INDIANA
DISABILITY RIGHTS

December 16, 2024

Amanda DeRoss
Office of General Counsel
Family & Social Services Administration
fssarulecomments@fssa.in.gov
SENT ELECTRONICALLY

Re: Comments about Fines for Statutory and Rule Violations (LSA Document #24-427)

Dear Ms. DeRoss,

Indiana Disability Rights (IDR) is Indiana's protection and advocacy system, tasked by Congress 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 various forms of systemic advocacy. For decades, IDR has received, and often substantiated, reports of providers violating the rights of Hoosiers with disabilities. Resultant harms range from time-limited minor rights violations to death.

IDR appreciates the Division of Aging's (DA's) apparent effort to hold providers accountable for the abuse, neglect, and mistreatment of older Hoosiers, many of whom have disabilities. Such effort is evidenced by the DA's proposed rule to clarify the agency's ability to financially sanction service providers. IDR is hopeful that the DA's appropriate use of fines will reduce provider violations and improve service quality. At the same time, IDR finds the proposed rule's details ambiguous and suggests that it be amended for clarity. IDR also has several concerns, as the rule is currently written, regarding fine mitigation and equity.

In regard to ambiguity, proposed rule 455 Ind. Admin. Code § 1-12-4 states that "[n]othing in this rule requires the division of aging to assess a fine for a violation." IDR suggests that the DA clarify the circumstances in which a provider would not be fined for violating its responsibilities. IDR also suggests that the DA identify the individual or entity ultimately responsible for determining whether a provider fine will be assessed. Without additional information limiting the DA's absolute discretion to impose sanctions, IDR is concerned that providers will continue to escape accountability for noncompliance and jeopardizing client safety. Relatedly, the vague nature of the proposed rule also allows the DA to avert accountability for failing to hold providers accountable.

Further, IDR finds proposed rule 455 Ind. Admin. Code § 1-12-5, which includes a schedule of base fines that "may be adjusted to a higher or lower amount," incredibly vague. For example, a Level 0 Sanction does not seem to be a sanction at all, as its base fine is zero dollars. The remaining base fines, encompassing

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Level 1 through 7 Sanctions, range from $250 to $10,000. Importantly, however, the proposed rule fails to state whether these fines are assessed on a per day or per violation basis. IDR suggests that the DA include this missing information in the final rule.

Moreover, the proposed section omits a description of 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." If IDR correctly understands that the DA 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; putting a long-term care recipient in a position in which a foot amputation is recommended by their physician due to an infected pressure sore created when DA-funded caregivers neglected to adequately help the recipient change their position should ostensibly result in a costlier sanction than failing to procure proof of CPR certification from a new employee whom a long-term care recipient requests a home health agency to hire for their case only.

Although the proposed rule includes mitigating and aggregating factors that can influence "[t]he amount [that] a fine may be adjusted," in proposed 455 Ind. Admin. Code §§ 1-12- 2 and 1-12-3, critical information is, again, missing. For example, what individual or entity is responsible for determining the presence of aggregating or mitigating factors? If one or more factors are present, what individual or entity determines the amount that a sanction is increased or decreased? Must the factors be raised by the provider subject to sanctions? Do third parties have an opportunity to introduce aggregating or mitigating factors? Does a harmed recipient of DA-funded services have an opportunity to weigh in on the application of mitigating or aggregating factors? If so, what is the process for gathering their input and how is it weighted?

In addition to these concerns about the proposed rule's ambiguity, IDR has a couple of discrete concerns about the DA's expressed policy choices. The first involves the DA's proposed justifications for fine mitigation. In particular, proposed 455 Ind. Admin. Code § 1-12-2(1) states that sanctions 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 those rules, corrective action to address deviance from them might even be considered an aggravating, rather than mitigating, factor.

Similarly, proposed 455 Ind. Admin. Code § 1-12-2(2) states that sanctions can also be reduced in light of "[e]vidence that the violation was the result of isolated, nonsystemic events, behaviors, or circumstances." Although IDR agrees that such circumstances should be mitigating factors *if due to circumstances beyond the provider's control*, that clause is articulated as a separate factor in proposed 455 Ind. Admin. Code § 1-12-2(3). Thus, subsection (2) appears to focus on incidents within the provider's control. Again, IDR believes that the DA has a responsibility to address noncompliant provider (in)actions. The proposed mitigating factors seem overly broad in supporting the DA's responsibility here.

Consider just one example of how this subsection could be misused. Imagine that a DA-funded provider sends a new caregiver to a client's home because their regular caregiver is ill. The fill-in caregiver was not expecting to be called in and spent the day indulging in drugs and alcohol. The caregiver falls asleep on the client's couch and does not hear the client pleading for help after falling out of bed. Because client fell

on their head, they have bleeding out and eventually pass away. The fill-in caregiver is awakened when the client's son comes home from work and demands information about why his parent is dead.

The provider in this situation will almost certainly claim that the client's death was the result of isolated behaviors, as well as maintain the fill-in caregiver acted contrary to company policy. Nonetheless, systemic problems may lurk beneath the surface. Did the provider wait until the last minute to find a replacement for the client's regular caregiver? Does the provider properly screen and hire caregivers? Does the provider randomly test direct service employees for illicit drug use? While egregious occasions like the death or serious injury of clients are, fortunately, often isolated circumstances, they tend to stem from the absence of systemic compliance and consistent management by providers. For that reason, IDR is concerned that the DA will mitigate sanctions for some of the most significant client harms, on the basis that such egregious incidents tend to be isolated and harm one client at a time.

Unlike other agencies under the umbrella of the Family and Social Services Administration, such as the Bureau of Disabilities Services (BDS), the DA does not appear to have a systemic process to review the causes of death of agency service recipients. The absence of such a process likely makes it more difficult for the DA to assess whether individual recipient deaths are caused by or correlated with certain providers or provider practices – and, subsequently, help providers address these causes. Moreover, IDR notes that BDS's mortality review process includes members who are not State employees. Should the DA consider creating its own mortality review process, IDR suggests that external committee members, including recipients of DA services, can assist the agency in identifying and remedying potential systemic causes of individual client deaths (and, potentially, other egregious harms). This committee could also foreseeably make recommendations regarding the assessment of monetary fines against noncompliant providers.

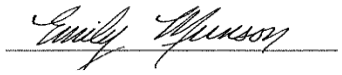
The final issue IDR raises is that the proposed rule does not indicate how revenue from provider sanctions will be used. IDR recommends that the DA retain those fines rather than have them revert to the General Fund; in other words, IDR believes the collected provider fines are best directed to the improvement of DA services or to address systemic provider non-compliance. For example, if data collected by the DA suggests that service recipients are ailing because nonemergency medical transportation and other services are insufficient to consistently and safely transport individuals to their doctors' appointments, the DA could use fine revenue to remediate the problem. If, say, the data shows that older Hoosiers in wheelchairs are the ones not getting to the doctor, it could potentially use fine revenue to purchase accessible vehicles for area agencies on aging. If, instead, the data suggests that only older Hoosiers in the Madison area are not getting to the doctor, fine funds could be used to sponsor a pilot ridesharing program in Jefferson County. By spending collected fines on older Hoosiers, the DA demonstrates far more equity than would be achieved by transferring the same to the General Fund.

In conclusion, IDR has concerns that the DA's proposed rule, as currently drafted, can be meaningfully implemented, due to substantial gaps in how the agency will determine, collect, and use provider fines. Relatedly, IDR is concerned that the DA's proposed leniency in regard to fine mitigation undermines the rule's apparent intent, as well as the agency's critical role, in overseeing providers and holding them accountable. IDR also encourages the DA to promulgate the manner in which collected sanctions will be equitably used for the benefit of older Hoosiers.

IDR appreciates the opportunity to share the foregoing concerns with the DA. Should you or someone from the DA have any questions about these comments or wish to discuss provider sanctions further, please do

not hesitate to contact me at emunson1@indianadisabilityrights.org. IDR looks forward to reading the final rule and supporting the DA's efforts to ensure providers are complying with their responsibilities.

Sincerely,



Emily Munson
Policy Director