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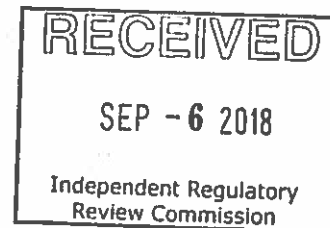

Good Afternoon,

Attached are comments from Disability Rights Pennsylvania on the proposed Intensive Behavioral Health Services regulations.

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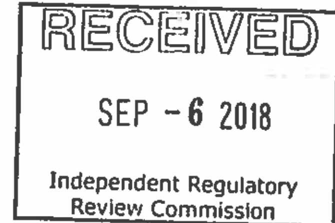

VIA EMAIL

September 4, 2018

Tara Pride
Office of Mental Health and Substance Abuse Services
Bureau of Policy, Planning and Program Development
303 Walnut Street
Harrisburg, Pennsylvania 17105

RE: Intensive Behavioral Health Services Regulations

Disability Rights Pennsylvania (DRP) is the organization designated by the Commonwealth under federal law to protect the rights of and advocate for Pennsylvanians with disabilities. In addition, DRP is legal counsel to the class members in the class action lawsuit *Sonny O. v. Miller*, Civil Action No. 1:14-cv-01110. The class consists of all children (under age 21) who, now or in the future, are receiving Medical Assistance (MA), are diagnosed with autism spectrum disorder (ASD), and request Applied Behavioral Analysis (ABA) from the Commonwealth's Department of Human Services (DHS)'s behavioral health system.

The goal of *Sonny O.* was, and still is, to enable children with ASD to access ABA, which is the standard of care for Autism treatment. With some important qualifications, we support the passage of these regulations as a major step forward in reaching that goal.

Comments Related to the Qualifications Requirements of *Sonny O.*:

As part of the settlement of *Sonny O.*, DHS agreed to promulgate regulations, with input from experts, setting forth the qualifications, including training, experience, and supervision, necessary for practitioners to provide ABA services to children with Autism. The settlement set forth some minimal interim qualifications pending the promulgation of regulations, and also required DHS to track access to ABA providers. As class counsel, we have been closely following these access and quality issues and have concluded that the current minimal interim standards are woefully inadequate with respect to quality, and that, even using only minimal standards, capacity is seriously lacking, with several counties frequently having one or no ABA providers. Thus, there is a tension between quality and capacity. Yet we must do the best we can for the Commonwealth's children by promulgating regulations that require ABA practitioners to have the skills necessary to actually do ABA, without making it impossible for agencies to participate.

Clinical Director Qualifications - §5240.81(B)

The most significant change that we feel is absolutely necessary relates to §5240.81(B), which relates to the qualifications for Clinical Directors of ABA programs. While DHS heard input from experts in the process of drafting these proposed regulations, it did not always follow their advice. Many medical and behavioral experts in the field are of the opinion that only Board Certified Behavior Analysts (BCBAs) should be permitted to provide Behavior Specialist Analyst (BSA) services. While we agree that would be ideal, given the huge capacity problems throughout the Commonwealth, we are deeply concerned that too many children would be prevented from receiving medically necessary ABA.

At the same time, we believe it would be reckless to allow lesser qualified professionals to provide ABA without at least the supervision of a BCBA. These regulations would require a Clinical Director to become Board Certified within three years of taking on the position, but that would allow agencies to simply hire new clinical directors every three years, thwarting

the intent of the regulations and the *Sonny O.* settlement. In addition, one needs supervision by a BCBA to become Board Certified, and there is nobody to supervise the Clinical Director. **Therefore, we believe these regulations must require all Clinical Directors of agencies that provide ABA to be BCBAs by a date certain**, such as eighteen months from enactment of the regulations. As class counsel, we would challenge anything short of a date certain as a violation of the settlement agreement.

Another reason to require all Clinical Directors to be BCBAs is that §5240.81 requires all paraprofessionals providing ABA services to be Registered Behavior Technicians (RBTs) within eighteen months of enactment of the regulations. But in order to maintain certification as an RBT, supervision by a BCBA or Board Certified Assistant Behavior Analyst (BCABA) is required. **So, it is critical for every agency to have BCBAs on staff even if not every Behavior Specialist Analyst has that qualification.**

<u>PA Certification Board</u> – §5240.81

Moreover, references to the PA Certification Board throughout the regulations as an alternative way to meet qualifications or training requirements for the provision of ABA are premature. As far as we know (and we have asked DHS counsel) the PA Certification Board does not yet have any certification related to ABA and has not yet developed any standards or training requirements. The regulations do not define who is on the board, what qualifications these individuals have to determine what courses/credentials are required to render an ABA practitioner qualified to practice in the Commonwealth. **If the regulations are to use this PA Board certification as an acceptable credential then it must be qualified in some way, such as – "if the certification standards are equal to or higher than those otherwise specified in these regulations", or "are approved by the Behavior Analyst Certification Board or similarly qualified organization."** Without that, this certification could undermine the purpose of the regulations and of *Sonny O.*

Training - §5240.83

Section 5240.83 includes annual training requirements; however, the annual requirements do not apply to everyone. BSAs who are not licensed as Behavior Specialists are not included. If staff are exempt because they have annual ABA training requirements from another certifying or licensing entity, that is fine, but it is not clear to us whether that is the case or not. For example, what annual training in ABA is required for a licensed social worker who qualifies as a BSA under these regulations as a result of having had one year's experience working under the supervision of a BCBA? All staff should have annual ABA training requirements from somewhere. For BHT-ABA, one of the proposed exceptions to the training requirements is certification from the Pennsylvania Certification Board. Yet, as we mentioned earlier, if such certification does not yet exist, we have no way of knowing whether it will have acceptable training requirements. **The regulation should state that any ABA staff must have the initial and annual training required in this section, but that ABA training taken to meet the requirements of their licenses or certifications will count towards that training.**

Other Provisions Related to ABA

Additional definitions needed – §1155.2

In the definition section, **skill deficits** (as used for example in §5240.87), **should be defined,** consistent with DHS's OMHSAS Bulletin 17-02, to clarify that acquisition of communication skills and skills necessary for age appropriate activities of daily living (e.g., toileting, dressing, etc...) are appropriate goals of ABA.

Community, for ABA purposes, should be defined to include providers' offices and clinics. Some aspects of ABA may be best accomplished in an office and then transferred to the home, school or other setting. Outpatient mental health therapy is provided in clinics and providers' offices outside of these regulations, but outpatient ABA is not due to the licensing requirements for mental health services. Virtually all other therapies - PT, OT, speech - are permitted to be done in offices as

well. ABA should not be treated differently. If those services are not part of these regulations, then DHS should be required to permit office and clinic services through other means.

<u>Scope of ABA -</u> § 5240.86(c)

While the concept of maximizing age appropriate functioning is set forth in the definition of "Individual Services", it does not appear anywhere in relation to ABA services. One way to address that would be to **add the phrase, "to maximize age appropriate functioning" at the end of § 5240.86 (c),** which lists the requirements for ITP's.

<u>BHT-ABA Service Limitations -</u> § 5240.87(c)

We are also very concerned about the language in § 5240.87(c) limiting the services a BHT-ABA can provide in the process of implementing the ITP. The BHT-ABA is supposed to implement the specific protocols developed by the BSA. Those protocols may not be covered by the list provided in this regulation. Also, we do not know what "problem solving skill development to address skill deficits" (item 5) means. Skill deficits should be addressed by specific ABA protocols. And finally, item 6, "referrals to other necessary services and supports" is not something the typical BHT would likely know enough about. While we are not opposed to BHTs providing this information if they happen to have it, this should not take the place of a case manager who would hopefully be expected to know the various service systems and entitlements for children. **The list should be amended to include "the specific protocols identified in the ITP".**

<u>Group Services</u> - §§ 5240.101 - 5240.108

Group services provider qualifications and service provisions should be amended or clarified to ensure that ABA providers can provide group activities such as social skill building programs.

<u>ABA provider enrollment</u> - § 1155.31

Section 1155.31(a) states that "except as provided in subsection (b)" payment will be made to licensed IBHS agencies. Subsection (b) provides

that payment will be made to an agency that holds an unexpired mental health license. We assume this means even if they don't yet have an IBHS license to avoid a gap in services– although this is unclear. What does this mean for the new ABA providers that do not have mental health licenses? Will there be a gap between the effective date of the regulations and the ability to obtain an IBHS license? This would create a serious problem for our clients. **The regulation should say payment will be made to MA currently enrolled ABA providers until________.**

Provisions Related to All IBHS Services

Diagnoses required - § 1155.32

Title XIX of the Social Security Act does not permit the denial of a medically necessary service based on a diagnosis. For clarity's sake, the words "behavioral health disorder diagnosis listed in the most recent edition of the DSM or ICD" found in § 1155.32(1)(iii) should be changed to simply read "diagnosis listed in the most recent edition of the DSM or ICD." The current language "behavioral health disorder diagnosis" could be read to be more narrow than the diagnoses listed in the DSM or ICD. It might be read, for example, to exclude Intellectual Disability, a condition for which ABA or another treatment covered by these regulations might be medically necessary, thereby violating federal law.

Safety and Restrictive Procedures - § 5240.6

DRP is pleased that there is a section on restrictive procedures. Unfortunately, there are times when such procedures are necessary to keep children and others safe, and strict provisions, including proper training for their use, are critical. We have only a few suggestions regarding these provisions. First, some children need two-to-one staffing for safety purposes. Two to one staffing should be permitted when necessary and should be used before manual restraints when the need can be anticipated. Second, the restrictive procedures should, whenever possible, be described and included in the ITP. Third, the IBHS agency should be required to offer full training to parents and caregivers on the use of the restrictive procedures so that they can implement the ITP on their

own, therefore maximizing the child/young adult's potential to live independently while reducing negative behaviors. Finally, § 5240.6(d) needs to be amended to address situations when there is not more than one staff person working with a child at the time. In those instances, we recommend that the provision require that a parent/caregiver observe.

Reinitiation of Services - §§ 1155.33(7), 5240.86(g) and other identical sections

§ 1155.33(7) and 5240.86(g) are confusing. We assume the language means that services can be reinitiated for 90 days without going through all the initial procedures. But it could be read to mean that services can only be reinitiated ever for one 90-day period. This should be clarified for all IBHS services.

Limitations – § 1155.37(b)

§ 1155.37(b) limits the provision of IBHS to the last 60 days of a residential stay, and to services not included in the facility rate. Under Title XIX of the Social Security Act, children are to receive the services that are medically necessary for them. There must be a method to get an exception to this limitation in order to address the needs of youth who are especially difficult to serve – such as those currently being placed in out-of-state facilities or those waiting in jails and acute care hospitals because no PA facilities will take them. The waiver provision in the regulation does not seem to apply to this section as it is in a different chapter.

We thank you for consideration of our comments. Please contact Jennifer Garman, Director of Government Affairs at jgarman@disabilityrightspa.org with questions.

Sincerely,

Rachel Mann, Esq.

Koert Wehberg, Esq.