



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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MEMORANDUM

DATE: July 16, 2010

TO: Ms. Frann Anderson, Quality Control
Division of Substance Abuse and Mental Health

FROM: Daniese McMullin-Powell, Chairperson ^{DMP/kit}
State Council for Persons with Disabilities

RE: 14 DE Reg. 18 [DSAMH Proposed Substance Abuse Facility Licensing Standards]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Substance Abuse and Mental Health's (DSAMH's) proposal to amend its regulations regarding the provision of substance abuse and mental health treatment programs in Delaware. The proposed regulations were published as 14 DE Reg. 18 in the July 1, 2010 issue of the Register of Regulations. SCPD has not limited comments to the sections earmarked for revision since Council believes there are errors and omissions throughout the document. Parenthetically, nonsubstantive changes to correct technical errors and amendments to conform to statute are exempt from pre-publication [Title 29 Del.C. §10113(b)].

1. Section 3.0, definition of "clinical director", recites that it is someone who meets the requirements of §6.1.2.1. However, the regulation also uses the term "clinical director" in the context of co-occurring treatment facilities (Part 16.0). The qualifications of a "clinical director" under §16.2.3 are inconsistent with the qualifications of a "clinical director" under §6.1.2.1. SCPD recommends that this inconsistency be resolved.

2. Section 3.0, definition of "counseling", categorically limits counseling to "face-to-face" interaction. There are both pros and cons to this approach. One disadvantage is that telephonic or videoconferencing communication is precluded. For example, as a practical matter, if a spouse is in treatment, it may only be possible to "tie in" the other spouse (who may live or work 80 miles away) through electronic communication. DSAMH may wish to consider some exceptions based on extenuating circumstances. Parenthetically, the definition conflicts with §11.5.1.2.1 which specifically allows counseling by phone.

3. Section 3.0, definition of "Nurse Practitioner", could be improved by using the Delaware

licensing terminology, “advanced practice nurse” (“APN”) consistent with Title 24 Del.C. §1902(b)(1). If amended, a conforming reference should also be added to the definition of “Qualified Psychiatric Practitioner” in §3.0.

4. Section 4.1 contemplates licensure under the regulations for “mixed” facilities (e.g. co-occurring substance abuse and mental health disorder programs). Both residential and non-residential entities are covered (§4.1.1.1). Unfortunately, there are major omissions throughout the regulations which ignore the application of statutory standards to such facilities. For example, the residential facilities may be subject to the patient bill of rights codified at Title 16 Del.C. §1121. See Title 16 Del.C. §1102(4). Moreover, the regulations omit any reference to the bill of rights codified in the Substance Abuse Treatment Act, Title 16 Del.C. §2220. The bill of rights was co-authored by DSAMH. Moreover, with the June 29, 2010 enactment of H.B. 41, co-occurring substance abuse and mental health facilities are now subject to the Community Mental Health Treatment Act. The regulations should incorporate many of the statutory standards which apply to both residential and non-residential treatment facilities. Compare 16 DE Admin Code Part 3315, Appendix B (Family Care Homes) for illustration of incorporating bill of rights into regulatory appendix. SCPD will include some specific recommendations below.

5. Section 4.3.3 reflects a \$15.00 application fee for a facility license. The Division may wish to consider whether the fee is unduly modest.

6. Sections 4.5.3 and 4.9 address the Division’s access rights, cross referencing federal laws. The Division should consider including specific State law references such as Title 16 Del.C. §1107 (residential facilities).

7. Sections 4.6 and 4.7.1 could be problematic. By communicating “deficiencies” solely through “recommendations”, the Division may be inviting facilities to consider such notices as hortatory and encouraging but not binding.

8. Section 4.12.1.6 authorizes suspension or revocation of a license for violations of Title 16 Del.C. Ch. 22. DSAMH should consider adding a reference to violations of Title 16 Del.C. Ch. 11 (for residential facilities) and Title 16 Del.C. §5191 (for co-occurring facilities). See, e.g., Title 16 Del.C. §1138.

9. The citation in §4.14.5 is incorrect. The citation should be to 29 Del.C. Chs. 100 and 101.

10. The Division proposes to delete the following sentence in §4.15.1:

The waiver request shall be posted in a prominent place in the facility and outline a process approved by the Division whereby clients can offer comments and feedback specific to the waiver request.

This provision had been inserted at the behest of the Council based on past commentary. The

deletion is highly objectionable and demeans the value of input from consumers. A facility can simply avoid the application of any regulation through an ex parte request to the Division. The consumers who are the protected class under the regulations would be “clueless” that their rights are being undermined through a waiver request. Consumer input on waiver requests is authorized in analogous regulations. See, e.g. 16 DE Admin Code 3301, §9.1.5 (group homes for persons with AIDS):

9.1.5. Prior to filing a request for a waiver, the facility shall provide written notice of the request to each resident, each court-appointed guardian of any resident, each person appointed in the durable power of attorney of any resident, each person appointed to be any resident’s health care agent under the Death with Dignity Act and each spouse and adult child of any resident. Prior to filing a request for a waiver, the facility shall also provide written notice of the request to the Office of the Long Term Care Ombudsman. The notice shall state that the recipient has the right to object to the waiver request in writing to the Division.

Consumer input on facility waiver applicants from residents of DDDS group homes is also authorized (16 DE Admin Code Part 3310, §17.1.4).

11. Section 5.1.1.1 contemplates each community-based agency including “representatives of the population it serves” on its “governing body and/or advisory council”. This could be interpreted to mean 1 “token” representative or, since plural, 2 representatives (e.g. 1 on a governing board and 1 on advisory council). The Division may wish to clarify its expectation in this context.

12. Section 5.1.4.4.1.16 requires the facility policy and procedures manual to contain a protocol for making child abuse/neglect reports. The regulations contain no analogous requirement for a protocol to report adult abuse/neglect. There is a mandatory reporting duty for adults subjected to abuse/neglect. See Title 31 Del.C. §3910, Title 16 Del.C. §1132, Title 16 Del.C. §2224, and Title 16 Del.C. §5194 (created by newly enacted H.B. 41). PM 46 also requires “each Division that has, or contracts for the operation of, residential facilities” to have standardized reporting procedures. The only reporting references in the regulations pertain to licensing boards. See §§5.1.4.4.1.24 and 5.1.7.1.1.5.

13. Section 5.1.6 could be improved by requiring facilities to include a recital that there will be no retaliation against persons who report abuse, neglect, financial exploitation, or mistreatment and reminding employees that there are penalties for failure to report. See Title 16 Del.C. §§5194 and 5195, Title 16 Del.C. §§1132, 1135, and 1154, and Title 16 Del.C. §2224.

14. Section 5.1.7.1.1.2 requires staff training in reporting child abuse but not adult abuse. The training requirement should be expanded to cover reporting of adult abuse.

15. In §6.1.3.1.2, the Division is deleting a requirement that the 5 years experience for a “clinical supervisor” be “clinical” experience. This is odd since it would allow someone who had been a janitor in a facility for 5 years to meet the experience standards to be a “clinical supervisor”.

16. In §7.1.1.1, the extraneous words “unless such disability makes” should be deleted. There should be no exceptions.

17. In §7.1.1.3, a reference to the Equal Accommodations Act, Title 6 Del.C. Ch. 45, should be added.

18. Section 7.1, titled “Client Rights”, would be a logical place to insert information about the applicable bills of rights referenced above. Another option would be to include the bills of rights as an appendix to the regulation. This approach was adopted for the Rest Care Homes regulations, 16 DE Admin Code Part 3315.

19. Section 7.1.2.1.7 only provides an assurance that child abuse will be reported, not adult abuse.

20. The grammar in §8.1.1.1.5.15 should be corrected. Literally, it would read - “Results of the client’s diagnostic assessment, including the clients:...Indicates what issues and areas of clinical concern are to be...”

21. The grammar in §8.1.1.1.5.17 should be corrected. The references are to “signed”, “reviewed”, and “is completed”.

22. In §8.1.2.1.8.1, delete the extraneous “and” after the word “counselor”.

23. Section 8.1.4 requires a facility to maintain records for only 12 months which would be subject to review in a DHSS audit. DSAMH may wish to consider a longer time frame. Current records may reveal an on-going problem dating back more than a year and facilities could simply destroy or not produce older records.

24. The grammar in §11.2.1.1.3.2.6 should be corrected. It literally reads as follows: “A physical examination by qualified medical personnel that shall: ...Completed at admission.”

25. Substitute “advice” for “advise” in §11.4.1.2.1 and in §14.4.1.1.5.

26. In §11.6.1.6.2.3.1, substitute “rationale” for “rational”.
27. In §12.1.1.7, there is a typographical error - “eeach”.
28. Section 12.2.4 would disallow clinical supervision meetings being conducted by videoconferencing unless “face-to-face”. It is unclear if “face-to-face” is meant to include electronic “face-to-face” communication. DSAMH may wish to consider allowing videoconferencing.
29. The “therapeutically necessary” exception to visitation and phone usage in §12.4.2.2.1 is at odds with bills of rights, including Title 16 Del.C. §§1121(11) and 5192(10). It is also “odd” that a non-clinical administrator makes the “therapeutic” decision.
30. In §14.3.4.2, the word “individuals” should not be capitalized.
31. The hyphen in “take-home” is missing in §§14.8.1.8 and 14.8.1.10
32. If not referenced elsewhere, Section 16.0, titled “Co-Occurring Treatment”, would be a logical place to incorporate the new Community Mental Health Treatment Act provisions included in the recently enacted H.B. 41.
33. While §16.5.1.3 requires a Qualified Psychiatric Practitioner to meet with a consumer at least every 6 months, §16.5.4 contemplates the Qualified Psychiatric Practitioner conducting a record review only every 12 months. DSAMH may wish to change the latter standard to every 6 months to match the schedule for meeting with the consumer.
34. In §16.5.8, DSAMH lists a variety of supports for consumers, including step groups and faith-based organizations. DSAMH may wish to consider adding references to physical exercise which is also correlated with improved affect and recovery and less reliance on medications.
35. In §17.4.1, “DSMAH” should be “DSAMH”.
36. The regulations (§§17.0-19.0) authorize exemption from many of the standards for facilities with certain accreditations (e.g. JCAHO, CARF, COA). There is no State statutory authority to exempt covered facilities from the application of patient rights and prescriptive statutory licensing standards. For example, if a State statute directs abuse/neglect reporting conforming to a specific protocol, that would supersede any national certification standard. DSAMH may wish

to review applicable State statutory patient rights compilations, including Title 16 Del.C. §§1121, 2220, and 5192, to ensure that the regulations do not inadvertently exempt facilities from compliance.

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

cc: Ms. Rita Landgraf
Ms. Kevin Huckshorn
Ms. Debbie Gottschalk
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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