

10.63 Regulatory Confusion

March 28, 2023



In 2015, CBH engaged with BHA in substantive dialogue about the definition and application of key provisions in the 10.63 licensing regulations. Since that time, CBH has worked to prompt compliance with the regulations in its communication with its members and in its response to member inquiries.

Beginning in the summer of 2020, BHA made known its desire to change how key elements of 10.63 applied to providers, but never promulgated rule changes. This has created confusion for providers, and a lack of clarity among CBH and its members as to what standards are required to ensure compliance. In the intervening time, CBH approached BHA on five different occasions to request written clarification from BHA on the standards – and has not received it. Providers face risks related to licensing and audit uncertainty as a result of the environment of regulatory confusion.

The chronology below reflects CBH’s efforts to seek clarity from BHA over the last three years:

- **October 2015:** In the formulation of new licensing regulations under 10.63, CBH had extensive dialogue with BHA staff about the meaning of provider or program in the context of the regulations, particularly as it applied to staffing requirements and notice of closure. At the time, BHA staff pointed to the 10.63 definition of program “means an organization that provides or seeks a license” as alleviating CBH’s need for clarity. In reference to required staffing for OMHC medical directors, BHA’s response to CBH comments stated:

Response: As written, the regulations require the program, not each site, to have a psychiatrist. However, the program is nonetheless required to address clinical needs, which may require additional psychiatric on-site time.

- **July 30, 2020:** CBH returns comments to BHA in response to soft-release of proposed changes to 10.63, particularly around staffing requirements in OMHCs and PRPs, as well as changes to the definition of program.ⁱ The proposed changes are never promulgated.
- **April 2021:** Spencer Gear, in BHA’s Licensing Office, emails another staff in the licensing division, stating, “[T]he [PRP] Rehab Specialist under the current regs can cover multiple sites. I know it shouldn't be so, but it currently is. We are talking about changing how we interpret it in future.” BHA forwards Gear’s email to a CBH member as provider guidance in response to a provider’s inquiry whether a rehab specialist can cover multiple sites.ⁱⁱ BHA’s written guidance is consistent with CBH’s understanding.
- **August 2021:** BHA resumes provider licensing when the state’s PHE ends. Multiple members reach out to CBH expressing alarm that BHA is requiring a rehab specialist at every site as part of licensing process.
- **October 28, 2021:** After BHA states that a rehab specialist is required at every site, CBH sends a letter to Susan Steinberg to request adherence to the regulatory standard of a single rehab specialist per program *until a clear regulatory change is promulgated* that notifies providers of a change in standard.ⁱⁱⁱ CBH cites the fact that its members are currently licensed by BHA with only a single rehab specialist per program as evidence supporting CBH’s plain language interpretation of the regulation. This is CBH’s first request to BHA for written clarification. Steinberg retires in December 2021 without responding to the letter.

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- **March 9, 2022:** CBH asks Dr. Aliya Jones to seek a response to the October letter, and Jones agrees to respond.^{iv} This is CBH's second request to BHA. Later that spring, Dr. Jones leaves the Department before she responds to the concerns.
- **April 14, 2022:** CBH meets with acting BHA leadership to discuss clarifying rehab specialist requirements. This is CBH's third request to BHA. BHA indicates that it will provide a written clarification short of a regulatory change to providers and share a PRP workplan with CBH.^v
- **April 22, 2022:** CBH follows up with BHA leadership to ask when the workplan and written communication will be shared. This is CBH's fourth request to BHA. This email receives no response.^{vi} No workplan or written clarification to providers is issued.
- **December 2, 2022:** CBH meets with Marshall Henson in response to CBH's fifth request to BHA for clarification. In oral communication with CBH staff later summarized to members, Marshall Henson indicates that providers can retain a single rehab specialist until "BHA promulgates regulation in the future," and written clarification via a Provider Alert will be released shortly. The importance of the need for regulatory clarification is highlighted, as Henson indicates that BHA will *not* require a specialist at every site, but tied to client volume.^{vii} On the same date, Spencer Gear at BHA's licensing division sends CBH a letter indicating that a rehab specialist is required at every site.^{viii} No written guidance to the provider community via an Provider Alert on the subject is subsequently released.^{ix}
- **January 27, 2023:** After BHA sends an alert citing 10.63 regulations for the proposition that providers must alert the Department for any *site* closure, CBH sends a letter to Dr. Lisa Burgess indicating that the regulations apply to the closure of any program, not any site.^x For the first time, BHA is now interpreting additional requirements in 10.63 to apply to a site-based definition of program, rather than the regulation's stated definition of program as an organization. The letter receives no response.
- **February 3, 2023:** CBH member shares an OMHC audit letter from BHA which requires 10.63 staffing compliance at a *site* level.^{xi} Specifically, the audit letter indicates that OMHC has to demonstrate medical director and other staffing requirement "of the OMHC *for this location*."^{xii} The audit letter also indicates that a psychiatrist must be a medical director.^{xiii} This COMAR provision has been superceded by Maryland law and does not reflect current staffing requirements for OMHCs, which are codified in Health General § 7.5-402(a)(4) and allow NPs to serve as OMHC medical directors.
- **February 24, 2023:** BHA proposes regulatory changes to 10.63.01, including new definitions but lacking a definition for program or clarify on how the regulations will be applied to staffing-level regulations.
- **March 15, 2023:** CBH member reports a conversation with BHA licensing division and audit result, including a deficiency finding based on the fact that their rehab specialist devoted insufficient time to the function, a requirement not established in existing 10.63 regulations. When the provider asked for a regulatory citation to support the hours required by the rehab specialist, the provider is told that the regulatory process was where they should seek clarity,^{xiv} *but no regulations changing the 10.63 standards have been promulgated.*

End Notes

ⁱ Reference material on file with CBH and available on request.

ⁱⁱ Email from Spencer Gear to Barbara Smythe, forwarded to Ashley Archie (April 2, 2021), appended at pages A3-A4 and screenshot pasted below:

----- Forwarded message -----

From: **Barbara Smythe** <barbara.smythe@maryland.gov>

Date: Tue, Apr 6, 2021 at 12:07 PM

Subject: Re: Rehabilitation Specialist Question

To: Ashley Archie <a.archie@btstservices.com>

Ashley,

I just received a correction from Spencer. A single RS can cover multiple sites:

Spencer Gear -MDH-

11:59 AM (6
minutes ago)

to me

Barb - This isn't correct -- **the Rehab Specialist under the current regs can cover multiple sites**. I know it shouldn't be so, but it currently is. We are talking about changing how we interpret it in future. However, the kids/adult piece is still there...

Thanks,

Spence

ⁱⁱⁱ CBH letter to Steinberg (Oct. 28, 2021), appended at pages A1-A5.

^{iv} CBH email to Jones (March 9, 2022), appended at B1-B2.

^v Conversation referenced in CBH email to Burgess and Henson (April 22, 2022), appended as C1.

^{vi} CBH email to Burgess and Henson (April 22, 2022), appended as C1.

^{vii} CBH email to CEO and Rehab member lists (December 2, 2022), appended at D1-D2.

^{viii} Gear letter to Lori Doyle (Dec. 2, 2022), appended at E1-E2.

^{ix} See Optum Provider Alerts at <https://maryland.optum.com/content/ops-maryland/maryland/en/bh-providers/alerts.html>

^x CBH letter to Burgess (Jan. 27, 2023), appended at F1-F2.

^{xi} Email correspondence between BHA and Upper Bay Counseling & Support Services, appended at G1-G5.

^{xii} *Id.* at top of page G5.

^{xiii} *Id.* at G3.

^{xiv} Email from Jonathan Kearney at CBH (March 15, 2023), appended at H1.