STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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MEMORANDUM

DATE: March 30, 2010

TO: Ms. Mary T. Anderson, MSW, DDDS
Director of Policy Development

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

RE: 13 DE Reg. 1164 [DDDS Proposed Appeal Process Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Developmental Disabilities Services (DDDS's) proposal to adopt a regulation defining its appeal process published as 13 DE Reg. 1164 in the March 1, 2010 issue of the Register of Regulations. SCPD has the following observations.

First, SCPD applauds DDDS for publishing a proposed regulation in this context as juxtaposed to a "policy". Although its enabling legislation [Title 29 7909A] contemplates DDDS issuance of regulations, it has only adopted a single regulation since its inception, i.e., its eligibility standards which have been amended a few times. See 16 DE Admin Code 2100.

Second, DDDS should consider overlapping appeal processes apart from Medicaid. For example, if DDDS proposes action covered by the long-term care bill of rights (Title 16 Del.C. §1121) (e.g. changing a roommate in group home or Stockley), the client could initiate a "grievance" with DHSS pursuant to Title 16 Del.C. §1121(28) and 1125. Moreover, if an applicant desired institutional versus HCBS care (covered by §2.1 of the DDDS policy), and the decision were PASARR-related, a DSS hearing is available to even non-Medicaid beneficiaries. See 16 DE Admin Code Part 5000, Section 5304.1. Therefore, it would be prudent to include a non-supplanting provision in the DDDS regulation. Consider the following amendment to §11.0:

> 11.0 A DDDS Appeal shall not be a pre-requisite for requesting a DSS Medicaid Fair Hearing nor shall the availability of a DDDS appeal supplant or preclude access to appeal and review processes otherwise available under law or Departmental policy.

Third, §3.0 could be interpreted as categorically requiring exhaustion of informal resolution methods prior to appealing to DDDS. This could be problematic since it could result in dismissal of an appeal based on perceived "insufficient efforts" to resolve the dispute informally. Moreover, literally, it would require a client dissatisfied with the outcome of a rights complaint to try to

negotiate a different disposition with Chris Long prior to appeal. It would be preferable to "encourage" but not categorically "require" resolution efforts prior to filing for appellate review.

Fourth, in §3.0, the reference to "an appeal DDDS" makes no sense. Consider substituting "an appeal under this regulation."

Fifth, in §9.0, the comma after the word "appealed" should be deleted.

Sixth, in §10.0, the comma after the word "disposition" should be deleted.

Seventh, in §4.0, consider adding the following amendment: "The implementation..., unless it has already been implemented *or by agreement of the appellant and DDDS.*" There may be situations in which the parties agree to "roll back" action pending the processing of the appeal. It would be preferable to authorize DDDS discretion in this context.

Eighth, under §5.0, the 90 day time period to request a Medicaid hearing is not tolled during the pendency of the DDDS appeal. It would be preferable to reach an accord with DSS that would allow tolling. See, e.g., attached January 27, 2000 policy letter from Medicaid Director, Phil Soule, authorizing tolling of 90 day Medicaid fair hearing request period during pendency of internal MCO review. In addition, the timelines are generally too long. See, e.g., V.F. of attached policy which allows 90 days for the "Appeals Committee" to schedule a hearing). SCPD recommends a much shorter period of time, i.e., no more than 30 days.

Ninth, in §2.4, it would be preferable to insert "limitation" after "reduction". Compare 18 DE Admin Code Part 1403, §2.0, definition of "adverse determination" and 18 DE Admin Code Part 1301, §2.0, definition of "adverse determination".

Tenth, in §2.0, it would be preferable to include the following: "2.6. Decisions involving the content or implementation of an ELP or Family Support Agreement".

Eleventh, in §2.0, it would be preferable to include a "catch-all" such as "2.7 . Other adverse DDDS action or refusal to act with significant impact on appellant."

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

cc: The Honorable Rita Landgraf, DHSS
Mr. Roy A. Lafontaine, Ph.D.
Ms. Judy Govatos, The Arc of Delaware
Ms. Esther Curtis, Brain Injury Association of Delaware
Mr. Tony Horstman, Chair, DDDS Advisory Council
Ms. Theda M. Ellis, Autism Delaware
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

Delaware Health and Social Services
Division of Developmental Disabilities Services
Dover, Delaware

Title: **Appeal Process** **Approved By:** Acting Division Director

Written/Revised By: **DDDS Policy Committee** **Date of Origin:** **June 1988**

Date of Current Review/Revision: **January 2010**

I. **Purpose**
To establish a process for appealing decisions made by the Division of Developmental Disabilities Services (DDDS) regarding an individual receiving services or applicant.

II. **Policy**
The Division of Developmental Disabilities Services shall provide an internal process to appeal decisions regarding an individual receiving services or applicant.

III. **Application**
All DDDS staff, all individuals supported, guardians, advocates and applicants.

IV. **Definitions**
A. Appeal: A DDDS internal evidentiary review of a decision by an objective committee appointed by the Division Director.
B. Appeal Committee: A group whose purpose is to objectively review formal appeals and submit recommendation(s) to the Division Director based on a review of the facts presented. The Appeals Committee membership shall include the Executive Director of Stockley Center or designee, Director of Community Services or designee, and two adjunct members appointed by the Division Director (one of whom will serve as the chairperson).
C. Individual/Applicant: Any person who is either applying for or receiving services from the DDDS.
D. Advocate: Any individual who has been designated by the individual and/or has a vested interest in the individual's well being.
E. Guardian: A legal relationship in which a person is authorized to make decisions for another person who has been determined by a court to be incompetent to manage his/her affairs and/or property.
F. Medicaid Fair Hearing: A review process that is available to Medicaid recipients and applicants for Medicaid funded services, independent of the DDDS appeals process, in accordance with 42 CFR §431.
G. Working Days: A period of time including Monday-Friday and excluding recognized holidays and days of approved absence.

V. **Standards**

A. Applicants for DDDS Services and or his or her surrogate or legal guardian shall be informed of the right to appeal a DDDS eligibility determination, via the DDDS appeals process and or the Division of Social Services (DSS) Medicaid Fair Hearing process.

B. DDDS staff shall facilitate the participation of the individual and/or the surrogate or guardian in decision making processes. Efforts shall be made to resolve disputes in a manner that is acceptable to all involved parties.

C. DDDS decisions that involve the omission of choice between institutional care and home and community based services, the denial of services or provider of choice and/or the denial, reduction, suspension or termination of services and the outcome of an Individual Rights Complaint shall be explained to the individual and/or the surrogate or guardian, via written correspondence. Information explaining the process for requesting a DDDS Appeal and/or a DSS Medicaid Fair Hearing shall be included, as well as an explanation of the reason(s) for the action taken.

D. A request for a DDDS Appeal must be made within thirty (30) calendar days of receiving written notification of a rights complaint outcome, DDDS eligibility determination or discontinuation of DDDS services.

E. Contact with the appellant by the Appeals Committee Chairperson shall be initiated within five (5) working days of receiving the Appeals Request and copy of Applicant Services file for eligibility decision(s).

F. The Appeals Committee chairperson shall review with the appellant his/her reason for appealing, provide clarification as necessary, describe the appeals process and schedule within ninety (90) days of receiving the appeals request.

G. If not previously implemented, a DDDS decision shall **not** be implemented during the time an appeal is active with the DDDS Appeals Committee or is being reviewed by a Medicaid Fair Hearing Office.

H. A written appeal request shall be considered active until reviewed by the DDDS Appeals Committee and a disposition sent to the appellant.

I. The DDDS Appeals Committee Chairperson shall maintain a copy of all appeals and their dispositions.

J. The Appeals Committee Chairperson shall track the receipt and disposition of all appeals in an electronic database.

K. A Medicaid recipient may request a DSS Medicaid Fair Hearing, up to 90 days following receipt of written notice of the DDDS decision that the recipient decides to appeal.

L. The Appeals Committee Chairperson shall notify the Risk Management Committee of identified trends at the conclusion of each calendar year or as requested.

VI. **Procedures**

Responsibility	**Action**
DDDS Staff	1. Communicates with the individual/advocate guardian in an effort to resolve disagreements relative to a DDDS decision

	2. Informs the individual advocate guardian of the DDDS and Medicaid Fair Hearing appeal procedures on an annual basis, and when decisions/actions arise that are appealable
	3. Documents notification of right to appeal
Appeals Committee Chairperson	4. Schedules an appeal hearing date within 5 working days of receipt of an Appeals Request (or receipt of the Office of Applicant Services file if denied eligibility). Coordinates presentations by the individual advocate guardian and applicable representatives of the DDDS who were involved in making the decision in dispute
Appeals Committee	5. Meets with the individual advocate guardian and representatives of the DDDS staff responsible for the original decision in dispute to hear the appeal.
Appeals Committee Chairperson	6. Completes Section II of the Appeals Request and forwards the original to the DDDS Director within five (5) working days of the appeal hearing.
DDDS Director	7. Reviews the Appeals Committee's recommendations
	8. Sends written notification to the individual filing the appeal, within 15 working days of the hearing, and to the Appeals Committee Chairperson relative to the final disposition of the appeal

VII. References

DHSS Living Will, Power of Attorney, Guardianship; 12 Del.C. 1987, §3914
42 CFR 431.201; 42CFR431.210

VIII. Exhibits

A. Appeals Request Form
B. Appeal Process

Exhibit A

DELAWARE HEALTH AND SOCIAL SERVICES
DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES
APPEALS REQUEST FORM

Section I - **To be completed by individual/advocate/guardian appealing decision:**

Date: _____

Name of Applicant Individual: _____

Please check the reason(s) that you are requesting a DDDS Appeal:

☐ Choice of preferred care or home and community based services not offered

☐ Services are denied

☐ Provider of choice is denied

☐ Services are reduced, suspended or terminated

☐ Disagree with outcome of Individual Rights Complaint

☐ Other (please explain) _____

_____

_____

Please describe efforts made to resolve the disputed issue, if applicable:

_____

_____

Requested By: _____
Name and Relationship to Applicant/Person Receiving Services

Mailing Address: _____

_____

Daytime Phone #: _____

E-Mail Address: _____

Please only list your phone number and e-mail address if you give DDDS permission to use use it for the purposes of facilitating your appeal request.

Section II: *To Be Completed by DDDS Appeals Chairperson:*

Date of Appeal: _____

Persons Participating in Appeal: _____

_____

_____

_____

Committee Recommendation(s) to the Division Director: _____

_____

_____

_____

_____

_____

_____

Signature of DDDS Appeals Committee Chairperson or Designee

_____

Date

EXHIBIT B

DDDS Appeal & DSS Medicaid Fair Hearing Procedures

If you are not satisfied with 1) an eligibility for DDDS services determination, 2) if the choice of provider or home and community based services vs. institutional care is not offered; 3) if a service or provider of choice is denied or if services are suspended, terminated or reduced, you have the right to appeal such directly with the DDDS Appeals Committee and or via the DSS Medicaid Fair Hearing process (if the aggrieved person is a Medicaid recipient or applying for a Medicaid service). You have the right to choose if you want to appeal the decision and if you want to appeal with the DDDS Appeals Committee, the DSS Medicaid Fair Hearing Process or both. A DDDS Appeal is not a pre-requisite for filing for a DSS Medicaid Fair Hearing.

The process for requesting both a DDDS Appeal and a DSS Fair Hearing are delineated below.

Type of Grievance	DDDS Appeal	DSS Medicaid Fair Hearing
How	Complete attached Appeals Request form and send to DDDS (send to address below) for any of the following reasons:	Contact Division of Social Services (DSS) by telephone or in writing (see below contact information) for any of the following reasons:
Why	1) you are not provided the choice of home and community based services or institutional care; 2) you are denied the service(s) or provider of choice; 3) services are denied, suspended, reduced or terminated 4) you are not satisfied with the outcome of a Client Rights Complaint.	1) you are not provided the choice of home and community based services or community based services 2) you are denied the service(s) or provider of choice; 3) services are denied, suspended, reduced or terminated
Where	DDDS: Mary Anderson, M S W. 2633 Patriots Way Georgetown, DE 19947	Division of Social Services Medicaid Fair Hearing Officer PO Box 906 New Castle, DE 19720 (302)255-9528
When	Within 30 calendar days of the DDDS decision	Within 90 days of DDDS decision
Questions??	Call Mary Anderson at 302-933-[illegible]	Call Division of Social Services (DSS) at (302)255-9528

Approved by PARC 10 22 09
Form #11 Admin

DELAWARE HEALTH
AND SOCIAL SERVICES
DIVISION OF
SOCIAL SERVICES

TELEPHONE: (302)

January 27, 2000

Brian J. Hartman
Disabilities Law Program
Community Legal Aid Society, Inc
913 Washington Street
Wilmington, DE 19801

Dear Attorney Hartman:

This is in response to your letter dated January 20, 2000 where you requested a policy letter clarifying the position of Delaware Medicaid with regards to the termination or material reduction of services to Medicaid recipients, especially home health or home care services.

Since the inception of the Medicaid Managed Care Program in 1996, we have required that prior to the termination and/or reduction of any services, unless there is an approved plan that calls for a reduction in care or change of service, the MCO, or one of its Agencies (i.e.; a Home Health Agency) must conduct a face to face meeting and/or assessment, preferably at the site the care is given, with the Medicaid recipient or a parent. All four MCO's in our program at the start were aware of this requirement, and to the best of my knowledge the remaining two MCO's, DelawareCare and First State, are not only aware of this, but are following this process.

To your second issue. Medicaid has made it clear to the MCO's and to recipients using the Health Benefits Manager (HBM) Contractor that the clients should go through the MCO appeal process before using the State appeal process. This usually gets issues resolved in a more efficient manner, but they can appeal to the State at the same time, or any time during the process or even wait up until 90 days after to final MCO decision to appeal to the State. There are issues for both sides with this; the clients feel that MCO's could drag out the process and therefore not provide care for a long time and the MCO's feel the clients can appeal, ask to keep the benefit, and keep MCO's providing care for months, then loose and never payback the MCO's.

I hope this meets your need. If not just give me a call. I will also copy this to Priscilla Ruebeck at DMR as you requested. I am also faxing copies to Mr. Chaffin of DelawareCare and Mr. Bates at First State.

Sincerely,

Philip P. Soule, Sr.