

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 9/15/2022

Re: September 2022 Policy and Law Memo

Please find below, per your request, analysis of pertinent proposed regulations and legislation identified by councils as being of interest.

Proposed DHSS Regulation on Title XIX Medicaid State Plan - Ambulatory Surgical Center Services Rate, 26 DE. Reg. 153 (09/01/22).

The Delaware Department of Health and Social Services (“DHSS”) / Division of Medicaid and Medical Assistance (“DMMA”) proposes to amend Title XIX Medicaid Statute regarding Ambulatory Surgical Center Services, under the authority of 31 Del. C. §512. The amendment concerns adjusting the current reimbursement methodology.

Prior to October 1, 2021, Ambulatory Surgical Centers (“ASC”) did not perform surgical dental procedures. According to the Centers for Medicare and Medicaid Services (“CMS”), ASCs are defined as “distinct entit[ies] that operate exclusively for the purpose of providing surgical services to patients not requiring hospitalization and in which the expected duration of services would not exceed 24 hours following an admission.” However, as the COVID-19 pandemic greatly burdened access to traditional outpatient surgical space, DMMA expanded such access by allowing surgical dental procedures in ASCs, beginning on October 1, 2021. DMMA has concluded, in the 11 months since implementing this change, that the ASC policy of reimbursement does not adequately cover the costs of performing dental services.¹

The proposed amendment aims to remedy the discrepancy between the cost of service and the amount covered by Medicaid.² The amendment eliminates language stating “an ambulatory surgical center being used for patient dental services will be reimbursed by Medicaid for such services at 50 percent of the current Medicare Outpatient Prospective Payment (OPPS) rate for procedure codes specified by the State for these dental services.”³ The amended language, instead, states that effective October 1, 2022, ASCs that provide patients with dental services

¹ 26 DE Reg. 154 (09/01/22).

² Medicare provides a rate of \$203.64 of the \$2,334.87 average cost of dental patients requiring operating room access. Because of this, hospitals are reluctant to schedule such cases. Medicaid programs typically follow Medicare’s lead in deciding what to cover, and thus the same problem occurs when a patient is covered by Medicaid. Michelle Diament, Rule Change Could Improve Access To Dental Care For People With Disabilities, DISABILITY SCOOP, Aug. 29, 2022, at 1.

³ 26 DE Reg., *supra* note 1, at 155.

will be reimbursed by Medicaid “at the facility’s usual and customary charge or a maximum fee for their service, whichever is lower.”⁴

Practically, this amendment would alleviate the often long wait times for those seeking dental care.⁵ Access to ASCs that provide extensive dental procedures for those using Medicaid or Medicare would expand, as a significant amount of the procedure expense would be covered by the reimbursement method described in the amendment.

Moreover, this amendment would positively impact individuals with disabilities. Many people with disabilities use Medicaid to help cover medical expenses. Living with a disability can make the maintenance of dental health difficult.⁶ Mobility issues, neuromuscular issues, one’s ability to control his body movements, anxiety, and other behavioral problems result in a two-fold consequence; individuals with disabilities may require sedation during dental procedures directly because of a disability (e.g., if one has difficulty controlling his movements), or because lack of accessible and affordable dental facilities has prevented such individuals from seeking dental treatment at all. This means that when treatment is finally sought, more invasive procedures are needed. When dental health is overlooked, significant health consequences may arise.⁷

ASCs are often the only available locations for individuals with disabilities to receive dental services, as more invasive procedures are often required. If more ASCs receive proper compensation for provision of services, more people with disabilities will be able to receive treatment, resulting in better dental health.

Councils may wish to support this regulation as it aligns with the widening accessibility of dental care to patients using Medicaid while ensuring such centers receive proper compensation for provision of services.

Proposed DHSS DMMA State Plan -Medicaid Recovery Audit Contractors Program, 26 DE. Reg. 155 (09/01/22)

DMMA is proposing to get a permanent exception of CMS’s requirement that it contract with a Medicaid Recovery Audit Contractor.⁸ DMMA had a waiver in 2020. Although at one time it had a contractor, its more recent RFPs did not result in any bids. These programs are one of several strategies to improve “program integrity” with in the Medicaid system, in order to detect and investigate over and underpayments, and fraud and abuse in the Medicaid provider systems.

⁴ *Id.*

⁵ “The lack of (operating room) access for needed and covered dental procedures often results in wait times of 6-12 months for these patients, many of whom are children whose daily activities and school performance are often significantly affected in the interim.” Michelle Diament, *supra* note 2, at 1.

⁶ *Developmental Disabilities & Oral Health*, NAT’L INST. OF DENTAL AND CRANIOFACIAL RSCH., <https://www.nidcr.nih.gov/health-info/developmental-disabilities> (last visited Sept. 13, 2022).

⁷ Mayo Clinic Staff, *Oral health: A window to your overall health*, MAYO CLINIC, <https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/dental/art-20047475> (Oct, 28, 2021).

⁸ For a deep dive on Medicaid Recovery Audit Contractor programs, please see <https://www.macpac.gov/wp-content/uploads/2019/06/Improving-the-Effectiveness-of-Medicaid-Program-Integrity.pdf>

Apparently, a number of states have had to seek waivers of this requirement. Councils may wish to endorse, or to ask what other methods DMMA uses to enhance program integrity.

Proposed DHSS Regulation on Food Benefit Certification, DSSM 9000 Food Stamp Program, 26 DE. Reg. 159 (09/01/22).

CLASI staff is evaluating this proposed change to shorten the time line for recertification; analysis will be shared with councils when it becomes available.

Final Regulations

Several regulations that Councils commented on became final this month.

1. Final DHSS DMMA Regulation on Incarcerated Medicaid Program, 26 DE. Reg. (09/01/22).

DMMA acknowledged Councils' support for this amendment to facilitate Medicaid coverage for incarcerated individuals who are being released to help ensure continuity of care and assist in avoiding recidivism.

2. Final DSHS Regulations on Police Training, Body Cameras, 26 DE. Reg. 223-224 (09/01/22).

Councils may recall that they made extensive comments to the original regulations proposed by DSHS regarding police use of body cameras. Several attended a hearing/meeting where the suggested changes were discussed. The final version does address, though not in particularly strong language, some of the concerns raised, particularly about SROs.

The following changes were made:

1. The definition of SROs was expanded to include other officers when acting as SROs. 26.1
2. The section related to SROs was qualified by the following language: SROs have a unique position in law enforcement; in light of that and the fact that SROs, by their roles, routinely interact with juveniles and students with special needs, these mandatory standards shall be interpreted with greater flexibility to those officers when not engaged in traditional law enforcement interactions. 26.3.3
3. There was additional language regarding notification of witnesses or members of the public when a camera is either turned off, or turned back on. 26.13.7.5 Where an officer feels it is necessary to stop recording to facilitate speaking with a witness or a member of the public. When feasible, the officer will state an intent to stop recording before stopping

the BWC and, upon reactivation, state that the BWC was restarted, but in all cases, video interruptions will be indicated in a written report 26.13.7.5

4. Finally , the regulation provides greater detail on the prerequisites for the release of the videos of use of force incidents resulting in death or serious injury.

Councils may wish to consider whether it is appropriate to reiterate concerns about the use of bodycams in school settings, or whether to withhold comment.