



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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MEMORANDUM

DATE: March 27, 2013

TO: Kai-Stefan Fountain
Division of Developmental Disabilities Services

FROM: Daniese McMullin-Powell *DMP/KSF* Chairperson
State Council for Persons with Disabilities

RE: 16 DE Reg. 918 [DDDS Proposed Autism Services Providers Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Developmental Disabilities Services' (DDDS) proposal to implement the requirements of S.B. 22 which was enacted in 2012. It requires the Department of Health & Social Services to promulgate regulations establishing standards for certifying qualified autism services providers. The proposed regulation was published as 16 DE Reg. 918 in the March 1, 2013 issue of the Register of Regulations. As background, in early February, the Disabilities Law Program (DLP), Autism Delaware and the SCPD submitted comments on a pre-publication draft of the standards. The Department is now formally publishing its proposed regulations which include some edits prompted by the earlier commentary. SCPD has the following observations.

First, in §2.0, the definition of "applied behavior analysis" is not co-terminus with the statutory definition. The regulation adds two sentences which limit the scope of ABA and amount to an invitation to insurers to deny payment based on the exclusions and limitations. It is improper to have a regulatory definition which is narrower than a statutory definition. The enabling legislation does not confer authority on DHSS to further define ABA and the attempt is "ultra vires".

Second, in §2.0, the definition of "autism services provider" covers a "board-certified behavior analyst" (BCBA) but omits a Board Certified Behavior-Analyst Doctoral (BCBA-D) which is treated as a distinct provider throughout the regulations. See, e.g. §2.0, definition of "behavioral technician" and §§3.1, 3.2, and 4.1.1. A reference to the BCBA-D should be added to the definition of "autism services provider".

Third, in §2.0, definition of "autism services provider", the reference to "authorized by this section" is copied directly from the statute and makes no sense in the context of §2.0 of the regulations. Consider substituting "by this regulation" or, based on the reference to "these regulations" in the definition of "behavioral technician", substitute "these regulations".

Fourth, in §2.0, definition of "therapeutic care", insert "acting" between "assistant" and "under". Compare comparable reference in definition of "psychological care".

Fifth, in §3.1, first sentence, delete “to be” since the regulation(s) are establishing the standards now, not in the future.

Sixth, in §3.1, second sentence, substitute “it certifies” for “they certify” since the antecedent (Board) is singular.

Seventh, in §3.1, referring to a website that may change in a regulation may be imprudent. It would be preferable to simply refer to the most recent ethical and practice standards adopted by the Behavior Analyst Certification Board. For example, in §2.0, definition of autism spectrum disorders”, the reference is to the most recent edition of the DSM, not a version appearing on a website.

Eighth, in §3.2, the reference to “2.2” should be “§2.0”.

Ninth, in §3.3.1, first sentence, substitute “reflects” or “must reflect” for “should reflect”. The word “should” is hortatory. Cf. Delaware Administrative Code Style Manual, §6.3.

Tenth, in §3.3.1, second sentence, substitute “hours per week” for “hours a week”. Compare reference in §3.3.2.

Eleventh, in §3.3.1, second sentence, substitute “clinical management and case supervision” for “supervision” for consistency.

Twelfth, §§3.3.1 and 3.3.2 are ostensibly inconsistent. Section 3.3.1 establishes a 1.5/10 hourly ratio of supervision to treatment. Thus, a supervisor could spend 0.75 hours supervising a technician conducting 5 hours of treatment. Section 3.3.2, however, would literally require a supervisor to spend 1.5 hours in supervision for a technician conducting 5 hours of treatment. Indeed, the reference to “10 hours per week or less” results in the need to spend 1.5 hours in supervision for a technician spending 1 minute to 9.99 hours in direct treatment.

Thirteenth, §3.3.3 refers to “other requirements” It would be preferable to clarify that this applies to behavioral technicians”.

Fourteenth, in §3.3.3.7, first sentence, delete the period after “BCBA”.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

cc: Ms. Jane Gallivan
Mr. Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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