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To: GACEC Policy and Law

CC: SCPD Policy and Law; DDC

From: Disabilities Law Program

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

Proposed Regulations

1. **DHSS Regulation Free Standing Emergency Centers 4404, 23 Del. Register of Regulations 9 (July 1, 2019).**

The proposed regulation abrogates the existing one (4404) and re-numbers it 3340. The former regulation referred to the facility as a Free Standing Emergency Center and defined same. The proposed regulation adds a host of new definitions, including abuse, adverse incident, emergency care, and it changes the name of the facility to Free Standing Emergency Department (FSED).

If a FSED is owned and operated by a hospital and is accredited by an organization approved by the Centers for Medicare and Medicaid Services, it is exempt from this regulation.

The regulation sets up a comprehensive licensing procedure and vests the Department of Health and Social Services with the authority to impose disciplinary action, including immediately suspending a license where there is an “immediate jeopardy or imminent danger to the public health, welfare and safety requiring emergency action.”

This author was asked to address the regulation for accessibility issues for individuals with disabilities. The regulation applies to new construction and renovations to an existing building. While the regulation does not specifically mention the Americans with Disabilities Act of 1990 (ADA) or Section 504 of the Rehabilitation Act of 1973 (Section 504), it does require the FSED to comply with federal, state, and local laws and codes in §§4.15 and 4.17.5. The ADA requires access to medical care services and the facilities where the services are provided. Private FSED’s are covered by Title III of the ADA. Section 504 covers any FSED that received

federal financial assistance (including Medicare and Medicaid reimbursements). It would be better if the regulation specifically mentioned that the FSED must comply with the ADA and Section 504, so that its application to persons with disabilities would be readily apparent (and not by inference).

Nevertheless, the regulation (§4.17) incorporates the 2018 Facility Guidelines Institute (FGI) Guidelines for Design and Construction of Health Care Facilities, and these guidelines provide the minimum design standards for a variety of medical services facilities, including FSED's. These guidelines apply to all patients, including those with disabilities. In particular, there is a section dealing with accommodations for care of patients of size (changed from the previous term bariatric patient), and include expanded clearances and the number of rooms required to accommodate these patients. There are also guidelines for clinical service rooms that include standards for minimum clear floor area. These standards are different for examination rooms, procedure rooms, and operating rooms. Ventilation of outpatient facilities, energy efficiency, and water conservation are also covered.

While the FGI provides guidance for an emergency preparedness assessment if required, the regulation makes preparation of a written disaster preparedness plan for dealing with medical and non-medical emergencies mandatory (§15.0). The plan must take into account the patient population served, including persons with disabilities. However, there is no specific language setting forth any requirements for dealing with patients with disabilities during an emergency.

Although the regulation requires the FSED to comply with the rules and regulations of the Fire Prevention Commission and be inspected annually by the fire marshal, there is no specific language dealing with how patients with disabilities would be evacuated. Further, the regulation does not require that employees receive training in procedures to be followed for patients with disabilities. It would be better if the regulation had requirements that specified an evacuation route for patients with disabilities, including the width of any route and removal or any obstructions.

This regulation is a major effort to protect the state's citizens and ensure they receive proper care from Free Standing Emergency Centers. The regulation is comprehensive and applies equally to all patients, including those with disabilities. That being said, the regulation could be made more effective by specifically including the ADA and Section 504 in terms of application. Further, language could be added to the disaster preparedness and fire safety sections to more adequately address the needs of individuals with disabilities.

2. **DMMA State Plan Amendment OTC Medications, 23 Del. Register of Regulations 10 (July 1, 2019)**

DMMA proposes to amend the Medicaid State Plan to allow Medicaid members to request coverage of over the counter FDA approved medications without a prescription when required by law. This state plan amendment is a change to reflect the requirements of SB 151

passed last year that requires coverage without a prescription of OTC emergency contraception. The medication must be procured at a “CMS rebate participating labeler.”

SB 151 codified into state law language from the Affordable Care Act related to mandatory coverage for birth control methods with no out of pocket cost. The bill also mandates coverage of OTC emergency contraception without a prescription. The proposed state plan amendment allows Medicaid recipients to access any drug that is required by any state or federal law to be available OTC without a prescription. This would of course include SB 151, but would also include any other law that may be passed in the future related to access to OTC medication without prescription. The Medicaid and MCO Preferred Drug Lists offer coverage of other OTC medications with a prescription and are subject to applicable co-pays.

The only concern is whether DMMA and or DPH will publicize this benefit and provide resources so that individuals wishing to obtain OTC emergency contraception through Medicaid will know how to do so (e.g., where does one find a list of “ CMS rebate participating labelers?”

Councils should consider endorsement with a query regarding how outreach and information will be provided.

Final Regulations

1. Final Department of Education Regulation on Education of Children and Youth Experiencing Homelessness, 22 Del. Register of Regulations 33 (July 1, 2019)

The Department of Education finalized the proposed amendments to 14 DE Admin. Code 901. The amendments update the definition of “homeless children and youths” to comply with a change made to the McKinney Vento Homeless Education Assistance Improvement Act, 42 U.S.C. § 11431 et seq., (“McKinney Vento Act”) and make generally non-substantive changes to Delaware’s dispute resolution process. This dispute resolution process is one protection offered to homeless students by the McKinney Vento Act in the event there is a disagreement about which school a homeless student should attend.

Councils supported the amendments, but made the following recommendations:

- (1) Strike “Best Interest Meeting” from the definitions section since the term is not used in the regulation.
- (2) Amend the definition of “School of Origin” Amend Section 4.2 in the proposed amendment to clarify that school placement options are either the School of Origin or the School of Residence.
- (3) Substitute “Unaccompanied Youth” for “Homeless Youth” in Section 4.5.1 of the proposed amendment.
- (4) Add “Local” in front of School District in 4.4.1 and 4.4.3.1 of the proposed amendment.
- (5) Add the phrase “or designee” following “Secretary” in 4.5.7 of the proposed amendment.

The Department of Education adopted all of the changes that the Councils recommended except for (2), amending the definition of “School of Origin.”

Councils may wish to ask again that the Department of Education consider amending the definition of School of Origin. The finalized regulation adopts the following definition of School of Origin:

“School of Origin” means the specific public school building that the student attended when permanently housed, the public school in which the student was last enrolled before becoming homeless or the next receiving public school the student would attend for all feeder schools.

The School of Origin definition can be broken down into three parts: The third part addresses a situation where a child was last enrolled in elementary or middle school, but has completed the final grade level at that school and is ready to move to middle or high school, respectively. The first two parts of the definition, however, say the same thing: the public school the child went to when *permanently housed* is going to be the same public school the child was last enrolled in *before becoming homeless*.¹

The McKinney Vento Act defines School of Origin in relevant part as “the school that a child or youth attended when permanently housed or the school in which the child or youth was last enrolled, including preschool.” 42 U.S.C. § 11432(g)(3)(I)(i). The first part of the federal definition contemplates the situation where a child was not homeless and then became homeless. The second part of the definition addresses either a situation where the child has always been homeless or one in which the child was enrolled in a different school more recently than the school they attended when permanently housed.

The finalized Delaware Regulation does not explain what the School of Origin would be for a child who has never been permanently housed, in other words, who has never experienced a “before becoming homeless.” It also does not address a situation where a child might have been more recently enrolled in a school that differs from the school the child attended when last permanently housed. The Delaware regulation can align itself with the federal definition of School of Origin if the phrase “before becoming homeless” is stricken from the definition of School of Origin.

¹ The public school the child went to when permanently housed is going to be the same public school the child was last enrolled in before becoming homeless unless the student is moving from preschool to elementary school, elementary to middle school or middle to high school, at which point the third part of the definition applies.

2. DMMA Final Regulation: PTRFs – Provision of EPSDT Services, 23 Del. Register of Regulations 46 (July 1, 2019)

DMMA has adopted regulations proposed in the March 2019 *Delaware Register of Regulations*, doing away with previous limitations on the types of inpatient psychiatric care that would qualify for reimbursement under EPSDT. These amendments were to ensure state compliance with the federal 21st Century Cares Act. Per the final regulations, patients under 21 years of age will be “guaranteed access to the full range of EPSDT services.”

There do not appear to have been any substantial revisions to the proposed regulations. DMMA acknowledged the input submitted by SCPD and GACEC, as well as the Councils’ endorsement of the proposed regulations.

3. Final DSS Regulations on DSS Application Process, 23 Del. Reg. of Regulations 53 (July 1, 2019)

DSS has amended the DSS Manual to update the sections on the application process for DSS benefit programs to modernize the language and make it more understandable. For example, the term “food stamps” has been updated to “food benefits.” Additionally, in response to Councils’ comments, DSS made further changes that improve or clarify DSS policies.

Subsection 20001.1 and Application Assistance by DSS:

Under DSSM 20001.1(1)(E), “Submitting Applications,” DSS agreed with Councils’ suggestion that DSS should broaden the policy concerning situations in which DSS should help an applicant with the application process. Councils also urged DSS to specify in the updated manual that DSS will make reasonable accommodations to help individuals, which may include accommodations to allow completion of the application process (including interviews) at the client’s home or other locations. While the proposed policy only stated that DSS would provide assistance if an individual is hospitalized or ill, updated language now explains that applicants will be assisted by DSS if the applicant requires a reasonable accommodation. This revised policy will help ensure that more people who may require extra assistance, such as individuals with disabilities, limited English proficiency, and so on will receive the help they need when applying for DSS benefits. The change will also better reflect what DSS claims is their current practice, which is to “make several accommodations to help all clients who require assistance.”

Subsection 2000.2 and Language Access for Limited English Proficient (LEP) Applicants:

Another change DSS made in response to Councils’ comments is in DSSM 2000.2, which describes DSS’ policy of providing interpreters to individuals with limited English proficiency. DSS revised this policy to clarify that DSS will offer interpretation services through DSS’ contracted language assistance service upon request or when necessary (rather

than requiring applicants to provide their own interpreters). Additionally, DSS now requires that interpreters be at least 18 years of age and sign the signature page of applications as an accountability measure.

Overall, DSS made changes to the DSS Manual that help reinforce the agency's obligation to accommodate people with disabilities and other individuals requiring assistance. Further policy changes are necessary, but the amendments in the final regulations are an improvement over the regulations that DSS originally proposed.

4. Final DSS Regulations on TANF - CMR, 23 Del. Reg. of Regulations 63 (July 1, 2019)

DSS has finalized changes to various sections of the DSS Manual concerning the Contract of Mutual Responsibility (CMR) for TANF (cash assistance) recipients. TANF is a limited cash benefit for families with little to no income, and adult recipients must participate in work programs to receive the benefit. The CMR is an individual responsibility plan and an agreement between the TANF client and DSS that “sets obligations and expectations for helping the client achieve self-sufficiency.” Amendments were intended to more concisely define the TANF CMR, update the requirements of the contract, and improve readability.

These final regulations fail to address Councils' overarching concern that DSS' written policies do not describe in detail how to respond when a TANF participant has a disability. Councils explained that the US Department of Health and Human Services' Office of Civil Rights has issued guidance for TANF agencies that stresses the importance of comprehensive written policies about modifications to ensure that individuals are not subject to disability-based discrimination. Nevertheless, DSS declined to include any additional details on accommodating people with disabilities. Instead, DSS simply acknowledged in their response that DSS must comply with the ADA and will continue to explore good cause and make accommodations for clients facing barriers to complying with the CMR.

Although DSS asserts that they will continue to make accommodations, Councils highlighted that DSS regulations fail to describe how DSS will make determinations of “good cause” for non-compliance. Councils also requested policies that explain how DSS will consider and grant any substantiated reasonable accommodation request from a recipient with a disability (or a member of the household with a disability) when developing or revising a CMR. Without more explicit guidance for DSS staff, it is unclear how DSS will consistently evaluate such requests. In their response to these comments, DSS wrote that clients with medical exemptions can be referred to the Transitional Work Program (DSSM 3017.1), which is a program for people who have been determined unable to work in an unsubsidized employment setting by a health professional. Although the TWP policies do address accommodations for TANF recipients who are eligible for that program, DSS is obligated under the ADA and Section 504 to ensure that all of its programs and services accommodate people with disabilities.

In sum, the final regulations fail to provide detailed policies on how DSS will accommodate people with disabilities in developing the CMR and imposing sanctions. DSS appears to believe that the TWP program and general references to good cause are sufficient to qualify as policies concerning accommodations. Councils should continue to raise the issue of reasonable accommodations in future comments regarding DSS policies.

5. DMMA State Plan Amendments: Children’s Health Insurance Program (CHIP), 23 Delaware Reg. of Regulations 51 (July 1, 2019)

DMMA has adopted amendments to the XXI Delaware Healthy Children Program State Plan (hereinafter “the State Plan”), which shall be effective as a final rule on July 11, 2019. DMMA claims that in accordance with 29 Del. C. § 10113 (b), these amendments are exempt from the usual procedural requirements, as they “make [the existing regulations] consistent with changes in basic law but which do not otherwise alter the substance of the regulations.” Therefore the change was published in its final form without the submission of a proposed version for public comment.

In April 2016, the Center for Medicaid and Medicaid Services (CMS) issued final regulations (see 81 FR 27498) which updated Medicaid managed care rules, applying to both Medicaid and CHIP. As a result, CMS revised the template to be used for CHIP state plans. According to the instructions on the updated template form, states were not required to resubmit state CHIP plans on the new template, however states would be required to use this template for the submission of any new CHIP plan amendments.

The state plan amendment to be adopted by DMMA appears to reflect the updated language in Section 3 (Methods of Delivery and Utilization Controls”) of the state plan template.