

February 2, 2011

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Division of Developmental Disabilities
PO Box 726
Trenton, New Jersey 08625-0726

Re: PRN 2010-297 (Proposed Readoption without Change: N.J.A.C. 10:46)

Dear Ms. Monteschio:

The following comments are submitted on behalf of Disability Rights New Jersey. DRNJ is the designated protection and advocacy system for New Jersey pursuant to the Developmental Disability Assistance and Bill of Rights Act, 42 U.S.C. §§ 15041 to 15045.

Readoption without Amendment

DRNJ is disappointed that the Division has again chosen to readopt one of its basic regulations without amendments despite the fact that the existing regulations contain provisions that are no longer correct or no longer reflect the practices of the Division.

For example, the list of offices where applications can be obtained and filed does not match the list of current offices on the Division's website. The existing regulation refers to guardianship services as being provided by the Division although those services were moved out of the Division some time ago. And, the appendix to chapter 46, of doubtful relevance here, has not been updated since 2003.

"mental retardation"

One of the consequences of the Division's failure to make any changes to the existing regulation is the embarrassing retention of the term "mental

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Mary E. Monteschio, Esq.

Re: PRN 2010-297 (Proposed Readoption without Change: N.J.A.C. 10:46)

Page 2

retardation" in the text of the regulation. Despite the Department's and the Division's leadership in securing the passage of legislation eliminating the use of the term in New Jersey's statutes, regulations, and policies, the Division's summary unconvincingly expends more than 200 words attempting to justify not changing four words in its regulations.

"Developmental Disability"

The Division's failure to amend the definition of "developmental disability" found in N.J.A.C. 10:46-1.3 demonstrates why the Division's promises with respect to rulemaking have lost credibility.

The definition of "developmental disability" used by the Division to determine eligibility has been challenged for more than 20 years. *See, for example, T.L. v. Div. of Developmental Disabilities*, 243 N.J. Super. 476, 479 n.4 (1990) (decided on other grounds) ("Being able to live alone and being able to support oneself were testified to as quite different life activity skills. Where eligibility depends on qualifying in *three* areas, such a dichotomy is relevant.")

In its response to comments received on the proposed amendment to this regulation in 2007, the Division acknowledged the need for a change, saying:

The Division received comments from four agencies: The Department of the Public Advocate, Office of the Child Advocate, Alliance for the Betterment of Citizens with Disabilities (ABCD) and Spina Bifida Association.

COMMENT: All four agencies commented on the proposed definition of "developmental disability." [. . .]

The four agencies commented that the proposed definition is still too restrictive. Pursuant to the Federal regulations promulgated under the Developmental Disabilities Assistance and Bill of Rights Act (the Act), 42 U.S.C. §§ 15001 et seq., a state is prohibited from having an "eligibility definition of developmental disability" which is "more restrictive" than the Federal definition. 45 CFR §1385.3. [. . .]

RESPONSE: After a review of the public comments and a review of the definition from the regulation adopted on December 15, 2003, the Division agrees with the recommendation of the commenters and will propose to make this change in a future rulemaking, as this change is too substantive to make

Mary E. Monteschio, Esq.

Re: PRN 2010-297 (Proposed Readoption without Change: N.J.A.C. 10:46)

Page 3

upon adoption. *The Division is working on proposing amendments to Chapter 46, and will incorporate this change into those amendments.*

39 N.J.R. 4122(a). (Emphasis added.) In the more than three years since, the Division has progressed no further than reportedly convening a committee.

Summary, Social Impact, Economic Impact

The Summary, Social Impact, and Economic Impact sections each contain a statement substantially similar to the following:

By increasing the number of individuals for which the State receives federal funds, the State will be able to increase revenues, off-set cost of services to those individuals, and re-invest those revenues in services to more individuals, primarily those living at home.

Substantially similar, if not identical statements, have appeared in previous years. *See, for example, 35 N.J.R. 3015(a) (2003).*

Because this statement is more relevant to the receipt of services rather than eligibility for those services, its continued appearance here is questioned. In addition, the statement omits informing the public that any increased revenues might also be withheld from the Division and not used to offset costs and reinvest in services for individuals found eligible for services from the Division.

Federal Standards Statement

DRNJ believes that the Federal Standards Statement is incorrect. As the Division has previously acknowledged, the definition of "developmental disability" is different from, and, contrary to federal regulations, more restrictive than the federal definition. A federal standards analysis should have been completed and reported.

Expiration of Regulation

DRNJ believes that N.J.A.C. 10:46 has likely expired. The 2007 adoption notice stated that these regulations would expire on October 18, 2010. While the Administrative Procedure Act permits an extension of the expiration date, notice of the intention to readopt the regulation must be

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Re: PRN 2010-297 (Proposed Readoption without Change: N.J.A.C. 10:46)

Page 4

filed *before* the regulation expires. N.J.S.A. 52:14B-5.1(c). While there is no easily accessible way to determine when the notice to readopt was actually filed, the publication of the notice 50 days after the known expiration date at least raises the question of the regulation's current validity. The Division's citing expiration dates of both October 18, 2010, and April 16, 2011, only contributes to the confusion.

Regulatory Process Needs Changing

The Division must change the way it reviews expiring regulations and proposed amendments. These changes must include a significantly greater effort not only to propose readoption or amendments in a timely manner, but also in sufficient time to allow community input *prior* to publication.

While DRNJ believes that using an internal workgroup is a reasonable method to propose new regulations and review expiring regulations, there must be a sincere effort to distribute its recommendations in sufficient time to permit community input *prior* to publication.

Prepublication input is essential because the Division has established a track record of not responding to substantive comments after a proposal has been published.

The failure to change the definition of "developmental disability" is just one example. A more egregious example is the Division's regulation on mechanical restraints and safeguarding equipment, N.J.A.C. 10:42. Despite convening a workgroup, drafting revised regulations, and holding public meetings about the proposed revisions in 2005, the Division adopted its existing regulations in 2007 without any amendments. In response to the public's comments, the Division acknowledged six times that a comment merited consideration, but insisted that the commenters' proposed changes were too substantive to be made at that time. Instead, the Division made an agreement it did not keep:

The Division agrees to move forward with its review process for further development of its new rules. To that end, its restraint work group will reconvene to consider additional safeguards prior to finalizing the new rules. Upon completion, the new rules regarding restraint use will be filed with the Office of Administrative Law for proposal in the New Jersey Register for public comment.

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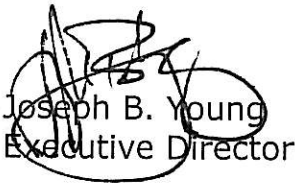
Re: PRN 2010-297 (Proposed Readoption without Change: N.J.A.C. 10:46)

Page 5

While the Division convened another workgroup, that workgroup stopped meeting some years ago and no new rules were proposed.

DRNJ, as well as a number of others, take our responsibility to comment on the Division's regulations seriously. Too often it seems that the Division has not shared the same level of commitment.

Very truly yours,



Joseph B. Young
Executive Director

JBW/md

cc: Dawn Apgar, Deputy Commissioner