this can be significant depending on the number of staff
- Unable to bill for supervision under Individual BSC but it is listed as a duty under ABA. If it's listed as a duty under a particular role does this make it a billable service?
- Additional supervision requirements mean hiring additional staff. Since supervision is not funded, this is a significant added expense for providers
- Travel expenses for onsite supervision (time and mileage)
- Based on our estimation we believe that under the new supervision requirements for TSS alone, for our agency alone it will result in a 300% increase in the number of hours per week. This would account for about a minimum of $35,000 increase.

Staff qualification requirements:

- BCBA's are paid significantly more in other industries than what will be IBHS. This will exacerbate an already difficult recruiting environment and may make wait times for services higher. To retain this level of staff could be a significant financial cost for providers.

Quality Requirements:

All of these proposed requirements are time intensive with no funding attached. This will require hiring additional administrative staff in order to be in compliance. We agree and support quality initiatives and already have quality improvement plans and indicators.

- Annual reporting – both the internal and what needs to be given to the public
- Level of auditing – frequency of record reviews
- Community resource list to be maintained and updated annually

- Annual licensing requirements

Other areas identified that will add cost:

- Initial program description development

How does an IBHS agency obtain payment for the assessment if it is unfunded:

- It is unclear in the regulations as to how a work order or assessment are to be paid for under the various service provisions

Concerns about definition of "staff" added to the final form regulations:

Currently, many organizations engage independent contractors to provide services. Access Services is one such provider. From a Department of Labor (DOL) standpoint under which we as the contracting agency must treat the contractors not as staff, but as contractors, the solution provided by the Department indicated below is problematic. In the final form regulations, the Department responded to requests for clarification that the services were able to be provided by agency employed staff or contractors or independent contractors. We appreciate the Department clarifying that each of those may provide services. Independent contractors, especially at a clinical level, are a significant resource statewide to Providers operating BHRS services. Without these contractors, Providers may find that the labor market will be further diminished, increase costs, and not provide the needed skilled workforce to meet the high demand. However, the response provided to clarify this creates another problem with potential unintended consequences placing providers in a very difficult position. This is what is now in the final form regulation under definitions.

"*Staff*—Any individual, including an independent contractor or consultant, who works for an IBHS agency."

This now means that anywhere in the regulations it says "staff," that this will now apply which comingles staff and independent contractors. This creates significant issues with the differentiation between how we are to handle staff verses an independent contractor under DOL, as many aspects of these regulations are very prescriptive and directive. We may include expectation in independent contractors' contracts, but we are not able to direct them and make certain requirements. We are unable to direct independent contractors the way we can agency staff. This will need to be addressed in perhaps the future legal review and clarified to separate them in order to allow agencies to comply with DOL requirements on handling how staff versus independent contractors are handled.

Limitation of access to certain services for children diagnosed with Autism:

5240.71 Staff qualifications for individual services (b) individuals who provide behavior consultation services to children diagnosed with ASD shall meet the qualifications for an individual who provides behavior analytic services or behaviors consultation -ABA services in 5240.81 (d) or (e) (relating to staff qualifications for ABA services)

This will create access issues for children diagnosed with ASD (and who are not receiving ABA services), needing to have clinicians who have ABA training or certificates will only increase what we need to provide for them or pay to obtain additional training. Providers are extremely concerned that the limitation will create a significant access issue for many diagnosed with ASD who need treatment, but not ABA treatment, especially in rural areas. There must be a remedy that will address this limitation because it will have major impact.

It can also be inferred that the creation of separate services was also an effort to insure the high fidelity of ABA services as well as a settlement response to the *Sonny O* litigation. It is understood that the need for the strict adherence to educational and experiential requirements for the delivery of ABA for children diagnosed with ASD, but why would a Behavior Specialist who is providing another intervention or service in individual services be required to have the ABA qualifications? There is a specific section of the regulation that outlines the qualifications for those identified staff delivering ABA services. Additionally, it is accepted, in accordance with Act 62, that a license is needed to serve

individuals with ASD; it is not necessary for them to be trained as, or under, BCBAs because they are not delivering ABA in Individual Services.
It will be very important for the state to evaluate access to services for kids with ASD. For example, a child with ADHD will be able to access individual services readily, as there are many professionals indicated as able to treat this individual. However, if a child with ASD tries to access the very same services they will not be able to readily access these services because their clinician will need education and experience way beyond the clinician who is serving the client with ADHD when not providing ABA services. This practice could be construed as discriminatory on restricting access to individual services (Non ABA) to consumers with Autism.

We feel that the Department's response did not address the concerns of IRRC and 21 commentators that qualifications would create access issues and cause delays.

Area: Staffing:

Areas of concerns:

- 5340.11 Completing and documenting a clinical record review for quality of the IBHS provided and compliance with this chapter and documenting the outcomes of the review quarterly.
  - Seems this is different than the quality improvement (5240.61) section that includes individual record reviews annually for quality, timeliness, and appropriateness, family satisfaction, evaluation of compliance with the service description etc.
  - This states quarterly clinical record review that would require resources and time. Are all the files to be reviewed? There are no details of specifics listed. Quarterly clinical record reviews of all the files is a full-time job.

- (e) IBHS agency shall employ sufficient number of qualified staff to comply with the administrative oversight, clinical supervision and monitoring requirements of this chapter
  - Does this language mean that IBHS agencies have to 'employ' additional staff to meet the requirements?
  - Increase in cost to bring all independent contractors on as employees? Increase cost in recruitment? What happens if we don't have appropriate number of staff?
  - If contractors become employees- the addition of these for Human Resources will increase their workload and will require additional staff, cost of Relias (training program), and possible devices for electronic health records? Currently difficulty exists on what to equipment or support to provide to TSS to complete their notes in Evolv (record keeping program).

- (F) IBHS agency shall employ a sufficient number of qualified staff to provide the maximum number of services hours identified in the written order and the ITP for each child
  - Many providers already face a difficult time hiring staff/clinicians. What happens if we are unable to? We tell families that staffing is not guaranteed; even if they have staff, they call out sick, they leave without notice. What does this being in regulations mean and what are the consequences (financial and otherwise) if we can't staff all the hours or have a lapse in services?

- 5240.71 (d) Individuals who provide BHT (TSS) services shall meet one of the following" (1) Have a cert as a BCaBA (2) have a certification as an RBT (3) have a certification as a BCAT (4) have behavior cert or behavior analysis cert from an organization that is accredited. (5) High school diploma and 40-hour training covering the RBT task list – certification (6) minimum of 2 years experiences.
  - Current TSS have bachelor's degrees. This is referring to individual services, the first several listed are qualifications of those who typically work with ABA services. The regulations are focusing on ABA. Will we need to spend additional funds to train the TSS for RBT certification or other behavior certification training?

- 5340.81 Staff qualifications for ABA services
  - We currently provide ABA services in the Southeast and plan to do so in the other regions, which are more rural and may prove difficult to find qualified staff.

- Hiring of staff/contactors; similar to those for individuals services but would need ABA certifications, 12 college credits in ABA or 40 hours training related to ABA.
- BHT-ABA- almost identical to BHT in individual services.

- 5240.81 Supervision of staff who provide ABA services. Person who meets the qualifications of clinical director will provide supervision to those who provide Behavior Analytic Services (BAS) and Behavior consolation-ABA Services one hour face to face per month. If that person supervises a BHT-ABA, they will need an additional hour per month. 30 minutes observation every 6 months.
  - May add increased requirement of an additional hour if they supervise BHT-ABA
  - Also added for supervision onsite although it may be included in their current service delivery.

- Assistant BC services: one hour two times per month. If they have never provided this before, 3 hours of onsite supervision.
  - This is 30 minutes of onsite every 6 months.
  - Supervision of BHT-ABA. Will need to be an additional staff/contractor with the qualifications for ABA. The time requirements are the same as BHT individual services.

- 5240.11 Staff Requirements (2) Ensuring that staff schedules meet the needs of the children, youth or young adults serves and accommodate the parents/legal guardians or care givers schedule
  - Language change consideration:
    - Insert "typical schedule" as scheduled change daily based upon operational values in a given day
    - Insert "attempts to accommodate" it is unreasonable to schedule every child's visit around every parents schedule

- 5240.73 Training requirements for staff who provide individual services
  - Department Approval of Training

    Clarification is needed:
    - Will there be a list of already approved trainings?
    - Will the training approval process be fully functional at the effective dates of the regulations?
    - What is the process for training curriculum submission for approval?
    - What is the expected time frame for review and approval?
    - During the review period what are the options for an IBHS agency to bring in new staff?
    - Are electronic platform program such as Relias, accepted as an approved training?
    - Will CEU's be accepted as training credit?
    - How is the Department equating the new training requirements as being neutral in cost to an IBHS agency?
    - Will the Department create a mandatory initial training curriculum?
    - Will the MCO accept these training plans?

- **Additional concern about access to services based on new staff qualifications:**

  - On page 18 of the Preamble the IRRC and 21 commentators note concerns that changes to qualifications may limit access to services, delay services, and/or create further difficulty in hiring and retaining qualified staff. In the Department response they indicate that they disagree that these concerns will be an issue and list some reasons they feel this will not be an issue.
    - We remain very concerned that these changes to qualifications may impact any or all of the above stated concerns by the IRRC and 21 commentators. In the current environment it is often difficult to find, hire and retain qualified staff already, and the field in general faces a shortage which has already created access issues.
    - Our hope is that actions by the Department such as considerations of increases on rates will be one factor in attempting to address concerns on hiring and retaining qualified staff, many of which will require higher compensation.

- In addition, we expect that the Department will work with providers when/if access issues occur, and/or delays in services occur, and not take negative licensing or other such actions towards providers when factors will be out of their control in many ways.

Area: Records:

5240.41 Individual records

- "Reviewed for quality by the Administrative Director, Clinical Director or designated quality improvement staff within 6 months of the initial entry. After initial review, subsequent reviews may be limited to new additions to the record and must occur at least annually"
    - Clarification: Can reviews be a sample size as indicated elsewhere in the regulations, as it may not be realistic for larger organizations? We recommend that the Department clarifies that a sample size is acceptable.

Area: Quality Improvement:

5240.61

- Clarification of what needs to be shared with the public related to the annual quality reports. In addition, any data to be made public must allow for providers to establish the context of data so it is not left up to interpretation to be potentially misconstrued positively or negatively.

Area: 5240.72 Supervision:

Access Services currently has approximately 77 TSS across three locations. The cost for supervision will be a significant financial undertaking, with calculations showing the cost to the provider agency increasing close to 300% based on our calculations. Currently for clinicians the cost for the our agency alone about over $35,000 per year. If this is extrapolated out to the other 380 providers in the system that the Department identified in the Preamble, this could surpass $13,300,000 in impact statewide as estimated.

5240.72 Supervision of staff who provide individual services:

While we understand and agree the importance of training to ensure skill fidelity, the standards will create concerns and additional costs related to time in supervision including the following:

- Clarification
    - What requirements of the regulations can be met through the group supervision process?
    - Onsite Supervision of a mobile therapist; having an observer in an individual session could be crossing an ethical boundary in addition to potential for client reaction
    - Does a platform such as "Go to Meeting" web meeting application qualify as a secure transmission?

Area: Applied Behavioral Analysis:

5240.81 Staff Qualifications for ABA services:

Clarification:

- Can a Clinical Director carry a caseload?
- Have a high School Diploma or the equivalent and have completed a 40-hour RBT Task List as evidenced by a certification that includes the names of the responsible trainer who is a certified BCBA or BCaBA
- Does the staff need to have a certificate that they completed the 40 Hour Task List, as the regulations stipulate "certification" or do they have to pass the RBT test?

Area: Group Services:

5240.92 Supervision of staff who provide group services:

Clarification:

- What requirements of the regulations can be met through the group supervision process?

Conclusion:

Access Services supports the passage of these regulations and appreciates the Department addressing some of our previously submitted comments on concerns and concerns from draft regulations. We will appreciate your consideration of our comments to these areas of concern. Thank you.

Sincerely,

M. Christopher Tabakin, MS

M. Christopher Tabakin, MS, Director of Quality and Compliance on behalf of Whitney Smith, Vice President of Children and Family Services, and Audra Nihart, MA LBS, Director of BHRS and Access Services Executive Management Team