DISABILITIES LAW PROGRAM

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MEMORANDJUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: September 7, 2017

Consistent with the request of multiple councils, I am providing analyses of seven (7) regulatory initiatives appearing in the September, 2017 issue of the Register of Regulations. Given time constraints, the analyses should be considered preliminary and non-exhaustive.

1. DPH Final DMOST Regulation [21 DE Reg. 233 (9/1/17)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2017. A copy of the April 26, 2017 SCPD letter is attached for facilitated reference.

The Councils endorsed the initiative which clarified that a DMOST form must include a patient's address, phone number, and gender. The form already contained fields for such information so the regulation was essentially a "housekeeping" measure. DMMA has now acknowledged the SCPD endorsement and adopted a final regulation which conforms to the proposed version. DMMA does not mention receipt of the GACEC's similar commentary.

Since DPH has adopted a final regulation endorsed by the Councils, no further action appears warranted. In its discretion, the GACEC may wish to inquire whether the Division received its April 27 letter.

2. DLTCRP Final Neighborhood Home Reg. [21 DE Reg. 229 (9/1/17)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2017. A copy of the April 26, 2017 SCPD memorandum is attached for facilitated reference. The Division of Long Term Care Residents Protection (DLTRP) has now adopted a final regulation incorporating a few amendments prompted by the commentary.

First, the Councils noted that DDDS is authorized by statute to promulgate Neighborhood Home regulations and recommended the joint promulgation of regulations by DDDS and DLTCRP. No change was made. The DLTCRP does not address the statute and merely notes that "(w)e conferred with the Department of Justice (DOJ) and Delaware Division of Disabilities Services (DDDS) as regulations were being revised." At 229.

Second, the Councils recommended revision of the "authorized representative" definition since it was inconsistent in restricting representatives to individuals lacking capacity and failed to address minors residing in neighborhood homes. No change was made. The Division posits that the "regulation covers all situations in which an authorized representative may function" and the "DLTCRP licenses Neighborhood Homes for adults only (18 years and older)."

The Division is incorrect in both contexts. The regulation is inconsistent in capacity references. Moreover, minors do reside in Neighborhood Homes, the DDDS HCBS Waiver authorizes individuals ages 14-17 to be provided residential services, DHSS settled an age discrimination complaint in the past with a commitment to allow minors to reside in group homes, and there is no age restriction in the statutory requirement that DHSS license Neighborhood Homes. See attachments. Moreover, by statute, the Division is required to address standards for minors in facilities it licenses:

> §1119C Regulations
>
> (a) The Department has the authority to adopt, amend or repeal issue regulations to implement this chapter. In addition to regulations by category of facility to be licensed, the Department shall also develop pediatric regulations regarding the care of children in nursing facilities and similar facilities.

The entire Chapter 11 is titled "Nursing Facilities and Similar Facilities" . Hence, "Neighborhood Homes" are within the scope of "similar facilities."

Third, the Councils recommended grammatical corrections in the definition of "person centered plan". The Division agreed and revised the definition.

Fourth, the Councils recommended clarifying that inspections were not limited to one per year. The Division agreed and inserted "at least annually" per the Councils' suggestion.

Fifth, the Councils noted that a total ban on firearms in Neighborhood Homes could be at odds with a 2014 Delaware Supreme Court decision. The Councils recommended consultation with the Attorney General. Rather than consult the Attorney General, the Division recites that "(t)he provision was in the previous regulations, and there are no changes". This ignores the obvious, i.e., the former regulations were adopted in 2012, before issuance of the Supreme Court's decision. The categorical ban may also violate the CMS HCBS Rule.

Sixth, the Councils recommended clarification that, under certain circumstances, the Architectural Accessibility Board would have jurisdiction to review plans. No change was made. The Division inaccurately believes that the AAB would never have jurisdiction over Neighborhood Home construction or renovation plans.

Seventh, the Councils objected to limiting accessibility references to ramps. No change was made. The Division posits that local and state building codes include applicable accessibility standards. This is inaccurate since there is no state building code and local building codes do not require residences to be accessible.

Eighth, the Councils objected to limiting ramps to accommodate individuals who regularly require wheelchairs. In response, the Division eliminated the section in its entirety. At 232. The Division posits that local and state building codes address accessibility. This is inaccurate since there is no state building code, local building codes do not require residences to be accessible, and local building codes do not require installation of ramps for residents and visitors with mobility limitations.

Ninth, the Councils noted some "tension" between door standards and the CMS Rule. The Division agreed and modified the standards.

Tenth, the Councils recommended the addition of a subsection noting that residents have some choice in roommates. No change was made. The Division posits that a cross reference to another statute should be sufficient.

Eleventh, the Councils recommended revision of a section on medication records. The Division agreed and revised the section.

Twelfth, the Councils expressed concern that elopement was a reportable incident only if the resident suffered harm. No change was made. The Division posits that the following cryptic standard would alert providers that elopement without harm could be a reportable incident:

6.6. Reportable incidents are as follows:

...6.8.2. Neglect, mistreatment, or financial exploitation as defined in 16 Del.C. §1131 or reasonable suspicion of same.

Thirteenth, the Councils recommended expanding the scope of reportable injuries beyond those requiring transfer to an acute care facility. The Division agreed and revised the section to cover "medical or dental treatment other than first aid provided in the home."

Fourteenth, the Councils recommended that a wall-mounted fire extinguisher requirement address the ADA's 4-inch protrusion standard. No change was made. The Division posits that this would be covered by state and local building codes.

Fifteenth, the Councils objected to a categorical requirement that all prescribed medications be kept locked in a cabinet or box. The Councils noted that this approach was inconsistent with the CMS HCBS Rule. No change was made. The Division's justification is that "(a)ll medication is accessible to the individual via 24 hour staff." This represents an anti-autonomy approach which would, inter alia, preclude a resident from taking a medication outside the home.

Sixteenth, the Councils observed that a waiver provision had been deleted from the regulation. The Division responded that this was intentional. Reasonable persons might vary on the prudence of this approach.

The Councils may wish to consider whether follow up on some standards is appropriate. For example, the Division's approach to firearms, ramps/accessibility, choice of roommates, and locked medications could be the subject of correspondence to CMS.

3. Dept. of Insurance Health Ins. Arbitration Reg. [21 DE Reg. 197 (9/1/17)]

The Department of Insurance proposes to amend its regulations covering the arbitration process which enables covered persons to contest adverse insurer decisions.

As background, State-regulated health insurers must participate in a Department of Insurance-sponsored arbitration system consistent with 18 DE Admin Code Part 1315. The proposed amendments are intended to implement H.B. No. 100 which was enacted earlier this year. That legislation authorizes the Attorney General's Office, through employees or contractors, to represent individuals contesting adverse insurer decisions involving substance abuse treatment. The Attorney General's Office issued a second RFQ in August soliciting private attorney applications to provide legal assistance in this context. Issuance of the initial RFQ apparently did not result in viable applications.

The proposed regulation is limited in scope. Apart from some formatting changes, its principal revision is the addition of an explicit authorization for an Attorney General's representative to qualify as an "authorized representative":

> In cases involving the existence or scope of private or public coverage for substance abuse treatment, an attorney retained or employed by the Delaware Department of Justice may serve as an authorized representative, regardless of whether the covered person has been determined by a physician to be incapable of assigning the right or representation. The Department of Justice may be reached by calling 302-577-4206.

Section 2.0.

I have the following observations.

First, although H.B. No. 100 (lines 37-38) and the current RFQ contemplate retention of attorneys to represent individuals in substance abuse insurance disputes, it may be preferable to not categorically limit DOJ assistance to attorneys. For example, non-attorney family members and providers are included in the scope of "authorized representatives" in the current regulation. Non-attorney representation in grievance procedures prior to arbitration is also contemplated by Department of Insurance regulation. See 18 DE Reg. 1301.2.0, definition of "authorized representative". It would therefore be anomalous to limit DOJ assistance solely to attorneys. The Department could consider inserting the following underlined sentence to the proposed revision to §2.0:

> In cases involving the existence or scope of private or public coverage for substance abuse treatment, an attorney retained or employed by the Delaware Department of Justice may serve as an authorized representative, regardless of whether the covered person has been determined by a physician to be incapable of assigning the right of representation. Such attorney may authorize an expert to act on the attorney's behalf in arbitration proceedings within the scope of this regulation. The Department of Justice may be reached by calling 302-577-4206.[1]

The addition of the sentence would clarify that the DOJ can utilize substance abuse experts to represent covered persons in arbitration proceedings. Cf. §2.0, definition of "provider" which lists several types of experts who could be well qualified to present arbitration cases on behalf of a covered person.

Second, the Department should consider providing a specific DOJ website address (with description of its substance abuse legal assistance program) in addition to a phone number.

Third, H.B. No. 100 can only be effective if covered persons denied substance abuse treatment receive timely and prominent notice of the availability of DOJ assistance. The Department of Insurance is charged with developing the language in such notices (lines 51-53). Unfortunately, this arbitration regulation omits any reference to such notice and does not otherwise inform persons of the availability of such assistance. At a minimum, the Department should consider adding a provision notifying an aggrieved person contesting denial of substance abuse treatment of possible DOJ assistance in §3.14 and §3.5

The SCPD may wish to consider endorsement of the regulation subject to the above recommended revisions.

A copy of the Council's commentary should be shared with the Matt Denn, the Attorney General, and Christian Wright, the DAG who is spearheading this program within the DOJ. A copy should also be shared with the DSAMH and DPBHS Advisory Councils.

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[1]H.B. No. 100 (line 24) contemplates the use of "experts" in substance abuse insurance disputes. The term "expert" is not defined and could encompass professionals in the field of addiction who, under attorney supervision, could appear on a covered person's behalf in arbitration proceedings authorized by 18 DE Admin Code Part 1315.

In its discretion, the Council could share a courtesy copy of comments with the prime sponsors of H.B. No. 100.

4. Dept. Of Insurance Health Ins. Claim Review Reg. [21 DE Reg. 192 (9/1/17)]

This proposed regulation (amending Part 1301) complements the preceding proposed regulation (amending Part 1315). The Department of Insurance proposes to amend its regulations covering the internal review and utilization review processes which enable covered persons to contest adverse insurer decisions.

As background, State-regulated health insurers must participate in a Department of Insurance-regulated internal review and utilization review system consistent with 18 DE Admin Code Part 1301. The proposed amendments are intended to implement H.B. No. 100 which was enacted earlier this year. That legislation authorizes the Attorney General's Office, through employees or contractors, to represent individuals contesting adverse insurer decisions involving substance abuse treatment. The Attorney General's Office issued a second RFQ in August soliciting private attorney applications to provide legal assistance in this context. Issuance of the initial RFQ apparently did not result in viable applications. H.B. No. 100 (lines 51-53) also requires the Department of Insurance to ensure notice to covered persons of the availability of DOJ assistance.

I have the following observations.

First, although H.B. No. 100 (lines 37-38) and the current RFQ contemplate retention of attorneys to represent individuals in substance abuse insurance disputes, it may be preferable to not categorically limit DOJ assistance to attorneys. For example, non-attorney family members and providers are included in the scope of "authorized representatives" in the current regulation. See 18 DE Reg. 1301.2.0, definition of "authorized representative". It would therefore be anomalous to limit DOJ assistance solely to attorneys. The Department could consider inserting the following underlined sentence to the proposed revision to §2.0:

> In cases involving the existence or scope of private or public coverage for substance abuse treatment, an attorney retained or employed by the Delaware Department of Justice may serve as an authorized representative, regardless of whether the covered person has been determined by a physician to be incapable of assigning the right of representation. Such attorney may authorize an expert to act on the attorney's behalf in proceedings within the scope of this regulation. The Department of Justice may be reached by calling 302-577-4206.[2]

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[2]H.B. No. 100 (line 24) contemplates the use of "experts" in substance abuse insurance disputes. The term "expert" is not defined and could encompass professionals in the field of addiction who, under attorney supervision, could appear on a covered person's behalf in proceedings authorized by 18 DE Admin Code Part 1301.

The addition of the sentence would clarify that the DOJ could utilize substance abuse experts to represent covered persons in mediation (§4.0), IHCAP (§5.0), and expedited IHCAP (§6.0) proceedings. Cf. §2.0, definition of "provider" which lists several types of experts who could be well qualified to present cases on behalf of a covered person. This option would preserve DOJ resources by allowing the DOJ to send an expert to a mediation proceeding in lieu of an attorney.

Second, the Department should consider providing a specific DOJ website address (with description of its substance abuse legal assistance program) in addition to a phone number.

Third, the Department should reconsider the proposed notice of DOJ assistance in §4.0. Consider the following:

A. The notice is "buried in the boilerplate" and not prominent. To fulfill the spirit of H.B. No. 100, the Department could consider a separate heading (e.g., "Substance Abuse Treatment Denials: Special Assistance") followed by a brief explanation and DOJ contact information (website and phone number).

B. The notice only informs an aggrieved person of the availability of DOJ assistance with mediation. See §4.0. This is misleading since DOJ assistance is also available in the internal review process (§3.0), IHCAP procedure (§5.0), and expedited IHCAP procedure (§6.0). Apart from carrier notice of the availability of DOJ assistance in contexts other than mediation, the Department could consider including a notice of DOJ assistance as a complement to the notice in §5.4.

C. The proposed notice indicates that DOJ assistance is only available if "you are approaching the deadline for filing your appeal". This limitation is not authorized by law and will deter requests for DOJ assistance.

D. To encourage individuals to consider DOJ assistance, it would be preferable to clarify that DOJ assistance is "free". This could be easily accomplished by revising the relevant language to "...receive free legal assistance".

The SCPD may wish to consider endorsement of the regulation subject to the above recommended revisions.

A copy of the Council's commentary should be shared with the Matt Denn, the Attorney General, and Christian Wright, the DAG who is spearheading this program within the DOJ. A copy should also be shared with the DSAMH and DPBHS Advisory Councils. In its discretion, the Council could share a courtesy copy of comments with the prime sponsors of H.B. No. 100.

5. DMMA Prop. "Psych. Under 21" Reimbursement Reg. [21 DE Reg. 187 (9/1/17)]

The Division of Medicaid and Medical Assistance (DMMA) proposes to amend its reimbursement methodology for inpatient psychiatric residential treatment facilities ("PRTFs"). DMMA notes (p. 188) that this benefit is often referenced as "Psych under 21".

As background, most states have elected to provide the "Psych under 21" optional benefit in their Medicaid plans. At 188. The benefit covers the costs of residential psychiatric services for individuals under age 21. Consistent with the attached CMS Bulletin, states have several options in establishing reimbursement rates. Some states have a single "bundled" per diem rate which covers all costs. Some states have a base per diem rate with add-on payments based on additional services which can be provided by non-facility professionals.

The current reimbursement standards are listed on pp. 189-190. DMMA posits that the revised standards will have no fiscal impact:

> The proposed amendment imposes no increase in cost on the General Fund as the proposed services in this State plan amendment will be budget neutral. The federal fiscal impact associated with this amendment will be zero dollars.

At 189.

Delaware includes many services in the per diem rate, including dental services, OT, PT, ST, lab work, and transportation. In-state facilities are currently paid the lesser of (a) a facility's usual and customary charge; and (b) the standard per diem rate plus additional funds for services in the plan of care not in the per diem rate. Out of state facilities are paid using the home state's per diem rate plus additional funds for services in the plan of care not in the per diem rate.

I have the following observations.

First, DMMA proposes to strike the current, discrete approach for out-of-state facilities. However, the proposed revision is not clear. I believe the Division intends to limit the following new third bullet on p. 189 to out-of-state facilities:

- The lesser of a negotiated per diem reimbursement rate, the facilities (sic "facility's) usual and customary charge, or the Delaware Medicaid per diem rate.

If that is the intent, DMMA should amend the provision as follows:

- If an out of state facility, ~~T~~the lesser of a negotiated per diem reimbursement rate, the facilities (sic "facility's) usual and customary charge, or the Delaware Medicaid per diem rate.

Otherwise, the first and second bullets are meaningless or superfluous and the "add on" for supplemental plan of care services in the first bullet would never be applicable. The new third bullet (with no "add on" authorization") would always be "lesser" than the first bullet.

Second, apart from inserting "(i)f in out of state facility", the Division should substitute "facility's" for "facilities" in both the second and new third bullets to correct the grammar.

Third, adopting the Delaware per diem reimbursement rate (as opposed to the home state reimbursement rate) should contribute to ease of administration, especially since a minority of states may have no "Psych under 21" rate. However, the deletion of the "add on" for "activities in the plan of care but not in the per diem" is not revenue neutral. Assuming the new third bullet only applies to out-of-state facilities, the deletion creates a lower reimbursement methodology for out-of-state facilities versus in-state facilities. DMMA may wish to consider amending the new third bullet to authorize an "add on" for "activities in the plan of care but not in the per diem".

The SCPD may wish to consider sharing the above observations with DMMA with a courtesy copy to the DPBHS, Rockford, Meadowood, and DDC member Steve Yeatman.

6. DMMA Prop. Care Expense Deduction Reg. [21 DE Reg. 185 (9/1/17)]

The Division of Medicaid & Medical Assistance proposes to amend the Medicaid State Plan to revise a countable income deduction.

As background, DMMA notes that the attached federal law [42 USC §1396(r)(1)(A)] authorizes states to deduct from countable income unreimbursed medical and remedial care expenses of a beneficiary receiving HCBS or institutional care. At 185. The Division is expanding the scope of the deduction from costs incurred within 30 days of the beginning date of Medicaid eligibility to 3 months of that date. At 187.

The projected fiscal impact is very modest, i.e., $5,725 and 22,900 in State funds for FY17 and FY18 respectively. At 186.

Since the proposal benefits Medicaid enrollees receiving HCBS or institutional services with little fiscal impact, the SCPD may wish to consider endorsement.

7. DOE Prop. Foster Care Student Placement Reg. [21 DE Reg. 176 (9/1/17)]

This regulation is intended to implement the attached S.B. No. 87 which was effective July 21, 2017. As the synopsis indicates, the legislation was motivated by changes in federal law. In a nutshell, students in the custody of DSCY&F are entitled to remain in their school of origin unless a decision is reached that such placement is not in the student's "best interest". The legislation requires the Department of Education to issue regulations defining the process for making the "best interest" determination.

I have the following observations.

First, the attached federal law [20 USC §6311] requires the "best interest" determination to specifically include consideration of "the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement." These considerations should be explicitly included in the DOE regulation,

Second, there is a major "disconnect" between the regulation and the enabling law. Although a principal impetus for S.B. No. 87 was ostensibly federal law addressing children in foster care, the bill is literally much broader in scope. It is not limited to children in foster care. The text of the bill never mentions foster care. Rather, the bill uniformly refers to "children in the custody of the Department of Services for Children, Youth and Their Families" and applies to any child covered by 13 Del.C. Ch. 25 (lines 11-12). That chapter never mentions foster care and broadly covers a broad range of children in DSCY&F custody. As a result, the title to the regulation ("Students in Foster Care") and all of the references to foster care are much narrower than the enabling law. The DOE was ostensibly under the impression that all students in DSCY&F custody are in foster care. Compare §§4.1.1 and 4.1.2 with §4.1.3. See also §2.0, definitions of "child in DSCY&F custody" and "student in foster care".

Third, the regulation categorically presumes that all children in DSCY&F custody are in DFS custody. Only DFS representatives are involved in the process established by the regulation and only a DFS caseworker is authorized to coordinate the scheduling of the Best Interest Meeting. See, e.g., §2.0, definitions of "DFS", "DFS Caseworker"; §5.1; and §5.1.2. In fact, there may be no DFS caseworker involved with the child. The Family Court may grant custody of a child to any division of the DSCY&F. Compare Title 10 Del.C. §1009(b)(5) with §1009(b)(7). The DSCY&F Division of Prevention and Behavioral Health Services (DPBHS) may have sole custody of a child.

Fourth, the role of charter schools is unclear. There is a definition of "charter school" in §2.0. However, it is unclear if a charter school can be a "school of origin" (§3.0). A charter school is excluded from consideration as a "school of origin" under §3.1.3 (which refers to "Local School District") but is not literally excluded from qualifying as a "school of origin" under §§3.1.1 and 3.1.2.

Fifth, the time period (10 working days) to notify the DOE of the inability to schedule a "Best Interest Meeting" is too long. See §4.2. A student covered by §4.1.3 may be receiving no or inappropriate services and the notice to DOE could be a simple email with attachments.

Sixth, the DOE should consider making the parent or educational representative one of the decision-makers at the Best Interest Meeting convened under §5.3. S.B. No. 52 (lines 52-54) indicates that the public representatives are "minimum". The analogous federal law covering homeless youth prioritizes the views of the parent or unaccompanied youth:

(B) School stability. In determining the best interest of the child or youth under subparagraph (A), the local educational agency shall -

> (i) presume that keeping the child or youth in the school of origin is in the child's or youth's best interest, except when doing so is contrary to the request of the child's or youth's parent or guardian, or (in the case of an unaccompanied youth) the youth;...

42 U.S.C. §11432(g)(3)

Seventh, the regulation does not provide notice of any appeal right. The analogous federal law covering homeless youth authorizes appeals. See 42 U.S.C. §§11432(g)(1) (C) and 11432(g)(3)(B)(E). If the placement decision can be appealed, the regulation should address notice of such right.

The SCPD may wish to share the above observations with the DOE and SBE.

Attachments

E:legis/2017/917bils
F:pub/bjh/legis/2017/917bils

STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
Margaret M. O'Neill Bldg., Suite 1, Room 311
410 Federal Street
Dover, Delaware 19901
302-739-3621

The Honorable John Carney
Governor

John McNeal
SCPD Director

April 26, 2017

Mr. Jamie Mack
Division of Public Health
Jesse Cooper Building
417 Federal Street
Dover, DE 19901

RE: 20 DE Reg. 770 [DPH DMOST Regulation (4/1/17)]

Dear Mr. Mack:

The State Council for Persons with Disabilities (SCPD) has reviewed the Division of Public Health's (DPH's) proposal to adopt a brief amendment to its regulations covering Delaware Medical Orders for Scope of Treatment (DMOST). The proposed regulation was published in the April 1, 2107 Register of Regulations.

Section 2.1.1 would be amended to clarify that the DMOST form's identification section must include the patient's address of record, phone number, and gender. The form (attached) already included these fields but the regulation did not require their inclusion. The proposed amendment is benign and essentially a "housekeeping" initiative.

The SCPD is endorsing the proposed regulation.

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: Ms. Karyl Rattay, DHSS-DPH
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

DELAWARE MEDICAL ORDERS FOR SCOPE OF TREATMENT (DMOST)

- FIRST, follow the orders below. THEN contact physician or other health-care practitioner for further orders, if indicated.
- The DMOST form is voluntary and is to be used by a patient with serious illness or frailty whose health care practitioner would not be surprised if the patient died within next year.
- Any section not completed requires providing the patient with the full treatment described in that section.
- Always provide comfort measures, regardless of the level of treatment chosen.
- The Patient or the Authorized Representative has been given a plain-language explanation of the DMOST form.
- The DMOST form must accompany the patient at all times. It is valid in every health care setting in Delaware.

Print Patient's Name (last, first, middle) _____ Date of Birth ___/___/___ last four digits of SSN _____ Gender _____

Patient's Address _____ Phone Number _____

A **Goals of Care** (see reverse for instructions. This section does not constitute a medical order.)

B **Cardiopulmonary Resuscitation** (CPR) *Patient has no pulse and/or is not breathing*

☐ Attempt resuscitation/CPR ☐ Do not attempt resuscitation/DNAR.

C **Medical Interventions:** *Patient is breathing and/or has a pulse.*

☐ **Full Treatment:** Use all appropriate medical and surgical interventions, including intubation and mechanical ventilation in an intensive care setting if indicated to support life. Transfer to a hospital, if necessary.

☐ **Limited Treatment:** Use appropriate medical treatment, such as antibiotics and IV fluids, as indicated. May use oxygen and noninvasive positive airway pressure. Generally avoid intensive care.

☐ Transfer to hospital for medical interventions.

☐ Transfer to hospital only if comfort needs cannot be met in current setting.

☐ **Treatment of Symptoms Only/Comfort Measures:** Use any medications, including pain medication, by any route, positioning, wound care, and other measures to keep clean, warm, dry, and comfortable. Use oxygen, suctioning, and manual treatment of airway obstruction as needed for comfort. Use antibiotics only to promote comfort. Transfer only if comfort needs can not be met in current location.

☐ **Other Orders:** _____

D **Artificially Administered Fluids and Nutrition:** *Always offer food/fluids by mouth if feasible and desired.*

☐ Long-term artificial nutrition

☐ Defined trial period of artificial nutrition: Length of trial: _____ Goal: _____

☐ No artificial nutrition ☐ hydration only ☐ none (check one box)

E **Orders Discussed With:** ☐ Patient _____ ph.# _____

☐ Guardian ☐ Surrogate (per DE Surrogacy Statute) Printed Name & phone number

☐ Other ☐ Agent under healthcare POA/or AHCD _____

☐ Parent of a minor Signature

_____

Print Name of Authorized Representative Relation to Patient Address Phone #

If I lose capacity, my Authorized Representative may / may not change or void this DMOST _____ Patient Signature

F

SIGNATURES: Patient/Authorized Representative/Parent (mandatory) *I have discussed this information with my Physician / APRN / PA*

_____

Signature Date

If authorized representative signs, the medical record must document that a physician has determined the patient's incapacity & the authorized representative's authority, in accordance with DE law.

Physician / APRN / PA

_____

Signature Date Time

_____

Print Name

_____

Print Address

_____

License Number Phone #

DIRECTIONS FOR HEALTH-CARE PROFESSIONALS

COMPLETING A DMOST FORM

- Must be signed by a Licensed Physician, Advance Practice Registered Nurse, or Physician's Assistant.
- Use of original form is highly encouraged. Photocopies and faxes of signed DMOST forms are legal and valid.
- Any incomplete section of a DMOST form indicates the patient should get the full treatment described in that section.

REVIEWING A DMOST FORM -- It is recommended that a DMOST form be reviewed periodically, especially when:

- The patient is transferred from one care setting or care level to another,
- There is a substantial change in the patient's health status, or
- The patient's treatment preferences change.

MODIFYING AND VOIDING INFORMATION ON A COMPLETED DMOST FORM

A patient with decision-making capacity can void a DMOST form at any time in any manner that indicates an intent to void.

Any modification to the form voids the DMOST form. A new DMOST form may be completed with a health care practitioner. Forms are available online at www.delaware.gov.

SECTION A This section outlines the specific goals that the patient is trying to achieve by this treatment plan. Health care professionals shall share information regarding prognosis with the patient in order to assist the patient in setting achievable goals. Examples may include:

- Longevity, cure, remission or better quality of life
- To live long enough to attend an important event (wedding, birthday, graduation)
- To live without pain, nausea, shortness of breath or other symptoms
- Eating, driving, gardening, enjoying time with family, or other activities

SECTION B This is a medical order. Mark a selection for the patient's preferences regarding CPR.

SECTION C This is a medical order. When "limited treatment" is selected also indicate whether the patient prefers or does not prefer transfer to a hospital for additional care.

- IV medication to enhance comfort may be appropriate treatment for a patient who has indicated "symptom treatment only."
- Non-invasive positive airway pressure includes continuous positive airway pressure (CPAP) and bi-level positive airway pressure (Bi-PAP).
- The patient will always be provided with comfort measures.
- Patients who are already receiving long-term mechanical ventilation may indicate treatment limitations on the "Other Orders" line.

SECTION D This is medical order. Mark a selection for the patient's preferences regarding nutrition and hydration. Check one box.

- Oral fluids and nutrition should always be offered if feasible and consistent with the goals of care.

SECTION E This section documents with whom the medical orders were discussed, the name of any healthcare professional who assisted in the completion of the Form, the name of any authorized representative and if the authorized representative may not modify/void the Form.

SECTION F To be valid, all information in this section must be completed.

HIPAA PERMITS DISCLOSURE OF DMOST FORMS TO OTHER HEALTH CARE PROFESSIONALS AS NECESSARY FOR TREATMENT.

SEND FORM WITH PATIENT WHENEVER MOVED TO A NEW SETTING

Faxed, Copied, or Electronic Versions of the Form are legal and valid.

STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
Margaret M. O'Neill Bldg., Suite 1, Room 311
410 Federal Street
Dover, Delaware 19901
302-739-3621

The Honorable John Carney
Governor

John McNeal
SCPD Director

MEMORANDUM

DATE: April 26, 2017

TO: Ms. Renee Purzycki, DLTCRP
Planning & Policy Development Unit

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

RE: 20 DE Reg. 766 [DLTCRP Proposed Neighborhood Home Regulation (4/1/17)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Long Term Care Residents Protection (DLTCRP's) proposed regulation. DLTCRP proposes a full revision of the standards applicable to DDDS neighborhood homes. The proposed regulation was published as 20 DE Reg. 766 in the April 1, 2017 issue of the Register of Regulations.

SCPD has the following observations.

First, DHSS should consider joint promulgation of regulations by both the DLTCRP and DDDS. By statute, DDDS is authorized to promulgate regulations covering neighborhood homes. See 29 Del.C. §7909A© (1) and (e). In the past, the DLTCRP and DDDS jointly promulgated the neighborhood home regulations. See 15 DE Reg. 968 (January 1, 2012). Sole promulgation by DLTCRP may render the regulations vulnerable to question in any enforcement action.

Second, in §1.0, the definition of "authorized representative" merits revision. On the one hand, it appears to limit an "authorized representative" to someone acting on behalf of a resident lacking decision-making capacity in the first and last sentences. On the other hand, it includes someone appointed under a POA, AHCD, or supportive decision-making agreement - all of which require the resident to have capacity. This is confusing. The section should be revised to encompass anyone authorized by law to act on the resident's behalf.

Third, in §1.0, definition of "person centered plan", the grammar in the second sentence is incorrect. The list inconsistently includes nouns (people; strategies) and verbs (uses; offers). Compare the attached §7.3 from the Delaware Administrative Code Drafting & Style Manual.

Fourth, in §3.2.1, insert "at least" prior to "annually". Otherwise, a licensee could argue that DHSS can only conduct one inspection annually, i.e., there is a regulatory "cap" of one inspection annually.

Fifth, in §4.2.15, a total ban on firearms on the premises of a neighborhood home could be challenged under the Second Amendment and the Delaware Constitution. See attached March 14, 2014 News Journal article describing Delaware Supreme Court ruling that WHA cannot limit firearms in common areas. See also Title 16 Del.C. §1121(25) and (29). The DLTCRP may wish to seek guidance from the Attorney General's Office in this context.

Sixth, the Division should consider adding a subsection to §5.4 which currently contemplates submission of plans only to DHSS. Under certain circumstances, the premises would be subject to review by the State Architectural Accessibility Board. See Title 29 Del.C. §7303.

Seventh, the only accessibility references in Section 5.4 are in the context of ramps. See, e.g. §§5.4.6 and 5.4.6.2. This is highly underinclusive. For example, a ramp for ingress and egress is of little use if doorways are narrow or bathrooms are inaccessible. A general reference at §5.6 is rather cryptic. The CMS Rule contemplates that "the setting is physically accessible to the individual" overall. See 42 C.F.R. 441.710(a)(1)(B).

Eighth, Section 5.4.6 only requires a ramp if accommodating individuals who regularly require wheelchairs. One problem with this approach is that providers have no incentive to have accessible sites and individuals using wheelchairs are disproportionately excluded from the neighborhood home network. A second problem with this approach is that visitors using wheelchairs cannot enter the home.

Ninth, there is some "tension" between §5.9.5 (requiring doors to be capable of being opened from either side at all times) and §5.10.7 (requiring lockable doors). The CMS Community Rule promotes resident privacy, including doors "lockable by the individual, with only appropriate staff having keys to doors". See 42 C.F.R. 441.710(a)(1)(B).

Tenth, Section 5.10.12 limits bedrooms to no more than two (2) individuals. It would be prudent to include a subsection noting that residents have some choice in roommates. See Title 16 Del.C. §1121(28). The CMS Rule is even more affirmative: "Individuals sharing units have a choice of roommates in that setting." 42 C.F.R. 441.710(a)(1)(B).

Eleventh, Section 6.2 contemplates manual entries in a medication administration record. If electronic entries are permissible in a data base (e.g. in THERAP), then this section may merit revision.

Twelfth, Section 6.8.3.1 merits review. It generally includes elopement as a reportable incident only if an individual's whereabouts are unknown and the individual suffers harm. Many behavior plans include restrictions (e.g. line of sight or supervision standards). Section 6.8.3.1 does not account for violations of behavioral plans. Thus, an individual restricted to line of sight due to sex offenses could elope and the agency would not have to report the occurrence.

Thirteenth, Section 6.8.4.2 characterizes injuries resulting in transfer to an acute care facility as a reportable incident. At a minimum, we recommend including "urgent care" facilities in this section. Anecdotally, we understand that a provider may have opted to take injured individuals to urgent care facilities to inferentially avoid reporting incidents. By analogy, the DSCY&F requires its providers to report any injury resulting in medical/dental treatment other than first aid provided on-site. See 9 DE Admin Code 103.15.22 and 103.32.0. This is manifestly a more protective standard.

Fourteenth, Section 7.4 could be improved by incorporating the ADA standard that there should be no protrusion from the wall in excess of four inches. See attachments related to fire extinguishers.

Fifteenth, Section 9.1.5 is overly restrictive in requiring all prescribed medications to be kept locked in a cabinet or lock box. An individual with asthma could not keep an emergency inhaler in his personal possession. An individual with dry skin could not keep a prescription skin moisturizer in his personal possession. The standard is also too brittle if staff are trying to train an individual to monitor and self-administer medications in anticipation of developing greater independence. Restricting access to an individually prescribed medication is not "normal" and the blanket policy of locking all prescribed medications may violate the CMS Community Rule. If there are less intrusive methods to achieve safety, they should be considered and restrictions only allowed if included in the person-centered service plan. See 42 C.F.R. 441.530 and 441.710(a).

Sixteenth, we did not notice a "waiver of standards" provision analogous to the current regulation, §12.0. If this is an oversight, the Division may wish to include a comparable provision.

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

cc: Ms. Mary E. Peterson, DLTCRP
Ms. Jill Rogers, DDDS
Mr. Stephen Groff, DMMA
Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

20reg766 dltcrp-neighborhood home 4-24-17

Generally, use the active rather than the passive voice:

EXAMPLE:
Use: The Chairman appoints members of the committee.
Avoid: Members of the committee are appointed by the chairman.

Generally, use the third person:

EXAMPLE:
Use: The applicant shall file the appropriate forms.
Avoid: You shall file the appropriate form.

If an idea can be accurately expressed either positively or negatively, express it positively. The negative form is appropriate where a provision expresses a prohibition. Negative words should not be used where provisions provide only advisory guidance.

7.3 Tabulation and Use of Bullets

Tabulation is used to arrange the structure of subdivisions in a document. All items in the tabulated enumeration must belong to the same class. Each item listed must be parallel to the introductory language. The following tabulation is incorrect because each subdivision is not parallel in substance or form to the introductory language:

EXAMPLE:

1.1 An applicant for licensure shall:
1.1.1 Complete the application for examination;
1.1.2 Submit in advance the examination fee; and
1.1.3 Eligibility for licensure by reciprocity.
(Language not parallel)

Subdivision 1.1.3 should read, "Be eligible for licensure by reciprocity."

The following guidelines apply when using displayed lists:

1. In most cases, the introductory language to a displayed list should end in a colon.
2. All items in a displayed list should begin with a capital letter, whether the entry is a word, a sentence fragment, a full sentence, or numerous sentences.
3. Each item should end with a semicolon or period, and a period should be used after the last item if it is the end of a sentence.
4. Items should end with periods if the items are complete sentences or if it is anticipated that the list will be modified often.
5. If using semicolons and the list consists of alternatives, "or" should be placed after the second to last item.
6. If using semicolons and the list is inclusive, "and" should be placed after the second to last item.
7. Language should not be added after a displayed list that continues the sentence of the introductory language.
8. The automatic numbering feature of word processing programs should not be used. Each number should be typed individually.

If a displayed list is not an exhaustive list and uses "but ... not limited to" in the introductory language or if it is a list of suggestions, the list should be bulleted and not numbered.

EXAMPLE

9.4.4 Sources of CE credits include but are not limited to the following:

- Programs sponsored by national funeral service organizations.
- Programs sponsored by state associations.
- Program provided by local associations.
- Programs provided by suppliers.
- Independent study courses for which there is an assessment of knowledge.
- College courses.

9.4.5 The recommended areas include but are not limited to the following:

- Grief counseling
- Professional conduct, business ethics or legal aspects relating to practice in the profession.
- Business management concepts relating to delivery of goods and services.
- Technical aspects of the profession.
- Public relations.
- After care counseling.

9.4.6 Application for CE program approval shall include the following:

9.4.6.1 Date and location.

9.4.6.2 Description of program subject, material, and content.

9.4.6.3 Program schedule to time segments in subject content areas for which approval of, and determination of credit is required.

9.4.6.4 Name of instructor, background, and expertise.

9.4.6.5 Name and position of person making request for program approval.

7.4 Use of "shall", "may", "may not", and "must"

Use "shall" in the imperative sense to express a duty or obligation to act. The term "shall" is generally used in connection with statutory mandates. "May" is permissive and generally expresses a right, privilege, or power. When an individual is authorized but not ordered to act, the term "may" is appropriate. If an obligation to act is intended, "shall" is used.

Use "may not" when a right, privilege, or power is restricted. Using "shall not" negates the obligation but not the permission to act; therefore, "may not" is the stronger prohibition. Wherever possible, the words "shall" or "may" are used in place of other terms such as "is authorized to", "is empowered to", "is directed to", "has the duty to", "must", and similar phrases. However, if certain action is intended to be a condition before accruing a right or privilege, the word "must" is used instead of "shall" or "may" (e.g., "In order to have your regulations published, you must file them by the deadline.")

When the word "shall" is used, the subject of the sentence must be a person, committee, or some other entity that has the power to make a decision or take an action. For this reason, do not use the word "shall" to declare a legal result or state a condition. When writing a sentence that contains the word "shall", check for proper use of the word by reading the sentence to yourself and substituting the phrase "has the duty to" for "shall".

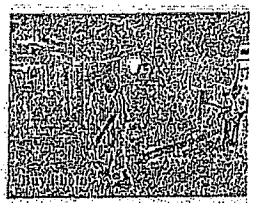
EXAMPLE:

Use: A practitioner shall perform clinical work only in designated areas.

Avoid: Clinical work shall be performed only in designated areas

NRA wins court ruling against WHA

Sean O'Sullivan, The News Journal Published 7:15 p.m. ET March 18, 2014 | Updated 9:01 a.m. ET March 19, 2014

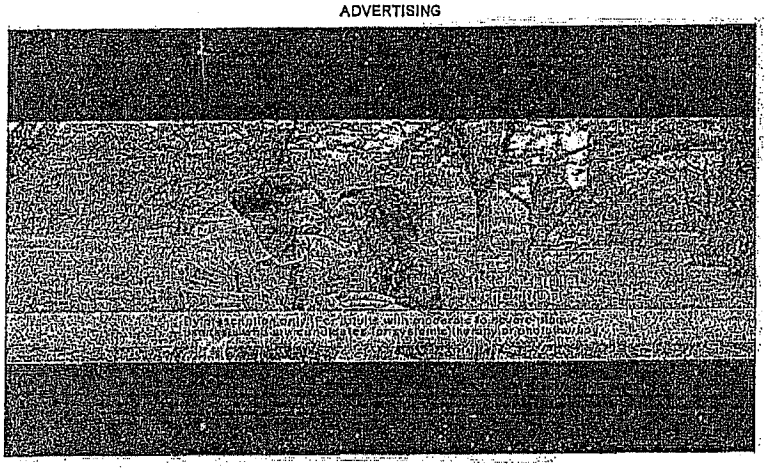


(Photo: ROBERT CRAIG/THE NEWS JOURNAL)

In a surprising blow to public housing officials and a clear win for the National Rifle Association (http://home.nra.org/), the Delaware Supreme Court (http://courts.delaware.gov/Supreme/index.stm) has ruled that the Wilmington Housing Authority (http://www.wha.net/) cannot set limits on residents' rights to carry guns in common areas of public housing.

The unanimous ruling by the state Supreme Court noted that under the Delaware Constitution, which offers broader gun rights protections than the U.S. Constitution, the WHA limitations on possessing a gun were "overbroad and burden the right to bear arms more than is reasonably necessary."

"Public Housing is 'a home as well as a government building,' " Justice Henry DuPont Ridgely wrote for the panel.



The ruling directly contradicts a July 2012 ruling by U.S. District Judge Leonard Stark who found that the limits on residents carrying guns in common areas like lounges, halls and laundry rooms was "a reasonable policy."

Because the case turned on questions of state, not federal law, the Delaware Supreme Court ruling prevails.

Poll: Guns in public housing (http://archive.delawareonline.com/poll/2014-03-19/7892044)

The Delaware justices wrote that in certain circumstances, the WHA could limit the "use" of firearms but it could not limit "possession" of firearms in what amounted to parts of the residents' homes.

The state justices said that more narrow regulations – like barring residents from bringing guns into portions of WHA buildings where state employees work – may be acceptable.

"It is definitely a win," said attorney Francis X. Pileggi, who represented two WHA residents in the NRA-funded lawsuit. "The result is excellent and exactly what we were looking for."

WHA Executive Director Frederick S. Purnell said he was very disappointed, "Overall I think the ruling sets us back."

Purnell said he thought the restrictions on guns in common areas "struck a good balance between the right to bear arms and the overall mandate we have to provide a safe environment for our residents."

Before the ruling, Purnell and others said that public housing agencies across the nation were watching the case to see what kind of limits could be placed on gun possession.

Purnell said the WHA would comply with Tuesday's ruling and said he does not expect there will be an appeal.

WHA attorney Barry Willoughby said he was at least pleased that the court adopted a standard of review which may give the WHA some limited authority to regulate weapons in future.

But, he said, "Effectively the case is over."

Before Tuesday's decision, residents of Wilmington public housing were divided. Some strongly opposed any weapons in the buildings while others said they wanted to have a firearm for self defense. And some, like WHA resident Mary Williams, who favored allowing residents to have guns, opposed guns in common areas.

"You don't need that," she said in August. "Just keep it in your room."

The case against the WHA started June 2010 when two WHA residents filed suit to keep guns in their public housing units. At that time, the WHA had a broad ban on all guns in public housing. But weeks later, the U.S. Supreme Court made a landmark ruling that state and local governments could not impose a blanket ban on gun ownership.

So in Sept. 2010, WHA dropped its flat ban on guns and instead adopted a policy that placed restrictions on guns in common areas of public housing like television lounges and laundry rooms. The NRA and the WHA plaintiffs, however, persisted in their legal challenge arguing the new restrictions improperly limited their rights. District Judge Stark disagreed, finding the limits were a reasonable safety measure.

The NRA then appealed to the U.S. Third Circuit Court of Appeals arguing that the issues in the case involved questions related to the Delaware Constitution, not the U.S. Constitution. The federal appeals court agreed in August and sent the matter to the Delaware Supreme Court for clarification.

As a technical matter, the case will now go back to the U.S. Third Circuit Court of Appeals, which will in turn likely send the case back to District Judge Stark. But it appears that will not be needed, as WHA officials said Tuesday they will comply with the Delaware Supreme Court ruling and lift the restriction on guns in common areas.

In court, the WHA had argued it was unsafe to allow guns to be carried in common areas because it could lead to a situation where the person with the largest caliber gun gets control of the television remote. On Tuesday, Pileggi said that was a false argument because other state and federal laws restrict the use of guns and place limits on how people can behave with firearms.

He said if someone used a gun in a threatening manner to gain control of the TV remote, then they could be charged with terroristic threatening.

Also, Pileggi said he did not believe this case would end up limiting other public institutions from putting restrictions on guns in places like courthouses and town halls.

"In this opinion, the court went out of its way to distinguish public residences from government buildings," he said. "There is a huge distinction" he said, because one is a home and the other is not.

Contact Sean O'Sullivan at 302 324-2777 or sosullivan@delawareonline.com or on Twitter @SeanGOSullivan

Target Group	Included	Target SubGroup	Minimum Age	Maximum Age	
				Maximum Age Limit	No Maximum Age Limit
☐ Aged or Disabled, or Both - General					
	☐	Aged			☐
	☐	Disabled (Physical)			
	☐	Disabled (Other)			
☐ Aged or Disabled, or Both - Specific Recognized Subgroups					
	☐	Brain Injury			☐
	☐	HIV/AIDS			☐
	☐	Medically Fragile			☐
	☐	Technology Dependent			☐
☑ Intellectual Disability or Developmental Disability, or Both					
	☑	Autism	14		☑
	☐	Developmental Disability			☐
	☑	Intellectual Disability	14		☑
☐ Mental Illness					
	☐	Mental Illness			
	☐	Serious Emotional Disturbance			

b. **Additional Criteria.** The State further specifies its target group(s) as follows:

In order to be enrolled in the Lifespan waiver, individuals must have been determined to meet the following criteria:

1) Must be determined eligible for DDDS services per the criteria delineated in Title 16, Section 2100 of the Delaware Administrative Code. This eligibility criteria requires a diagnosis of an intellectual developmental disability (including brain injury), autism spectrum disorder or Prader Willi Syndrome assigned in the developmental period and also documented functional limitations.

2) Must meet established priority criteria for selection of entrance into the waiver or meet the criteria for one of the groups for which capacity has been reserved

3) Must meet level of care and financial eligibility for ICF/IID Services (as described in Appendix B-4)

c. **Transition of Individuals Affected by Maximum Age Limitation.** When there is a maximum age limit that applies to individuals who may be served in the waiver, describe the transition planning procedures that are undertaken on behalf of participants affected by the age limit *(select one):*

◉ **Not applicable. There is no maximum age limit**

○ **The following transition planning procedures are employed for participants who will reach the waiver's maximum age limit.**

Specify:

Appendix B: Participant Access and Eligibility

B-2: Individual Cost Limit (1 of 2)

DEPARTMENT OF HEALTH AND HUMAN SERVICES
REGION III
3535 MARKET STREET
PHILADELPHIA, PENNSYLVANIA

OFFICE OF THE SECRETARY
OFFICE FOR CIVIL RIGHTS
MAILING ADDRESS:
P.O. BOX 13716
PHILADELPHIA
PENNSYLVANIA 19101

Our Reference: 03863006

DEC 08 1986

Mr. Brian J. Hartman
Disabilities Law Program
Community Legal Aid Society, Inc.
913 Washington Street
Wilmington, Delaware 19801

Dear Mr. Hartman:

On November 24, 1986, we received your request to withdraw your complaint against the Department of Health and Social Services (DHS). Specifically, your complaint related to group-home services for mentally retarded persons under age eighteen under the authority of the Age Discrimination Act of 1975 and its implementing Regulation, 45 CFR Part 91.

It is our understanding that the assurances outlined in the agency's November 12, 1986 letter to you, satisfactorily resolve the issues relating to the complaint. The agency has provided its policy of non-discrimination on the basis of age and its assurance that it does not exclude the participation of persons under age eighteen in its group-home services. In addition, the agency will provide you with periodic reports, within the next year, regarding its clients under age eighteen.

We have informed DHS that our office will require copies of all periodic reports sent to you. These submissions will be due to us at the same time as they are sent to you. We have also advised the agency that if the information indicates disparity in the age of the clients served, we may re-open your complaint for a formal investigation.

We do appreciate your efforts in resolving this complaint informally and we are hopeful that the agency will continue to be cooperative in adhering to their assurances. If you have any questions, please contact Ms. Barbara Banks, Director, Investigations Division, at (215) 596-6173.

File
85-9069 DE

Sincerely yours,

Paul F. Cushing

Paul F. Cushing
Regional Manager

STATE OF DELAWARE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MENTAL RETARDATION
802 SILVER LAKE BOULEVARD
ROBBINS BUILDING
DOVER, DELAWARE 19901

OFFICE OF THE
DIRECTOR

TELEPHONE: (302) 736 - 4386

November 12, 1986

Brian J. Hartman, Esquire
Community Legal Aid Society, Inc.
913 Washington Street
Wilmington, DE 19801

Re: Residential Services for Mentally Retarded Minors

Dear Brian:

This is to confirm that the Department of Health and Social Services, Division of Mental Retardation (DMR) does not now, nor has it, violated 45 C.F.R. Part 90 in DMR's provision of community-based residential services.

Enclosed is a copy of a memorandum circulated to the Intake Committee at DMR, dated September 19, 1986. This memorandum confirms our policy of nondiscrimination.

The DMR Intake Committee will actively consider [redacted] for placement in a group home setting consistent with his need[redacted] DMR is not compelled by this letter, however, to determine that [redacted] is an appropriate candidate for admission to a group home.

[redacted] will continue to be actively considered as one of a group of priority candidates for a community placement commensurate with [redacted] s needs.

Within one month of the date of this letter, DMR will forward to you the following non-identifying information: the total number of non-adults presently in DMR ICF/MR and neighborhood group home settings, specifying dates of birth and identity of group home in which each such non-adult resides.

Finally, within six months and one year from the provision of the above data, DMR will forward to you the following non-identifying information:

a. the total number of non-adults applying for placement in DMR ICF/MR and neighborhood group homes within the preceding six months, specifying dates of birth and action taken on each application;

b. the total number of non-adults in DMR ICF/MR and neighborhood group homes as of the respective dates, specifying dates of birth and identity of group home in which each such non-adult resides.

The terms of this letter are conditional upon your withdrawing the complaint in this matter.

Should there be material noncompliance with the representations in this letter, DMR understands that the complaint may be reopened until August 24, 1988, and that DMR waives its right to have such complaint heard in the first instance at the federal mediator level.

Very truly yours,

Thomas Pledgie, Ph.D.
Director, Division of Mental Retardation

TP:bwr

Enclosure

Susan Kirk-Ryan
Paul Cushing

§ 7909A Division of Developmental Disabilities Services.

(a) There is hereby established the Division of Developmental Disabilities Services under the direction and control of the Secretary of the Department of Health and Social Services.

(b) The mission of the Division of Developmental Disabilities Services is to provide services and supports to individuals with developmental disabilities and their families which enable them to make informed choices that lead to an improved quality of life and meaningful participation in their communities.

(c) The Division of Developmental Disabilities Services shall have the following powers and duties:

(1) Provide community-based services including family supports, advocacy, foster care placements, respite, neighborhood homes, supported living, vocational and supported employment opportunities and day habilitation services;

(2) Provide case management, nursing, behavioral services, therapy and other professional supports needed to assist individuals in achieving their goal or goals;

(3) Provide early intervention services to families so as to prevent or minimize developmental delays in children at risk who are ages 0-3; and

(4) Provide intermediate care facility residential services.

(d) The Division of Developmental Disabilities Services shall ensure the investigation of complaints of abuse, neglect, mistreatment and financial exploitation. Such investigations may be in coordination with the Attorney General's Office, law-enforcement or other appropriate agencies.

(e) The Division of Developmental Disabilities Services shall be authorized to promulgate rules and regulations to implement this statute.

60 Del. Laws, c. 677, § 2; 73 Del. Laws, c. 97, § 6[5]; 78 Del. Laws, c. 179, § 315.;

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

Center for Medicaid and CHIP Services

CMCS Informational Bulletin

DATE: November 28, 2012

FROM: Cindy Mann, Director
Center for Medicaid and CHIP Services (CMCS)

SUBJECT: Inpatient Psychiatric Services for Individuals under age 21

This Informational Bulletin clarifies that states may structure coverage and payment for the benefit category of inpatient psychiatric hospital or facility services for individuals under age 21(hereinafter referred to as inpatient psychiatric facility benefit) to ensure that children receiving this benefit obtain all services necessary to meet their medical, psychological, social, behavioral and developmental needs, as identified in a plan of care. This clarification is intended to describe flexibility currently available to states to ensure the provision of medically necessary Medicaid services to children in inpatient psychiatric facilities.

Background

Under section 1905(a) of the Social Security Act (the Act), there is a general prohibition on Medicaid payment for any services provided to any individual who is under age 65 and who is residing in an Institution for Mental Diseases (IMD) unless the payment is for inpatient psychiatric hospital services for individuals under age 21 pursuant to section 1905(a)(16) of the Act, as defined in section 1905(h) of the Act. Implementing regulations at 42 Code of Federal Regulation 440.160 and 441 Subpart D define these inpatient psychiatric hospital services as services furnished by a psychiatric hospital, a general hospital with a psychiatric program that meets the applicable conditions of participation, or an accredited psychiatric facility that meets certain requirements. These requirements include that the services must be provided under the direction of a physician, pursuant to a certification of need and plan of care developed by an interdisciplinary team of professionals, and must involve "active treatment" designed to achieve the child's discharge from inpatient status at the earliest possible time.

The Centers for Medicare and Medicaid Services (CMS) has historically prohibited states from claiming expenditures under the inpatient psychiatric facility benefit unless the expenditures were made to qualified providers of such services. This had the effect of denying coverage for other medically necessary Medicaid items and services, such as prescription drugs or practitioner services that were not included by the state as part of the rate paid to the facility for care. These items and services would be available under other benefit categories for individuals who did not reside in an IMD, such as the benefit for Early and Periodic Screening, Diagnostic and Treatment (EPSDT), and states had separate payment methodologies for such items and services.

Recently, several Departmental Appeals Board decisions have clarified that other covered services can be furnished as part of the inpatient psychiatric facility benefit even when payment was made to an individual practitioner or supplier other than the inpatient psychiatric facility itself, when such services are furnished to a child residing in such a facility, authorized under the child's plan of care, and provided under an arrangement with the facility. In essence, the Departmental Appeals Board indicated that payment for such services does not need to be bundled into a single per diem rate for

the IMD facility, but could be authorized under the approved State plan to be paid directly to the treating practitioner. In light of these decisions, CMS is currently applying this flexibility in the approval of State Plan amendments, and seeks to clarify the ability that states have in covering and paying for a more robust benefit for children receiving the inpatient psychiatric facility benefit.

Services Provided under Arrangement

The inpatient psychiatric facility benefit is defined in part to include a needs assessment and the development of a plan of care specific to meet each child's medical, psychological, social, behavioral and developmental needs. In some cases a psychiatric facility may wish to obtain services reflected in the plan of care under arrangement with qualified non-facility providers. Such services would be components of the inpatient psychiatric facility benefit when included in the child's inpatient psychiatric plan of care and furnished by a qualified provider that has entered into a contract with the inpatient psychiatric facility to furnish the services to its inpatients. To comply with the requirement that services be "provided by" a qualified psychiatric facility, the psychiatric facility must arrange for and oversee the provision of all services, must maintain all medical records of care furnished to the individual, and must ensure that all services are furnished under the direction of a physician. Services being furnished under arrangement do not need to be provided at the psychiatric facility itself if these conditions are met.

Payment for Services Provided under Arrangement

States have a number of options in electing a methodology in their Medicaid State plans to pay for the inpatient psychiatric facility benefit. Traditionally, many states make a direct payment to the facility through either an all-inclusive per diem rate or a base per diem rate with add-on payments. Under this direct payment method, if the facility obtains services under arrangement with outside providers, the facility would be responsible for paying the providers of the arranged services.

An option that may be more flexible, and has been approved in State Plan amendments, is to directly reimburse individual practitioners or suppliers of arranged services using payment methodologies that are applicable when the services are otherwise available under the State plan. States electing this option would pay the same fees to such practitioners or suppliers as would otherwise be applicable when the services are furnished to Medicaid beneficiaries outside the inpatient psychiatric facility benefit. This option would allow states greater ability to capture potential efficiencies, and monitor the quality of care, through the use of existing delivery and billing processes. States electing to make separate payments under this option will need to assure there is no duplication of payment between the inpatient facility rate and the items paid for separately using existing State plan fees. It is important to note that while the state may directly reimburse individual providers, CMS will require expenditures for all services provided to individuals receiving services through the inpatient psychiatric facility benefit to be reported and claimed on the Mental Health Facility Services line item of the CMS 64 form, and not under the line item applicable to the furnished Medicaid service.

We are ready to work with states to provide assistance in implementing this benefit, and we look forward to our continuing collaboration. If you have questions, please contact Ms. Barbara Edwards, Director, Disabled and Elderly Health Programs Group, at 410-786-7089, or at Barbara.Edwards@cms.hhs.gov.

(r) DISREGARDING PAYMENTS FOR CERTAIN MEDICAL EXPENSES BY INSTITUTIONALIZED INDIVIDUALS

(1)

(A) For purposes of sections 1396a(a)(17) and 1396r–5(d)(1)(D) of this title and for purposes of a waiver under section 1396n of this title, with respect to the post-eligibility treatment of income of individuals who are institutionalized or receiving home or community-based services under such a waiver, the treatment described in subparagraph (B) shall apply, there shall be disregarded reparation payments made by the Federal Republic of Germany, and there shall be taken into account 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, and

(ii) necessary medical or remedial care recognized under State law but not covered under the State plan under this subchapter, subject to reasonable limits the State may establish on the amount of these expenses.

(B)

(i) In the case of a veteran who does not have a spouse or a child, if the veteran—

(I) receives, after the veteran has been determined to be eligible for medical assistance under the State plan under this subchapter, a veteran's pension in excess of $90 per month, and

(II) resides in a State veterans home with respect to which the Secretary of Veterans Affairs makes per diem payments for nursing home care pursuant to section 1741(a) of title 38,

any such pension payment, including any payment made due to the need for aid and attendance, or for unreimbursed medical expenses, that is in excess of $90 per month shall be counted as income only for the purpose of applying such excess payment to the State veterans home's cost of providing nursing home care to the veteran.

(ii) The provisions of clause (i) shall apply with respect to a surviving spouse of a veteran who does not have a child in the same manner as they apply to a veteran described in such clause.

(2)

(A) The methodology to be employed in determining income and resource eligibility for individuals under subsection (a)(10)(A)(i)(III), (a)(10)(A)(i)(IV), (a)(10)(A)(i)(VI), (a)(10)(A)(i)(VII), (a)(10)(A)(ii), (a)(10)(C)(i)(III), or (f) or under section 1396d(p) of this title may be less restrictive, and shall be no more restrictive, than the methodology—

(i) in the case of groups consisting of aged, blind, or disabled individuals, under the supplemental security income program under subchapter XVI, or

(ii) in the case of other groups, under the State plan most closely categorically related.

(B) For purposes of this subsection and subsection (a)(10), methodology is considered to be "no more restrictive" if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.

Delaware General Assembly (/)

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Senate Bill 87

149th General Assembly (Present)

Bill Progress

Current Status:

Signed 7/21/17

What happens next?

Becomes effective upon date of signature of the Governor or upon date specified

Bill Details

Introduced on:

5/22/17

Primary Sponsor:

Henry (/LegislatorDetail?personId=227)

Additional Sponsor(s):

Sen. Sokola (/LegislatorDetail?personId=90)
Reps. Jaques (/LegislatorDetail?personId=111), M. Smith (/LegislatorDetail?personId=1051), K. Williams (/LegislatorDetail?personId=198)

Co-Sponsor(s):

Sen. Bushweller (/LegislatorDetail?personId=2), Hansen (/LegislatorDetail?personId=3212), Marshall (/LegislatorDetail?personId=294), Townsend (/LegislatorDetail?personId=13)
Reps. Baumbach (/LegislatorDetail?personId=252), Bolden (/LegislatorDetail?personId=332), Lynn (/LegislatorDetail?personId=317), Wilson (/LegislatorDetail?personId=92)

Long Title:

AN ACT TO AMEND TITLES 13 AND 14 OF THE DELAWARE CODE RELATING TO PUBLIC SCHOOL ENROLLMENT OF CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES.

Original Synopsis:

This Act updates the school stability law for children in the custody of the Department of Services for Children, Youth and Their Families (DSCYF) following passage of the federal Every Student Succeeds Act (ESSA), which reauthorizes the Elementary and Secondary Education Act (ESEA). ESSA requires Delaware to eliminate the provision "awaiting foster care placement" under § 202(c), Title 14 in accordance with the federal McKinney Vento Homeless Assistance Act by December 10, 2017, and instead create a distinct provision regarding school stability for children in the custody of DSCYF. [42 U.S.C. §§ 11431 to 11435; ESEA section 1111(g)(1)(E)(i)-(iii)), 20 U.S.C. §6311(g)(1)(E)]. This Act clarifies that children in the custody of DSCYF remain entitled to attend their school of origin if it is in their best interests to do so, or are eligible for immediate enrollment in a new school. Sections 1, 2, and 3 of this Act take effect on the effective date of final regulations published in the Register of Regulations and promulgated under authority granted by § 202A(d) of Title 14, which is created by Section 2 of this Act.

Volume Chapter:

81:92

Fiscal Note/Fee Impact:

Not Required

Effective Date:

7/21/17

Bill Text

Original Text:

SPONSOR: Sen. Henry & Sen. Sokola & Rep. Jaques & Rep. M. Smith & Rep. K. Williams
Sens. Bushweller, Hansen, Marshall, Townsend; Reps. Baumbach, Bolden, Lynn, Wilson

DELAWARE STATE SENATE
149th GENERAL ASSEMBLY

SENATE BILL NO. 87

AN ACT TO AMEND TITLES 13 AND 14 OF THE DELAWARE CODE RELATING TO PUBLIC SCHOOL ENROLLMENT OF CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 202, Title 14 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 202. Free schools; ages; attendance within school district; nonresidents of Delaware.

(c) Persons attending the public schools of this State shall attend the public schools in the school district within which they reside, except as provided in Chapters 4, 5 and 6 of this title and in Chapter 92, Volume 23, Laws of Delaware, as amended by Chapter 172, Volume 55, Laws of Delaware. Notwithstanding the foregoing, homeless children and unaccompanied youth, as defined by 42 U.S.C. § 11434a, shall attend school in accordance with the McKinney-Vento Homeless Education Assistance Improvement Act [42 U.S.C. §§ 11431 to 11435]; provided any person determined to be ineligible under the act may be denied enrollment. ~~For the purpose of this section and provisions of the McKinney-Vento Homeless Education Assistance Improvement Act [42 U.S.C. §§ 11431-11435], the words "awaiting foster care placement" include all children in foster care.~~ Children in the custody of the Department of Services for Children, Youth and Their Families under Chapter 25 of Title 13 must attend school in accordance with § 202A of this title.

(e)(1) For purposes of this section, a student shall be considered a resident of the school district in which that student's parents or legal guardian resides. If the child's parents do not reside together and a court of appropriate jurisdiction has entered a custody order, the child's residency for school attendance purposes shall be determined as follows unless otherwise agreed in a writing signed by both parents:

a. In cases in which 1 parent is awarded sole custody, the child shall be considered a resident of the district in which the sole custodian resides.

b. In cases in which the parents are granted joint custody, the child shall be considered a resident of the district in which the primary residential parent resides.

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c. In cases in which the parents are granted shared custody, the child may be considered a resident of either parent's district.

Under no circumstances shall a child be enrolled in 2 different schools at the same time.

(3) Children under the care or custody of the Department of Services for Children, Youth and Their Families are exempted from the provisions of this subsection. Children in the care and custody of the Department of Services for Children, Youth and Their Families who are in foster care ~~shall attend school in accordance with the McKinney-Vento Homeless Education Assistance Improvement Act (42 U.S.C. §§ 11431-11435)~~ under Chapter 25 of Title 13 must attend school in accordance with § 202A of this title.

Section 2. Amend Subchapter I, Chapter 2, Title 14 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 202A. School enrollment for children in the custody of the Department of Services for Children, Youth and Their Families.

(a) For purposes of this section, "school of origin" means any of the following:

(1) The school in which the child is enrolled at the time of entry into the custody of the Department of Services for Children, Youth and Their Families (DSCYF).

(2) The school in which the child is enrolled at the time of any change in placement while in the custody of DSCYF.

(3) The school identified for the next grade level in the same school district where the child in the custody of DSCYF is enrolled.

(b)(1) A child in the custody of DSCYF under Chapter 25 of Title 13 must remain in the child's school of origin, unless a determination is made that it is not in the child's best interest to attend such school.

(2) If it is determined that it is not in the best interest of a child to remain in the child's school of origin, the child must immediately be enrolled in the child's school of residence based on the current address of the DSCYF custody placement, even if the records or other documents normally required for enrollment are not produced. The school in which the child is enrolled shall immediately contact the child's school of origin to obtain relevant academic and other records.

(3) The determination of a child's best interest under this subsection must, at a minimum, be made by a representative of DSCYF, a representative of the child's school of origin, and a representative of the child's school of residence based on the address of the DSCYF custody placement at the time of the determination.

(c)(1) If a child leaves the custody of DSCYF, the child must remain in the school in which the child is enrolled through the remainder of the academic year, unless a determination is made that it is not in the child's best interest.

(2) The determination of a child's best interest under this subsection must, at a minimum, be made by a representative of DSCYF, a representative of the school in which the child is enrolled, and a representative of the child's school of residence based on the address of the DSCYF custody placement at the time of the determination.

(d) The Secretary of Education shall promulgate regulations to establish a process for the determination of a child's best interest under subsection (b) and (c) of this section.

Section 3. Amend § 2502, Title 13 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2502. Definitions.

For the purposes of this chapter, unless the context indicates differently:

(20) "School of origin" ~~is defined as the school the child attended at the time the child was placed in the custody of DSCYF~~ means as defined in § 202A(a) of Title 14.

Section 4. Sections 1, 2, and 3 of this Act take effect on the effective date of final regulations published in the Register of Regulations and promulgated under § 202A(d) of Title 14, as contained in Section 2 of this Act. The Secretary of the Department of Education shall provide notice to the Registrar of Regulations that the publication of final regulations is required for Sections 1, 2, and 3 of this Act to become effective.

Section 5. Section 202A(a)(3) of Title 14, as contained in Section 2 of this Act, expires on June 30, 2020, unless otherwise provided by a subsequent act of the General Assembly.

SYNOPSIS

This Act updates the school stability law for children in the custody of the Department of Services for Children, Youth and Their Families (DSCYF) following passage of the federal Every Student Succeeds Act (ESSA), which reauthorizes the Elementary and Secondary Education Act (ESEA). ESSA requires Delaware to eliminate the provision "awaiting foster care placement" under § 202(c), Title 14 in accordance with the federal McKinney Vento Homeless Assistance Act by December 10, 2017, and instead create a distinct provision regarding school stability for children in the custody of DSCYF. [42 U.S.C. §§ 11431 to 11435; ESEA section 1111(g)(1)(E)(i)-(iii)), 20 U.S.C. §6311(g)(1)(E)]. This Act clarifies that children in the custody of DSCYF remain entitled to attend their school of origin if it is in their best interests to do so, or are eligible for immediate enrollment in a new school.

Sections 1, 2, and 3 of this Act take effect on the effective date of final regulations published in the Register of Regulations and promulgated under authority granted by § 202A(d) of Title 14, which is created by Section 2 of this Act.

Author: Senator Henry

Cornell Law School

U.S. Code › Title 20 › Chapter 70 › Subchapter I › Part A › Subpart 1 › § 6311

20 U.S. Code § 6311 - State plans

(a) FILING FOR GRANTS

(1) IN GENERAL For any State desiring to receive a grant under this part, the State educational agency shall file with the Secretary a plan that is—

(A) developed by the State educational agency with timely and meaningful consultation with the Governor, members of the State legislature and State board of education (if the State has a State board of education), local educational agencies (including those located in rural areas), representatives of Indian tribes located in the State, teachers, principals, other school leaders, charter school leaders (if the State has charter schools), specialized instructional support personnel, paraprofessionals, administrators, other staff, and parents; and

(B) is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the Rehabilitation Act of 1973 (20 U.S.C. 701 et seq.),[1] the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.), the Workforce Innovation and Opportunity Act (29 U.S.C. 3101 et seq.), the Head Start Act (42 U.S.C. 9831 et seq.), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858 et seq.),[2] the Education Sciences Reform Act of 2002 (20 U.S.C. 9501 et seq.), the Education [3] Technical Assistance Act of 2002 (20 U.S.C. 9601 et. seq.), the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9621 et seq.), the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.), and the Adult Education and Family Literacy Act (29 U.S.C. 3271 et seq.).

(2) LIMITATION

Consultation required under paragraph (1)(A) shall not interfere with the timely submission of the plan required under this section.

(3) CONSOLIDATED PLAN

A State plan submitted under paragraph (1) may be submitted as part of a consolidated plan under section 7842 of this title.

(4) PEER REVIEW AND SECRETARIAL APPROVAL

(E) the steps a State educational agency will take to ensure collaboration with the State agency responsible for administering the State plans under parts B and E of title IV of the Social Security Act (42 U.S.C. 621 et seq. and 670 et seq.) to ensure the educational stability of children in foster care, including assurances that—

(i) any such child enrolls or remains in such child's school of origin, unless a determination is made that it is not in such child's best interest to attend the school of origin, which decision shall be based on all factors relating to the child's best interest, including consideration of the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(ii) when a determination is made that it is not in such child's best interest to remain in the school of origin, the child is immediately enrolled in a new school, even if the child is unable to produce records normally required for enrollment;

(iii) the enrolling school shall immediately contact the school last attended by any such child to obtain relevant academic and other records; and

(iv) the State educational agency will designate an employee to serve as a point of contact for child welfare agencies and to oversee implementation of the State agency responsibilities required under this subparagraph, and such point of contact shall not be the State's Coordinator for Education of Homeless Children and Youths under section 722(d)(3) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11432(d)(3));

(F) how the State educational agency will provide support to local educational agencies in the identification, enrollment, attendance, and school stability of homeless children and youths; and

(G) such other factors the State educational agency determines appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging State academic standards.