COMMONWEALTH OF VIRGINIA
Virginia Board for People with Disabilities

Mary McAdam
Chair
Phil Caldwell
Vice Chair
Rachel Loughlin
Secretary
Heidi L. Lawyer
Executive Director

Washington Building, Capitol Square
1100 Bank Street, 7th Floor
Richmond, Virginia 23219

804-786-0016 (TTY/Voice)
1-800-846-4464 (TTY/ Voice)
804-786-1118 (Fax)
info@vbpd.virginia.gov
www.vaboard.org

TO: Cleopatra L. Booker, Psy. D., Director, DBHDS Office of Licensing
Department of Behavioral Health and Developmental Disabilities

FROM: Heidi L. Lawyer, Executive Director
Virginia Board for People with Disabilities

RE: Periodic Review of Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services, 12 VAC 35-105-10 *et seq*.

DATE: December 12, 2017

The Virginia Board for People with Disabilities (the Board) appreciates the opportunity to comment on the Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services. The following recommendations are organized according to the specific sections of the Chapter to which they relate, beginning with several general recommendations that refer to a proposed new section, to multiple sections, or to the entirety of the Chapter.

General Recommendations

Recommendation 1: ***Develop separate regulations for providers of mental health and substance abuse services, and providers of developmental services.*** The Board has long recommended that DBHDS provide separate provider regulations for providers of Mental

Health and Substance Abuse services, and providers of Developmental Services, as some other states, such as Massachusetts have done. The Board continues to believe that developing separate regulations for the providers who serve these very different populations is advisable. For a variety of reasons, the history and philosophy of services for these different populations diverge, as do their unique needs and the requisite skills, knowledge, and qualifications that providers must possess to successfully meet those needs. These differences make it difficult to develop regulations that are applicable to providers of services to each population.

The benefits of developing separate regulations for providers of developmental services are accentuated by recent shifts in the philosophical and regulatory landscape in which these services are delivered. The focus in the Commonwealth on increasing the independence, autonomy, and community integration of individuals with developmental disabilities, including intellectual disabilities, in accordance with the DOJ Settlement Agreement, as well as the new Home and Community Based Services integrated settings rules that apply to many of the developmental service providers in the Commonwealth, only heighten the need for separate regulatory schemes for the providers of these services. The Board, therefore, recommends taking steps to begin the process of separating the regulations.

Recommendation 2: ***Replace the phrase "mental retardation" with the phrase "intellectual disability" throughout the regulations.*** The Board is appreciative of the continuing efforts by the Department to remove the phrase "mental retardation" from Virginia's Administrative Code and replace it with the more appropriate and more person centered "intellectual disability." While the Board is confident that this change will be made upon the review of the Rules and Regulations for Licensing Providers, we would be remiss not to note the presence of the phrase "mental retardation" throughout the Chapter. This includes phrases in which "mental retardation" is a component of the phrase, for instance: Community Intermediate Care Facility/Mental Retardation (ICF/MR); and Qualified Mental Retardation Professional (QMRP).

Recommendation 3: ***Remove or change references to the Individual and Family Developmental Disabilities Support (IFDDS) Wavier.*** The IFDDS Waiver is the only waiver defined in 12VAC35-105-20; and individuals with a developmental disability who are served under the IFDDS Waiver are referenced in 12VAC35-105-30, 12VAC35-105-590, and 12VAC35-105-665. This waiver, which formerly only served individuals with developmental disabilities *other than* intellectual disability, was amended as part of the Commonwealth's overall Waiver redesign. It has now transitioned into the Family and Individual Supports (FIS) Waiver, for which individuals with developmental disabilities, *including* individuals with intellectual disabilities may be eligible. The references to the IFDDS Waiver and the individuals who received services under this Waiver are a product of the historical differentiation of people with intellectual disabilities from people with other developmental disabilities in Virginia's service system. While some differences continue to be drawn between these disability categories because of state code requirements relative to the provision of case management services, these diagnostic differences no longer determine for which waiver an individual is eligible. Therefore, references to the IFDDS Waiver should be removed, and where it remains necessary to distinguish between people with intellectual disabilities and people with other developmental

disabilities, this distinction should be drawn without reference to the specific Waiver for which an individual is eligible.

Proposed new section (12VAC35-105-385). Providers of Medicaid-reimbursed home and community bases (HCB) services

Recommendation 4: ***Incorporate language consistent with the Center for Medicaid Services (CMS) Home and Community Based Services (HCBS) settings rule into the regulations:*** CMS published new rules governing the settings in which Medicaid funded HCB services can be delivered, known as the HCBS Settings Rules. Ideally, many of the requirements of these rules should be incorporated into developmental services provider regulations in order to set a single standard for the regulation of provider settings where developmental services are provided. Currently, the physical environment standards, privacy standards, and other standards contained in the regulations that address provider settings are applicable to such a wide variety of settings that it is difficult to establish standards that capture the philosophical shift towards increased independence, autonomy, and community integration that are the object of the HCBS settings rules. Until separate regulations are created, therefore, the Board recommends the inclusion of the following language in a new section of the Chapter 12:

A. All settings in which Medicaid-reimbursed HCB services are provided must:
    a. Be integrated in and support full access to the greater community
    b. Be selected by the individual from among a variety of setting options
    c. Ensure that individual rights of privacy, dignity, respect, and freedom from coercion and restraint
    d. Optimize autonomy and independence in making life choices
    e. Facilitate choice regarding services and who provides them
B. Individuals living in a provider-owned or -operated HCBS residential setting must:
    a. Have a signed lease or other legally enforceable agreement providing similar protections
    b. Have access to privacy in their sleeping units including lockable doors, choice of roommates, and freedom to furnish or decorate their unit
    c. Have the ability to control their daily schedules and activities and have access to food at any time
    d. Have the ability to have visitors at any time
    e. Be able to physically maneuver within the residential setting (e.g. setting is physically accessible.)
C. Any modifications or exceptions made to the criteria in Subsection A must result from identified specific needs of the individual discovered through an independent assessment and documented and justified in the individual's ISP

12VAC35-105-20 – Definitions

Recommendation 5: ***Update the definition of Developmental Disability by using the definition in VA Code § 37.2-100.*** The definition of Developmental Disability contained in 12VAC35-105-20 is outdated and differs from the definition that appears elsewhere in both Virginia and federal law in several ways. Most notably, 12VAC35-105-20 requires a disability to manifest "before the individual reaches age 18" in order to be considered a developmental disability, while definitions contained elsewhere state that such disability must manifest prior to the age of 22. The Board recommends that the definition of developmental disability contained in VA Code § 37.2-100 be adopted, which reads as follows:

> *"Developmental disability" means a severe, chronic disability of an individual that (i) is attributable to a mental or physical impairment, or a combination of mental and physical impairments, other than a sole diagnosis of mental illness; (ii) is manifested before the individual reaches 22 years of age; (iii) is likely to continue indefinitely; (iv) results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency; and (v) reflects the individual's need for a combination and sequence of special interdisciplinary or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated. An individual from birth to age nine, inclusive, who has a substantial developmental delay or specific congenital or acquired condition may be considered to have a developmental disability without meeting three or more of the criteria described in clauses (i) through (v) if the individual, without services and supports, has a high probability of meeting those criteria later in life.*

Recommendation 6: ***Change the phrase "Community Intermediate Care Facility/Mental Retardation" to "Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF-IID)."*** As discussed above in the Board's general comments, the phrase Mental Retardation should be changed to Intellectual Disability throughout the regulations, including in phrases of which the phrase "mental retardation" is a component. The Board also recommends removing the word "community" from this phrase. Intermediate Care Facilities (ICF's) are not community settings as the term community is presently understood, but are institutional in nature. The inclusion of the word community in the phrase is, therefore, confusing and misleading. If a descriptor is required, the use of the term non-state operated should be considered.

Recommendation 7: ***Define the term "aversive stimuli."*** While aversive stimuli are prohibited actions under this Chapter, the term "aversive stimuli" is neither defined in the definitions sections of the Chapter, nor in the text of 12VAC35-105-820, where aversive stimuli are prohibited. The Board recommends the following definition:

> *"Aversive stimuli" means any action used to punish an individual or to eliminate, reduce, or discourage a problem behavior by use of actions that are painful,*

humiliating, degrading, or abusive, including but not limited to the use of physical force (e.g., sound, electricity, heat, cold, light, water, or noise) or substances (e.g., hot pepper sauce or spray) measurable in duration and intensity that when applied to an individual are noxious or painful to the individual.

Recommendation 8: ***Change "co-occurring disorders" to "co-occurring diagnoses" or "co-occurring conditions."*** Each of these phrases is used in the body of the regulations. The former, "co-occurring disorders," is appropriate in some circumstances, but not all developmental disabilities are appropriately characterized as "disorders." The Board, therefore, recommends the adoption of the more general phrase "co-occurring diagnoses," or alternatively "co-occurring conditions."

12VAC35-105-170. Corrective Action Plan

Recommendation 9: ***Correct the Code citation contained in Subsection G.*** Subsection G references 12VAC30-105-620. This Code section does not exist. The likely correct Code citation appears to be 12VAC35-105-620.

Recommendation 10: ***Add the following as Subsection H: Provider shall submit to the Department verification of the completion of each corrective action within five days of the completion of the corrective action; or if the corrective action(s) is not completed by the date(s) of completion specified in the corrective action plan, then the provider shall submit to the Department a corrective action plan revision with a new projected date(s) of completion.*** The current regulation requires providers who have been found to be noncompliant with applicable regulations to create a corrective action plan, and to monitor the implementation of that plan internally. It does not appear to require providers to verify to the Department that these corrective actions were completed, however. The addition of this requirement will strengthen the regulations by closing this loop.

12VAC35-105-180. Notification of Changes

Recommendation 11: ***Increase the minimum advance notification of a provider's intent to discontinue services to 90 days prior to the cessation of services in the case of the Department (subsection D), and 60 days in the case of individuals and their authorized representatives (subsection E).*** The 30 day notification as contained in the current regulation may be too short a period of time to obtain adequate, comparable services, housing, and other supports; in many instances it will be inadequate to develop an effective transition plan for the individual. The Board recognizes that there may be instances where a provider is unable to provide a full 90 day notice prior to the termination of a service due to exigent circumstances. These scenarios should be addressed through an exceptions process, rather than by adopting a general standard that is insufficient for many individuals.

12VAC35-105-430. Employee or Contractor Personnel Records

Recommendation 12: ***Add the following under subsection A.: 11. Verification of possession of any applicable employee competencies.*** Personnel records for employees or contractors when those employees or contractors must possess specified competencies per DBHDS regulations or policies should contain evidence of the verification of such competencies by the employer or contracting entity. At a minimum, this should include the specific competencies possessed, the method of verification of the competencies, and any initial or remedial training provided to achieve the required level of competency.

12VAC35-105-610. Community participation

Recommendation 13: ***Strike through first sentence, and replace with the following text: Individuals receiving residential, day support, and/or community engagement services shall be afforded opportunities to participate in integrated community activities at naturally occurring times and places that are based on their personal interests and preferences. Community activities should provide individuals opportunities to interact with individuals with and without disabilities to the same extent as individuals without disabilities engaging in the same community activities.*** These changes will strengthen this regulation by aligning the language of the regulation with the Commonwealth's ongoing efforts to enhance the community integration of individuals who receive mental health and developmental services, as well as with the spirit of the ADA and the *Olmstead* decision.

12VAC35-105-820. Prohibited actions

Recommendation 14: ***Prohibit the use of aversive stimuli without qualification.*** As the regulation currently reads, "applications of aversive stimuli" are prohibited, "except as permitted pursuant to other applicable state regulations." The Board is unaware of other state regulations that expressly permit the use of aversive stimuli by providers of mental health, substance abuse, or developmental services; and the Board strongly believes that the use of aversive stimuli should be prohibited by providers of these services without qualification, as it is in 22VAC40-151-820 pertaining to standards for Licensed Children's Residential Facilities.

12VAC35-105-830. Seclusion, Restraint, and Time Out

Recommendation 15: ***Include the following language as subsection C(8): "Planned preventative steps to reduce the likelihood of the need for such intervention in the future."*** Seclusion and restraint should be a last resort interventions during an emergency when life or safety of the individual or others is at risk. The necessity of their use is evidence of the need to revise the individual's treatment plan. It should be followed by a timely evaluation of the precipitants of their use and a plan to prevent the need for the use of these interventions in the

future. There should be documentation of the review and development of a new or amended plan following any restraint or seclusion incident.

12VAC35-105-840. Requirements for Seclusion Room

Recommendation 16: ***Strike through Subsection G. and replace with the following: "Any room used for the seclusion of a person at risk of harming him or herself shall be free of any object that poses a danger to the person who is being placed in the room."*** The requirement that a seclusion room be free of all objects except a mattress with a washable mattress covering prohibits the presence of therapeutic objects in a seclusion room under all circumstances. While it is reasonable to remove objects that could pose a danger to the person being secluded, the exclusion of therapeutic objects from the seclusion room when those objects do not pose a danger to the person being secluded appears to be punitive, rather than a therapeutic or safety measure; seclusion should never be used as a punitive measure or in a punitive manner. The Board recommends further consideration of the potential benefit of therapeutic objects in a seclusion room under individual circumstances.