COMMONWEALTH OF VIRGINIA
Virginia Board for People with Disabilities

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TO: Emily Bowles
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FROM: Heidi L. Lawyer

RE: DBHDS 2018 Draft Amendments Re Settlement Agreement Compliance: Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services, 12 VAC 35-105-10 *et seq*.

DATE: March 7, 2018

The Virginia Board for People with Disabilities (the Board) appreciates the opportunity to comment on the Draft Amendments to come into Settlement Agreement Compliance. In December, the Board made public comment with respect to the Periodic Review of these same Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services. The Board greatly appreciates that a number of its recommendations were incorporated into this amendment draft. We recognize that these amendments are designed to address Settlement Agreement Compliance. However, we believe that a number of our recommendations that were not included in the draft amendments remain relevant and are consistent with Settlement Agreement requirements. These recommendations and one addressing the reporting of serious incidents are listed below.

General Recommendation

Recommendation 1: ***Develop separate regulations for providers of mental health and substance abuse services, and providers of developmental services.*** The Board continues to recommend 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. 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.

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

Recommendation 2. ***Incorporate language consistent with the Center for Medicaid Services (CMS) Home and Community Based Services (HCBS) settings rule into the regulations:*** The Board appreciates that under 12VAC 35-105-150, *Compliance with Applicable Laws, Regulations and Policies*, the Department has added a new provision 3c that addresses the need to comply with home and community waiver setting regulations 42 CFR 441.301(c)(1)-(4) HCBS Waiver Services: Waiver Requirements (for person centered planning and community-based settings). However, the Board believes that with the newness and complexity of the rules, additional detail is needed. As noted in our December comments, 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 continues to recommend 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 3: ***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 4: ***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."

Recommendation number 5: ***Add the following to the definition of "Level II serious incidents:"***

11. Self-harm that results in a serious injury
12. Any occurrence of a serious injury of unknown cause
13. Two or more substantially similar Level I serious incidents, or three or more dissimilar

Level I serious incidents involving the same individual in a 12 month period

Serious injuries should be reported regardless of whether they occur as a result of physical aggression by a third party, physical restraint, or self-injury. Additionally, multiple incidents of Level I serious incidents could evidence systemic issues that if left unaddressed could result in Level II or III serious incidents. Therefore, multiple Level I serious incidents should also be reportable.

12VAC35-105-160. Reviews by the department; requests for information, required reporting

Recommendation 6. ***Require providers who are made aware of Level II serious incidents that did not occur on that provider's premises, or during the delivery of services by that provider, to take reasonable steps to ensure that the incident was reported in accordance with this Chapter by the responsible party; and where no responsible party can be identified, require the provider to report these incidents.*** While Level III serious incidents must be reported regardless of where they occur, Level II serious incidents are only reportable when they occur on the premises of the provider or while the provider is delivering services. This will likely reduce incidents of duplicative reporting, but does raise concerns about serious incidents going unreported. This concern would be reduced by requiring providers to take reasonable steps to ensure that Level II incidents that occur off premises and outside of service provision are reported.

12VAC35-105-170. Corrective Action Plan

Recommendation 7: ***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 amended regulation does make some changes to the requirements of this section but still does not require any report back to the department that the action has been taken. Given the limitations of licensing staff to conduct inspections on a regular basis, there should be q requirement to verify that correction action has been taken. We recognize that 5 days may be too stringent a requirement and that time period could certainly be lengthened in accordance to reasonableness determined by the Department.

12VAC35-105-180. Notification of Changes

Recommendation 8: ***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).*** This section was not included in the amendments, but the Board believes that they it be amended. The Board believes that 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 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 9: ***Add the following under subsection A.: 11. Verification of possession of any applicable employee competencies.*** This section was not included in the proposed amendments and the Board continues to recommend this change. 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 10: ***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.*** This section was not included in the amendments, but the Board believes it should be amended. The Department of Justice Settlement Agreement has a strong focus on community-based supports for individuals with DD. 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 11: ***Prohibit the use of aversive stimuli without qualification.*** This section was not included in the proposed amendments. 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.

12VAC35-105-800. Policies and procedures on behavior interventions and supports.

Recommendation 12. ***Emphasize requirement to address behavioral challenges through positive behavioral supports. Specifically, the Board recommends the following changes:***

A (2). ~~Emphasize~~ Require positive approaches to behavioral interventions to the maximum extent possible, using restrictive/intrusive interventions such as seclusion, restraint or time-out only when the behavior causes an imminent threat of physical harm to the individual or others.

Add A(7). Specify the mechanisms for reviewing all intrusive/restrictive behavioral interventions used with an individual to determine the antecedents of the behavior, how the behavior could have been mitigated, if possible, and ways in which the behavior plan should be modified to address the behavior using positive behavioral supports in the future.

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

Recommendation 13: ***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/or restraint should be a last resort intervention 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 14: ***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."*** This section was not included in the proposed amendments. The Board reiterates its recommendation as follows. 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.