INDIANA
DISABILITY RIGHTS

January 6, 2025

Amanda DeRoss
Family & Social Services Administration
fssarulecomments@fssa.in.gov
SENT ELECTRONICALLY

Re: Comments about BDS Fines (LSA Document #24- 434)

Dear Ms. DeRoss,

Indiana Disability Rights (IDR) is Indiana's protection and advocacy system, congressionally tasked to uphold and advocate for the rights of Hoosiers with disabilities. To accomplish this objective, IDR is authorized to use tools such as monitoring facilities that serve individuals with disabilities, investigating allegations of abuse and neglect, informal negotiation, legal representation, and engaging in systemic advocacy. For decades, IDR has received, and often substantiated, reports of providers violating the rights of Hoosiers with disabilities. Many of these reports involve noncompliant activity by disability service providers, including those providing services through the Bureau of Disabilities Services (BDS).

IDR appreciates BDS's apparent effort to hold providers accountable for the abuse, neglect, and mistreatment of Hoosiers with disabilities, including those receiving services through two Medicaid waivers traditionally administered by the Division of Disability and Rehabilitative Services (DDRS).[1] Such effort is evidenced by BDS's proposed rule to clarify the subagency's ability to financially sanction service providers. IDR hopes that BDS's appropriate use of fines will reduce provider violations and generally improve the quality of services for Hoosiers receiving BDS services. Nonetheless, upon detailed review of the proposed rule, IDR is concerned about its ambiguity, application, and proposed fine mitigation criteria.

In regard to ambiguity, proposed rule 460 Ind. Admin. Code § 6-37-4 states that "[n]othing in this rule requires the division to assess a fine for a violation." IDR suggests that BDS clarify the circumstances in which a provider would not be fined for violating its responsibilities. Further, IDR suggests that BDS identify the individual or entity ultimately responsible for determining whether a provider fine will be assessed. Without circumspection of BDS's proposed absolute discretion to impose sanctions, IDR is concerned that

[1] Specifically, these DDRS-administered waivers are the Community Integration and Habilitation Waiver and the Family Support Waiver. As explained later in these comments, IDR suggests that BDS should expand the potential sanction of provider fines to all BDS providers, including those serving Hoosiers with disabilities through the Health and Wellness Waiver and Traumatic Brain Injury Waiver, as well as other BDS service providers whose scope of services do not fall within 460 Ind. Admin. Code § 6.

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providers will continue to avert accountability for noncompliance, leaving client safety in jeopardy. Relatedly, the proposal's vague nature allows DDRS to deflect accountability for not holding providers accountable.

Moreover, IDR finds proposed rule 460 Ind. Admin. Code § 6-37-5, which includes a schedule of base fines that "may be adjusted to a higher or lower amount," exceedingly unclear. For example, a Level 0 Sanction does not seem to be a sanction at all, as it carries a zero-dollar base fine. The proposed rule's remaining base fines, encompassing Level 1 through 7 Sanctions, range from $250 to $10,000. Importantly, however, the proposed rule fails to state whether such fines are assessed on a per diem or per violation basis. IDR suggests that BDS include this missing information in the final rule.

Neither does the proposed rule state or describe the particular violations that constitute Level 0 through 7 Sanctions – except to mention that "[e]ach violation is set as a Level 2 sanction as the base fine [sic]." Id. If IDR correctly understands that BDS is proposing that every violation begin with a $500 base fine, IDR encourages reconsideration of that plan. Certainly, some violations are more egregious than others; BDS-administered home health care that neglects a paralyzed service recipient to the extent that they need to be hospitalized for pressure sore treatment should ostensibly result in a costlier fine than a similar provider's failure to procure a clean tuberculosis test result from an individual that a BDS service recipient specifically asks to be hired and assigned solely to their case.

Although the proposed rule includes mitigating and aggregating factors that influence "[t]he amount [that] a fine may be adjusted," in proposed 460 Ind. Admin. Code §§ 6-37-2 and 6-37-3, critical information is, again, missing. Just some undisclosed details include: the individual or entity responsible for determining the presence of mitigating or aggravating factors; the individual or entity responsible for determining the amount that a fine is increased or decreased, based upon the existence of one or more mitigating or aggregating factor; the party or parties who may bring a mitigating or aggregating factor to BDS's attention; whether a BDS service recipient who was adversely affected by an act for which a fine is being assessed will have an opportunity to weigh in on the application of mitigating or aggregating factors; and the mechanism or process for determining how much the presence of a mitigating or aggregating factor will, respectively, increase or decrease the amount of a fine.

In addition to the foregoing concerns about the proposed rule's ambiguity, IDR has several other discrete concerns about the proposed rule's operations. First, IDR suggests that BDS's proposed mitigating factors may be overbroad and overly lenient. In particular, proposed 460 Ind. Admin. Code § 6-37-2(1) states that a provider fine may be reduced if "[p]roactive remediation or corrective action [is] taken by the provider to address deficiencies in policy, procedure, or practice that contributed to the violation." IDR suggests this mitigating factor is inappropriate. Providers have ample notice of what is required of them – through statute, regulation, agency guidance materials, and their provider contract – and have committed themselves to compliance. Indeed, because providers sign an agreement to follow programmatic rules and have unambiguous notice of them, corrective action to address deviance from the rules might even be considered an aggravating, rather than mitigating, factor.

Similarly, proposed 460 Ind. Admin. Code § 6-37-2(2) states that provider fines may also be reduced due to "[e]vidence that the violation was the result of isolated, non-systemic events, behaviors, or circumstances." Although IDR agrees that such circumstances should be mitigating factors *if caused by circumstances beyond the provider's control*, lack of provider control over causal circumstances is currently included as a separate mitigating factor in proposed 460 Ind. Admin. Code § 6-37-2(3). Thus, subsection

(2) appears to pertain to circumstances that are subject to provider control. Again, IDR believes that BDS and DDRS are responsible for addressing noncompliant provider activity. The proposed mitigating factors are so expansive that they appear unaccommodating, if not obstructive, to DDRS and BDS's provider oversight and quality control duties.

Consider just one example of how this subsection could be misused. Imagine a Community Integration and Habilitation Waiver participant named Noel. Noel has multiple disabilities and risk plans. Most importantly for this anecdote, he has an intellectual disability and pica, communicates through sign language, and is at high risk of choking. He lives with his parents and younger teenaged brother. One morning, his transportation provider arrives to take Noel to his day program. Al, his usual driver, is on vacation; the provider has assigned Danielle to Al's route until he returns. Over the weekend, Noel's mom had a gallbladder attack and remains in the hospital awaiting surgery. Noel's dad is at work, so his brother is helping him get on the bus. Noel's brother has never met Al or Danielle, and only knows that the bus is sent by the day program to pick up Noel and other participants who live nearby. Noel's brother doesn't notice that Danielle doesn't put Noel in the passenger seat to keep an eye on him; Danielle was running late today, her first morning filling in, and had no time to review passenger packets.

During the ride, Noel's fellow passenger, Carol, entertains herself by going through the bus's first-aid kit. She loves watching medical shows and wants to be a nurse. She finds a mercury thermometer in the kit and puts it under Noel's tongue. Unsurprisingly, Noel tries to eat the thermometer. Carol and other passengers begin shouting for Danielle when they see blood flowing from Noel's mouth. Danielle speeds to the day program, where she tells waiting staff that Noel may need stitches because something happened to his mouth. When staff ask how the injury was caused, Danielle said she did not know, as her eyes were on the road. Looking at the back of the bus, she discovers the open first-aid kit and suggests that Noel and Carol got into a fight because Carol wanted to play doctor and Noel did not. Day program staff, knowing Carol's interest in being a nurse and verifying a history of "inappropriate behaviors" in her file, think Danielle's hypothesis is plausible. Noel receives stitches at the hospital, but begins exhibiting tremors, irritability, and anxiety. Day program staff call Noel's father and explained that he was hit by Carol, received stitches, and seems to be overwhelmed by the ordeal. Noel's father leaves work early and takes him home. While resting, Noel dies of acute mercury poisoning. He also suffered mightily as swallowed glass shards cut his esophagus, stomach, and small intestine. Not until the autopsy results are issued is the truth evident.

The provider in this situation will inevitably claim that Noel's death was the result of isolated circumstances and take corrective action by retraining or firing Danielle. Nonetheless, systemic issues may lurk beneath the surface explanations. Given that Al gave six-weeks' notice of his vacation to the provider, why didn't it arrange for Danielle to shadow Al at least once? Why did the provider wait until less than an hour before Danielle began picking up clients to share those clients' packets? Why weren't clients and family members informed about Al's vacation by the provider? If the provider genuinely believed that Carol posed a danger to others, why was additional staff not assigned to the bus? If the driver cannot see clients while the bus is in motion, why did the provider not install a camera system or mirrors? Why didn't the provider send a sign language interpreter to the clinic with Noel or request that the clinic provide one? While egregious occasions like Noel's hypothetical death – such as numerous real incidents of BDS service recipients suffering serious injury or death – are often isolated, more often than not many of them stem from the absence of systemic compliance and consistent management by providers. Therefore, IDR is concerned that BDS is poised to mitigate sanctions for some of the most significant client harms, on the basis that they tend to be isolated and harm one client at a time.

Relatedly, IDR asks whether asks whether the mortality review committee will have a role in the provider fine process. If yes, does that involvement include addressing the presence and weight of mitigating and aggravating factors? Given that DDRS has recently accepted administrative responsibility for the Traumatic Brain Injury and Health and Wellness Waivers, will the deaths of these waiver participants also be discussed by the mortality review committee? If yes, will the committee be expanded to include representatives with expertise in traumatic brain injury and physical disabilities, including waiver participants? If not, how will BDS ensure that providers across Medicaid waivers are treated equitably?

Next, IDR is concerned that BDS's proposed rule would be embedded in Article 6 of DDRS's regulatory Title, which pertains exclusively to Supported Living Services and Supports. Pursuant to 460 Ind. Admin. Code § 6-2-1, the "article applies [only] to the approval and monitoring of providers of supported living services or supported living supports." As noted, BDS and DDRS serve a much larger population of Hoosiers with disabilities receiving agency services, including individuals with traumatic brain injuries and mobility disabilities. IDR asks about BDS's exclusive focus on providers to certain individuals with intellectual disabilities, rather than providers throughout its constituency. IDR believes the ability to sanction providers comprehensively is important, particularly as BDS clients with intellectual disabilities have other resources that other disability subpopulations receiving BDS services do not, such as an Ombudsman. *See* Ind. Code § 12-11-13-1 et seq. IDR suggests that BDS consider relocating the proposed rule, such that all service providers – other than those service recipients who participate in self-directed services as employers – shall be subject to the agency's sanction authority.

Also related to equity principles, IDR's third area of concern is that the proposed rule does not indicate how revenue from provider fines will be used. IDR recommends that BDS retain that revenue rather than direct it to the General Fund; that is, IDR believes the most appropriate use of collected fines is the improvement of BDS services, including efforts to reduce systemic provider noncompliance. For example, if data collected by BDS suggests that service recipients are not having their end-of-life wishes respected by providers, BDS could use fine revenue to investigate and remediate the problem.

In summary, IDR supports BDS's initial efforts to hold noncompliant providers accountable, particularly in instances of noncompliance that violate clients' rights. However, IDR is concerned that the proposed rule lacks critical information, including the limits on BDS's discretion and how collected fine revenue will be used. Additional concerns include overly lax mitigating factors and the apparent exclusion of providers who do not offer supported living services from the rule's reach. Both service recipient equity and involvement in the provider fine process should be considered in greater detail prior to issuance of the final rule.

Please note that IDR appreciates the opportunity to bring its concerns to BDS's attention. Should you or your team have any questions about these comments or wish to discuss them in greater detail, please contact me at emunson1@indianadisabilityrights.org.

Sincerely,

Emily Munson

Emily Munson
Policy Director