



DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801

Wilmington, Delaware 19801

(302) 575-0660 TTY (302) 575-0696 Fax (302) 575-0840

www.declasi.org

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory Initiatives

Date: January 3, 2017

Consistent with past practice I am providing analyses of five (5) regulatory initiatives appearing in the January Register of Regulations. Given time constraints, the analyses should be considered preliminary and non-exhaustive.

1. DOE Final Public, Private & Nonpublic School Definitions Reg. [20 DE Reg. 547 (1/1/17)]

The Department of Education (DOE) published the initial proposed version of this regulation in July, 2016. The SCPD and GACEC submitted comments identifying (2) concerns: 1) the definition of charter school omitted an in-state physical plant requirement which would allow a "cyber" school to qualify as a charter school; and 2) the definition of school district was ambiguous. In response to the commentary, the DOE issued a revised proposed regulation in November, 2016 with amendments addressing both concerns. The Councils endorsed the revised proposed regulation. A copy of the SCPD's November 30, 2016 letter is attached for facilitated reference.

The Department is now issuing a final regulation which acknowledges the endorsements and conforms to the revised proposed version. Since the regulation is final, and it incorporates amendments prompted by the Councils' earlier commentary, no further action appears warranted.

2. DOE Final Age of Majority Regulation (Part 1) [20 DE Reg. 549 (1/1/17)]

In October, 2016, the Department of Education (DOE) published two sets of proposed regulations implementing "age of majority" legislation (S.B. No. 180). Part 1 merely added a single sentence to an IEP regulation. The SCPD and GACEC endorsed the proposed regulation. A copy of the SCPD's October 24, 2016 letter is attached for facilitated reference.

The DOE is now adopting a final regulation which acknowledges the endorsements and conforms to the proposed version. Since the regulation is final, no further action appears warranted.

3. DOE Final Age of Majority Regulation (Part 2) [20 DE Reg. 550 (1/1/17)]

In October, 2016, the Department of Education (DOE) published two sets of proposed regulations implementing “age of majority” legislation (S.B. No. 180). Part 2 proposed amendments to the DOE procedural safeguards standards. The SCPD and GACEC endorsed the proposed regulation subject to one (1) recommendation, *i.e.*, the addition of a sentence addressing supported decision-making as an option for IEP teams to consider along with a power of attorney or grant of authority form. A copy of the SCPD’s October 24, 2016 letter is attached for facilitated reference.

The DOE is now adopting a final regulation with only minor edits. It declined to add the requested reference to supported decision-making. At 551.

Since the regulation is final, no further action appears warranted.

4. DMMA Final DDDS Waiver Participant Patient Pay Regulation [20 DE Reg. 552 (1/1/17)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2016. A copy of the SCPD’s November 30, 2016 letter is attached for facilitated reference. The Division of Medicaid & Medical Assistance (DMMA) omits any reference to similar GACEC commentary which was issued on November 28. I alerted the GACEC to the ostensible oversight.

The SCPD shared two (2) concerns with the proposed regulation.

First, the Council noted the anomaly of a waiver participant paying 100% of the patient pay amount to the residential provider as juxtaposed to allocating payments between different residential and day providers. DMMA effected no amendment based on the following rationale:

Splitting the patient payment across multiple providers would add administrative burden for both the state and for the providers. As long as the monthly payment to the residential provider is sufficiently large to accommodate the entire patient pay amount, it will be deducted from the payment to the residential provider.

At 554.

Second, the Councils observed that DDDS is the SSI/SSDI representative payee for hundreds of waiver participants so revamping the payment system will only complicate administration. DMMA effected no amendment based on the following rationale:

The Council is correct in pointing out that DDDS is the representative payee for many waiver recipients. For those individuals, DDDS will distribute the patient payment to the provider acting on behalf of the waiver member. The change in the regulation clarifies that it is the provider's responsibility to ensure that the patient pay is collected for each individual. The regulation does not prohibit DDDS from acting on behalf of the individual in its capacity as representative payee. For those individuals for whom DDDS is not the representative payee, the provider will work directly with the individual or his or her guardian or non-DDDS representative payee to ensure that they receive the patient payment amount.

Id.

Since the regulation is final, no further action appears warranted.

5. DPH Proposed School-Based Health Centers Regulation [20 DE Reg. 528 (1/1/17)]

The Division of Public Health proposes to amend its school-based health center regulations "to make technical corrections to bring the regulations in line with recently revised statutes." At 528.

I have the following observations.

First, in §1.0, DPH should consider deletion of the reference to §3365. That statute was in effect only until January 1, 2017.

Second, the Legislature enacted H.B. No. 234 in 2016 with the understanding that "(u)nder DPH regulations students under 18 must enroll for services by having a parent or guardian sign a consent form". See synopsis. There was no evidence of a legislative intent to eliminate a consent requirement. In contrast, DPH is striking the operative §4.1 which addresses who can consent to services. This makes little sense. Moreover, DPH is retaining a revised definition of "parent" in §2.0. There is no reason to have a definition of "parent" if §4.1 is stricken. The only residual reference to "parent" in the entire regulation is a passing reference to satisfaction surveys within §8.1.2.

Third, the amended definition of "parent" in §2.0 merits reconsideration. For example, it would not cover a court-appointed guardian of a student ages 18 and up. It would also not cover a relative caregiver who is not "charged with caring" but is voluntarily caring for a child. The reference to 13 Del.C. §8-201 is odd. That Code section is from the chapter on establishing paternity and maternity. DPH could consider a cross reference to the Code section specifically addressing consent to health care (Title 13 Del.C. §707) which includes relative caregivers, parents, and guardians.

Fourth, the definition of “student” in §2.0 is odd. It does not cover students ages 18 and above. School-based health centers have historically served students age 18 and above. See, e.g., current §4.1, second sentence.

Fifth, revised §4.2 contemplates SBHCs only serving “children”. This is “underinclusive” since it omits students age 18 and above.

Sixth, revised §4.2 limits persons serving students to “licensed professionals”. See also revised §5.1. This would exclude a host of professionals and paraprofessionals, including certified school psychologists [14 DE Admin Code §1583]; unlicensed autism services providers [18 Del.C. §3570A(e)(2) and (f)]; physical therapist assistants [24 Del.C. §2602(9)]; occupational therapy assistants [24 Del.C. §2002(5)]; psychological assistants [24 Del.C. §3507]; and speech pathology aides [24 Del.C. §3702(12)]. DPH should consider retaining the current language, “health professionals” (§5.1). Section 5.2 already limits provision of services to that within a staff member’s “education and experience and legally within their scope of practice”.

Seventh, the enabling legislation for SBHCs explicitly requires insurers to cover some costs of care. See 18 Del.C. §3571G(c). DPH proposes to eliminate the only regulation contemplating insurer billing: “~~6.1 SBHCs are required to implement and maintain a third party insurance billing process for services provided.~~” There is some “tension” between the statutory requirement and elimination of this regulation.

Eighth, §4.3 disallows diagnosis and treatment of certain conditions and diseases without school board approval. This should be reconsidered. If there is valid consent, what is the interest of the school board in excluding diagnosis and treatment? In particular, the rationale for requiring school board approval of HIV testing in revised §4.3 is not self-evident and singling out this form of screening may be imprudent.

Ninth, §4.3 refers to “approval of the school board governing the SBHC locale.” This is an odd reference and ignores the overlapping “locales” covered by local districts and Vo-tech school districts. Vo-tech districts are required to maintain SBHCs. See 14 Del.C. §4126. The “locales” of local districts and Vo-tech districts overlap.

The Councils may wish to consider sharing the above observations with the Division. In their discretion, the Councils could consider sharing a courtesy copy of comments with legislative policymakers (e.g. Sen. Poore and Rep. Williams).

Attachments

E:\legis\2017\117bils
F:\pub\bjh\legis\2017P&L\117bils



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

MARGARET M. O'NEILL BUILDING
410 FEDERAL STREET, SUITE 1
DOVER, DE 19901

VOICE: (302) 739-3620
TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

November 30, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 20 DE Reg. 338 [Proposed Public, Private & Nonpublic School Definitions (11/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its regulations regarding the definitions of Public School, Private School and Nonpublic School. DOE cites the purpose of amending this regulation is to include and clarify definitions of various types of schools as well as change the title of the regulation to more accurately reflect its content. The proposed regulation was published as 20 DE Reg. 338 in the November 1, 2016 issue of the Register of Regulations.

In July, 2016 the Department of Education published an earlier version of this proposed regulation. The SCPD submitted comments with two recommendations: 1) the definition of charter school should include a reference to operation in an approved physical plant to prevent a "cyber" school from qualifying as a charter school; and 2) the definition of school district was ambiguous since it recited that a Vo-Tech district "may" meet the definition. The Department is now issuing a revised proposed regulation which addresses both concerns.

First, it revises the definition of "public school" (which is incorporated into the definition of "charter school") to include a reference to having a "physical plant".

Second, it has separate definitions of "reorganized school district" and "school district" with a caveat that a "school district" is included in the definition "depending on the context in which the term is used". This concept is reinforced by a new preamble to §2.0: "The following words and terms are applicable unless a specific regulation, statute or the context in which they are used clearly indicates otherwise".

SCPD endorses the proposed regulation since it addresses both observations identified in the Council's July commentary,

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our position on the proposed regulation.

Sincerely,

Jamie Wolfe

Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Laura Makransky, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Valerie Dunkle, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

20reg338 doe public private nonpublic school definitions 11-28-16



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
MARGARET M. O'NEILL BUILDING
410 FEDERAL STREET, SUITE 1
DOVER, DE 19901

VOICE: (302) 739-3620
TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

October 24, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 20 DE Reg. 233 [Proposed "Age of Majority" Regulation (Part 1) (10/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation addressing educational decision-making upon a student's attainment of age 18. As background, the Disabilities Law Program (DLP), Governor's Advisory Council for Exceptional Citizens (GACEC) and other councils were highly involved with the drafting and enactment of State legislation (S.B. 180) implementing a federal regulation (34 C.F.R. 300) which addresses this issue. The legislation, enacted in June, requires the DOE to promulgate implementing regulations in consultation with the GACEC. Representatives of the DLP, GACEC, DOE, and school districts reached consensus on regulatory text in September. The DOE is now formally publishing two (2) sets of regulations based on that consensus. This is the first set of proposed regulations. The proposed regulation was published as 20 DE Reg. 233 in the October 1, 2016 issue of the Register of Regulations.

This regulation revises a single sentence in an IEP regulation resulting in the following standard:

20.3. Transfer of rights at age of majority: Beginning not later than one year before the child reaches the age of 18, the IEP shall include a statement that the child has been informed that the child's rights under 14 Del.C. §3132 will transfer to the child, or an educational representative or educational surrogate parent on reaching the age of 18 under 14 DE Admin Code 926.20.0.

This recital is accurate and alerts IEP participants to the statutory and regulatory sections which provide detailed standards on decision-making upon the student's attainment of age 18.

SCPD endorses the proposed regulation.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our position or observations on the proposed regulation.

Sincerely,

Jamie Wolfe

Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Laura Makransky, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Valerie Dunkle, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

20reg233 doe age of majority (Part 1) 10-24-16



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

MARGARET M. O'NEILL BUILDING
410 FEDERAL STREET, SUITE 1
DOVER, DE 19901

VOICE: (302) 739-3620
TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

October 24, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 20 DE Reg. 233 [Proposed "Age of Majority" Regulation (Part 2) (10/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation addressing educational decision-making upon a student's attainment of age 18. As background, the Disabilities Law Program (DLP), Governor's Advisory Council for Exceptional Citizens (GACEC) and other councils were highly involved with the drafting and enactment of State legislation (S.B. 180) implementing a federal regulation (34 C.F.R. 300) which addresses this issue. The legislation, enacted in June, requires the DOE to promulgate implementing regulations in consultation with the GACEC. Representatives of the DLP, GACEC, DOE, and school districts reached consensus on regulatory text in September. The DOE is now formally publishing two (2) sets of regulations based on that consensus. This is the second set of proposed regulations. The proposed regulation was published as 20 DE Reg. 233 in the October 1, 2016 issue of the Register of Regulations.

This regulation essentially "tracks" the requirements of S.B. 180 while adding some supplemental "common sense" provisions. For example, if the IEP team determined that a student lacked capacity in a prior review, the participation of a school psychologist in later IEP meetings would be "discretionary if it is clear there has been no change in the child's capacity." See §20.1.3.1.

Parenthetically, the DOE has incorporated some "housekeeping" revisions in the regulation unrelated to S.B. 180. For example, the DOE includes some minor edits to §11.0 to conform to changes in the relevant statute, 14 Del.C. §3137. The DOE is also amending §4.0 to require the provision of a copy of procedural safeguards to the parents at each IEP meeting. This conforms with a regulation adopted last month, 20 DE Reg. 172 (9/1/16).

SCPD is endorsing the proposed regulation subject to one important recommendation. At the federal level, the President's Committee for People with Intellectual Disabilities issued an October 6, 2016 report which includes "Recommendation 55" encouraging the sharing of information about supported

decision-making with families of IDEA transitioning students. See attachment. At the State level, the Governor signed S.B. 230 on September 15, 2016. That legislation authorizes competent adults to execute a "supported decision-making agreement". It would be preferable for IEP teams to be aware of this option. For example, the new law specifically authorizes agents appointed through a supported decision-making agreement to assist with accessing educational records and assisting the principal (adult student) with educational decision-making. See, e.g. 16 Del.C. §§9403A(11)(h), 9406A(a)(2), and 9409A. Since the regulation (§20.1.2) already addresses powers of attorney and voluntary grants of authority, it makes sense to include a reference to supported decision-making in the same section. Consider adding the following bracketed second sentence to §20.1.2 as follows:

20.1.2. A child with a disability with capacity may authorize an adult agent to exercise rights through execution of a power of attorney or standard voluntary grant of authority form published by the Department of Education. [A child with a disability with capacity may also authorize an adult agent to provide assistance with making and communicating educational decisions through execution of a supported decision-making agreement authorized by 16 Del.C. Ch. 94A.]

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations and recommendation on the proposed regulation.

Sincerely,

Jamie Wolfe

Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

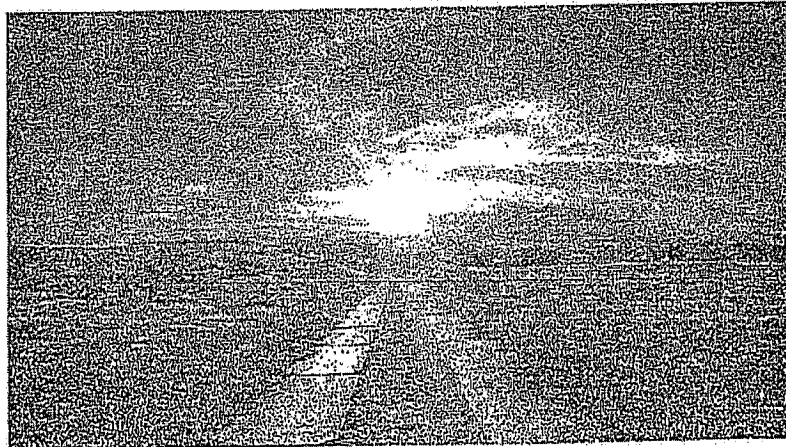
cc: The Honorable Nicole Poore
The Honorable Debra Heffernan
The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Laura Makransky, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Valerie Dunkle, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

20reg233 doe age of majority part 2 10-24-16



Report to the President

Strengthening an Inclusive Pathway for People with Intellectual Disabilities
and Their Families



2016

Supported decision-making is often defined as an individual using a team of trusted people (e.g., friends, family members, advocates) to help them understand a situation and the choices they have so they may make their own informed decisions to the best of their ability (Dinerstein, 2011–2012; Quality Trust, 2013). In a specific situation, supported decision-making takes into account the diversity of decisions to be made and can adjust the support a person needs depending on the nature of a given decision.

Although guardianship is still prevalent, supported decision-making is increasingly used as an augmentation to guardianship or even an alternative in the United States (Kohn, Blumenthal, & Campbell, 2013). The UN Convention on the Rights of Persons with Disabilities recognizes supported decision-making as a means to ensure access to human and civil rights for persons with disabilities, and several states have passed laws studying and authorizing the use of supported decision-making (Blank & Martinis, 2015). Supported decision-making can provide individuals with ID the skills to live self-determined lives and to enjoy the rights afforded them as humans and as citizens (Kohn et al, 2013).

Decision-making and self-determination involve both opportunity and teachable skills. Young adults who receive instruction to increase self-determination exhibit better employment outcomes, increased independence in daily-life activities, and more extensive community integration than those who do not (Powers et al., 2012; Shogren et al., in press). Studies have indicated a positive relationship between self-determination and quality of life. One such study found that young adults with greater self-determination were more likely to want to manage their own money, be employed in competitive integrated settings, and live independently (Wehmeyer & Schwartz, 1997). Other studies have found that adults who exerted more self-determination were more likely to live independently, protect themselves from abuse, and have higher-paying jobs (Wehmeyer & Palmer, 2003; Kehemka, Hickson, & Reynolds, 2005). Supported decision-making may increase self-determination and have a positive influence on an individual's quality of life.

Recommendations: Self-Determination and Supported Decision-Making

Recommendation #50: The U.S. Department of Health and Human Services (HHS-ACL) and the U.S. Department of Justice should monitor and study current guardianship laws in order to develop incentives for the adoption and expansion of augmentations and alternatives to guardianship, including supported decision-making.

Guardianship can be a problematic and a potentially abusive practice. More research must be conducted to determine the financial, political, and social incentives that maintain the system of guardianship. More research will also provide better data on the prevalence of guardianship and the monitoring that is or is not in place to protect people with guardians from abuse. In order for courts and providers to make informed decisions about guardianship and the use of alternatives such as supported decision-making, data regarding the use and outcomes of guardianship are necessary. As guardianship can severely limit an individual's civil rights, sound information is necessary for those in the position to determine whether a person is assigned a guardian. Research also should be conducted on the potential reduction or elimination of guardianship and the impact such a shift may have on those currently under guardianship.

Recommendation #51: The Administration for Community Living (ACL), in collaboration with the Administration on Children, Youth, and Families (ACYF), should support the development and continued use of systems for sharing information about supported decision-making and alternatives to guardianship for individuals with intellectual disabilities, as well as for those who are aging.

As new data and information emerge about best practices in supported decision-making, that information must become readily accessible and shared with families, courts, school personnel, and service providers. Organizations such as the National Resource Center for Supported Decision-Making (NRC-SDM) are leading and coordinating efforts to make supported decision-making a recognized alternative or augmentation to guardianship (Blank & Martinis, 2015). The NRC-SDM is acting as a clearinghouse for information on supported decision-

making, conducting research on best practices in supported decision-making, and establishing services, such as a website for families, self-advocates, and government officials, to share information and coordinate efforts in promoting supported decision-making. ACL should collaborate with NRC-SDM to ensure that information about supported decision-making is widely available.

Recommendation #52: The Office of Special Education and Rehabilitation Services (OSERS) and the Administration for Community Living (ACL) should jointly promote and distribute information about supported decision-making and self-determination as methods to engage individuals with intellectual disabilities in their own lives and exercise their rights throughout their lives.

The OSERS and the ACL should work jointly to disseminate information about self-determination skill development and supported decision-making for people with ID throughout their lives. This dissemination should frame decision-making and self-determination as basic human rights and as a natural part of the human experience. To improve the trajectory of inclusion for individuals with ID, they should be supported in developing such skills as early as possible. Professionals (e.g., teachers, child care providers, personal care attendants) should be knowledgeable about self-determination and supported decision-making skills and should provide opportunities for children and young people with ID to develop those skills.

Likewise, those in a position to make decisions about guardianship for people with ID should have access to information about alternatives. In a study exploring the awareness perception of guardianship and its alternatives among educators, students with disabilities, and parents, it was found that almost all parties were aware of the nature and process of guardianship but few were aware of any alternatives, such as supported decision-making (Millar, 2007). The ACL and the OSERS should put in place strategies to provide guardianship decision-makers, such as judges, court officials, social workers, and transition specialists, with information about alternatives to guardianship.

Recommendation #53: The U.S. Departments of Education, Labor, and Health and Human Services should include in their personnel development grant programs requirements for education about supported decision-making and guardianship.

For all competitive grants related to pre-service and professional development in each of the three departments, grantees should be required to provide evidence-based instruction about supported decision-making and its outcomes related to autonomy, self-determination, and quality of life. Likewise, instruction should be required about the potential abuses and negative outcomes associated with guardianship.

Recommendation #54: The U.S. Department of Justice should consider including a competitive preference for its Bureau of Justice Assistance competitive grant programs to expand the knowledge of court officers about supported decision-making and guardianship.

The Department of Justice, through its Bureau of Justice Assistance competitive grant programs, should offer a preference for applicants who include evidence-based instruction for judges and court officers about supported decision-making and its outcomes related to autonomy, self-determination, and quality of life. Likewise, instruction should be required about the potential abuses and negative outcomes associated with guardianship.

Recommendation #55: The U.S. Department of Education should require, as part of the requirements for reporting data for IDEA Indicator 13, that the notice provided to families and youth with disabilities leading up to the age of majority include robust information about the implications of guardianship and options for supported decision-making.

The U.S. Department of Education should include in its reporting requirements concerning transition activities the mandate for states and local school districts to supply data regarding the type of information they provide to families and youth with disabilities about shared decision-making and the implications of partial and full guardianship. The Department should use the most up-to-date information generated by the National Institute on Disability,

Independent Living, and Rehabilitation Research (NIDILRR), the Eunice Kennedy Shriver National Institute of Child Health and Human Development (NICHD), and the National Institute on Aging (NIA) about supported decision-making. The Department should also provide guidance about the quality of information to be shared. The percentage of families and students with disabilities receiving such information should be reported annually.

The members of the President's Committee for People with Intellectual Disabilities are hopeful that this Report will provide a strategy for strengthening federal policies in the areas of: family engagement, education, transition, and self-determination and supported decision-making to place people with intellectual disabilities on a new trajectory to full inclusion and access to opportunities for the highest quality of life.



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

MARGARET M. O'NEILL BUILDING
410 FEDERAL STREET, SUITE 1
DOVER, DE 19901

VOICE: (302) 739-3620
TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

MEMORANDUM

DATE: November 30, 2016

TO: Ms. Kimberly Xavier, DMMA
Planning & Policy Development Unit

FROM: Ms. Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

RE: 20 DE Reg. 340 [(DMMA Proposed DDDS Waiver Participant Patient Pay Regulation (11/1/16)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) proposal to amend its regulation regarding patient pay calculations. The proposed regulation was published as 20 DE Reg. 340 in the November 1, 2016 issue of the Register of Regulations.

As background, based on CMS regulations, DDDS waiver participants are subject to contributing a "patient pay" amount towards the cost of their waiver services. There are several deductions and exclusions in determining the "patient pay" contribution. See 42 C.F.R. §483.726 and DSSM §§20720, 20720.1, 20720.2, and 20720.3.

Historically, the patient pay amount has been paid to DDDS. See deleted sentence on p. 342. DMMA is proposing to change this approach as follows:

Individuals receiving Residential Habilitation funded by the DDDS waiver will submit their patient pay amount directly to the provider of Residential Habilitation.

No fiscal impact is contemplated. The proposal is intended "to be compliant with federal regulation". The citation to the federal regulation is not provided.

SCPD has two observations.

First, many DDDS waiver participants have one provider for residential habilitation and a different provider for day programming. Under the proposal, the residential provider would be paid 100% of the patient pay amount. The attached CMS regulation (42 C.F.R. §435.726) does not literally apportion the patient pay contribution exclusively to the residential habilitation provider. It only generally refers to "home and community-based services". DMMA may wish

to assess whether 100% of the patient pay contribution is required to be paid exclusively to the residential provider. If not, the proposed approach may be inequitable for day program providers.

Second, SCPD assumes part of the rationale for the proposal is reduction of the administrative burden of DDDS accounting/allocating the patient pay funds. However, DDDS is the representative payee for the SSI/SSDI monthly benefits for several hundred DDDS clients. Therefore, reciting that "(i) individuals receiving Residential Habilitation... will submit their patient pay amount directly to the provider" will ostensibly still result in DDDS (as representative payee) allocating patient pay funds to providers. Moreover, if an individual defaults in payment to the provider, SCPD assumes this should affect waiver eligibility which is within the province of DDDS, not the provider. Therefore, if this change in approach is not required by federal regulation, DMMA may wish to consider retention of the current approach.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

cc: Mr. Stephen Groff
Ms. Jill Rogers
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

20reg340 dmma-ddds waiver participant patient pay 11-28-16

established under § 435.811, if the agency provides Medicaid under the medically needy coverage option.

(3) *Maintenance needs of family.* For an individual with a family at home, an additional amount for the maintenance needs of the family. This amount must—

(i) Be based on a reasonable assessment of their financial need;

(ii) Be adjusted for the number of family members living in the home; and

(iii) Not exceed the higher of the need standard for a family of the same size used to determine eligibility under the State's approved AFDC plan or the medically needy income standard established under § 435.811, if the agency provides Medicaid under the medically needy coverage option for a family of the same size.

(4) *Expenses not subject to third party payment.* Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including—

(i) Medicare and other health insurance premiums, deductibles, or coinsurance charges; and

(ii) Necessary medical or remedial care recognized under State law but not covered under the State's Medicaid plan, subject to reasonable limits the agency may establish on amounts of these expenses.

(5) *Continued SSI and SSP benefits.* The full amount of SSI and SSP benefits that the individual continues to receive under sections 1611(e)(1) (E) and (G) of the Act.

(d) *Optional deduction: Allowance for home maintenance.* For single individuals and couples, an amount (in addition to the personal needs allowance) for maintenance of the individual's or couple's home if—

(1) The amount is deducted for not more than a 6-month period; and

(2) A physician has certified that either of the individuals is likely to return to the home within that period.

(3) For single individuals and couples, an amount (in addition to the personal needs allowance) for maintenance of the individual's or couple's home if—

(i) The amount is deducted for not more than a 6-month period; and

(ii) A physician has certified that either of the individuals is likely to return to the home within that period.

(e) *Determination of income—(1) Option.* In determining the amount of an individual's income to be used to reduce the agency's payment to the institution, the agency may use total income received, or it may project monthly income for a prospective period not to exceed 6 months.

(2) *Basis for projection.* The agency must base the projection on income received in the preceding period, not to exceed 6 months, and on income expected to be received.

(3) *Adjustments.* At the end of the prospective period specified in paragraph (e)(1) of this section, or when any significant change occurs, the agency must reconcile estimates with income received.

(f) *Determination of medical expenses—(1) Option.* In determining the amount of medical expenses to be deducted from an individual's income, the agency may deduct incurred medical expenses, or it may project medical expenses for a prospective period not to exceed 6 months.

(2) *Basis for projection.* The agency must base the estimate on medical expenses incurred in the preceding period, not to exceed 6 months, and on medical expenses expected to be incurred.

(3) *Adjustments.* At the end of the prospective period specified in paragraph (f)(1) of this section, or when any significant change occurs, the agency must reconcile estimates with incurred medical expenses.

[43 FR 45204, Sept. 29, 1978, as amended at 45 FR 24884, Apr. 11, 1980; 48 FR 5735, Feb. 8, 1983; 53 FR 3595, Feb. 8, 1988; 55 FR 33705, Aug. 17, 1990; 56 FR 8850, 8854, Mar. 1, 1991; 58 FR 4992, Jan. 19, 1993]

§ 435.726 Post-eligibility treatment of income of individuals receiving home and community-based services furnished under a waiver: Application of patient income to the cost of care.

(a) The agency must reduce its payment for home and community-based services provided to an individual specified in paragraph (b) of this section, by the amount that remains after deducting the amounts specified in paragraph

(c) of this section from the individual's income.

(b) This section applies to individuals who are eligible for Medicaid under § 435.217 and are receiving home and community-based services furnished under a waiver of Medicaid requirements specified in part 441, subpart G or H of this subchapter.

(c) In reducing its payment for home and community-based services, the agency must deduct the following amounts, in the following order, from the individual's total income (including amounts disregarded in determining eligibility):

(1) An amount for the maintenance needs of the individual that the State may set at any level, as long as the following conditions are met:

(i) The deduction amount is based on a reasonable assessment of need.

(ii) The State establishes a maximum deduction amount that will not be exceeded for any individual under the waiver.

(2) For an individual with only a spouse at home, an additional amount for the maintenance needs of the spouse. This amount must be based on a reasonable assessment of need but must not exceed the highest of—

(i) The amount of the income standard used to determine eligibility for SSI for an individual living in his own home, if the agency provides Medicaid only to individuals receiving SSI;

(ii) The amount of the highest income standard, in the appropriate category of age, blindness, or disability, used to determine eligibility for an optional State supplement for an individual in his own home, if the agency provides Medicaid to optional State supplement recipients under § 435.230; or

(iii) The amount of the medically needy income standard for one person established under §§ 435.811 and 435.814, if the agency provides Medicaid under the medically needy coverage option.

(3) For an individual with a family at home, an additional amount for the maintenance needs of the family. This amount must—

(i) Be based on a reasonable assessment of their financial need;

(ii) Be adjusted for the number of family members living in the home; and

(iii) Not exceed the higher of the need standard for a family of the same size used to determine eligibility under the State's AFDC plan or the medically needy income standard established under § 435.811 for a family of the same size.

(4) Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party including—

(i) Medicare and other health insurance premiums, deductibles, or coinsurance charges; and

(ii) Necessary medical or remedial care recognized under State law but not covered under the State's Medicaid plan, subject to reasonable limits the agency may establish on amounts of these expenses.

[46 FR 46639, Oct. 1, 1981, as amended at 50 FR 10026, Mar. 13, 1985; 57 FR 29165, June 30, 1992; 58 FR 4932, Jan. 19, 1993; 59 FR 37715, July 25, 1994]

§ 435.733 Post-eligibility treatment of income of institutionalized individuals in States using more restrictive requirements than SSI: Application of patient income to the cost of care.

(a) *Basic rules.* (1) The agency must reduce its payment to an institution, for services provided to an individual specified in paragraph (b) of this section, by the amount that remains after deducting the amounts specified in paragraphs (c) and (d) of this section, from the individual's total income.

(2) The individual's income must be determined in accordance with paragraph (e) of this section.

(3) Medical expenses must be determined in accordance with paragraph (f) of this section.

(b) *Applicability.* This section applies to the following individuals in medical institutions and intermediate care facilities:

(1) Individuals receiving cash assistance under AFDC who are eligible for Medicaid under § 435.110 and individuals eligible under § 435.121.

(2) Individuals who would be eligible for AFDC, SSI, or an optional State