



OHIO LEGAL RIGHTS SERVICE

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for people with disabilities

Thank you for the opportunity to provide comments on the draft proposed rules 5101:3-3-14, 5101:3-d-15.1 and 5101:3-3-15.2. These comments also incorporate comments on 5122-21-03 and 5123:2-14-01. Because these rules operate together these comments are directed to the entire package of rules.

Ohio Legal Rights Service (OLRS) is the federally mandated and state designated protection and advocacy system for Ohioans with disabilities. OLRS program priorities include the legal right of people with disabilities to community integration, which includes the right under both the Constitution and the Americans with Disabilities Act (ADA) of 1990 to be free from unnecessary institutionalization and the right to services in the most integrated setting.

These rights were affirmed by the U.S. Supreme Court in the Americans with Disabilities Act case Olmstead v. L.C., 527 U.S. 581 (1999) and have been recognized by at least one court specific to the rules governing the PASRR process by the federal Nursing Home Reform Act, 42 U.S.C. Section 1396r, which was part of the Omnibus Budget Reconciliation Act of 1987. Joseph S. v. Hogan, Lexsee 2008 U.S. Dist. Lexis 53940 From this perspective, the state rules that govern entry into nursing facilities are a critical component of any state policy that implements the right of people to receive services in the community rather than in an institutional setting.

Although the revisions proposed in the current draft of the rules move the state closer to compliance with federal regulations, there are a few outstanding questions and issues for which OLRS would like to offer recommendations as the state agencies responsible for implementation proceed with rule revision and eventual implementation. Congress passed the PASRR requirements to prevent non-medical placement of people with intellectual, developmental, and psychiatric disabilities in nursing facilities. Congress found that this was necessary because of the common practice of "dumping" and warehousing people in the 1980s. Any rules that govern PASRR and Resident Review requirements must recognize this Congressional intent and must create a strong presumption against long term placement of people with disabilities in nursing facilities.

Federal law requires that PASRR be administered consistent with the requirements of the ADA and Section 504 of the Rehabilitation Act. Therefore, the PASRR process should be viewed as an opportunity to determine if there are community alternatives for an individual as compared to a nursing facility. OLRS recommends that when an individual is first identified as having indications of mental illness or developmental disabilities the individual is offered options other than nursing facility placement. This could be analogous to the "Home First" initiative offered to older Ohioans.

Resident Review

5101:3-3-15.2(C)(4)(a) provides that if a resident review has been conducted and the individual is determined not to have indications of either MR/DD or SMI, the Nursing facility (NF) is to place the JFS form 03622 and supporting evidence in the residents record at the facility. Notice to relevant departments is required in other circumstances and should be required in this circumstance as well. If the goal of many of these rule changes is to collect better data and to decrease the number of people inappropriately receiving services in nursing facilities, it would make sense to keep track of resident reviews and to develop a method to monitor their quality. This is particularly important given that historically resident reviews have not been consistently done when there is a "significant change in condition." It would also provide an opportunity for the relevant departments to offer other options to the individual.

Paragraph (D) of 5101:3-3-15.2 (RR/SMI and RR/MRDD Determination Requirements), and paragraph (1)(a) read together state that if a resident review has determined that the individual does not require the level of care of services in a NF and requires specialized services, they may choose to remain in the NF if they have resided in a NF for at least thirty months. Again, often a person will "choose" to remain in the NF only because they know of no other options. The relevant departments (or boards) should be required to offer other options to the person in order for the person to make a truly informed choice.

OLRS also recommends that there be some additional clarity regarding the circumstances when a resident review should be done. The requirement under federal regulation is that residents of nursing facilities who have a "significant change in condition" should have a resident review initiated. Although the Definition rule, 5101:3-3-14, does elaborate somewhat on what "significant change in condition" means, its basis relies heavily on the routine resident assessments required of nursing facilities. OLRs recommends that some "significant change in condition" markers be added to the resident review rule, such as a hospitalization, or a move from an unlocked to a locked unit or from locked to unlocked. Also, significant changes in condition should not be assumed to mean only an adverse or negative change in condition. In theory, some people should be benefiting from their stay in a nursing facility. Therefore, a change in condition should also trigger an exploration of less restrictive alternatives for the individual. Paragraph (34)(a) is phrased only in the negative and while paragraph (34)(b) may suggest the positive, it is very vague. There should be a requirement that if the change of condition is positive, then the nursing facility must explore less restrictive options for the individual in the treatment or discharge planning process.

5101:3-3-15.2 (resident review requirements) paragraph (F)(2), states that if there is an adverse determination, the NF shall provide the individual with notice of intent to discharge and that those who do not meet the retention criteria "must be discharged from the NF and relocated to an appropriate setting in accordance with Chapter 3721 of the revised code." Because no specific portion of Chapter 3721 is specified, one must guess which portions are being referenced. This is particularly problematic given the problems and variances that exist in nursing facility discharge planning generally. If the intent here is to merely reference the appeal rights in 3721, then that reference should be specific. If the intention is to encourage better and more expeditious discharge planning, then we must deal with the issue of "appropriate setting." The

nursing facility has the responsibility for the relocation to an "appropriate" setting after an adverse determination based upon a resident review. However, the requirement for discharge is embodied in JFS rule. OLRS recommends that the JFS rule provide at least some discharge planning guidance in the JFS rule. Further, the resident review rule, paragraph (I) provides that ODJFS "has authority to assure compliance with the provisions of this rule."

OLRS is pleased that the ODMH rule 5122-21-03 adds a requirement that the mental health system assist in the discharge of individuals who receive an adverse determination on a resident review. OLRS recommends a similar requirement when an individual in a nursing facility is found to require "specialized services," is discharged to a hospital setting as required, and after stabilization is discharged back to a nursing facility.

Specialized Services

OLRS is pleased that there is now clarity that "specialized services" for SMI purposes means treatment in an inpatient setting. OLRS remains concerned, however, that there are currently large numbers of people in nursing facilities who over time have entered facilities (with or without the knowledge of the mental health system) who meet the criteria for specialized services and who are not identified upon resident review. There are also many individuals with mental illness who do not meet the specialized services criteria but who are being refused discharge due to their mental illness. There are also individuals who are determined to require "specialized services" who are moved for a short time to an inpatient setting and then discharged back to a nursing facility with no exploration of or offering of other settings. The memo attached to the proposed rule package states that additional changes to PASRR are expected in later phases of the "rebalancing" of the system. OLRS recognizes that some of the additional notifications required in these rules are an attempt to capture data and information to inform those later rule changes. Nonetheless, OLRS recommends that ODMH and the Ohio Department of Developmental Disabilities undertake a review of all individuals with mental illness currently in nursing facilities and offer alternatives to nursing placement for those who would like to move and those for whom nursing placement is no longer appropriate.

The ODMH proposed rule 5122-21-03 states that a person may return to the nursing facility after specialized services are provided in a hospital setting if the individual "chooses to do so." This is another place where options should be provided to the individual, so that an informed choice is made. The nursing facility is required to request a new resident review under these circumstances. The results of that resident review should be sent to ODMH and/or the relevant mental health board.

In the proposed MR/DD rule definition of "specialized services" OLRS has concerns that the requirement that the level of services provided shall be made available at the frequency and intensity necessary to meet the needs of the individual has been deleted. Instead the phrase "to address needs in each of the life areas in which functional limitations are identified by the county board" has been substituted. OLRS is concerned that this dilutes the services that will be provided to an individual. It may also create a conflict, or the appearance of a conflict, between the interests of the county boards and the individual's interest in and right to "active treatment." OLRS proposes that the deleted phrase be reinserted and that the proposed language be retained,

so that both elements will exist in the rule. Also, the existing rule specifies that functional limitations are to be determined according to 5123.01. This has been deleted in the proposed rule. No changes in the MR/DD rule should alter responsibilities under the Sermak v. Manuel consent decree.

The proposed MR/DD rule, in section (E)(10)(b) states that the board shall determine "whether the individual requires the level of services provided by a NF based on the comprehensive analysis of all data and consideration of the most appropriate placement such that the individuals need for treatment does not exceed the level of services that can be delivered in the NF." The next paragraph adds a determination of "whether or not the individual requires specialized services." "Most appropriate placement" is very vague in this context. It is difficult to determine what is intended in this part of the rule.

Hospital Exemption

OLRS is particularly pleased that 5101:3-3-14 renames and redefines the former "convalescent" exemption. The proposed rules also create a process, with requirements, for this exemption to occur. This change, if properly implemented, may reduce the number of people with mental illness who enter nursing facilities and remain there with no review.

Clarification of Rule References

OLRS proposes a clarification of the definition of "ruled out" in 5101:3-3-14(B)32 and 5123:2-14-01. 5101:3-3-14(B)32 references 42 C.F.R. 483.128(m). It would provide more clarity if that reference were more specific and incorporated language from 483.128(m), which explains that the required evaluations may be terminated "if the evaluator finds at any time during the evaluation that the individual being evaluated (1) does not have MR or SMI; or (2) has (i) a primary diagnosis of dementia (including Alzheimer's Disease or a related disorder); or (ii) A non-primary diagnosis of dementia without a primary diagnosis that is a serious mental illness, and does not have a diagnosis of MR or a related condition." Without this kind of clarity, the use of the slightly different term "rule out" in other contexts is confusing.

In 5101:3-3-15.1(G) the Hospital (convalescent) Exemption from PAS requirements, there is a reference to paragraph (B)(4) of rule 5101:3-3-14. That rule references (B)(9). These references and the need to look in several rules to track the references are confusing. It would be more clear to include some of the actual language.

There are a few additional items to mention. First, there are places in the proposed rules where paragraph references are incorrect. For example, in rule 5101:3-3-15.1(B)(4)(e), there is a reference to persons 22 years or older who have previously been determined by ODMRDD to be ruled out from PAS as defined in paragraph (B)(33) of 5101:3-3-14. This reference goes to the definition in "Serious Mental Illness". It should reference (B)(32).

Second, in light of recent Ohio legislative activity to change the name of the Department of Mental Retardation and Developmental Disabilities to the Department of Developmental Disabilities, references to the Department and MR/DD should be changed in the proposed rules.

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