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John Martin, Director
Ohio Department of Developmental Disabilities
30 East Broad Street, 12th floor
Columbus, OH 43215

Re: Nursing services for people with intellectual and developmental disabilities

Director Martin:

We appreciate the discussions we have had and the correspondence we have shared regarding nursing care for people with intellectual and developmental disabilities in Ohio. As we have said, a large number of people and their families have contacted us because they received notices from the Ohio Department of Developmental Disabilities (“DODD”) that the nursing care they need should be provided by homemaker/personal care aides, not nurses. This has caused a lot of concern and anxiety across the state.

We appreciate that people and families can contact Lori Horvath at DODD directly with any questions or issues that arise as they are trying to navigate and understand this very complex system.

Below is a summary of the assurances that DODD has made going forward and some areas where we agree and disagree. We look forward to continuing our dialogue.

Assessments

DODD has said that aides should perform no nursing tasks (for example, administration of oxygen or other health related activities) that require nursing judgment. At a minimum, as part of its general legal duty to ensure the health and welfare of people enrolled in its waiver programs, DODD should ensure it is assessing the factors in Ohio Admin. Code 4723-13-05(E)(6):

- “the nursing task requires no judgment based on nursing knowledge and expertise on the part of the [aide] performing the task;
- the results of the nursing task are reasonably predictable;
- the nursing task can be safely performed according to exact, unchanging directions, with no need to alter the standard procedures for performing the task;
- the performance of the nursing task does not require that complex observations or critical decisions be made with respect to the nursing task;
- the nursing task does not require repeated performance of nursing assessments; and
- the consequences of performing the nursing task improperly are minimal and not life-threatening.”

The burden should be on DODD to show all of these criteria are met before any proposal to cut nursing services is considered; if any of these is not met, nursing services should be maintained.

Regarding administration of “as-needed” or “PRN” medications, DODD should also assess whether the person’s order from a doctor or other licensed health professional is “written with specific parameters which preclude independent judgment,” which would prohibit certified aides from administering such medication. *See* Ohio Admin. Code 5123:2-6-03(B)(1)(b)(xx).

These rules are not contained in hearing notices, which must be remedied, as we discuss below. Nor are they accurately explained in appeal summaries, so we appreciate DODD’s assurance that it will conduct a heightened review of future appeal summaries.

Provider capacity

Before issuing a formal notice proposing to cut services, DODD should also assess whether the following factors in Ohio Admin. Code 4723-13-05(E)(5) will be met:

- the nursing task is within the scope of practice of the delegating nurse;
- the nursing task is within the knowledge, skill, and ability of the nurse delegating the nursing task;
- the nursing task is within the training, ability, and skill of the [aide] who will be performing the delegated nursing task;
- appropriate resources and support are available for the performance of the tasks and management of the outcome; and
- adequate and appropriate supervision by a licensed nurse of the performance of the nursing tasks is available.

Additionally, DODD’s assessment should include consultation with the individual’s nurse or nurses.

DODD has agreed that the delegation of nursing tasks is always within the purview and professional discretion of the nurse. The treating nurse could determine that a task should not be delegated, or he or she could decide it is not appropriate to supervise, train, or oversee an aide to do nursing tasks. Under these circumstances, the assessment should take this into account and maintain one’s nursing services (instead of, as DODD said, reconsidering its proposal after the fact if a nurse refuses to delegate services to an aide provider).

Similarly, DODD also agreed that provider capacity is a major issue in Ohio and that, in many instances, people cannot find aide providers, despite their best efforts. We have not seen a concrete plan to fix these systemic issues, other than vague assurances that DODD is working with stakeholders. DODD has said that provider availability is not considered before a decision is made to propose replacing one’s nursing services with homemaker/personal care aide services.

Because of the difficulty many people face finding providers, the availability of willing and able aide providers should be part of the assessment process. DODD should take this into account when deciding whether to propose cutting one's nursing services.

In fact, these issues of fact are relevant to whether a "lower cost alternative" exists. In order to qualify as a "lowest cost alternative," a proposed medical service must "effectively address[] and treat[] the medical problem." Ohio Admin. Code 5160-1-01(C). Homemaker/personal care aides cannot effectively address an individual's medical problem if there are no providers willing or able to train and provide aides to provide care, if a treating nurse's professional discretion will not allow her to delegate that task, or if the treating nurse later determines that delegation must be stopped. A theoretical "lowest cost alternative" does not meet the definition of medical necessity found at Ohio Admin. Code 5160-1-01(C). An alternative must actually exist.

Skype calls and "extenuating circumstances"

DODD will continue to arrange for a Skype call with people, their families, and their providers prior to issuing any formal proposed decision regarding nursing services. This allows people to provide more information and documentation that DODD may not have previously had regarding their need for services performed by nurses, not aides. DODD refers to this information as "extenuating circumstances," which may not have been captured by DODD's interviews, its assessment tool, or its review of documentation as part of the assessment process.

No law or rule defines the term "extenuating circumstances." DODD should be clear and transparent about what this term means so people know what information and documentation to gather and present to DODD (and potentially later to hearing officers).

Due process obligations

We have expressed concern that DODD's current practices in issuing notices of proposed cuts to nursing services do not comply with state and federal laws. DODD consistently takes the position in hearings that people are not eligible for nursing services because the care they need can be delegated to or performed by unlicensed personnel. But we have yet to see a single notice issued by DODD that cites either Ohio Admin. Code § 4723-13 (the Board of Nursing rules on delegation) or 5123:2-6-06(B)(1)(b)(xx) (which describes how aides cannot administer "as-needed" medications if independent judgment is required), for example. DODD has indicated it does not intend to change this practice. Again, we believe DODD must make a factual determination about whether the criteria in these rules is met when assessing whether someone is eligible for nursing services and whether a lower cost alternative exists, and correspondingly must cite to these regulations when denying nursing services on the basis that criteria in the regulations are met. *See* 42 C.F.R. § 431.210(b)-(c); Ohio Admin. Code 5101:6-2-03(A)(1). If DODD does not provide this information, it is unfair to people and their families and puts them at a significant disadvantage at state hearings.

DODD has indicated that the state will continue to authorize nursing services for people, even after a denial or unfavorable state hearing or administrative appeal decision, “until appropriately trained homemaker/personal care staff are in place.” But DODD has also decided that it may stop nursing services in instances where it believes the person or family member is failing to make “good-faith efforts to secure alternative providers” and would not provide due process notice and hearing rights when this decision is made. This approach violates 42 C.F.R. § 431.220(a)(1) and Ohio Admin. Code 5101:6-3-01(B). People may disagree about the extent of their efforts to cooperate in finding providers, and any dispute must be resolved by a neutral decision-maker.

DODD said it would at least reconsider its stance on this point. In the meantime, we will recommend any person or family immediately request a state hearing under these circumstances. Keep in mind, if DODD evaluated whether the alleged “lowest cost alternative” aide existed prior to deciding to eliminate someone’s nursing, DODD and families would not be placed in this predicament.

Respectfully,



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