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MEMORANDUM

DATE: January 30, 2012

TO: Ms. Sharon L. Summers, DSS
Policy, Program & Development Unit

FROM: Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: 15 DE Reg. 973 [DSS Proposed Fair Hearing Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Social Services' (DSS) proposal to revise its fair hearing regulation published as 15 DE Reg. 973 in the January 1, 2012 issue of the Register of Regulations. As background, DSS proposed a set of comprehensive revisions to its fair hearing regulation in January, 2011. The SCPD submitted extensive comments resulting in a final regulation in July, 2011 which incorporated several amendments prompted by the commentary [14 DE Reg. 618 (January 1, 2011) (proposed); 15 DE Reg. 86 (July 1, 2011) (final)]. SCPD has the following observations and recommendations on the latest proposed revisions.

1. In §5000, definition of "abandonment", delete the comma after "cause".

2. In §5000, definitions of "advance notice period" and "timely notice period" are inaccurate since they categorically state that the period is ten days. A notice can be provided which gives more than a 10-day notice. The 10 days is a "minimum" which an agency or MCO may exceed. See, e.g., 42 C.F.R. 431.211 and 5300, Par. 2.B. ("timely notice is one mailed at least 10 days before the time of action"). If an MCO mailed out a notice with an effective date 15 days from notice date, the "timely" notice period would be 15 days, not 10 days. Reduction or termination of benefits would be barred within that 15 day period, not a 10 day period.

3. In §5000, definition of "fair hearing", Par.5 refers to "(t)he opportunity to obtain counsel". This

is somewhat misleading. Compare 42 C,F.R. 431.206(b)(3), which requires DSS to publish hearing procedures which include notice that the appellant "may represent himself or use legal counsel, a relative, a friend, or other spokesman." See also 7 C.F.R. 273.15(f). Finally, other sections (§5000, definition of "group hearing"; §5606, Par. 3) refer to "authorized representative" or "authorized agent".

4. In §5000, it is redundant to have a separate definition of "fair hearing summary" and "hearing summary". It would be preferable to combine the definitions and ensure that it encompasses the text from both of the current definitions and §5312 components, including a reference to the omitted persons expected to testify on behalf of the agency.

5. Section 5000 now defines an MCO as including "individual medical service providers of an MCO panel." This may be "overbroad". SCPD is dubious that the federal regulations contemplate hearings involving a beneficiary and a doctor's office or child's dentist. The federal regulations contemplate "agencies" as parties, not individual providers.

6. Section 5000 includes a definition of "State Presenter". DSS may wish to consider substituting "agency presenter" since MCOs involved as parties are not "State" presenters.

7. In §5501, the "note" is "overbroad". It recites as follows: "Staff must always prepare a claim against the household for any over-issuance when the hearing decision upholds the agency's action." SCPD shared a similar concern in connection with the January, 2011 proposed regulation resulting in the following commentary and response:

> Third, §5300, Par. 2.A.6 is not literally accurate. It categorically recites "(i)f the agency action is upheld, that such assistance must be repaid." Repayment is discretionary and the State or MCO can decide to not pursue recovery. The analogous federal regulation [42 C.F.R. 431.230(b)] states that the agency "may institute recovery". Moreover, a beneficiary can elect to not continue benefits during the pendency of appeal. See §5308, Par. 2.A and §5300, Par. 2.C. Finally, this section would literally impose a mandatory repayment duty for benefits received prior to issuance of the notice and during the minimum 10-day notice period.
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> Agency Response: DSS and DMMA thank you for your comment. The regulation is amended and indicated by [Bracketed Bold Text]. See §5300, Par. 2.A.6.

The proposed categorical requirement that "(s)taff must always prepare a claim" should be amended or deleted.

8. Section 5600.1, Par. 1.D contains a highly objectionable provision: "The hearing officer may make a negative assumption when a party declines to give testimony under a claim of privilege." The corresponding Delaware Rule of Evidence explicitly bars such a "negative assumption":

> Rule 512. Comment upon or inference from claim of privilege; instruction.

(a) Comment or inference not permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

It is highly inappropriate to penalize a party for invoking the attorney-client or other privilege.

9. Section 5600.1, Par. D.1 recites as follows: "Privileges are waived by a claimant if the information is relevant to the defense of the action or inaction under appeal." This is also "overbroad". Simply because what a party told his attorney could be "relevant" to a defense does not automatically waive the attorney-client privilege.

10. Section 5604, Par. 1. B, recites as follows: "However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer." There is no definition of "made final". Moreover, the regulation ostensibly allows ex parte contact. This authorization is problematic for several reasons. A party can ask for reconsideration of a fair hearing decision. Cf. Henry v. Dept. of Labor, 293 A.2d 578, 581 (Del. Super. 1972)(Delaware quasi-judicial administrative hearing bodies have inherent jurisdiction to entertain applications for reconsideration). If one party has already had ex parte contact with the hearing officer, the hearing officer could not impartially entertain the application for reconsideration. A party could also request "reopening" based on criteria contained in the attached Superior Court (Civ) Rule 60. Accord, Henry at 581. If parties have had ex parte contact with the hearing officer, such applications could not be impartially entertained by the hearing officer.

11. Section 5605, Par. 2, which addresses continuances, is problematic.

a. This section omits consideration of the status of a party's attorney or representative (e.g. illness). This should be included in Par. 2.B .1.

b. There are no exceptions for a continuance within 24 hours of hearing. A medical emergency, hospitalization, or sudden illness can occur within 24 hours of hearing. Adoption of a "no-exceptions" regulation violates due process.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations and recommendations on the proposed regulation.

cc: Ms. Elaine Archangelo
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

15reg973 dss-fair hearing 1-27-12

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. -- Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders.

(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. -- On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon the Court, or to deal with judgments by confession as provided by law. Writs of coram nobis, coram vobis, and audita querela are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these Rules or by an independent action.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise