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Becky Phillips
Administrative Rules Coordinator, Division of Legal and Oversight
Ohio Department of Developmental Disabilities
By email only to

Ms. Phillips:

I am writing regarding the most recent draft of the proposed Ohio Administrative Code 5123:2-9-03, which places restrictions on the number of hours in a work week an independent provider may provide services. Disability Rights Ohio appreciates the changes the Ohio Department of Developmental Disabilities ("Department") has made to the previous draft of this same administrative rule. For example, the new draft's increase in the threshold number of hours an independent provider may work in a work week (from 40 to 60) without needing authorization from a county board of developmental disabilities is positive, and is consistent with testimony that was provided at the public hearing. This and other changes reflect a better understanding of the genuine concerns of the hundreds of people with intellectual and developmental disabilities, their families, advocacy groups and other stakeholders, and independent providers throughout the state who provided oral or written testimony last February.

While the current draft is much improved, there remains several important concerns, as outlined below.

The lack of publicly-available data makes it difficult to assess whether the new threshold is appropriate or whether it should actually be higher. How many independent providers statewide work overtime? What is the number of hours of overtime these independent providers work? At what cost to the state of Ohio? Does the Department know the number of people with intellectual and developmental disabilities who rely on one or more independent providers to work more than 60 hours in a work week? Are there other providers to take their place for the remaining hours if overtime is not authorized? Reviewing these data prior to final filing the rule is critical in order not to further stress an already overburdened system.

The state should permanently commit to incurring the full cost of overtime pay. Otherwise, the same problematic dynamic remains as in the previous proposal. County boards are gatekeepers for service plans, including the authority to approve or disapprove overtime pay for independent providers. At the same time the board is responsible to use local dollars to pay the non-federal share of home and community-based waiver services. In some circumstances these decisions will predictably be influenced by financial considerations. State payment of the match is critical to ensure adequate services are provided.

These decisions must be subject to the Medicaid fair hearing process. The new draft recognizes that people who disagree with a decision of the county board to authorize an independent provider to work more than 60 hours in a work week must have an avenue to

challenge that decision. Nonetheless, the Ohio Department of Job and Family Services state hearing process would be preferable to the county board complaint process, in part because of the conflict-of-interest concerns noted above, in part because it has more robust due process protections and correctly allocates the burden to justify the decision to the state or county. Furthermore, the rule must mandate notice to the individual regarding the reason for the denial of authorization and how to challenge this decision.

Lack of alternative providers is a systems problem, and the burden to provide this information should not fall on the person or family. The new rule disconcertingly contains a requirement that people with intellectual and developmental disabilities must affirmatively provide documentation of efforts to find additional providers. This is unnecessary and wrongly places the burden on people and their families, especially when county boards have their own legal responsibilities to identify and coordinate providers for people, and the state's obligation under federal law to ensure a robust pool of competently-trained providers. This can be addressed in the individual service planning process without placing the burden on the person or his or her family to offer proof.

Services over 60 hours must be continued until a change in circumstances otherwise justifies a reduction. The rule creates an unfair presumption that additional hours can be phased out when an independent provider is authorized to work more than 60 hours in a work week because of the shortage of other available providers or because of the unique qualifications or skills or training of the independent provider, paragraph (D)(3)(c). It requires the individual and his or her service and support administrator and team to develop and implement a plan to eliminate the need for working hours exceeding the 60-hour threshold. This requirement suggests that these services are not needed or are excessive, yet this in many cases is the only reason that an individual is successfully living in an integrated setting on the waiver. There will certainly be situations where no plan can rectify the shortage of available providers, or no plan can ensure other appropriately-trained providers can be found to meet the individual's unique needs. Federal law would require continuation of the existing service plan in that instance, and this should be reflected in the rule.

Situations in which multiple people share the same independent provider are still not addressed. Paragraph (D)(3)(a)(i)-(iii) could more clearly state that these events or circumstances are examples where a service and support administrator can authorize an independent provider to work more than 60 hours in a work week.

The situations in which a service and support administrator can authorize hours above 60 hours should be expanded. As we stated in our February 9, 2017 comments, this reinforces Medicaid principles of free choice of provider:

> Finding a reliable provider with whom one is comfortable and whom one trusts is not easy. Many tasks providers perform (for example, helping a person get dressed, bathe, administer medications, attend to personal hygiene, and so forth) are highly personal and private. For these reasons, the right to free choice of provider must be protected. Importantly, many people with disabilities throughout Ohio have expressed their strong interest in the ability to choose independent providers instead of agency providers. They have emphasized that their relationships with independent providers tend to be closer, more trusting, provide more stability and involve more flexibility, all of which they highly value.

Thank you for the opportunity to provide input on the new draft of Ohio Administrative Code 5123:2-9-03.

Respectfully,

Kevin Truitt
Attorney at law