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CLASI
DELAWARE
COMMUNITY LEGAL AID SOCIETY, INC.

DISABILITIES LAW PROGRAM
COMMUNITY LEGAL AID SOCIETY, INC.
100 W. 10th Street, Suite 801
Wilmington, Delaware 19801
(302) 575-0660 TTY (302) 575-0696 Fax (302) 575-0840
www.declasi.org

To: GACEC Policy and Law

CC: SCPD Policy and Law; DDC

From: Disabilities Law Program

Date: 11/13/2018

Consistent with council requests, I am providing an analysis of certain proposed regulations appearing in the November 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 DHSS/DMMA Revisions to DSSM on MAGI Methodology, 22 Del. Register of Regulations 361 (November 1, 2018).**

The Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Delaware Social Services Manual (DSSM) regarding Medicaid MAGI methodology in order to clarify policies on special income counting rules for children and tax dependents. These policies are meant to align with the federal Affordable Care Act regulations. The proposed changes largely do track the relevant federal regulations, but they also contain an error and could benefit from additional clarifying language.

The amended section on definitions (Section 16100) explains that a tax dependent must be an individual's qualifying child or qualifying relative, but it fails to define the terms "qualifying child" and "qualifying relative," which have very specific definitions under federal regulations. In order to be considered a qualifying child or a qualifying relative, an individual must satisfy various tests. For example, a "qualifying child" must meet certain relationship, residence, age, and support tests.[1]

The proposed regulations also include a new section on "special income counting rules for children or dependents claimed by someone other than a parent" (Section 16500.5). This section notes that a tax dependent's income is excluded from total household income if the tax dependent's income is below the tax filing threshold and the tax dependent is therefore not required to file a tax return for the current tax year. Under federal regulations, *this exclusion*

[1] **26 U.S.C. §§ 152(c)(1)(A)-(E); see also NHeLP's Advocates' Guide to MAGI at 44-46, available at: https://healthlaw.org/resource/advocates-guide-to-magi-updated-guide-for-2018/.**

applies whether or not the tax dependent actually files a tax return,[2] but this language is not included in the proposed language for the DSSM. CLASI recommends adding this clarification. A similar clarification is already included in the preceding section, Section 16500.4, concerning situations in which a child's income is excluded from total household income. Including the additional language in Section 16500.5 would thus also improve consistency between these sections.

The last sentence in Section 16500.5 reads: "When determining the total household income of a child or dependent *who is not living with a parent*, the MAGI-based income is always counted in determining the child or dependent's eligibility, even if the income is below the tax filing threshold" (emphasis added). This sentence misstates the rule it is trying to convey. For tax dependents, their MAGI-based income is always counted in determining their own eligibility when determining the total household income of a tax dependent who *is claimed by someone other than a parent* [3] – not a tax dependent "who is not living with a parent." The two situations are not equivalent. For example, a 21-year-old niece could be living with her unemployed mother, and they both could be claimed as tax dependents by an aunt.[4] In this scenario, the tax dependent is living with a parent, but she is claimed as a dependent by someone other than a parent.

Finally, the above section fails to note that any exceptions exist to the general rule. The Centers for Medicare & Medicaid Services (CMS) highlights one such exception: "In the event that such a tax dependent's household (established using the non-filer rules described at 435.603(f)(3)) includes the tax dependent's parent, the tax dependent's income would be excluded from his own household income."[5] The DSSM should explain this exception and any others that may apply.

In conclusion, Councils should ask DHSS/DMMA to further revise proposed sections 16100 and 16500.5 regarding MAGI methodology. DHSS/DMMA should define the terms "qualifying child" and "qualifying relative." Additionally, Section 16500.5 should include language clarifying that the exclusion at issue applies whether or not the tax dependent actually files a tax return. This section should also explain that when determining the total household income of a tax dependent *who is claimed by someone other than a parent* (not "who is not living with a parent"), the tax dependent's MAGI-based income is always counted in determining his/her own eligibility. Lastly, the section should note any exceptions to the general rules.

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[2] 42 C.F.R. § 435.603(d)(2)(ii).

[3] Centers for Medicare & Medicaid Services, MAGI 2.0 Building MAGI Knowledge, Part 2: Income Counting at 11; available at: https://www.medicaid.gov/state-resource-center/mac-learning-collaboratives/downloads/part-2-income.pdf.

[4] See generally the Internal Revenue Service Tax Tutorial on Dependents, available at https://apps.irs.gov/app/understandingTaxes/hows/tax_tutorials/mod04/tt_mod04_01.jsp.

[5] Centers for Medicare & Medicaid Services, MAGI 2.0 Building MAGI Knowledge, Part 2: Income Counting at 11; available at: https://www.medicaid.gov/state-resource-center/mac-learning-collaboratives/downloads/part-2-income.pdf.

2. **Proposed OCCL Proposed DELACARE Regulations Re: Early Care and Education and School-Age Centers, 22 Del. Register of Regulations 379 (November 1, 2018).**

The Office of Child Care Licensing (OCCL) proposes to amend the Delacare regulations concerning the health, safety, well-being, and positive development of children who receive care in early care and education and school-age centers. This memo will focus on the amendments to the sections on positive behavior management and administration of medication. The latter changes are meant to ensure that licensed centers comply with the Americans with Disabilities Act (ADA) by meeting the needs of children with disabilities who require medication while in child care.

Positive Behavior Management:

In the section on positive behavior management (Section 20.3), OCCL has added the requirement that staff members should "adapt behavior management practices for a child who has a special need, including a behavioral or emotional disability." OCCL previously removed similar language from the regulations. Councils should consider supporting the re-introduction of this requirement, which specifies that staff must make efforts to accommodate children who require modifications in behavioral interventions due to a disability.

Administration of Medication:

With respect to administration of medication (Section 63.0), OCCL will now require licensed centers to ensure that a trained staff member who has received a valid Administration of Medication certificate from OCCL is present at all times to provide routine and emergency medications to children. In Subsection 63.6, the regulations also state that "a licensee may administer medication to a child who has a medical need during child care hours that requires the administration of medication by non-intravenous injection." This change is an important one that will help ensure that child care centers comply with the ADA by meeting the needs of children who require medication by non-intravenous injection, such as children with diabetes who need insulin. However, OCCL could improve the regulations on medication administration in several ways:

- One concern is that child care centers may interpret the language in Subsection 63.6 as meaning that they have discretion over whether or not to administer medication by injection. In order to comply with the ADA, child care centers must provide medications by injections (with the consent of parents and medical providers) unless doing so would cause a fundamental alteration to the program. Thus, as a general rule, child care centers should be administering medications by injections when parents ask them to. OCCL should consider adding a subsection to Section 63.0 that clarifies that medication administration must be part of the reasonable accommodations that child care facilities make in order to provide equal services to children with disabilities.

- OCCL should require licensees to develop and consistently implement a written policy on the administration of medication. The sections on Procedures for Initial Licensure (Section 7.0) and License Renewal (Section 8.0) do not seem to require licensees to submit such plans for approval. However, it seems that policies on medication administration must be included in

the parent/guardian handbook (see Subsection 23.1.13). These policies should be written in a way that makes it clear that the child care center is willing and able to accommodate children with medication needs, including medication by non-intravenous injections. CLASI also recommends that OCCL require licensees to develop individualized written plans for providing medication to students who need them. The proposed regulations do not currently have such a requirement, but they state that licensees shall ensure that medication is given as prescribed (Subsection 63.3).

- The section on staffing (Section 26.0) should cross-reference Section 63.0 and note that licensees must also ensure that at least one staff member with a valid Administration of Medication certificate is present at all times.

- The section on personnel files (Section 30.0) should note that, if applicable, valid Administration of Medication certificates (as well as certifications for any other trainings concerning medication administration) must be included in the personnel files for each trained staff member.

- The section on field trips and program outings (Section 68.0) makes no mention of meeting the needs of children who require medication while away from the child care center. Licensees must have plans and policies to accommodate children with medication needs on any field trips, and medication administration must not be interrupted when children are on these outings. The regulations should also state that licensees must not require parents/legal guardians to accompany their children on field trips to administer medications.[6]

Councils should endorse the proposed Delacare regulations for early care and education and school-age centers. However, they should consider asking for further revisions that clarify that providing medication by injections is generally not discretionary, but an integral part of providing reasonable accommodations for children with disabilities. Revisions should also address other important issues, such as ensuring that policies on medication administration are clearly conveyed to parents and that licensees have plans to accommodate children with medication needs on field trips.

3. **Proposed OCCL DELACARE Regulations Re: Family and Large Family Child Care Homes, 22 Del. Register of Regulations 380 (November 1, 2018).**

OCCL also proposes to amend the Delacare regulations for family and large family child care homes. These amendments are largely similar or identical to the proposed changes to the regulations for early care and education and school-age centers. CLASI recommends that Councils endorse the amendments but ask for the revisions described in our analysis above.

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[6] The US Department of Justice has settled several cases with child care centers concerning their refusal to accommodate children with disabilities, including children with medication needs, on field trips. For more information, see the Child Care Law Center's ADA Settlement Summaries, available at: http://childcarelaw.org/resource/united-states-department-of-justice-ada-settlement-summaries-2011/.

4. **Proposed DDOE Regulation Approval of Educator Preparation Programs, 22 Del. Register of Regulations 333 (November 1, 2018)**

House Bill 433 amended 14 *Del. C.* § 1260 to require Alternative Route for Teacher Licensure and Certification ("ARTC") programs to provide two types of training to program participants: (1) "a seminar and practicum" that includes "formal instruction or professional development, … supervised teaching experiences…, and "orientation to the policies, organization, and curriculum of the employing district or charter school"; (2) a minimum of "200 hours of formal instruction, or equivalent professional development" addressing "curriculum, student development and learning…, [and] the classroom and the school." House Bill 433 directed the Department of Education to create implementing regulations.

The current version of 14 DE Admin. Code 290.8.0 outlines the procedural requirements for becoming an approved ARTC program; it refers to 14 DE Admin. Code 1507 and "any applicable statute" for the substantive requirements of what types of supervision and training must be included in an approved ARTC program. The proposed amendment removes references to Section 1507 and "any applicable statute." It adds in two substantive requirements: (1) that ARTC programs formally evaluate participants; (2) that ARTC programs provide "a summer institute of no less than one hundred and twenty (120) instructional (clock) hours."

Sections 1507.4.0-7.0 contain functionally identical provisions to those inserted into the proposed amendment to Section 290. However, Sections 1507.4.0-7.0 also include additional substantive ARTC program requirements that are not in the proposed amendment to Section 290.

According to the synopsis of the proposed amendment, Section 290 "is being amended to align with changes made by House Bill 433… regarding the criteria for the alternative routes for teacher licensure and certification program." However, the proposed amendment does include the 14 *Del. C.* § 1260 statutory requirement that an ARTC program must include a minimum of 200 professional development hours; this requirement is found, however, in Section 1507.4.4.

It seems most logical to either move all substantive ARTC program criteria from Section 1507 into Section 290, or to amend Section 1507 and incorporate it into Section 290 through reference.

Councils may wish to approve this amendment, while seeking clarification on how 14 DE Admin. Code 1507 and 14 DE Admin. Code 290 will work together. If the Department intends for Section 290 to include an exhaustive list of the statutory requirements for an ARTC program, it may wish to in the 200-hour professional development re

5. **Proposed DDOE Regulation on reporting expulsions to DMV, 22 Del. Register of Regulations 337).**

House Bill 402 repealed a law which prevented the Division of Motor Vehicles from issuing driver's licenses to students who were expelled from public school.[7] It also eliminated the

[7] **Del. H.B. 402, 149th Gen. Assem. (2018).**

requirement that public school superintendents inform the Division of Motor Vehicles of student expulsions.[8]

The proposed amendment updates 14 DE Admin. Code 616 in light of House Bill 402; it eliminates the requirement that public school districts and charter schools inform the Division of Motor Vehicles when students are expelled.

The Councils may wish to support this amendment as it endorsed the bill.

6. **Proposed DDOE Regulation Related to Graduation Requirements and Diplomas, 22 Del. Register of Regulations 335 (November 1, 2018).**

House Substitute 1 to House Bill 287 eliminated the Certificate of Performance that was previously awarded to students with disabilities who satisfied their Individualized Education Program ("IEP") requirements, but did not meet the criteria to be issued a high school diploma. Now these students will be eligible for high school diplomas called the State of Delaware- Diploma of Alternate Achievement Standards. House Bill 15 as amended by Senate Amendment 1 allows high school students to count computer science classes towards the mathematics graduation credit requirement. House Bill 230 broadened the types of veterans that may be eligible for high school diplomas.

The proposed amendment to 14 DE Admin. Code 505 adds definitions that would allow students to use computer science coursework to meet the mathematics credit requirement for high school graduation, as required by the amended House Bill 15. The definition of veteran is updated to comply with HB 230.

The proposed amendment also outlines high school diploma credit requirements for students beginning with the graduating class of 2019. The proposed amendment incorporates the State of Delaware- Diploma of Alternate Achievement Standards.

Finally, the proposed amendment eliminates the Student Success Plans ("SSP") section. According to the synopsis, a new regulation on SSPs will be issued "in the near future." SSPs are developed with every student beginning in the eighth grade, and outline a student's post-high school goals along with the steps necessary to help the student achieve those goals. There does not appear to be a statute that addresses SSPs.

Councils may wish to consider supporting this proposed amendment, while seeking clarification on how SSPs will work until a new regulation is created.

7. **Proposed Department of Insurance Regulation related to Short Term Health Insurance Policies, 22 Del. Register of Regulations 326 (November 1, 2018).**

This regulation deals with short-term limited duration (STLD) health insurance policies. STLD policies were originally designed for people to fill a temporary gap in health insurance coverage. Under the Affordable Care Act (ACA), STLD policies are exempt from the market rules that apply to most major medical health policies. These include rules that prohibit medical underwriting, excluding pre-existing conditions, and limits on lifetime and annual coverage.

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[8] *Id.*

STLD polices are also exempt from the minimum coverage requirements of the ACA. The policies provided coverage for a limited period of time, usually less than 365 days and were not renewable.

The Department of Health and Human Services (DHSS) issued a final rule that applies to STLD policies sold on or after October 2, 2018. The final rule extends the coverage period in the initial contract to less than twelve (12) months and allows for renewals or extensions of the policies up to a maximum of thirty-six (36) months. The final rule only sets the minimum and maximum term of the contract and prescribes a notice requirement that must be given applicants. DHSS leaves it to the states to establish additional standards for the issuance of STLD policies.

Since the sale of the STLD plans can start soon, the Insurance Commissioner issued an emergency order establishing standards for the issuance of these policies. The Commissioner's concern was that the sale of these policies will take many healthy consumers out of the Health Insurance Marketplace (HIM), possibly resulting in an unhealthy risk mix and increases in health insurance premiums. This coupled with the reduction by Congress in ACA's mandate tax penalty to $0 beginning in 2019, could result in more consumer purchasing STLD policies. This regulation was promulgated in response to the final rule by DHSS and was designed to implement consumer protections for the sale of STLD policies and to codify the standards contained in the Commissioner's Emergency order dealing with STLD policies.

The purpose of the regulation as stated in the synopsis is to "ensure that carriers offering STLD health insurance plans comply with minimum consumer protection and notification standards so as to partially prevent the erosion of the stability of Delaware's HIM and to protect Delaware consumer from being potentially mislead into purchasing a STLD health insurance plan without being fully informed of its coverage limits or applicability."

The regulation does not apply to Medicare supplement policies and long-term care insurance policies.

The regulation applies to carriers, defined as insurance companies, health service organizations, managed care organizations, and any other entity providing a health insurance plan or health benefits. Health care services include medical care or hospitalization, services or supplies furnished to or incidental to the furnishing of medical care or hospitalization to an individual, and "services for the purpose of preventing, alleviating, curing or healing human illness, injury disability or disease." (§4.0).

The STLD policy cannot be issued for a period longer than three (3) months. The three (3) month term cannot be extended by re-issuing the same policy or by issuing a different STLD to the same individual more than once a year. The cost of the policy is to be offered at the "actuarially expected loss ratio of at least 60 percent." The Commissioner must approve the policy before it can be offered for sale. (§5.1 et seq.).

At the time of sale of a STLD policy, a carrier has to provide an "outline of coverage" and in most cases obtain a certificate of delivery unless the certificate of delivery describes the benefits, the exclusions and limitations of the policy, the non-renewability provisions, and the federal notice. (§§6.1, 6.2)

For policies commencing on or after January 1, 2019, the mandatory language shall be displayed in the application materials in 14 point bolded font and shall include the following:

- This coverage is NOT required to comply with certain federal market requirements for health insurance, principally those contained in the AFFORDABLE CARE ACT.
- Be sure to check your policy carefully to make sure you are aware of any EXCLUSIONS or LIMITATIONS regarding coverage of PREEXISTING CONDITIONS or HEALTH BENEFITS (such as hospitalization, emergency services, maternity care, preventive care, prescription drugs, and mental health and substance use disorder services).
- Be sure to check your policy carefully to make sure you are aware of any LIFETIME AND/OR ANNUAL DOLLAR LIMITS on health benefits.
- If this coverage expires or you lose eligibility for this coverage, YOU MIGHT HAVE TO WAIT until an open enrollment period to get other health insurance coverage.
- This coverage is NOT "MINIMUM ESSENTIAL COVERAGE." If you don't have minimum essential coverage for any month in 2019 or thereafter and the penalty for not having minimum essential coverage is more than the 2018 amount of $0, you may have to make a payment when you file your tax return unless you qualify for an exemption from the requirement that you have health coverage for that month. (§6.5).

For policies commencing before January 1, 2019, the mandatory language shall be displayed in the application materials in 14 point font and shall include the following:

- This coverage is NOT required to comply with certain federal market requirements for health insurance, principally those contained in the AFFORDABLE CARE ACT.
- Be sure to check your policy carefully to make sure you are aware of any EXCLUSIONS or LIMITATIONS regarding coverage of PREEXISTING CONDITIONS or HEALTH BENEFITS (such as hospitalization, emergency services, maternity care, preventive care, prescription drugs, and mental health and substance use disorder services).
- Be sure to check your policy carefully to make sure you are aware of any LIFETIME AND/OR ANNUAL DOLLAR LIMITS on health benefits.
- If this coverage expires or you lose eligibility for this coverage, YOU MIGHT HAVE TO WAIT until an open enrollment period to get other health insurance coverage.
- This coverage is NOT "MINIMUM ESSENTIAL COVERAGE." If you don't have minimum essential coverage for any month in 2018, you may have to make a payment when you file your tax return unless you qualify for an exemption from the requirement that you have health coverage for that month. (§6.4).

The application form for an STLD policy shall ask whether the STLD policy to be issued replaces other accident and sickness insurance the individual has. (§7.1)

If the carrier is not a direct response carrier or its agent, a notice as prescribed by the Commissioner shall be given to the applicant prior to issuance of the policy. (§7.2). The notice is a warning that because of existing factors, the coverage available under the new policy may be different than the existing policy. For example, pre-existing conditions may not be immediately or fully covered under the STLD policy. The notice also recommends that the individual discuss

the proposed replacement with his or her current carrier in order to understand what replacing the present coverage means. (§7.3).

If the carrier is a direct response carrier, a notice as prescribed by the Commissioner shall be given to the applicant upon issuance of the policy. The notice is not required for the solicitation of "accident only and single premium nonrenewable policies." (§7.2). The notice gives the individual ten (10) days to decide whether to keep the new STLD policy. The notice gives a right of rescission to the individual. The notice is a warning that because of existing factors, the coverage available under the new policy may be different than the existing policy. For example, pre-existing conditions may not be immediately or fully covered under the STLD policy. The notice also recommends that the individual discuss the proposed replacement with his or her current carrier in order to understand what replacing the present coverage means. (§7.4).

The regulation takes effect ten (10) days after final publication in *the Register of* Regulations. Councils may wish to endorse the regulation as it protects consumers, perhaps with a suggestion that the Department of Insurance engage in outreach activities to inform consumers of the disadvantages of these plans.

Final Regulations

- The DIAA Regulations commented on last month relating to transfers were adopted. Council comments were noted, and DIAA indicated that it would consider the suggestions related to clarifying hardships based on disability might be considered as part of a larger overhaul of the regulations. The DIAA noted generally the positive statements that Councils made regarding concussion protocols.
- DMMA regulations expanding the scope of credentialing for home health agencies was also finalized. Councils commented favorably on this regulation also.