

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

1915(c) Home and Community-Based Services Waiver for the Elderly and Disabled

Nature of the Proceedings:

Delaware Health and Social Services (“Department”) / Division of Medicaid & Medical Assistance initiated proceedings to submit an application to the Centers for Medicare and Medicaid Services (CMS) for renewal of its Home and Community-Based Services waiver entitled, Elderly and Disabled Waiver Services, for an additional five years. The Department’s proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the May 2009 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by May 31, 2009 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposal

As a reminder, the proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) announces its intent to submit to the Centers for Medicare and Medicaid Services (CMS) the State’s application for a renewal of Delaware’s Home and Community-Based Services waiver entitled, Elderly and Disabled Services Waiver Program, for an additional five years. This request is being filed pursuant to Section §1915(c) of the Social Security Act.

Statutory Authority

- Social Security Act §1915(c), *Provisions Respecting Inapplicability and Waiver of Certain Requirements of this Title*;
- 42 CFR §441, Subpart G, *Home and Community-Based Services Waiver Requirements*

Background

The Medicaid Home and Community-Based Services (HCBS) waiver program is authorized in §1915(c) of the Social Security Act. The program permits a State to furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization. The State has broad discretion to design its waiver program to address the needs of the waiver’s target population. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State plan and other federal, state and local public programs as well as the supports that families and communities provide.

The Centers for Medicare and Medicaid Services (CMS) recognizes that the design and operational features of a waiver program will vary depending on the specific needs of the target population, the resources available to the State, service delivery system structure, State goals and objectives, and other factors. A State has the latitude to design a waiver program that is cost-effective and employs a variety of service delivery approaches, including participant direction of services.

Delaware's Elderly & Disabled (E&D) Waiver was originally approved in 1985. Newly-established waiver programs are in effect for a period of three years, and existing waivers are in effect for five years. The E&D Waiver is approaching the conclusion of its current five-year effective period. The current demonstration, project #0136.90, is in effect through June 30, 2009. In order to continue providing services under this waiver after June 30, 2009, Delaware must submit a renewal application to the Centers for Medicare and Medicaid Services (CMS).

Summary of Proposal

The Division of Medicaid and Medical Assistance (DMMA) is in the process of renewing its home and community-based waiver for elderly and disabled waiver services and is announcing a thirty-day public comment period on the waiver extension. The State intends no significant changes in benefits or the population served during the renewal period.

Eligibility requirements, types of services provided, number of available slots, and other key program elements will remain the same. One new development for this renewal, however, is the implementation of a more extensive quality improvement strategy. Since the last renewal application several years ago, CMS has increased requirements for states to develop and implement quality improvement strategies for waiver programs. This renewal application conforms to these requirements and contains provisions for various aspects of a quality improvement strategy, including data collection, data aggregation, and remediation & improvement methodologies. Responsibility for the quality improvement strategy lies with the Division of Services for Aging and Physical Disabilities (DSAAPD), the E&D Waiver administering/operating agency, and the Division of Medicaid and Medical Assistance (DMMA), the oversight agency. The direct impact of the quality improvement strategy on participants and providers will be minimal. (Providers and a sample of participants will be asked questions during brief telephone surveys conducted annually.) Indirectly, all parties involved should benefit from improved efficiency and service delivery approaches which are expected results from the quality improvement strategy.

The renewal application proposes that Delaware will continue providing services under the E&D Waiver from July 1, 2009 through June 30, 2014.

The provisions of this waiver are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

Summary of Comments Received with Agency Response

The Governors Advisory Council for Exceptional Citizens (GACEC) offered the following condensed observations and recommendations summarized below. DSAAPD and DMMA have considered each comment and responds as follows:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Services for Aging and Adults with Physical Disabilities' (DSAAPD) April 14, 2009 letter responding to comments from the State Council for Persons with Disabilities (SCPD) regarding the renewal application for a §1915 (c) Home and Community-Based Waiver (Elderly & Disabled Waiver). Council truly appreciates the Division's consideration of their comments and is respectfully re-submitting the following important issues which remain "unresolved" with DSAAPD's April 14th response (italicized). GACEC infers that its observations will be shared with CMS.

1. GACEC strongly objects to the lack of inclusion of participant direction opportunities. Excluding participant direction from the waiver is obviously disfavored by CMS, is inconsistent with the Money Follows the Person Program, and maintains an outdated model.

DSAAPD shared intention to amend after approval from CMS.

Agency Response: DSAAPD is in strong agreement that self-direction needs to be incorporated into the E&D Waiver. We fully recognize that self-direction is a highly effective model for service delivery and that it has worked successfully in Delaware's Personal Attendant Services Program and in many programs in other states. Research indicates that it can be included in Delaware's E&D Waiver.

In preparation for developing this renewal application, DSAAPD staff researched self-direction models, reviewed waiver requirements, consulted with CMS staff, and drew up tentative plans for self-directed services in the E&D Waiver.

Ultimately, despite all of the good reasons to include self-direction in the renewal application, we decided to postpone these plans. The principle reason was an administrative reality that could not be overcome before July 1, the implementation date of the renewal. Specifically, the development of self-directed components into the waiver would involve certain re-structuring within the Medicaid Management Information System (MMIS), which handles the processing of claims and payments. It was not realistic to obtain cost estimates for programming fees or get the actual programming accomplished before the renewal date.

Fortunately, waivers can be amended at any time to adjust the service package and/or other aspects of waiver operations. As soon as the renewal application is in effect, we plan to begin the process of amending the E&D Waiver to include self-direction. CMS has been made aware of this intention and is in agreement that this is the best avenue to pursue in light of the amount of time and costs involved in the development and implementation of self-directed services.

2. DHSS allows ninety days to complete the level of care determination for an existing Medicaid beneficiary. See p. 33 (App. B, Sec. B-6.f.). DHSS could consider a shorter time frame.

DSAAPD opted to retain 90-day standard to “allow for unusual circumstances”.

Agency Response: A shorter time frame is preferable, but the maximum allows for unusual circumstances which might occur.

3. The services menu is relatively “bare-bones” (p. 44 (App. C, Sec. C-1a)). There are only five authorized services: adult day services, personal care, respite, personal emergency response systems, and specialized medical equipment and supplies. The scarcity of services deflects persons to nursing homes.

DSAAPD noted it is “willing to consider additional services and supports, but must operate within budgetary constraints.”

Agency Response: We are in agreement about the importance of community-based services in deflecting institutionalization. CMS allows other services under waivers, and we are willing to consider additional services and supports, but must operate within budgetary constraints.

4. DHSS disallows the provision of personal care by relatives and guardians. See p. 46 (App. C, Sec. C-1/3 and p. 58 (App. C, Sec. C-2e)). This is objectionable. In other contexts (e.g. PAS program), DSAAPD has authorized compensated relative caregivers.

DSAAPD plans to pursue the inclusion of service delivery by relatives and guardians as a component of self-direction when the waiver is amended.

Agency Response: DSAAPD plans to pursue the inclusion of service delivery by relatives and guardians as a component of self-direction when the waiver is amended.

5. DHSS disallows the provision of respite by relatives and guardians. See p. 48 (App. C, Sec. C-1/3) and p. 55 (App. C, Sec. C-2c). This is objectionable.

DSAAPD plans to pursue the inclusion of service delivery by relatives and guardians as a component of self-direction when the waiver is amended.

Agency Response: See agency response to #4 above.

6. The "Service Definition" of "personal emergency response systems" is unduly limiting. It only allows a PERS if linked to a "response center staffed by trained professionals". DSAAPD is exclusively adopting a rigid, outdated, and unduly expensive service model.

DSAAPD would like to consider these cost-saving suggestions and can perhaps incorporate changes in an amended waiver application.

Agency Response: DSAAPD would like to consider these cost-saving suggestions and can perhaps incorporate changes in an amended waiver application. (DSAAPD has begun to research these options.)

7. DHSS recites that the administration of medication is limited to medical personnel who are professionally licensed. See p. 104 (App.G, Sec. G-3c. This is not entirely accurate. For settings outside of assisted living and nursing homes (e.g. adult day settings), a waiver participant can delegate administration to non-medical personnel. See Title 24 **Del.C.** §1921(a)(19).

This section of the application applies only to the administration of medication in assisted living and nursing home facilities.

As a follow-up, the GACEC requests clarification as to why the Division responded that this section only applies to assisted living and nursing home facilities, or why a section pertaining to such facilities is included in a Home and Community Based Services Waiver application.

Agency Response: Instructions for completing Appendix G-3 of the waiver application indicate: "This appendix must be completed when waiver services are furnished to participants who are served in licensed or unlicensed living arrangements where a provider has round-the-clock responsibility for the health and welfare of residents. The Appendix does not need to be completed when waiver participants are served exclusively in their own private residences or in the home of a family member."

In general, Medicaid waivers can pay for services on a regular basis in community-based residential facilities, such as assisted living. In addition, waivers can pay for short-term respite services in community-based facilities as well as in nursing homes.

One of the services included in the E&D Waiver is respite care. Under the E&D Waiver, respite care services are available in an individual's residence or in an assisted living facility or in a nursing home. Responses provided in Appendix G-3 pertain to the administration of medication in assisted living or nursing facilities for participants receiving short-term respite care in those settings.

Thank you again for your comments and for your interest in helping us to improve the E&D Waiver. We look forward to working with advocacy groups such as yours as we further develop the waiver in the months ahead.

Findings of Fact:

The Department finds that the proposed changes as set forth in the May 2009 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation regarding the five-year extension of the Elderly and Disabled 1915(c) Waiver is adopted and shall be final effective July 10, 2009.

Rita M. Landgraf, Secretary, DHSS

***Please note that no changes were made to the regulation as originally proposed and published in the May 2009 issue of the *Register* at page 1362 (12 DE Reg. 1362). Therefore, the final regulation is not being republished. The application is available in PDF format at the following link:**

**[1915\(c\).pdf](#) [1915\(c\) Home and Community-Based Services Waiver for the Elderly and Disabled](#)
13 DE Reg. 93 (07/01/09) (Final)**