



DISABILITY RIGHTS PENNSYLVANIA

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IBHS Regulation #3209

COMMENTS OF DISABILITY RIGHTS PENNSYLVANIA

I am an attorney at Disability Rights Pennsylvania ("DRP"), the statewide organization designated by the Commonwealth to provide protection and advocacy services to Pennsylvania's citizens with disabilities. I am counsel to the plaintiff class in *Sonny O. v. Dallas*, a class action brought in 2014 to ensure the provision of Applied Behavioral Analysis ("ABA") to children with Autism Spectrum Disorder. I write to express the support of DRP for the IBHS regulation #3209.

One of the key issues that prompted the *Sonny O.* litigation was the lack of any requirements regarding the qualifications of professionals and paraprofessionals who claimed to be providing the specific and vital, evidence-based service of ABA. One provision of the approved class action settlement was that DHS promulgate regulations to specify appropriate qualifications, training and supervision of such practitioners. While the proposed IBHS regulations cover a much broader scope, one part of these final proposed regulations contains the provisions required by the *Sonny O.* lawsuit.

The new qualifications should greatly enhance the quality of care received by children. Among many other requirements, the proposed regulations require that all clinical directors of ABA programs will, by July 2022, be certified by the Behavior Analyst Certification Board or its equivalent – a certification that requires about 250 hours of ABA training - or be a licensed psychologist with ABA-specific training and have several years of experience in providing ABA. (While requirements for clinical directors prior to July 2022 are somewhat less stringent, there are currently no requirements for ABA training for clinical directors at all.)

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The proposed regulations also require that professional staff providing ABA have *significant* training in ABA and be supervised by someone meeting the qualifications of a clinical director. These are critical, minimal, components of ensuring quality of services. Therefore, Disability Rights Pennsylvania strongly supports the promulgation of these regulations.

Rachel Mann

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**TESTIMONY OF MAX ASSOCIATION
ON REGULATION 14-546
“INTENSIVE BEHAVIORAL HEALTH SERVICES”
AUGUST 15, 2019**

Good morning Mr. Chairman and members of the Commission. My name is Diane Conway and I am the Executive Director of MAX Association, an association of human service providers in Southeast Pennsylvania. So my comments are on behalf of those members organizations who have intensive behavioral health services.

This regulation revolutionizes services for children in need of intensive behavioral health services. It fundamentally changes the way these services are offered, delivered and monitored. These regulations are a catalyst in raising the bar so children receive stellar services. And isn't that what these children deserve?

MAX recognizes the Independent Regulatory Review Commission's role in this process is to approve or not approve a regulation based on whether the commission believes it is in the best interest of the citizens of Pennsylvania. With that in mind, MAX urges the Commission to approve the IBHS regulation today.

However, MAX urges the Commission to receive some clarifications from the Department and others that remain in the approval process of this regulation.

MAX has already submitted written comments to the Commission, so today's testimony is to deliver our broad concerns and need for clarifications.

At face value, the IBHS regulation appears to be an excellent vehicle to raise the standard of services for children in need of IBHS. First of all, MAX applauds the Department for moving forward to a comprehensive regulation instead of a collection of bulletins to mandate and monitor these services. . This approach, MAX believes, will lead to clearer, more consistent statewide service delivery and licensing expectations

In general, providers philosophically agree with the principles of the regulation which include increased staffing, increased and intensified supervision, improved, more rigid qualifications for staff delivering services, and more expanded and heightened staff training. Who wouldn't support all these improvements that raise the bar for these intensive behavioral health services?

There is, however, the logistical side of service provision – in particular how to pay for more staff, more supervision, more training and higher qualifications. MAX agrees with the IRRC and the 21 other commentators who questioned the financial feasibility of fully implementing these changes with no additional funding.

In response to these previous comments, the Department indicated in the Preamble "any increased costs will be taken into consideration when the Department determines future BH-MCO capitation rates". MAX urges the Commission to strongly encourage the Department to raise the capitation rates to cover anticipated increased costs. Furthermore, MAX advocates that these rate increases be directly passed onto the organizations providing these services.

MAX also has a major concern with how the Department is defining "staff".

The Department defines staff as "Any individual, including an independent contractor or consultant who works for an IBHS agency."

Currently, many service providers use independent contractors for IBHS. These organizations, as employers, must adhere to the Department of Labor's mandates and definitions for independent contractors. MAX urges the Commission to request a clarification that complies with both the DHS and DOL conflicting mandates and which gives providers clear guidance on how to comply with both simultaneously

Overall, MAX has a concern that this regulation may have an unintended consequence of limiting access to this service. Specifically, two key factors will primarily determine limitations for accessing this service in the future. The first is funding that covers the complete costs of providing this service, especially taking into consideration the additional anticipated cost increases. Without these increased rates, providers will be forced to reduce or even eliminate their capacity to provide intensive behavioral health services any longer. The other factor that will limit access is that this regulation in section 5240.7 requires certain increased qualifications for staff working with all children on the autism spectrum. Autism, being a spectrum disorder, means that everyone is very different and has very different treatment needs. Therefore, requiring such intense staff qualifications for those on the spectrum who do not need Applied Behavioral Analysis (ABA) may limit access to services for them. MAX questions the Department's response to this issue and urges the Commission to request that the Department revisit how they will implement this provision of the regulation without limiting access for all children on the autism spectrum.

Finally, MAX members are excited about the evolution this regulation will cause in IBHS for children. It is a fundamental shift which will raise the bar and dramatically increase the quality of services. This regulation represents a redesign of services and necessary accompanying organizational infrastructure rather than "doing business the way we always have." In some

cases, this may mean a reorganization for providers which will require an adequate transition period to "ramp up" and do it right including hiring and training additional staff. MAX urges the Commission to comment to the Department about recognition of the need for an extended transition period.

Again, thank you for the opportunity to provide testimony on the IBHS final form regulation.

Sincerely,

Diane Conway, Ph.D.
Executive Director

3204

Good morning Mr. Chairman and Members of the Commission. My name is Audra Nihart, and I am the Director of BHRS for Access Services. Access is a human service provider in southeastern PA. For over 40 years we have provided a variety of services to our communities, BHRS being one of those services. As a representative of the agency I would like to thank you for the opportunity to comment on the Department of Human Services Intensive Behavioral Health Services final form regulations.

Overall we support the proposed regulations. We appreciate the Department's efforts to create improvement to the system, and we look forward to the increased consistency and quality as the old bulletins are replaced by more current well-defined practice. Though we support the regulations and the Department's intentions, we would like to offer comment on a few areas of concern which we hope will be addressed by the Department moving forward.

First, we have serious concerns about the proposed regulations impact financially. In the Preamble response to the IRRC and commentators, the Department acknowledged the potential financial impact. They then noted cost increases will be taken in to "consideration when the Department determines future BH-MCO capitation rates." We must stress that this is critical for future increases and must be addressed sufficiently. Increases in staff qualification, supervision and training requirements will be unsustainable without increased financial resources.

On page 18 of the Preamble, the IRRC and 21 commentators note concerns that the 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. We remain very concerned that these changes will have a negative impact to access and costs, especially in the current environment where it is often difficult to find, hire and retain qualified staff. The field in general faces a shortage and we are concerned this may increase access issues and associated costs to fill positions. Our expectation is that the Department will take this in to account for rates moving forward for associated cost increases. In addition, we expect that the Department will work with providers if access issues occur, or delays in services occur, and not take any negative actions towards providers when factors are out of their control.

Based on the final form regulations several providers indicated they may need to shift from contracting with independent contractors, to hiring as agency staff. This is because many areas of the regulations require a more directive approach, are prescriptive and increase requirements. These are not able to be controlled with independent contractors due to Department of Labor requirements. A conversion of independent contractors to staff will have a significant fiscal impact and costs associated with this must be taken in to account by the Department.

In Preamble, the Department states that: "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." We do not believe this will reduce costs. Though it is possible for an agency to decide to not complete provider-specific training if a staff or contractor has met the training criteria, we believe most agencies will still be providing their own training. We desire for best practices to be implemented within our organization, as well as provision of services within the context of the organizational approach, culture and for clinical consistency and integrity. We expect most other agencies will follow a similar approach and still be providing training.

Also increasing costs are increases to supervision requirements, qualifications and other administrative requirements, such as quality plan expectations, among others. For example, though we have our own quality planning process in place, we will need to make changes in process and monitoring to comply with these regulatory expectations which will increase costs.

A second topic we are concerned about is the definition of "staff" added to the final form regulations. Access Services currently utilizes independent contractors. Under our Department of Labor requirements we are unable to treat

contractors the same as employees. In the final form regulations the Department developed a definition which will have unintended consequences and places providers in a very difficult position. The definition reads:

"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," this will 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. This will need to be addressed in perhaps legal review to clarify before promulgation to ensure staff and contractors are separate.

Lastly, we are very concerned that the Department requiring certain qualifications for individual services provided to children diagnosed with Autism, will create major access issues, specifically for children diagnosed with Autism who may not need Applied Behavior Analysis (ABA) services. We are concerned that for many diagnosed with Autism who need treatment, but not ABA treatment, especially in rural areas, they will be negatively impacted by the new requirements for ABA certification for even provision of individual services and not ABA. This becomes an equity issue. There must be a remedy that will address this limitation because it will have major impact to those needing services, but not ABA.

We appreciate the great strides these regulations will help the system make, however we urge the Department to take these, and other comments submitted, in to account when implementing the regulations.

On behalf the staff, contractors, and management team at Access Services, thank you for consideration of our comments and the opportunity to provide them.