



# DISABILITIES LAW PROGRAM

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## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiative

Date: October 4, 2017

Consistent with Council requests, I am providing an analysis of one (1) proposed regulation appearing in the October, 2017 issue of the Register of Regulations. Since this regulation was the only disability-related initiative appearing in the Register, I understand that the SCPD P&L meeting scheduled for October 12 has been cancelled.

### 1. DMMA Proposed Lifespan Waiver Regulation [21 DE Reg. 269 (October 1, 2017)]

The Division of Medicaid & Medical Assistance (DMMA) proposes to amend the Delaware Social Services Manual (DSSM) to clarify internal policy and procedures related to the DDDS Lifespan Waiver.

As background, CMS approved a major restructuring of the DDDS HCBS Medicaid Waiver which became effective on July 1, 2017. The current initiative is essentially a “housekeeping” measure to conform policies and procedures to the amended waiver.

I have the following observations.

In general the current regulation is consistent with the amended waiver which is available at <http://dhss.delaware.gov/dhss/ddds/files/lifespanamendment052517.pdf>. However, I did identify a few provisions which may merit DMMA review.

First, §20720.1 describes financial deductions from countable income. Countable income cannot exceed 250% of the Federal Benefit Rate (FBR). See Waiver, pp. 8-9 and 47-48. Deductions for a “maintenance needs allowance” are different for residential versus non-residential DDDS Waiver participants. See Waiver, p. 49. The daily living needs deductions in the Waiver are generally reflected in the proposed revisions to §20720.1. However, the following sentence has been omitted: “All earned income in the form of wages shall be allowed to be protected.” See attached p. 49 from Waiver. DMMA may wish to include the sentence in §20720.1.

Second, §20720.1 authorizes the following deduction for residential Waiver participants:

Individuals receiving Medicaid under the Division of ~~Developmentally Disabled~~ Developmental Disabilities (DDDS) Lifespan Waiver who receive Residential Habilitation services are allowed a deduction equal to the current Adult Foster Care (AFC) rate. The AFC rate is based on the current SSI income level plus \$140.00.

In contrast, the Waiver document refers to the “State Supplement amount” rather than “\$140.00”:

For those waiver participants that meet the criteria to receive residential habilitation services, the state will provide a maintenance needs allowance set at the Adult Foster Care Rate, which is the SSI standard plus the Optional State Supplement amount.

DMMA may wish to substitute “the Optional State Supplement amount” for “\$140.00”. Otherwise, if the State Supplement amount changes, the regulation would have to be immediately republished and corrected.

Third, §20720.1 describes the daily living needs deduction for non-residential participants as follows:

Individuals receiving Medicaid under the DDDS Lifespan Waiver who reside in the family home or in the Long Term Care Community Services (LTCCS) program are allowed an amount equal to their total income including income that is placed in a Miller Trust.

In contrast, the Waiver document describes the deduction as follows:

For waiver enrollees who do not receive a residential habilitation service, the state will provide a maintenance needs allowance that is equal to the individual’s total income as determined under the post eligibility process, which includes income that is placed in a Miller Trust.

The proposed revisions to §20720.1 are problematic since there may be Waiver participants living independently or in settings apart from “the family home or in the Long Term Care Community Services (LTCCS) program”. The language used in the Waiver document itself (“enrollees who do not receive a residential habilitation service”) is preferable since it is accurate and obviates the exclusion of participants who do not live in the undefined “family home” or the LTCCS program.

The Councils may wish to generally endorse the proposed regulation subject to DMMA considering a few amendments consistent with the above observations.

Attachment  
R:legis/fy18/1017bils

*(Complete Item B-5-b (SSI State). Do not complete Item B-5-d)***Appendix B: Participant Access and Eligibility****B-5: Post-Eligibility Treatment of Income (2 of 7)***Note: The following selections apply for the time periods before January 1, 2014 or after December 31, 2018.***b. Regular Post-Eligibility Treatment of Income: SSI State.**

The State uses the post-eligibility rules at 42 CFR 435.726 for individuals who do not have a spouse or have a spouse who is not a community spouse as specified in §1924 of the Act. Payment for home and community-based waiver services is reduced by the amount remaining after deducting the following allowances and expenses from the waiver participant's income:

**i. Allowance for the needs of the waiver participant (select one):** **The following standard included under the State plan***Select one:*

- SSI standard
- Optional State supplement standard
- Medically needy income standard
- The special income level for institutionalized persons

*(select one):*

- 300% of the SSI Federal Benefit Rate (FBR)
- A percentage of the FBR, which is less than 300%

Specify the percentage: 

- A dollar amount which is less than 300%.

Specify dollar amount: 

- A percentage of the Federal poverty level

Specify percentage: 

- 
- Other standard included under the State Plan**

*Specify:*

For waiver enrollees that do not receive a residential habilitation service, the state will provide a maintenance needs allowance that is equal to the individual's total income as determined under the post eligibility process, which includes income that is placed in a Miller Trust. For those waiver participants that meet the criteria to receive residential habilitation services, the state will provide a maintenance needs allowance set at the Adult Foster Care Rate, which is the SSI standard plus the Optional State Supplement amount.

All earned income in the form of wages shall be allowed to be protected.

- 
- The following dollar amount**

Specify dollar amount:  If this amount changes, this item will be revised.

- 
- The following formula is used to determine the needs allowance:**

*Specify:*


- 
- Other**

*Specify:*