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September 2, 2014

TO: Rules Advisory Committee and Commenters
Oregon Administrative Rules
Chapter 943, division 005 pertaining to Individual Rights: Prohibiting Discrimination against Individuals Based on Protected Class

FROM: Keely West, Administrative Rules Coordinator

cc: Tricia Tillman, Office of Equity and Inclusion, Oregon Health Authority
Mavel Morales, Office of Equity and Inclusion, Oregon Health Authority
Keely West,
OHA, Director's Office

SUBJECT: Report on Rulemaking Hearing and Public Comment Period

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Hearing and Comment Report

Date of Hearing: July 25, 2014

Public Comment Deadline: July 28, 2014

Purpose of Hearing: To receive testimony regarding the Oregon Health Authority, Office of Equity permanent adoption and amendment of Oregon Administrative Rules in chapter 943, division 005 related to the Agency's policy of non-discrimination, requesting modifications, and reporting and investigating complaints related to discrimination against a protected class.

Hearing Officer: Jana Fussell

Testimony Received: No oral or written testimony was received at the hearing.

Other Comments: Two sets of written comments were submitted to OEI within the period allotted for public comment. The comments are summarized briefly as follows:

Daniel Ward, Executive Director of the Alcohol and Drug Policy Commission

Mr. Ward suggested the addition of "facilities and equipment" to the sections related to reasonable modification for disability section; provided additional suggested definitions from the Americans with Disabilities Act Amendments Act; provided an alternative definition for sexual orientation and discrimination; and suggested changes to the language in the section on illegal use of drugs that would emphasize the illegality of behavior over the classification of the drug.

Mr. Ward's comments are included at the end of this report.

Agency Response: OAH appreciates the concerns and suggestions provided by Mr. Ward and provides the following response:

- OHA adhered to the accepted definitions in the original rule as approved by the RAC rather than adding facilities and equipment in some areas as suggested.
- The suggested ADAAA definitions were not added. The definitions included in the rules were carefully considered by the Rules Advisory Committee and full transparency prevents the addition of two broad and complex definitions without full consideration by a larger group.
- The sexual orientation and discrimination definitions approved by the Rules Advisory Committee were retained. The sexual orientation definition was selected based on a recommendation by Basic Rights Oregon that the rule definition mirror ORS 174.100. The definitions included in the rules were carefully considered by the Rules Advisory Committee and full transparency prevents creating broader definitions without RAC consultation.
- Some minor changes to the language have been made in compliance with the suggestions related to the illegal drug use language..

Kathy Wilde, Legal Director, Disability Rights Oregon

Ms. Wilde expressed concerns that the rule revision did not adequately address previous concessions that provided for obtaining the assistance of agency staff for individuals that need assistance understanding and completing forms under the alternate format definition; suggested that OHA restore the definition of auxiliary aids and services; and suggested the addition of a suggestion requiring the compilation of a monthly report.

Ms. Wilde's comments are included at the end of this report.

Agency Response: OHA appreciates the concerns and suggestions put forth by Ms. Wilde and provides the following response:

- The actual definition language for "alternate format communications" and "auxiliary aids and services" remains the same. The agency eliminated the example lists in an effort to prevent the rules from being outdated through changing technology or limited based on literal interpretation of the lists. Additionally the Authority expanded language in other sections related to ensuring access that we believe addresses the concerns of the commenter.
- The data collection portion of the rule (OAR 943-005-0050) requires the Authority to maintain reporting records for at least three years. These records are available to the public upon request under the Oregon Public Records Law (ORS 192.410 et. seq.).

West Keely L

From: Ward Daniel <daniel.ward@state.or.us>
Sent: Wednesday, July 02, 2014 4:33 PM
To: keely.l.west@state.or.us
Subject: Some ideas for the Client Civil Rights rules

Hi Keely,

I clicked on the link in Suzanne's email this morning and found your draft of OAR 943. With a brief scan, I see a few things missing that I may have included:

1. A statement of the civil rights of individuals who receive treatment, e.g.:
    a. To be treated with dignity and respect
    b. To receive treatment in the least restrictive environment
    c. To receive treatment in a safe and humane environment
    d. To receive available treatment most appropriate to one's own condition
    e. To be presumed competent to direct one's own affairs, including making decisions about one's own treatment, unless there is documented evidence to the contrary
    f. To have access to means of communication, printed and written materials, and media
    g. To be able to communicate with family, friends, attorney, clergy
    h. To be prescribed certain treatments (psychotropic chemotherapy, ECT, neurosurgery, TMS) only when certain conditions (specifically described by administrative rule) and special consent for treatment are met
    i. To be free of physical restraint unless certain conditions (specifically described by administrative rule) are met
    j. If physical restraint is used, it must be comply with conditions described by administrative rule

2. If treatment providers deliver services outside of the individual's home, it must be provided in facilities that fully comply with the American with Disabilities Act.

Daniel Ward
Executive Director
Alcohol and Drug Policy Commission
daniel.ward@state.or.us
503-884-5776

West Keely L

From: Ward Daniel <daniel.ward@state.or.us>
Sent: Monday, July 21, 2014 11:44 AM
To: keely.l.west@state.or.us
Cc: Morales Mavel
Subject: Recommendations for OAR 943-005-0000 et seq
Attachments: Recommendations for OAR 943-005-0000 et seq.docx

Hello Keely,

Here's a doc with some more recommendations for you, re OAR 943-005-0000 et seq.

You are correct about the treatment rights, etc., that I sent you a few weeks ago. As you suggested, I found those in other OHA OARs. I do wish Oregon would enforce some of those treatment rights—most normal, least restrictive, informed consent, etc.—as civil rights, however.

I think you'll find my comments in the attached doc more in sync with the scope of your project.

- Some subtle but important changes to the section on illegal use of drugs
- Addition of "facilities" and "equipment" to reasonable modification of disability sections
- Changed sexual orientation definition to more customary language
- Added two definitions from the ADAAA

Daniel Ward
Executive Director
Alcohol and Drug Policy Commission
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503-884-5776

943-005-0005

Definitions

…

(2) "Contractor" means any individual or entity with which the Authority has an agreement or contract to provide services to clients. ~~with federal funds.~~

Note: "Contractor" definition is not in alphabetical order; should be (4)

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(5) "Direct threat" means a significant risk to the health or safety of others. A direct threat is one that:

(a) Cannot be eliminated or reduced to an acceptable level through the provision of auxiliary aids and services or through reasonably modifying facilities, equipment, policies, practices or processes.

(b) Is identified through an individual assessment that relies on current medical evidence, or the best available objective evidence that shows:

(A) The nature, duration and severity of the risk;

(B) The probability that a potential injury will actually occur; and

(C) Whether reasonable modifications of facilities, equipment, policies, practices or processes will lower or eliminate the risk.

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(6) "Discrimination" means the denial of services to individuals or groups because the individual or group is part of a protected class. It includes policy, practice or treatment resulting in unequal access to ~~Authority~~ facilities, programs and services, or having a disparate impact on a protected class. It also includes failure to provide reasonable modification of facilities, equipment, policies, practices, or processes to allow an individual with a disability to participate equally in the program or benefit from the program or service.

Need to add these two definitions, from Americans with Disabilities Act Amendments Act (ADAAA) of 2008, *Public Law 110-325*:

8. "Impairment" means

(a) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(b) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

10. "Major Life Activities" include, but are not limited to:

(a) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(b) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

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(12) "Reasonable modifications" means a modification of facilities, equipment, policies, practices, or processes made to a program or service that allows an individual with a disability to participate equally in the program or benefit from the program or service.

(13) "Sexual orientation" means an individual's actual, ~~or~~ perceived, or self-defined heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from traditional sexual or gender roles, norms, expectations, or biological sex.~~that traditionally associated with the individual's sex at birth.~~

Comment [KLW1]: Adopted from information from Basic Rights Oregon and corresponds to another statute, rule (find if possible)

(14) "Subcontractor" means any entity or ~~agent~~ individual who enters into an agreement with an Authority contractor to perform part or all of the obligations of the contractor who has a contract with the Authority. ~~funded in whole or part with federal funds.~~

943-005-0010

Non-Discrimination Policy

(12) The Authority and its contractors and subcontractors shall comply with the following statutes and regulations:

…

g. Americans with Disabilities Act Amendments Act (ADAAA) of 2008, *Public Law 110-325*

…

The language of this next section must be cleaned up. The correct issue, particularly with contradictory state and federal marijuana laws and epidemic abuse of prescription pharmaceuticals, is illegal behavior rather than outlawed molecules. The language should always be "illegal use of drugs" rather than "use of illegal drugs."

943-005-0015

Illegal ~~Drug~~ Use of Drugs

(1) Except as provided in OAR 943-005-0015(2), this rule does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) The Authority shall not deny services to an eligible individual based on the individual's current use of ~~illegal~~ drugs when the requested or provided services are in connection with drug rehabilitation or other health services.

(3) A drug rehabilitation or treatment program may deny participation to an individual who engages in illegal use of drugs while that individual is in the program.

(4) A program may adopt reasonable drug testing policies designed to ensure that an individual who has illegally used ~~illegal~~ drugs in the past is not now illegally using ~~illegal~~ drugs.

(5) A psychoactive substance use disorder resulting from current illegal use of drugs is not a disability under these rules.

Stat. Auth.: ORS 413.042
Stats. Implemented: ORS 413.042

943-005-0020

Reasonable Modifications

(1) Unless the Authority Director or the Director's designee determines in writing that a modification or alteration will fundamentally alter the nature or benefit of the facility, program, service or activity, or create an undue administrative or financial burden, the Authority and its contractors and subcontractors, shall:

(a) Make reasonable modifications to the policies, practices or processes of a facility, program, service or activity when the modifications are necessary to avoid discrimination based on disability.

(b) Provide aids and services or alternate format communications to individuals with disabilities where necessary to ensure an equal opportunity to participate in, and enjoy the benefits of a facility, program, service, or activity.

(c) Provide facility modifications, specialty equipment, aids and services to individuals with disabilities where necessary to ensure personal safety and hygiene within a facility, program, service or activity.

(d) Provide facility modifications, specialty equipment, aids and services to individuals with disabilities where necessary to ensure safe and timely emergency egress from a facility, program, service or activity.

(2) The Authority shall decide which aid, service or format may be provided without fundamental alteration or undue burden, but shall consider first the choice of the requester.

(a) Except as authorized under specific programs, the Authority is not required to provide personal devices, individually prescribed devices, readers for personal use or study, or services of a personal nature.

(b) The Authority and its contractors and subcontractors shall not assess a charge or fee to an individual with a disability or any group of individuals with disabilities to cover the costs of measures required to provide the individual with a reasonable modification.

Stat. Auth.: ORS 413.042
Stats. Implemented: ORS 413.042

943-005-0025

Requests for Reasonable Modification

(1) Requests for reasonable modification to a facility, program, service, or activity may be made to program employees either verbally, by completing the Request for Reasonable Modification form, or in any manner otherwise acceptable to the Authority.

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West Keely L

From: Kathy Wilde <kwilde@droregon.org>
Sent: Wednesday, July 23, 2014 2:26 PM
To: keely.l.west@state.or.us
Subject: Comment on Proposed Regulations - OAR 943 Individual (Client) Civil Rights

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From: Kathy Wilde [mailto:kwilde@droregon.org]
Sent: Wednesday, July 23, 2014 2:24 PM
To: 'keely.l.west@state.or.us.'
Cc: 'Sarah Radcliffe'; 'bob@disabilityrightsoregon.org'
Subject: Comment on OAR 943 Individual (Client) Civil Rights

The following are the comments of Disability Rights Oregon on the proposed regulations.

First, the proposed regulations remove the specificity of alternate format communications previously provided in 943-005-0005, which were hard won as a result of a civil rights complaint and subsequent lawsuit against DHS. We would ask that you restore the list of available alternate formats, which includes but is not limited to large print, Braille, audiotape, electronic format, email attachments, diskettes, CD-ROMs and oral presentations. In addition, the settlement with DHS provided a reasonable accommodation process not only for obtaining alternate format, but also obtaining the help of agency staff in filling out forms, explaining forms, taking information over the phone, and so forth – for clients who were visually impaired, or cognitively disabled such that unable to understand or complete key forms or provide written information.

Second – and closely related – we would ask that OHA restore the definition of "auxiliary aids and services" which was previously in subsection (5) of 943-005-0005. This is a term of art under the ADA and it is important that it be defined.

Finally, the complaint process is much improved. However, we note that DHS is required to compile a monthly report of complaints received. We have found these helpful. We would propose that OHA consider adding something comparable to the DHS provision cited below:

407-005-0115
8) The Department shall compile a monthly report summarizing each customer service complaint filed. The report will be available to the public upon request. Customer service complaints related to Children, Adults and Families Division, Self-Sufficiency program issues will be provided monthly to the Family Services Review Commission.

Thank you for the opportunity to provide these comments. Please feel free to contact me should you have any questions.

Kathy Wilde, Legal Director
Disability Rights Oregon