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To: GACEC Policy and Law

CC: SCPD Policy and Law; DDC

From: Disabilities Law Program

Date: 10/10/2018

Consistent with council requests, I am providing an analysis of certain proposed regulations appearing in the October 2018 issue of the Delaware Register of Regulations. As the legislature is not in session, there are no new bills to review.

Proposed Regulations

1. **Proposed Medicaid State Plan Amendment for Health Home Services 22 Del. Register of Regulations 262 [October 1, 2018]**

This proposed Medicaid state plan amendment ("SPA") seeks to expand the Delaware Assertive Community Integration Support Team ("ACIST") program which supports individuals who have both severe and persistent mental illness (" SPMI") and intellectual and developmental disabilities ("ID/DD"). The ACIST program has been run as a "pilot" to provide intensive supports to 50 adults with both SPMI and ID/DD (as defined by DDDS). [1] PSI is the current provider for this program. The proposed SPA will allow DDDS to leverage federal matching funds to support the ACIST program. There is an enhanced federal match for the first eight quarters of the program of 90%/10%.

Health home programs were authorized as a state Medicaid optional benefit under the Affordable Care Act and have been used to provide comprehensive care coordination for

[1] **Please see attached minutes from 4/19/2018 Medical Care Advisory Council for description of current program as well as public notice briefly describing the SPA.**

individuals on Medicaid with chronic conditions.[2] All beneficiaries who are eligible for Medicaid under the state plan are eligible for the health homes program provided they meet program criteria (having both SPMI and ID/DD.) Enrollment is optional. Services that are provided under the health homes program cannot be funded by other Medicaid programs (i.e. PROMISE or Lifespan Waiver). Funding will provided on a fee for service "Per Member Per Month" formula.

There are six primary health home services:

1. Comprehensive care management
2. Care coordination
3. Health promotion
4. Comprehensive transitional care/ follow up
5. Patient and family support; and
6. Referral to community and social support services.

One cannot really tell from the SPA document whether health home funding will pay for direct services under the ACIST program or only the six services listed above. The SPA does describe a treatment team which includes clinicians as well as case managers, which suggests that it will, but the language in this regard could be clearer. There is a fair amount of discussion on how the state will avoid double dipping with other Medicaid programs, specifically PROMISE , Lifespan Waiver and DSHP.

As a general matter, a program that specializes in meeting the needs of individuals with both SPMI and ID/DD is a very positive development. This particular group of individuals has been subjected to a large degree of "siloing" with the end result of poorly coordinated and sometimes inappropriate services and greater risk of institutionalization, both in state and out of state. For children and their families, this need is particularly acute.

The DLP intends to provide more robust comments of its own. However, Councils may wish to consider endorsing the SPA in principle, with the following concerns.

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[2] There are currently health home option SPAs in 22 states. https://www.medicaid.gov/state-resource-center/medicaid-state-technical-assistance/health-home-information-resource-center/downloads/hh-map.pdf.

First, it is entirely unclear whether children are including in this program. CMS guidance has consistently been that states cannot exclude Medicaid populations based on age for this program, but the SPA criteria do not include serious emotional disturbance ("SED") in their definition of mental health condition, which is typically how childhood mental health disorders are described.[3] Children do not easily fit the SPMI criteria. Rhode Island developed two separate HH options, one for adults with SPMI and one for children with SED. This was acceptable to CMS; however, one program just for adults would probably not pass muster, and shouldn't. Children with both ID/DD and SED are very much an underserved population in Delaware. Families struggle to find the combination of services that their children need and frequently find themselves in crisis. Until fairly recently, DPBH would not even accept children with dual diagnoses or any child with autism, and it is unclear whether they have the developed sufficient expertise or staff to serve these children. It is vital that families with children with SED and ID/DD have access to these services. Councils should consider requesting that language be added that makes clear that children with SED are one of the populations with chronic conditions included in this SPA. [4]

Second, while the Health Home program's primary thrust is care coordination, the SPA is short on information about how the program will coordinate with MCOs and other payment and service systems. Sometimes there can be "too many cooks in the kitchen" to make coordination possible. It will be crucial that every provider and funding source knows its role and who is in charge of assisting the individual and the family in accessing care according to the person-centered plan of care.

2. Proposed DHSS Amendments for Authorizations of Child Care, 22 Del. Register of Regulations 264 [October 1, 2018]

Delaware Health and Social Services (DHSS) is proposing to amend the Division of Social Services Manual in order to comply with the new federal statute and regulations regarding authorization requirements for Child Care Eligibility. The federal government recently

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[3] There is language that suggests that CMS interprets "serious mental illness" to include both adults with SPMI and children with SED; however, the language in the SPA has specific criteria for SPMI (pgs. 35-42) including criteria that are not particularly useful for children. Please see Issue Brief developed for CMS, **https://www.chcs.org/resource/developing-health-homes-for-children-with-serious-emotional-disturbance-considerations-and-opportunities/ (February 2014). (attached)**

[4] **DLP requested clarification from DDDS on this issue, but have not received it as of this writing.**

reauthorized the Child Care and Development Block Grant (CCDBG), the federal block grant program that provides child care assistance for low-income families, in the Child Care and Development Block Grant Act of 2014. Additionally, the US Department of Health and Human Services published new rules in 2016 providing clarification about the 2014 law. Among other provisions, the new law and regulations establish a 12-month eligibility period for families and limits the situations in which cases may be closed, all of which are meant to improve continuity of care.[5] DHSS' proposed amendments are intended to address these updated requirements.

The proposed amendments specify that DSS case workers must set child care authorizations for a period of 12 months unless a limited set of exceptions apply. Further, the amended language clarifies when child care authorizations must continue, including situations where a caretaker experiences a temporary change in work, education, or training. DHSS' language explaining the scenarios that constitute a temporary change are not comprehensive enough to comply with federal regulations, which define what states should consider (at minimum) to comprise a temporary change in the status of a caretaker as working or attending a job training or educational program. For instance, while the state's proposed language lists a temporary change as including an "injury resulting in time off of work," it does not mention situations involving illness or the need to care for a family member – both of which are included in the federal regulations.[6]

DHSS also proposes to modify the requirements for closing child care cases. Although these amendments do not necessarily change the status quo and are in some ways an improvement over the manual's previous language, CLASI still has concerns regarding these provisions.

DHSS seeks to close child care cases upon the "death of the case head or of the authorized child." Rather than automatically closing a case upon the death of the case head, DSS

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[5] 45 C.F.R. § 98.21. Additional information about the new federal law and regulations can be found at the US Department of Health and Human Services' website at https://www.acf.hhs.gov/occ/ccdf-reauthorization , as well as in the Urban Institute's research report, "Improving Child Care Subsidy Programs", available at: https://www.urban.org/sites/default/files/publication/96376/improving_child_care_subsidy_programs.pdf

[6] 45 C.F.R. § 98.21(a)(1)(ii)

should evaluate whether a basis for continued eligibility still exists rather than disrupting services and forcing a new caretaker to reapply for benefits.

Under the proposed language, DSS will also close child care cases before redetermination or during graduated phase-out if the family's income exceeds 85% of the state median income (SMI). DSS' manual contains other provisions explaining the graduated phase-out process, which is a policy that applies to recipient families whose income exceeds the child care income limit at redetermination. However, new federal regulations note that states must establish a process for redetermination of eligibility that takes into account "irregular fluctuation in earnings, including policies that ensure temporary increases in income, including temporary increases that result in monthly income exceeding 85 percent of SMI (calculated on a monthly basis), do not affect eligibility or family co-payments."[7] Neither DHSS' proposed language nor its existing policies for graduated phase-out describe how DSS will prevent fluctuations in income from resulting in the closure of a child care case due to income exceeding 85% of SMI.

DSS proposes to mail a Form 330, "Request for Contact," to a parent or caretaker to request clarification about a child's "excessive unexplained absences" from a child care program before closing a case. Closing a case due to excessive unexplained absences is an option authorized by federal regulations. Yet federal requirements specify that states may only discontinue assistance when excessive unexplained absences persist "despite multiple attempts by the Lead Agency or designated entity to contact the family and provider, including prior notification of possible discontinuation of assistance."[8] DSS' proposed language does not provide for multiple attempts to contact both the family and provider – it simply states that a form will be mailed to the parent or caretaker requesting clarification, and DSS will terminate a case if the parent/caretaker does not respond by the requested due date. DSS should revise this language to make it clear that they must reach out to both families and providers multiple times and notify them of the risk of termination of benefits.

With respect to the proposed amendment concerning the 10-day closing notice, this provision should cross-reference DSSM 5300, which outlines the requirements for timely and

[7] 45 C.F.R. § 98.219(c)

[8] 45 C.F.R. § 98.21(a)(5)(i)

adequate notice. In addition, CLASI recommends that the proposed language explicitly require termination notices to include the specific reason(s) for case closure.

DHSS' proposed provisions on ending child care eligibility do not address the possibility of good cause for failing to timely respond to notices, or reasonable accommodations for situations involving disability or domestic violence. The proposed language simply makes no reference to possible barriers to compliance with DSS requirements. DSS should also allow a minimum of 30 days for families to provide any necessary information from the effective date of closure without having to reapply for benefits. Such a provision would support the purpose of these amendments, which is to comply with federal regulations meant to reduce interruptions to benefits. Colorado, for example, allows for 30 days from the effective date of closure for a caretaker to offer the information needed to continue the child care case. Upon providing the information, eligibility continues as of the date the missing information was given to the state.[9] DSS' manual should include a similar provision, and notices should clearly inform caretakers of the deadline to supply additional information.

In sum, Councils should consider asking DHSS to revise the proposed amendments in order to meet federal requirements concerning when child care authorizations must continue and when cases may be closed. The current proposed language is insufficient, and DHSS must include more guidance in order to ensure consistent compliance with federal regulations. Moreover, DHSS should include policies that: (1) address good cause for untimely responses to notices; (2) allow for reasonable accommodations for disability or domestic violence; and (3) provide opportunities for families to provide information following case closure without having to reapply for benefits.

3. Proposed DDOE Regulations for Repayment of Teacher student loan debt, 22 Del. Register of Regulations 256 [October 1, 2018]

House Substitute for House Bill 346, with amendment, created the High Needs Educator Student Loan Payment Program. This program will pay some of the student loan debt of educators that work and remain in high-needs schools or facilities and/or are certified and teach in areas in which there are teacher shortages. This bill is codified in 14 *Del. C.* § 1101A et seq.

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[9] 9 CCR 2503-9; available at:
https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=7750&fileName=9%20CCR%202503-9

The proposed regulation is the implementing regulation. Council may wish to support this proposed regulation with minor amendments, and a clarification. This regulation closely tracks the statute, and sets forth a financial incentive that may help recruit and retain educators in high needs areas.

The Legislature requires that an individual meet the following requirements to qualify for loan assistance under this program:

> (1) be an Educator;
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> (2) have secured a Qualified Educational Loan prior to submitting an application;
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> (3) have obtained a license and certificate through the Delaware Department of Education;
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> (4) received a rating of at least "effective" on the Delaware Performance Appraisal System II or an alternate state approved evaluation system in the most recent evaluative cycle; and
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> (5) instruct or provide educational support in an identified High Needs Area for at least one school year.[10]

The Delaware Department of Education ("DDOE") was given the authority to "narrow or refine [the] eligibility requirements" or the definition of High Needs Areas."[11] DDOE proposes to include two additional eligibility requirements. First, an individual may not be in default on any federal or state education loans.[12] It also requires educators seeking eligibility based on teaching in a high needs area school to have taught in that particular school for at least one year.[13] There is an exception that allows the teacher to remain eligible in the event they are terminated from that school for a reason beyond their control (i.e. workforce reduction). Neither of these additional eligibility requirements seems problematic.

There appear to be a few minor drafting errors that Council may wish to address. First, Section 1204.3.1.5 states that "the applicant shall instruct or provide educational support in an identified High Needs Area." However, it leaves out the statutory requirement that the educator shall instruct in a High Needs Area for at least one school year. A High Needs Area is defined as

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[10] 14 *Del. C.* § 1104A.
[11] 14 *Del. C.* § 1108A.
[12] 14 DE Admin. C. § 1204.3.1.6.
[13] 14 DE Admin. C. § 1204.5.2.1.

a critical need/shortage certification area, or a school with certain characteristics, or a facility operated by Department of Services for Children, Youth, and Their Families ("DFS").[14] While DDOE may limit eligibility, it may not broaden it.[15] Though 1204.5.2.1 inserts a one-year requirement for educators seeking eligibility based on school, no such time limit is placed on educators satisfying the High Needs Area criteria based on certification type or by teaching in a DFS facility. Failing to include the one year requirement for these educators may impermissibly broaden eligibility.

Next, the definition of High Needs Area should have an 'or' at the end of subsection (2)(b). There likely should be an 'or' at the end of 1204.5.3.1; the statute utilizes an 'or,' and it is not clear that the Department wishes to depart from that.

Finally, Council may wish to ask for clarification; will qualified applicants receive equal awards or will qualified applicants receive different amounts between $1,000-$2,000? If awards will differ, what are the criteria that will be used to determine why one applicant will receive more or less than a different applicant?

4. Proposed DDOE Regulations for, 22 Del. Register of Regulations 259 [October 1, 2018]

There is no statutory guidance on paraeducator permit requirements or procedure; the Legislature delegated that authority to the Professional Standards Board ("Board").[16] The Board enacted 14 DE Admin. Code 1517, which lists the qualifications necessary to obtain paraeductor permits. It also states the rules for permit renewal, denial, and revocation.

The Board and Delaware Department of Education ("DDOE") proposed an amendment to Section 1517 in August 2018. The August 2018 version received no comments; however the Board and DDOE subsequently made substantive changes, and therefore republished the proposed amendment for comment.

The Council may wish to consider seeking amendment to or opposing the proposed amendment. First, the proposed amendment eliminates Section 8.0, which explicitly defines

[14] 14 DE Admin. C. § 1204.2.0.
[15] 14 *Del. C.* § 1108A.
[16] *See* 14 *Del. C.* § 1205(b).

when permit applications will be denied and under what conditions a permit can or must be revoked. The proposed amendment also appears to take away the hearing right afforded to those who have their permit denied or revoked.

Section 1507.7.0 requires applicants to disclose their criminal history, and states that failure to do so "is grounds for denial or revocation." Section 8.0 states that a permit application may be denied if the individual fails to satisfy the requirements to obtain a permit or is "unfit."[17] It also indicates that a permit may be revoked if the holder is fired for enumerated reasons and must be revoked if the individual made "a materially false or misleading statement in his or her permit application."[18] An individual whose permit is denied or revoked may request a hearing.[19] The August 2018 version of the proposed amendment did not make substantive changes to either of the sections on denial and revocation of permits, or to the one on hearing rights.[20]

The current proposed amendment retains Section 7.0 (renumbered as 9.0); this is the requirement that applicants disclose criminal history and that failure to do so may result in application denial or a permit revocation. However, Section 8.0's additional guidance on denial and revocation, and provision of a hearing right is removed.

It may only be a minor problem that the Section 8.0 guidance on denial is removed; Section 7.0 states that failure to disclose criminal history may result in a denial, and language elsewhere in the regulation allows the reader to deduce other situations that will result in a denial.[21]

However, the removal of guidance on when revocation may occur appears more problematic. The proposed amendment states "a Title I, Instructional, or Service Paraeducator Permit shall be valid for five (5) years … unless revoked."[22] Section 9.0 (7.0 in current regulation) is the only act identified that may result in permit revocation. If failure to disclose criminal history may result in permit revocation, it seems likely there are other situations where

[17] 14 DE Admin. Code § 1517.8.1.
[18] 14 DE Admin. Code § 1517.8.2.
[19] 14 DE Admin. Code § 1517.8.3.
[20] 22 Del. Reg. 113 (Aug. 2018).
[21] For instance, the proposed amendment states that "the Department shall issue a Title I Paraeductor Permit to an otherwise qualified application who has not engaged in misconduct in violation of 14 Del. C. § 1218 and has met one of the following requirements." Therefore, one can assume a Title I Paraeducator Permit will be denied if an individual does not satisfy the enumerated requirements or has engaged in conduct described in § 1218.
[22] 22 Del. Reg. 259 (Oct. 2018) (See proposed section 6.0).

it would be good policy to revoke a permit. For instance, if a paraeductor commits an offense against a child after they have already disclosed past criminal history and obtained their permit, it seems useful for the Board to have the authority to consider revocation. If the Board intends to revoke permits in circumstances other than that described in Section 9.0, it should define them in the regulation; individuals must hold permits to obtain and retain employment as paraeductors. Holders should be aware of what behaviors/actions could result in permit revocation since there may be serious consequences affecting their careers and financial stability.

Finally, removing Section 8.0 appears to take away the right to a hearing if a permit application is denied or a permit is revoked. Other statutes and regulations that award hearing rights do not appear to apply to paraeductors; 14 DE Admin. Code 1515 outlines hearing rights and procedures, but states "this regulation shall apply to license denial actions under 14 *Del. C.* § 1217 and license disciplinary actions under 14 *Del.C.* § 1218." These sections address teacher certification and licensure, not paraeducator permits. Similarly, 14 *Del. C.* §§ 1217-1218A, 1222 discuss hearings but all in situations involving adverse actions taken against a *license* or *certificate*; these are teacher credentials, not paraeducators.[23] As discussed, *supra,* denial or loss of a permit may have serious consequences on an individual's life. Offering hearing rights is likely good policy when someone's livelihood is at stake.

An additional concern about this amendment is that it may disqualify people with petty criminal backgrounds from obtaining a permit. The proposed amendment would prevent a permit from being issued to someone who has "engaged in misconduct in violation of 14 *Del. C.* § 1218."[24]

First, the term "engaged in misconduct in violation of 14 *Del. C.* § 1218." is not defined. Presumably the Department would look at conviction or plea records to determine whether someone "engaged in" the "misconduct" described in 14 *Del. C.* § 1218, but that is not clear from the text. It may be helpful for the regulation to explain how it will determine whether an applicant "engaged in misconduct."

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[23] In 14 DE Admin. C. § 1517.7.2., the Department cites to 14 *Del. C.* § 1219, which addresses licenses and certifications, for authority. It appears more likely that is a mistake, rather than indication that these sections apply to paraeducator permits.

[24] 22 Del. Reg. 259 (Oct. 2018) (See proposed sections 3.1.1, 4.1.1, 5.1.1).

14 *Del. C.* § 1218 lists numerous crimes and improper acts. For less serious offenses, the Secretary of Education ("Secretary") has the option to revoke, limit, or suspend a teacher's credentials. Commission of other crimes results in mandatory revocation, limitation, or suspension. Section 1218 applies to teacher credentials, not paraeducator permits. One must look to the proposed amendment to see how commission of a § 1218 offense will impact a permit applicant. The proposed regulation does not utilize permissive language; the Department "*shall* issue… [a] Permit to an … applicant who has not engaged in misconduct in violation of 14 *Del. C.* § 1218."[25] (emphasis added.) In other words, if an applicant has engaged in misconduct described in § 1218, the Department cannot issue a permit. For example, Marijuana possession is a § 1218 offense.[26] The way the proposed regulation is currently written appears to prevent the Department from issuing a paraeducator permit to someone who was convicted or pled guilty or nolo contendere[27] to Marijuana possession at any point in their life. This is a barrier to employment for someone who is otherwise qualified, and either made a mistake or has been successfully rehabilitated.

The Council may wish to seek amendment or to oppose this proposed regulation because it removes guidance for when permits may be denied or revoked, eliminates hearing rights for an individual whose permit has been denied or revoked, and may prevent people with petty criminal backgrounds from obtaining permits.

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[25] *Id.*
[26] 14 *Del. C.* § 1218; 16 *Del. C.* § 4714.
[27] This is assuming the Department will use conviction and plea history to determine whether someone "engaged in misconduct."