



RESPONSE TO REQUEST FOR REVIEW OF

PROVIDER BULLETIN NO. 17-17

PURSUANT TO NEB. REV. STAT. § 84-901.03

DATED AUGUST 16, 2019

The Nebraska Department of Health and Human Services (“DHHS”) received a request dated August 2, 2019, in which a representative of a certified agency provider of Developmental Disabilities Home and Community Based Services (HCBS) requested a review of Provider Bulletin (PB) No. 17-17. The request was made pursuant to Neb. Rev. Stat. § 84-901.03(3), and contended that PB No. 17-17 imposes additional requirements or penalties on regulated parties.

Specifically, the requestor asked for a review of PB No. 17-17’s advisory that a certified agency provider of Developmental Disabilities (DD) HCBS must, through its Human and Legal Rights Committee (HLRC), review the use of psychotropic medications on a semi-annual basis. It appears the requestor contends that this imposes additional requirements on regulated parties that are not in fact contained in regulation.

Pursuant to Neb. Rev. Stat. § 84-901.03(3), DHHS has treated the request as a request to revise or repeal this guidance document. DHHS respectfully denies this request. The reasoning behind the denial is as follows:

Title 404 of the Nebraska Administrative Code (NAC) contains many of the regulations which impose requirements on certified providers of DD HCBS waiver services. The requestor is such a provider and subject to all the relevant regulations under Title 404.

In addition, DHHS’s Division of Developmental Disabilities (DDD) is tasked with administering the Medicaid DD home and community-based services waivers upon application approval by the federal Centers for Medicare and Medicaid Services (CMS).¹ The approved DD waivers contain assurances the State of Nebraska has made to CMS regarding the manner in which DD HCBS will be delivered, monitored, and implemented. As the designated state Medicaid agency responsible for administering the DD waivers, DHHS is responsible for ensuring that a waiver is operated in accordance with applicable Federal regulations and the provisions of the waiver itself.²

Thus, regulations promulgated by the State of Nebraska, the federal government, and provisions of the approved Medicaid waiver application are all applicable sources of law and impose certain requirements on all providers, including ILC, which are certified by DHHS to provide HCBS waiver services.

¹ Neb. Rev. Stat. § 83-1216(1)

² 42 CFR § 431.10

404 NAC § 4-011 states that all certified providers of DD HCBS services “must establish a rights review committee that meets no less than semi-annually. The function of this committee is to review any situation requiring an emergency safety intervention, the use of psychotropic medication as outlined in 404 NAC 5-003.02E and 404 NAC 6-005, any restrictive measure as outlined in 404 NAC 6-004, and any situation where violation of an individual’s rights occurred.” (emphasis added).

This regulation explicitly requires a provider’s rights review committee, also commonly referred to as a Human and Legal Rights Committee (HLRC) to meet at least twice a year. This regulation also explicitly states that the function of the HLRC is, among other duties, to review the use of psychotropic medications taken by the person due to a diagnosed mental illness;³ psychotropic medications used solely for the purpose of modifying behaviors;⁴ and, to review the provider’s compliance with the restrictions on the use of psychotropic medications set forth in 404 NAC § 6-005.02.

The plain language of this regulation shows that the HLRC must meet at least twice a year, and that one of the HLRC’s primary duties is to review the use of psychotropic medications pursuant to 404 NAC 6-005, which requires that there be a plan to reduce and eliminate the medication and that the drug is used in conjunction with a positive behavioral supports plan.⁵

Provider Bulletin No. 17-17 imposes no additional restrictions beyond this regulation. It is, as required by Neb. Rev. Stat. § 84-901.03, advisory in nature in that it explains the requirements of existing regulations. PB No. 17-17, on page two of the document, states that ongoing review of psychotropic medication is required at least semi-annually. Again, this comports with the language in 404 NAC 4-011, which requires a provider’s HLRC to meet at least semi-annually and to review the use of psychotropic medications at each meeting.

³ 404 NAC 5-003.02E

⁴ Id.

⁵ 404 NAC 6-005.02