OHCA Comments on October 2024 Draft of 3701-17 Rules
October 22, 2024

3701-17-01: Add all the statutory definitions relating to CHOPs: change of operator (CHOP); entering operator; exiting operator; operator; operational control; related party; relative of owner; property owner. These terms are used throughout rule 3710-17-03 and should be defined in the definitional rule.

3701-17-01(I): SOM Appendix PP defines elopement as "a situation in which a resident leaves the premises or a safe area without the facility's knowledge and supervision, if necessary." The rule uses the words, "without authorization or without supervision and/or any authorization to do so." In addition to being redundant, the rule language differs from the federal language by substituting authorization (a stricter standard) for knowledge. The federal language should be used for consistency and because residents have the right to leave the facility without first obtaining permission.

3701-17-03(A): The license fees are specified in division (E) of Revised Code section 3721.02, not division (A). Likewise, section 3701.83 does not have divisions, so the reference to (A) should be removed.

3701-17-03(B): Same.

3701-17-03(B)(2): Reference should be to paragraph (A)(1), not (A)(2)(b).

3701-17-03(B)(3): Reference should be to paragraph (A)(2), not (A)(3).

3701-17-03(D): This provision and several others refer to assignment or transfer of a license. The Revised Code does not permit transfers of licenses. Section 3721.026 begins, "If a nursing home undergoes a change of operator, all of the following requirements must be satisfied before the director of health may issue a license authorizing the person to operate the nursing home." The code speaks of issuing a license – a new license – not transferring the existing license. The next sentence of the statute refers to a change of operator license application. It is operation of the facility that is being transferred, not the license. Later in the statute, the timing of the application for a CHOP license is specified as "forty-five days before the proposed effective date of the change of operator."

The first sentence of paragraph (D) also does not make sense, as it states that the entering operator may receive a transfer of the license at least 45 days before the proposed transfer of the license. It should read as follows, consistent with statute: "At least forty-five days before the proposed effective date of the change of operator, the entering operator will apply for a change of operator license by submitting, on a form prescribed by the director, a completed

change of operator application and paying the non-refundable application fee of three thousand and two hundred dollars payable to 'Treasurer, State of Ohio.'"

As an aside, the fee for a CHOP application of $3,200 seems quite disproportionate to the other licensing fees, especially when ODH does not have to do a survey for a CHOP. I know ODH has the statutory authority to set the fee, but it does appear disproportionate.

3701-17-03(D)(1)-(3): Recommend, rather than repeating the exact same verbiage from (A)(1), (2), and (4) and (B)(4) in these paragraphs, simply cross-referencing the relevant portions of (A):

"A completed change of operator license application includes:

(1) The disclosures, attestations, inspection reports, and certificate of use specified in paragraphs (A)(1), (2), (4) and (B)(4) of this rule.

(2) Except for applications …"

3701-17-03(E): Also refers to transfer of the license. Modify the language, consistent with the statute, to say, "The entering operator will not complete the change of operator until the director issues a notice of intent to grant a change of operator license."

3701-17-03(E)(1): Again consistent with the statute, change "acceptance of the assignment or transfer of the license" to "completion of the change of operator" and change "purchase of a home, or the transfer or assignment of the license to operate a home" to "change of operator."

3701-17-03(E)(2): Reword as, "If the document(s) presented do not evidence the change of operator as proposed in the change of operator license application or reveal additional parties not disclosed by the entering operator in the application, the director will deny the change of operator license or revoke the license if previously issued."

3701-17-03(F): "CHOP" appears here and in subsequent paragraphs, which is why the acronym needs to be listed in the definitional rule.

3701-17-03(I): Change "approval letter" to "license."

3701-17-03(J): Change to, "In the case of a change of operator, the entering operator is responsible and liable for compliance with any notice of proposed action or order issued under section 3721.08 of the Revised Code prior to the effective date of the change of operator."

3701-17-03(K): This paragraph is new in this draft and has not been discussed. It needs clarification and the 60-day timeframe is excessive. The paragraph mixes two separate and distinct concepts: changing bed capacity (presumably, reducing) and moving or adding beds into unlicensed space (which should be clarified as space that does not contain beds licensed as either nursing home or RCF beds).

Reduction of bed capacity by bed surrender already is addressed through the bed surrender process and does not need to be addressed here, certainly not with the requirements listed in the rule.

In the case of moving beds into space that previously didn't contain licensed beds, the 45-day notice required for a new building is more than sufficient. The fire marshal inspection and certificate of occupancy could follow and would be necessary for the space to be licensed, but because it is an existing, licensed facility, the provider should not be required to wait 45 days after obtaining those things to get the additional space licensed.

The requirement for a CON or reviewability determination should be removed. It is not required for an entirely new facility, why require it for new space? Moreover, moving beds into different space without increasing bed capacity almost never requires a CON (not unless it involves a renovation costing more than $4 million with numerous exclusions that effectively raise the threshold to a much higher level). Why would ODH require the provider to incur the additional time and expense of getting a reviewability determination for projects that clearly are not reviewable? Reviewability determinations are optional "comfort letters" for providers whose projects are close cases.

I would revise the paragraph as follows:

"(K) If a nursing home proposes to use a portion of the building that is newly constructed or that previously did not contain licensed nursing home or residential care facility beds to increase licensed bed capacity or to relocate existing licensed beds, the home will provide the director with written notice at least forty-five days prior to the date the facility wants to commence using the new or relocated beds. The nursing home will not use the beds until the department notifies the facility in writing that the portion of the building to be used for the beds complies with the applicable provisions of Chapter 3721. of the Revised Code and rules 3701-17-01 to 3701-17-26 of the Administrative Code. The written notice from the facility will be written on company letterhead and include the following items, which may be supplied after the initial notice but before the director inspects the additional space:

(1) A floor plan of the area, including beds;

(2) The results of the inspection by the state fire marshal or a township, municipal, or other legally constituted fire department approved by the state fire marshal for the area; and

(3) A certificate of occupancy for the area."

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3701-17-03(L): The last sentence of this paragraph is new in this draft and should be removed. It conflicts with the first sentence, which requires buildings to be on the same lot to be operated under one license. The last sentence also mixes up the terms "nursing home" and "residential care facility."

3701-17-03(R): This paragraph is also new to this draft. It is not always apparent at the commencement of a legal action that receivership could result. The paragraph should be targeted at actual requests for receivership, which could come at the beginning of an action or later in the proceedings. The paragraph should be reworded as follows:

"(R) The operator of a nursing home will notify the director within ten days of a court filing that requests the home be placed into receivership."

3701-17-03(S): Insert "application" after "certificate of need."

3701-17-05(C)(1)(c): This paragraph about delaying access to records still needs to be clarified to apply to on-site access to records. ODH should not – and currently does not – require providers to allow off-site access to EMRs because of privacy and security concerns.

3701-17-06(A)(3) and (B)(4): We remain opposed to this massive expansion of SRIs. Our members are extremely concerned about these additional reporting requirements that go far beyond what is required federally: reporting of abuse, neglect, and misappropriation allegations and investigations.

Not only do the expanded reporting requirements create additional administrative burden, our members are concerned that unlike the existing SRI requirements, the triggering incidents are in many cases not clearly defined, setting up liability for failure to report. Moreover, abuse, neglect, and misappropriation are all negative outcomes for residents. Many of the proposed SRIs are things that have not resulted in negative outcomes but perhaps could in the future. We are very concerned about setting a precedent of requiring reporting of a variety of potential regulatory violations.

The expanded reporting requirements should be removed, leaving SRIs are they are currently specified in both federal and state rules.

3701-17-06(C)(1)(j): Remove this provision. Per federal regulations, the QAA committee reports to the facility's governing body relative to the SNF's QAPI activities. The purpose of QAPI is to create a regularized process for facility leadership to identify and address opportunities for improvement. While the QAPI process must include feedback from residents, airing dirty laundry to them or their representatives is not federally required or even appropriate. Although the wording, "make the resident council president or their designee aware of necessary items directly concerning them when appropriate" is confusing, it appears to call for the facility to share information about "QAPI meetings or discussions" with residents. This is not the purpose of QAPI and should not be required by the rule.

3701-17-06(C)(2): Remove "and communicate QAPI priorities with the resident council on a regular basis." Same.

3701-17-07(G)(5): Add “or state-recognized educational provider.” This language would allow entities such as OHCA that are recognized by BELTSS or another state agency as providers of diverse and comprehensive educational programming for SNF personnel to provide the required activity director training. We, and others like us, are well-suited to deliver industry-specific training. It is what we do on a daily basis.

3701-17-07(K)(3), (4), (5): We strongly oppose the added language, “real, alleged, or suspected abuse, neglect, or exploitation of a resident, or misappropriation of the property of a resident.” ODH simply cannot destroy a person’s livelihood and career on the basis of an allegation or a suspicion. It is a bedrock principle in America that a person is innocent until proven guilty. The proposed standard would open the door to incredible mischief, as anyone with an axe to grind against a worker could get them fired by making a false allegation. This language must be removed and the existing language, which appropriately refers to a finding of abuse, neglect, or misappropriation, restored.

3701-17-07.1(B)(8): The paragraph following (B)(8) relating to registry verification apparently is intended to apply to all of (B)(1)-(8), not just (B)(8). This language should be inserted into the preamble portion of paragraph IB), where registry verification first appears, to make it clear that it does apply to everything that follows. Placing the language immediately after “the facility has received from the nurse aide registry, established under section 3721.32 of the Revised Code, the information concerning the individual provided through the registry” would make the most sense, since the additional language elaborates on the requirement to obtain the information from the registry.

3701-17-11(A): Remove “part-time” from the preamble portion of the paragraph. Subparagraph (A)(3) already requires that the IP be at least part-time, making the preamble wording redundant and actually conflicting because it doesn’t include “at least.”

3701-17-11(B): The first sentence appears verbatim in paragraph (A) and is unnecessary and redundant in paragraph (B). It should be removed from (B), and the paragraph should start with “An effective infection control program ….”

3701-17-13(A)(3)(c): Change the term “on-call” to one of the more modern terms, “remotely” or “virtually.”

3710-17-13(A)(5): Remove the added words “and wellbeing.” This paragraph is about preventing spread of infectious disease, so the word “health” is sufficient. Adding wellbeing suggests that the medical director needs to monitor workers’ mental state, which has nothing to do with preventing spread of infectious disease.

3701-17-14(D): We are opposed to requiring reporting of elopements, so the added language at the end of this paragraph should be removed. Additionally, the reference to 3701-17-12(E) is incorrect because there is no such paragraph. Presumably, the intended reference is to 3701-17-06(A)(3) (which we are also asking to remove).

3701-17-17(K): Change the wording to, “The nursing home will have a plan for making sufficient medications and records of residents' orders available to ensure continuity of care in the event of an emergency evacuation or closure.” The wording “must be available” requires the facility to guarantee something that may be outside its control, depending on the nature of the emergency.

3701-17-19(A)(1)(a): We recommend annual updating of relative/guardian contact information instead of every 6 months to reduce the administrative burden while still ensuring regular updates.