



## DISABILITIES LAW PROGRAM

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**To: GACEC Policy and Law**

**CC: SCPD Policy and Law; DDC**

**From: Disabilities Law Program**

**Date: August 19, 2019**

Consistent with council requests, DLP is providing an analysis of certain proposed regulations appearing in the August 2019 issue of the Delaware Register of Regulations.

Proposed Regulations

### 1. **Proposed DSS Regulations on Documentation of State Residency, 23 Del. Register of Regulations 83 (August 1, 2019)**

DSS is proposing to amend sections of the DSS Manual regarding state residency documentation requirements for Medicaid. Under federal regulations, each state must provide Medicaid to eligible residents. In addition, evidence of immigration status may not be used to determine that an individual is not a resident. The proposed changes to the DSS Manual are meant to bring DSS policy in line with the relevant federal regulations (42 C.F.R. § 435.403 and 42 C.F.R. § 435.956(c)(2)).

The most significant change in the proposed regulations is DSSM 14110.10, "Specific Prohibitions for Denial or Termination of Eligibility." Previously, the DSS Manual stated that some individuals admitted to the U.S. as a non-immigrant for a temporary period of time (such as foreign students) were not Delaware residents and thus ineligible for Medicaid. In other words, DSS considered immigration status to determine Delaware residency, which was in direct conflict with federal regulations. DSS is now rescinding this illegal policy and replacing it with DSSM 14110.10, which states: "Per C.F.R. § 435.956(c)(2), [e]vidence of immigration status may not be used to determine than an individual is not a State resident."

The proposed regulations, however, still need the following revisions:

- In Sections 14110.6 and 14110.7, the citations to the federal regulations are incorrect. Instead of referencing 42 C.F.R. § 438.403, it should reference 42 C.F.R. § 435.403.

- In Section 14110.9, the citation to the federal regulation is also incorrect. Instead of referencing 42 C.F.R. § 435.503, it should reference 42 C.F.R. § 435.403.
- In Section 14100.8(c), DSS should clarify that for an institutionalized individual who is neither married nor emancipated, the state of residence is the parent's/legal guardian's state of residence at the time of placement; OR the parent's/legal guardian's current state of residence (i.e. DSS should add another "or" between the first two bullet points).
- In Section 14100.9(c), DSS should clarify that for any institutionalized individual who became incapable of indicating intent before age 21, the state of residence is that of the parent applying for Medicaid on the individual's behalf; OR the parent's/legal guardian's state of residence at the time of placement (i.e. DSS should add another "or" between the first two bullet points).
- In Section 14110.11(b) on institutionalized individuals capable of indicating intent, DSS should clarify whether this policy only applies to institutionalized individuals age 21 or over. DSS should also provide a citation to the applicable federal regulation.

Overall, Councils should endorse the proposed changes, particularly regarding the prohibition against using immigration status in determining residency. At the same time, Councils should ask DSS to fix incorrect citations to the federal regulations and add clarifying language as described above in Sections 14100.8(c) and 14110.9(c). Councils should also seek clarification on the application of Section 14110.11(b) and the source of this rule.

## **2. Proposed DSS Regulations on Excluding Income in TANF and GA Eligibility Determinations, 23 Del. Register of Regulations 93 (August 1, 2019)**

DSS is revising sections of the DSS Manual regarding income exclusions for the Temporary Assistance for Needy Families (TANF) and General Assistance (GA) programs. TANF and GA provide minimal cash assistance to low-income individuals and families. The proposed changes are meant to improve formatting and consolidate different lists of income exclusions under one policy. These changes are not substantive. However, DSS should expand their policy by allowing more types of income exclusions and clarifying existing income disregards.

DSS should consider adding a policy of excluding small gifts from counting as income for TANF and GA recipients. Under the federal regulations (45 C.F.R. §233.20(a)), states have



the option to disregard small, nonrecurring gifts of up to \$30 per recipient in any quarter. The federal regulations contemplate that recipients may receive small gifts of money for occasions such as Christmas, birthdays, and graduations.

DSS' policy on income exclusions should also cross-reference DSSM 4005.1, which explains that the first \$50 of child support received in a month is disregarded in determining financial eligibility for TANF. The proposed list of income exclusions does not include any information on child support payments and the \$50 income disregard.

Councils should ask for further revisions to DSS' proposed regulations. They should ask DSS to: 1) add an income exclusion for small, nonrecurring gifts for TANF and GA recipients; and 2) add the existing TANF \$50 child support income disregard to the list of income exclusions.

### **3. Proposed DSS Regulations on TANF School Attendance Requirement, 23 Del. Register of Regulations 89 (August 1, 2019)**

DSS is proposing to amend the sections of the DSS Manual regarding school attendance requirements for Temporary Assistance for Needy Families (TANF) recipients. Parents who receive TANF cash assistance are expected to help their children maintain satisfactory school attendance – otherwise, DSS imposes financial sanctions on the TANF household by reducing the TANF benefit amount. The new proposed regulations do not substantively change the way these sanctions are currently applied, but they do include a new rule on bonus payments for TANF children who graduate from high school by age 19.

#### Sanctions for Failure to Meet School Attendance Requirements

DSS should clarify its definition of “satisfactory school attendance.” The proposed regulations state that “TANF children are required to maintain satisfactory school attendance as defined by their individual schools or at an 85% attendance rate.” If these metrics are different, which will DSS use – whichever is less? When calculating the attendance rate, will DSS distinguish between excused vs. unexcused absences? How will DSS treat absences due to suspensions? These issues are important because a policy of sanctioning a TANF household when a child does not meet school attendance requirements is harmful for TANF families, who already face numerous challenges.

TANF sanctions punish families who live in poverty by increasing their material hardships, making it even more difficult for them to support their children's education. Poverty is a root cause of chronic absenteeism in school. For example, poor families may lack stable, affordable housing or access to reliable transportation. They may be unable to afford appropriate clothing or supplies their children need for school. When DSS sanctions families and reduces critical TANF benefits, it drives families further into poverty and only exacerbates the problems that lead to children missing school. Research on TANF sanctioned families has found that sanctioned TANF recipients are more likely to contend with hardships such as utility shut-offs, food shortages, and inability to pay for medical care. (See Review of Research on TANF



Sanctions. University of Washington, West Coast Poverty Center, June 2006.) In short, TANF sanctions can cause more instability in children's lives and increase barriers to regular school attendance.

DSS' school attendance requirement is also likely to have a disproportionate impact on families with children with disabilities. Statistics collected from the U.S. Department of Education show that the chronic absence rate for special education students is 1.5 times higher than for non-disabled students. Multiple factors contribute to this higher absence rate, including the fact that students with chronic health conditions may require frequent or extended absences from school. Students with disabilities may be receiving inadequate educational supports, or they may be experiencing bullying. Further, the U.S. Department of Education's Office of Civil Rights has found that students with disabilities are more than twice as likely to receive an out-of-school suspension than their non-disabled peers. DSS should take all of these issues into account and accommodate TANF children with disabilities before imposing sanctions due to unsatisfactory school attendance.

#### Bonus Payments for Achieving Specific School Milestones

The new regulations state that DSS will issue a one-time bonus payment for TANF children who graduate high school by age 19, with the payment going directly to the high school graduate. This bonus payment will be disregarded as income for TANF and SNAP cases. (This payment is highly unlikely to affect other public benefits that a TANF recipient may be receiving, such as Medicaid.)

This proposed rule should be revised in several ways. First, DSS should clarify how much this bonus payment will be. Second, DSS should make it clear that a determination regarding eligibility for a bonus payment is an appealable decision. And third, DSS should note how it will accommodate children with disabilities who may be unable to graduate by age 19.

Under the Individual with Disabilities Education Act (IDEA) and state regulations, children with disabilities are eligible to receive special education and related services until age 21 or graduation from high school, whichever occurs first. Regardless of their attendance record, students with disabilities may not be prepared to graduate by age 19, and these students may receive additional educational programming until they reach 21 years of age. Therefore, we recommend that DSS amend its policy so that TANF children with disabilities are eligible to receive a bonus payment if they graduate from high school by age 21. It should also be noted that children with disabilities who may need an extended deadline include not only those with individualized education plans (IEPs), but also Section 504 plans, or a disability but no formal plan.

In conclusion, Councils should urge DSS to reconsider its policy of sanctioning TANF families who do not meet school attendance requirements. They should also ask DSS to clarify how it will determine "satisfactory" school attendance. Finally, Councils should seek revisions to the proposed rule on bonus payments for school milestones, including an amendment to extend the graduation deadline for TANF children with disabilities.



**4. Proposed DSS Regulation Regarding Purchase of Care – Determining and Reviewing Child Care, 23 Del. Register of Regulations 77, 98 (August 1, 2019)**

DSS is proposing to amend the DSS manual regarding Purchase of Care (POC), specifically, amending 16 DE Admin. Code § 11004.11 to align with federal requirements mandated by the Child Care Development Block Grant (45 CFR § 98.21). The proposed changes regulating eligibility and recipients of child care assistance are consistent with the new federal requirements.

The policy amendment includes several notable substantive changes. First, the amendment requires 12-month authorizations for every eligible family and removes the requirement of a six month interim report. This provides greater stability for eligible recipients and ensures that they will continue to receive assistance for 12 months unless their case is closed due to excessive unexplained absences from the child care site, a permanent change in the child's state residency, substantiated fraud or intentional program violations, the death of the case head or authorized child, a written request to close the case or to authorize a child for a specific amount of time, or if the family's income exceeds 85% of the state median income.

Next, the amendment prohibits increasing copayments during the eligibility period. The child care copayment will decrease when there is a decrease in the family's income reported and cannot increase beyond the initial copayment amount during the authorization period if there is an increase in a family's income.

Finally, the amendment requires authorization of an additional 90 days of child care in the event of a loss of need of assistance during the eligibility period. The amendment further allows a family to remain eligible and authorized for child care until their next review if the family regains a need for services before the 90 days end.

Each of these changes are consistent with federal requirements. Councils should consider endorsing the additional protections provided by the policy amendment.

**Final Regulations**

There were no final regulations of interest to report.