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NH Dept of & Human Services
Bureau of Developmental Services
Attn: Lindsey Magee
105 Pleasant Street, Main Building
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Via Email: Lindsey.K.Magee@dhhs.nh.gov

Re: PART He-M 1001 CERTIFICATION STANDARDS FOR DEVELOPMENTAL SERVICES COMMUNITY RESIDENCES

Dear Lindsey,

The NH Developmental Services Quality Council was created by the NH legislature “to provide leadership for consistent, systemic review and improvement of the quality of the developmental disability and acquired brain disorder services provided within New Hampshire’s developmental services system” (RSA 171:A:33). The Quality Council is a group of people with disabilities, family members, advocates and professionals who come together with a variety of perspectives and experiences to improve the developmental disabilities and traumatic brain injury service delivery system in New Hampshire.

The Council was very concerned about the publication of the HeM 1001 Emergency Rule. While we understand the need to move quickly, we strongly believe that the rule would have been stronger with additional stakeholder input. Below we have identified a number of areas of concern. We have not attempted to offer detailed suggestions for improvement, but we may do so if we are given the opportunity to comment on future proposals.

As you know, the Council is in the process of a systems review related to recent stories of abuse and death in the Developmental Disabilities system. The Council has attempted to consider some of these discussions in these comments but will likely have more suggestions for regulatory reforms when the systems review is complete.

Throughout the rule, there are references to “the Department”. We have used this language in our comments, but we believe that the rule should provide more detail regarding which Bureau is responsible for each item for better accountability and understanding for all involved. Sometimes, we think this is a reference to Licensing and Certification; other times it seems to reference the Bureau of Developmental Services. This is confusion and limits accountability.

In addition, it is important to clarify that this rule is only applicable to homes that are certified community residences and the providers who are providing that service to the individual with disabilities. This does not apply to the providers of all services. It must be clear in which circumstances the Licensing and Certification Unit has the authority to investigate complaints, what they can investigate and what action they can take. As we have noted in our systems review, the complaint and investigative process is extremely confusing for providers, service coordinators, individuals and families. This can only cause more harm to people with disabilities.

Definitions

There appear to be a number of important definitions that are unclear or missing from the proposed rule including:

Complaint: The rule must identify what constitutes a complaint that should be investigated. We suggest that the Department look to overrules which provide this type of definition. The rule must also define what will be investigated, what will be referred to Adult Protective Services or the Office of Client and Legal Services, etc. It is important that everyone understands what will not be investigated through the HeM 1001 process.

As we understand it, the Department anticipates using some type of triage process to determine what will be investigated and how. While we understand the need for some flexibility, the Department must articulate how complaints will be assessed and triaged and by whom. Without this guidance, the process will not be transparent or well understood by providers, service coordinators, people with disabilities or families.

Plan of Correction: We believe this definition is incomplete.

State Monitoring: We have major concerns with this definition as written which appears to authorize service coordinators and area agencies to have enhanced involvement in day-to-day operations of community residences. We understand the need for state oversight when community residence providers engage in certain actions, we are concerned that this definition allows too much oversight by service coordinators and area agencies, who are not state actors and have other roles within the developmental disabilities system. This function should not be delegated to non-state actors. At minimum, the rule must specify that service coordinators and area agencies may only engage in specific monitoring activities as directed and closely monitored by the state. We recommend that the Department work closely with providers, service coordinators and people with disabilities to expand and refine this definition and this section of the rule.

Triage: From discussion with the Department, we believe that the Department intends to use some type of triage process to determine which complaints will be investigated. If this is accurate, the rule must outline the process to be used, responsibility for making the decision and what will happen with complaints which do not meet the criteria to be investigated.

Enforcement Action: This is used in the rule but is not defined. It is unclear whether “enforcement action” encompasses all or only some of the administrative remedies outlined or other actions.

Complaints

It is important that the rule clearly explains the complaint process and outlines strong procedures to hold providers accountable.

For example, one of the criteria for a complaint or report is “(2) Non-compliance with any other directives or recommendations made by any department bureau or division as a result of an investigation.” We believe that non-compliance with directives or recommendations as a result of routine inspections may also be cause for a complaint/report and further advocacy. On the other hand, this rule may inappropriately limit flexibility if a provider is attempting to comply with a directive or recommendation or to work with the Department on an alternative solution.

As we understand it, the Department has implemented a system to protect against the ability of a provider to operate two enhanced family care homes simultaneously. We support this effort and hope that the Department will continue to implement these types of protections.

He-M 1001.14 Inspections and Plans of Correction.

We support the change to submit a revised plan of correction from 21 to 14 days.

He-M 1001.17 Administrative Remedies

We have a number of concerns regarding this section.

First, why is the state monitoring portion outlined after the license revocation section? It would be clearer if the administrative remedies were outlined in order of severity.

We strongly encourage the Department to expand their authority to ensure plans of correction are implemented. In He-M 1001.17 Administrative Remedies, the Department seems to only have the authority to ensure directed plans of correction are implemented. We believe that there must be some ability to take further action if any plan of correction is not implemented.

We also believe that the highlighted language in this provision: “(d) If, at the time of the next inspection, the directed any plan of correction, not just the directed one POC referenced in (c) above is not implemented by the completion date stated in the directed POC, the department shall take one of the following actions depending on the severity of the issue and the health and safety of those in care” may be too restrictive, forcing the Department to take very punitive action when a provider is trying to correct a problem.

This section also references an administrative fine, but we are not clear where the ability to levy an administrative fine, how this is determined or the amount is articulated in this rule.

He-M 1001.18 Enforcement Actions and Hearings.

As noted above, “enforcement action” must be defined. In addition, it is not clear how the enforcement actions outlined regarding the denial an application or withdrawal a certification fit with the provisions regarding the revocation, not renewal or denial of a certification in section 17.

This provision “(2) An applicant or a provider agency has had a check returned to the department for insufficient funds and has not re-submitted the outstanding fee in the form of cash, money order, or certified check” should include a specific timeline for which fees must be paid.

This provision: “(7) A provider agency has had a certification withdrawn and submits an application during the 5- year prohibition period specified in (i) below” is also very confusing. Does this apply when a provider voluntarily withdraws an application or when an application is withdrawn by the Department? Can the Department withdraw an application? It seems like only a provider agency can do that. The consequences of this and the following section are severe and must be better explained. We have similar concerns about the use of “withdrawn” in section 10.

We are also confused about this provision: “(8) Unless a waiver has been granted, upon inspection, the applicant’s premise is not in compliance with RSA 126, RSA 171-A, He-M 310, He-M 503, He-M 504, He-M 506, He-M 507, He-M 1001, or He-M 1201;” as the whole previous section about plans of correction and state monitoring seem to address these types of violations. In this section, the Department must (shall) “deny an application or withdraw a certification” for failure to comply with these provision.

We are also confused by this provision: “(h) When a community residence’s certification has been denied or withdrawn, if the enforcement action specifically pertained to their role in the community residence, the applicant or provider agency shall not be eligible to reapply for a certificate for at least 5 years.” Who is their in terms of their role? Does this mean that the provider loses all of their current licenses or that they cannot apply for additional licenses? We are concerned again that a provider who voluntarily withdraws a license will suffer long term consequences. The rule does not clearly distinguish how this withdrawal of a license is different from any other withdraw of a license, which can happen for a variety of reasonable reasons.

The next section seems to indicate that the Department is making the decision to withdraw a license. Is this what was meant in earlier sections? How is this different from the Department’s decision to deny, revoke or refuse to renew a license. These all seem like more reasonable actions by the Department.

We have questions regarding this provision: “(j) Notwithstanding (i) above, the department shall consider an application submitted after the decision to withdraw or deny becomes final, if the applicant demonstrates

that circumstances have changed to the extent that the department now has good cause to believe that the applicant has the requisite degree of knowledge, skills, and resources necessary to maintain compliance with the provisions of RSA 126, RSA 171-A He-M 310, He-M 503, He-M 504, He-M 506, He-M 507, He-M 1001, or He-M 1201.” Is this intended to be an exception to the 5 year ban? How would the Department know this if the provider is banned from submitting an application? According to the section above, submitting an application during the 5 year ban can lead to serious consequences.

In addition, the Council wants to raise additional issues that arose in our Systems Review committee:

- Transparency. The Council believes that transparency is important throughout the Developmental Disabilities system as a way to hold the system accountable and for improvement. It is important that people with disabilities are informed about the outcomes of complaints that impact them and that providers can share some details of complaints as they work for improvement. Individuals need this information so that they can make informed decisions about providers. It is also important that the Department takes steps to trend data regarding complaints and make this analysis available to the public.
- Plain language. Information about these processes must be presented in plain language so that everyone understands how to make a complaint and what to expect.

As we have identified a number of concerns with the rule as it now stands. We hope that you will move quickly to issue the permanent revised HeM 1001 rule to address this confusion.

Finally, we want to note that a robust licensing and certification process is only as strong as the staff who are implementing it. Licensing and certification and the Bureau of Developmental Services must have sufficient, well-trained staff to ensure a strong process that protects people with disabilities. We support additional resources to the Department to meet these additional demands if needed.

Thank you for considering these comments. We are happy to continue to work collaboratively with the Department as the final rule is promulgated.

Sincerely,

Emily Manire
Emily Manire
Quality Council Chair