

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Chapter 5, Section 512
(16 Del.C., Ch. 5, §512)

FINAL

ORDER

Combining §1915(c) Home and Community-Based Services Waivers

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical intends to seek an amendment to the Elderly & Disabled §1915(c) Home and Community-Based Services (HCBS) waiver that combines three existing §1915(c) HCBS waivers. 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 August 2010 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by August 31, 2010 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to submit to the Centers for Medicare and Medicaid Services (CMS) an amendment to the Elderly and Disabled (E & D) §1915(c) Home and Community-Based Services (HCBS) Waiver that combines three existing HCBS waivers into one waiver.

Statutory Authority

- Social Security Act §1915(c), *Provisions Respecting Inapplicability and Waiver of Certain Requirements of this Title*
- 42 CFR §435.217, *Individuals receiving home and community-based services*
- 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 accordance with §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.

Summary of Proposal

The State of Delaware is requesting approval for an amendment to the Elderly and Disabled (E & D) Medicaid Waiver under authority of §1915(c) of the Social Security Act. The purpose of this amendment is to: 1) Consolidate three existing home and community-based waivers into one waiver; 2) Add participant direction opportunities to the E & D Waiver; 3) Make changes to personal care and respite service definitions and planned service units; 4) Make changes in the budget to reflect the waiver consolidation and service adjustments; 5) Update data sources used as part of the Quality Improvement Strategy; 6) Make miscellaneous adjustments to the narrative.

Specifically, the provisions of the proposed amendment:

1) **Consolidate three existing home and community-based waivers into one waiver.**

Currently, the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) administers and operates three waiver programs: the Elderly & Disabled (E & D) Waiver, the Assisted Living (AL) Waiver, and the Acquired Brain Injury (ABI) Waiver. Because many current services and service providers are shared across waivers, the consolidation of the three waiver programs into a single waiver will result in numerous efficiencies. The administration and operation of a single waiver, for example, will cut down on redundant administrative activities related to provider enrollment and monitoring, records management, reporting, financial tracking, and other functions. In addition, the streamlining will simplify choices for participants, and will allow for easier access to waiver services. Services currently provided as part of the AL and ABI waiver will be incorporated into the E & D waiver as part of this amendment. The AL and ABI Waiver will be discontinued, but this change will not result in the loss of service to persons currently receiving services under the AL or ABI Waiver, nor will it result in a loss of service to participants in the E & D Waiver. In recognition of the inclusion of participants currently served under the ABI waiver, the amendment specifies persons with acquired brain injury as part of the service population for the E & D waiver.

2) **Add participant direction opportunities to the E & D Waiver.**

This amendment includes the option for individuals who receive personal care services to choose between service delivery methods. Specifically, individuals can choose: a) participant-directed personal care services; b) agency-managed personal care services; or c) both participant-directed and agency-managed personal care services. Individuals who chose to direct their personal care services will have the full range of employer authority for personal care. As common-law employers, they will be able to hire, fire, train, schedule and direct the work of their personal care attendants. Participants will have the option of hiring relatives to serve as their personal care attendants, including, with certain safeguards in place, legally-responsible relatives. The state will contract with one or more vendors to provide Support for Participant Direction as an administrative function to assist participants in managing their responsibilities as employers. Support for Participant Direction vendor(s) will provide financial management services and information and assistance in support of participant direction (support brokerage).

3) **Make changes to personal care and respite service definitions and planned service units.**

Currently, except for a small number of respite care hours delivered in long-term care facilities, respite and personal care services under the E & D Waiver are virtually identical. Personal care and respite care (except, as noted above, respite care in long-term care facilities) are supportive services provided in the home of waiver participants. All providers of home-based respite care also provide personal care under the E & D Waiver. With this amendment, personal care and respite services will continue to be available, but with certain changes. First, respite services will be available only in long-term care facilities (assisted living facilities and nursing homes) to provide temporary and short-term relief for caregivers. The financial resources that are currently used to provide in-home respite hours will be used instead to expand the availability of personal care hours. It is expected that this change will be virtually seamless for participants, since the current respite service providers also provide personal care services. It is expected that this consolidation of in-home care service hours will be simpler for participants to understand, and more efficient for agency staff to manage. Second, the waiver amendment will increase the number and type of entities that can provide personal care services. Personal care will be available as a participant-directed service provided by individual personal care attendants, as described above, or as a provider-managed service. Currently, only home health agencies can provide personal care services under the E & D Waiver. The amendment will allow Personal Assistance Services Agencies (PASA), licensed by the State of Delaware, in addition to home health agencies, to deliver provider-managed personal care under the waiver. It is expected that the addition of personal care attendants and licensed PASA agencies as waiver providers will afford participants more choice in providers for personal care services.

4) **Make changes in the budget to reflect the waiver consolidation and service adjustments.**

Factor D: Cost estimates for Year 1 are adjusted to reflect the most recent claims data for the E & D Waiver. Changes in Years 2-5 are made to account for the addition of services and participants from the ABI and AL Waivers (cognitive services, day habilitation, and assisted living). In addition, service amounts for respite services are reduced and those for personal care are increased as a result of service definition changes, as described

above. Service unit costs for personal care services are adjusted to account for the inclusion of personal care attendants and PASA agencies as service providers. (Unit costs for personal care attendants and PASA agencies are projected to be lower than costs for home health agencies, currently the sole provider type for personal care services.) Year 2 costs are calculated to account for the fact that new services and participants will be introduced five months into the year. (Year 2 of the renewal period begins on 7/1/10 and the amendment will take effect on 12/1/10.) Service costs are calculated at the full annual amount beginning in Year 3. Factors D', G, and G': Adjustments to Factors D', G, and G' estimates are made based on utilization data for the combined waiver populations (E & D, AL, and ABI Waiver participants). Average length of stay: Adjustments are made to the average length of stay for each of the waiver years. The new figures are derived by weighting average utilization data from the three Waiver populations (E & D, AL, and ABI) and accounting for the partial-year enrollment of AL and ABI Waiver participants during Year 2.

5) **Update data sources used as part of the Quality Improvement Strategy.**

DSAAPD, in coordination with the Division of Medicaid and Medical Assistance (DMMA), has had the opportunity to refine its quality improvement strategy for the E & D Waiver, and in the process has developed new data collection and remediation tools, including the Initial Level of Care Review Tool, the Critical Event or Incident Report, and the Provider and Payment Oversight Report. In some cases, these new tools replace less effective data collection and reporting methods. For some performance measures, the collection and/or aggregation and analysis of data is changed from monthly to quarterly to reflect adjustments to the quality improvement strategy. These updates are included in the quality improvement sections of the affected appendices.

6) **Make miscellaneous adjustments to the narrative.**

A change was made to clarify language and create consistency within the document related to the number and type of participant contacts made by DSAAPD staff each year. Throughout the narrative, reference is made to the provider relations agent. Recently, the provider relations agent for Delaware underwent a corporate name change and is now known as HP Enterprise Services. This change was made throughout the document.

The waiver will be administered by the Division of Medicaid and Medical Assistance (DMMA), the State Medicaid agency, and operated by the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). The proposed waiver period is 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).

Fiscal Impact Statement

There is no increase in cost on the General Fund. Demonstrations must be "budget neutral" over the life of the project, meaning they cannot be expected to cost the Federal government more than it would cost without the waiver.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

The State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

As background, SCPD provided the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) with preliminary comments on a May 19, 2010 version of the proposed consolidation of the waivers. DSAAPD provided a July 29 response to each of the paragraphs of the preliminary critique. SCPD is resubmitting its initial observations (with DSAAPD's italicized responses) of the proposed consolidation of waivers as its official comments on the proposed regulations. In addition, SCPD has supplemental observations which are provided subsequent to the italicized responses.

1. The "assurance" section for "Inpatients" (p. 9) recites that waiver services will not be provided to individuals who are inpatients in a nursing home. DSAAPD may wish to add a caveat about respite being offered in such settings. See, e.g., p. 13.

Agency Response: *The referenced section is part of the CMS application template and cannot be altered by the applicant.*

2. The “assurance” section for “Room and Board” (p. 9) is inconsistent with Appendix I-6 (p. 154). The assurance section would include rent and food expenses for an unrelated live-in personal caregiver while the Appendix categorically excludes such coverage.

Agency Response: *The referenced sections are part of the CMS application template and cannot be altered by the applicant. In this case, room and board expenses are allowed under certain circumstances if claimed by the state. The state’s option with regard to room and board expenses for unrelated individuals providing live-in care is specified in Appendix I.*

3. The “transition plan” section (pp. 12-13) contains an informative list of services available under the current 3 waivers and the services menu under the new consolidated waiver. One significant change for ABI waiver participants is that case management will be switched from private providers to DSAAPD staff. Based on anecdotal criticism of the private case management system, this may enhance the quality of case management services. A second change is that “respite” will be limited to short-term stays in a nursing or assisted living facility. On a practical level, if a participant is interested in “respite” within a home setting, this would be covered as a “personal care service”.

Agency Response: *That is correct. The definition of respite has been narrowed, and services previously considered in-home respite will be covered under personal care.*

DSAAPD staff assuming case management duties may be familiar with the needs of persons with common physical disabilities and the elderly. However, DSAAPD staff may be less familiar with the specialized needs and services of the ABI population. Although SCPD is supportive of DSAAPD assuming case management duties, Council strongly recommends that DSAAPD commit to train all waiver case managers in the specialized needs and services related to the ABI population. DSAAPD should consider collaborating with DVR which has experience in this context. Moreover, SCPD recommends that DSAAPD require case managers working with individuals with ABI be formally trained as Certified Brain Injury Specialists (CBIS) - this could be achieved within a reasonable timeframe (e.g. 2 – 3 years). Otherwise, the consolidated waiver will be unresponsive to persons with ABI and people may be poorly evaluated.

Regarding respite care, SCPD recommends that a marketing/outreach plan be developed that will proactively inform waiver participants and family members that in-home respite is still available and will be covered under personal care. Anecdotal criticism of the waiver consolidation in this context suggests that many current waiver participants and/or family members believe that respite services will only be provided in institutional settings.

Agency Response: *DSAAPD has identified four case managers as well as one DSAAPD planner to be formally trained as Certified Brain Injury Specialists. Case managers who receive this specialized training will be responsible for providing case support for participants with brain injuries. DSAAPD is committed to making sure that its staff has the knowledge and skills necessary to appropriately respond to the unique needs of the ABI population.*

With regard to respite care, DSAAPD has incorporated outreach and information to current participants as part of its plans for the implementation of the waiver amendment. DSAAPD recognizes that the changes related to respite and personal care are most likely to cause confusion, and will be proactive in its communications to avoid unnecessary concern on the part of participants and their families.

4. Participant questionnaires/surveys will be used as part of the quality assurance process (pp. 24 and 137). This manifests respect for participants and merits endorsement.

Agency Response: *The endorsement is noted.*

SCPD recommends that the Division consider utilizing the format of surveys utilized by current waiver providers, JEVS and Easter Seals, since they have developed useful surveys which collect meaningful data.

Agency Response: *Participant questionnaires are in use for all waiver services at the present time. These questionnaires have been designed to collect information needed to ensure that participants are receiving high quality services. They have also been designed to be in compliance with all of the federally-required home and community-based waiver quality indicators.*

5. In Appendix B-1, Section a., Target Groups (p. 25), there is no “check-off” for “Brain Injury” as a subgroup. SCPD understands from the discussion with Lisa Bond at the June 21 SCPD meeting that CMS may have

suggested the lack of the "check-off". SCPD reiterates the observation since the omission is not intuitive.

Agency Response: *The designation in this section is presented based on instructions from CMS. The structure of the application template in this section lends to confusion with regard to the target population. There should be no ambiguity, however, with regard to the inclusion of persons with brain injury as part of the service population. Narrative is presented under "additional criteria" to highlight and clarify the fact that persons with acquired brain injury are included as part of the target population served the waiver.*

SCPD is still uncertain as to why CMS would have made this suggestion and once again reiterates the observation since the omission is not intuitive.

Agency Response: *DHSS agrees that the omission is not intuitive and reiterates that the problem is related to a limitation in the application form itself.*

The waiver application is a web-based electronic form. In the referenced section, the applicant is required to indicate a target group by selecting from a pre-established list using a "radio button." When a selection is made with a "radio button," represented by a dot in a circle, only one selection can be made from a list.

By law, waivers cannot serve more than one designated population group. The three designated groups are:

1) aged and/or disabled; 2) persons with mental retardation and/or developmental disabilities; 3) persons with serious mental illnesses. Persons with brain injury are a specially recognized "sub-group." They can be included in a general waiver (for example, an "aged and disabled" waiver) or can be served in a waiver exclusively designed for that population.

In the application form, "brain injury" is listed as a specialized sub-group. Based on instructions, "brain injury" should be selected from this list when waivers are designed specifically to serve that population as opposed to a broader population.

Again, narrative was included in the additional criteria section to clarify that persons with brain injury are included in the "aged and disabled" designation.

6. DHSS contemplates 1616 participants in years 1-5 of the waiver (pp. 28-29). DHSS is "reserving" 25 slots for individuals transitioning from nursing homes and 5 slots for young adults transitioning from the Children's Community Alternative Disability Program. The waiver contemplates admission of "all eligible persons" (p. 30). If oversubscribed, a waiting list based on a "first-come-first-served" approach would be established (p. 30).

Agency Response: *Based on past utilization patterns, we anticipate that a waiting list will not be needed during the five-year waiver period.*

7. DHSS ostensibly had the option of adopting a financial eligibility cap of 300% of the SSI Federal Benefit Rate (FBR). See Appendix B, "Medicaid Eligibility Groups Served in the Waiver" section (pp. 32-33). DHSS adopted a lower (250%) cap. From a consumer perspective, it would be preferable to adopt a higher income cap to encourage employment and promote implementation of the Ticket to Work legislation.

Agency Response: *The suggestion is noted. No changes to the cap are planned at this time.*

8. The minimum number of waiver services that an individual must require to be included in the waiver is "1" (p. 37). SCPD endorses this provision.

Agency Response: *The endorsement is noted.*

9. DHSS envisions using its standard "Long Term Care Assessment Tool" to determine whether an applicant meets the necessary nursing facility level of care (p. 38). This could prove problematic if the form is not adapted to identify limitations manifested by individuals with ABI.

Agency Response: *DHSS staff will consider this concern in reviewing the assessment tool.*

SCPD remains concerned that use of the standard "Long Term Care Assessment Tool" will be an invalid and unreliable tool for assessment of many individuals with ABI. Specialized assessment tools for ABI should be adopted and staff trained in their use. SCPD is reminded of DHSS use of its standard "long term care assessment tool" years ago when evaluating level of care of children for the Children's Community Alternative Disability Program. The form was not a valid tool for kids. It had a geriatric bias and did not adequately address mental health and cognition. SCPD predicts that use of a standard "Long Term Care Assessment Tool" for individuals with ABI

will prove equally deficient and result in many unjustified determinations of ineligibility. Apart from the assessment tool(s) for level of care, the ABI population may also benefit from use of specialized assessment tools to determine need for services.

Agency Response: *The specific concerns are noted and will be taken into consideration when reviewing the assessment tool. It should be pointed out that this tool has been used successfully to evaluate the level of care for applicants of the current Acquired Brain Injury Waiver, the Assisted Living Waiver, and the Elderly & Disabled Waiver as well as Delaware's long term care facilities. It includes a broad-based evaluation of physical, sensory and cognitive functions, among others, which may be salient in cases of brain injury. That being said, periodic reviews of such instruments should be conducted in such a way as to ensure that the care needs and functional deficits of sub-groups of the service population are being appropriately documented.*

10. The description of "adult day services" includes OT, PT, and ST (p. 49) and has 2 levels of service depending on need - "basic" and "enhanced". The standards are relatively liberal, i.e., the behavior justifying services need only occur weekly:

The service is reimbursed at two levels: the basic rate and the enhanced rate. The enhanced rate is authorized only when staff time is needed to care for participants who demonstrate ongoing behavioral patterns that require additional prompting and/or intervention. Such behaviors include those which might result from an acquired brain injury. The behavior and need for intervention must occur at least weekly.

Agency Response: *Standards will remain as presented. However, adjustments may be needed after utilization patterns have been established.*

SCPD recommends that the waiver include some provision for supported and competitive employment. In addition, DSAAPD should collaborate with DVR regarding pre-employment services. DVR's order of selection has resulted in hundreds of individuals being placed on a waiting list. DHSS should assess whether the waiver could include community-based adult day programs such as the TBI Clubhouse Model. Offering solely adult day care and facility-based adult habilitation is an outdated model. It would be preferable to include more robust vocational options for individuals who could benefit from something other than "day care". SCPD recommends that the waiver provide more flexibility which is not an exclusively facility based medical model that allows people to be able to utilize other community-based programs, including the TBI Clubhouse Model. If the objective of the waiver is to support people in the community and prevent deinstitutionalization, then community-based programs, meaningful employment and volunteer service should be encouraged.

Agency Response: *DHSS would be interested in exploring options for expanding and/or adjusting service options in this regard. DHSS would welcome the input of organizations such as SCPD in identifying participant needs and developing related options within the confines of waiver requirements and funding availability. An important aspect of the planning for such a service change would be to estimate costs and to secure funding. While such efforts could not be accomplished within the established timeframes for this waiver amendment, DHSS will consider the opportunities when planning for future enhancements.*

11. The description of "day habilitation service" (p. 50) also specifically mentions individuals with TBI:

Day Habilitation service is the assistance with the acquisition, retention, or improvement in self-help, socialization, and adaptive skills that take place in a non-residential setting separate from the participant's private residence. Activities and environments are designed to foster the acquisition of skills, appropriate behavior, greater independence, and personal choice. Meals provided as part of these services shall not constitute a "full nutritional regimen" (3 meals per day). Day habilitation services focus on enabling the participant to attain or maintain his or her maximum functional level and shall be coordinated with any physical, occupational, or speech therapies in the service plan. In addition, day habilitation services may serve to reinforce skills or lessons taught in other settings. This service is provided to participants who demonstrate a need based on cognitive, social and/or behavioral deficits such as those that may result from an acquired brain injury.

This description could be improved by including a reference to "reacquisition" of skills.

Agency Response: *A reference to the reacquisition of skills has been added to the definition.*

SCPD appreciates the inclusion of a reference to "reacquisition" of skills. In addition, SCPD recommends that the Division adopt reimbursement rates for adult habilitation sufficient to attract quality providers.

Agency Response: *Recommendation noted. Efforts are made to establish rates which are fair and*

appropriate for all of the waiver services.

12. DHSS specifies that “personal care” can be provided by the following: legally responsible person, relative, or legal guardian (p. 52). See also p. 69. This merits endorsement. However, DHSS later contradicts this authorization by reciting that “(a) representative of the participant cannot serve as a provider of personal attendant services for that participant” (p. 105). This restriction should be deleted. First, it would literally exclude anyone authorized to act on a participant’s behalf through guardianship, a power of attorney or advance health care directive. For persons in assisted living settings who lack competency, it would exclude the closest relatives. See Title 16 **Del.C.** §§1121(34) and 1122. For other participants, close relatives would be excluded given their authority under Title 16 **Del.C.** §2507(b)(2). Finally, the Social Security Administration regulations include a preference for relatives are representative payees. See 20 C.F.R. §404.2021. The exclusion of all such representatives as providers of personal attendant services is overbroad.

Agency Response: *The application has been clarified in response to your concern. The language now reads: “A person who serves as a representative of a participant for the purpose of directing personal care services cannot serve as a provider of personal attendant services for that participant.” A guardian, power of attorney, rep payee or any other person can serve as a provider of personal attendant services, but in those cases, another individual would need to act as representative for the more narrow purpose of directing the personal care. This separation, for example, would allow for two signatures on time sheets, one from the employer (the participant or his/her representative) and one from the employee. Note that the waiver allows for non-legal as well as legal representatives for purposes of directing personal care.*

13. DHSS requires all persons providing personal care to complete a training regimen in the absence of an emergency (App. C-1/C-3; p. 52). See also p. 71. This is ostensibly overbroad. For example, it is possible that a relative has been competently providing this service to a participant for years.

Agency Response: *It is understood that experience and skill levels will vary and this will be taken into consideration in the development of training standards.*

14. The service specifications for assisted living include 9 different levels of reimbursement depending on the participant’s needs (p. 56). This merits endorsement. It should facilitate continued residency in an assisted living setting since such facilities could rely on enhanced services to deter “dumping” to nursing homes.

Agency Response: *The endorsement is noted.*

15. The service specifications for “cognitive services” (p. 57) are critical for persons with ABI. The norm of 20 annual visits may be too restrained. Moreover, the criteria could be enhanced by including some forms of AT (e.g. biofeedback equipment) and also including OT and ST supports. For example, language development could be considered a component of “cognitive services”. SCPD recognizes that DME is separately covered under the heading of “specialized equipment and supplies” (p. 61). However, the service specifications for adult day services includes OT, PT, and ST supports (p. 49). By CMS regulation, OT, PT, and ST includes equipment used to facilitate the therapy. Thus, “DME” could be incorporated into other service specifications.

Agency Response: *With regard to the number visits, it is expected that a maximum of 20 visits per year will meet the needs of most participants. Note, however, that under the Waiver, DSAAPD case managers may authorize service request exceptions above that limit. With regard to assistive technology (AT) supports, DSAAPD staff will ensure that when such needs are documented, that those needs are reflected in an individual’s care plan. When applicable, AT supports would be paid for under the Medicaid State Plan. Those AT supports which are not reimbursable under the state plan could be covered under the Waiver as Specialized Equipment and Supplies.*

16. The list of providers of cognitive services (p. 58) omits licensed professional counselors of mental health (Title 24 **Del.C.** §3030). DHSS should consider whether to add a reference. It would also be appropriate to add “advanced practice nurse” [Title 24 **Del.C.** §1902(b)(1)].

Agency Response: *These are helpful suggestions that DHSS will research and consider for inclusion in the future amendments to the waiver.*

SCPD believes DHSS has the discretion to address this section as part of the amendment to the waiver. Council believes that the recommendation is fairly “benign” and is submitting the recommendation so it could be

included in this amendment to the waiver, not a future amendment.

Agency Response: *SCPD is correct that DHSS has the discretion to address this section as part of the amendment and acknowledges that the suggestions are good ones. Because of the nature of Medicaid waiver applications and operations, some changes that appear to be minor adjustments require a fair amount of research and forward planning, such as making changes to budgets, provider enrollment materials, quality review strategies, and claims payment systems. In addition, as part of the planning process, the State would need to recruit and enroll providers prior to project start-up. DHSS will certainly include these suggestions in planning for future amendments.*

17. The criteria for personal emergency response system (PERS) allows the participant to connect not only to a response center but also “other forms of assistance” (p. 59). This is preferable since some systems allow a participant to program the system to contact relatives, friends, neighbors, and 911 in sequence rather than an expensive and impersonal call center. However, the cost tables (pp. 160-161) appear to contemplate almost exclusive enrollment (740+ participants) in monthly monitoring services.

Agency Response: *This service alternative was added in response to SCPD’s recommendation during the waiver renewal process last year. DHSS is hopeful that the expanded emergency response definition will provide more options for participants and at the same time lead to cost savings in the Waiver program. After DHSS enrolls providers of non-monitored emergency response systems in the Waiver program and participants’ utilization patterns are established, the cost projections may need to be adjusted accordingly.*

18. DHSS may wish to consider requiring maintenance of service plans beyond the minimum 3 years (App. D-1; p. 86).

Agency Response: *The referenced language is part of the application template and cannot be changed by the applicant. In actuality, plans are maintained for a longer period of time.*

SCPD is dubious that DHSS would not have discretion to include a longer timeframe in the template. Therefore, Council continues to recommend requiring maintenance of service plans beyond the minimum 3 years.

Agency Response: *While DHSS understands and appreciates SCPD’s request that a higher standard be included in this section, we respectfully state again that the applicant is not able to edit that information on the application form. It is a web-based application with various form fields that the applicant must fill in. Some form fields are text boxes which enable an applicant to include narrative, some are radio buttons, and some are check boxes. Applicants have no access to the written material on the application form other than in the designated form fields. In this case, the applicant’s response is indicated in a check box. Specifically, this section, the application reads:*

Maintenance of Service Plan Forms. Written copies or electronic facsimiles of service plans are maintained for a minimum period of 3 years as required by 45 CFR §92.42. Service plans are maintained by the following (check each that applies):

- Medicaid agency
- Operating agency
- Case manager
- Other

Specify:

The applicant’s only allowable response is to fill in one or more check boxes related to the location of service plans.

19. DHSS contemplates a minimum of 4 contacts annually (2 contacts from a case manager and 2 contacts from nurse) with each participant (p. 88). This standard is arguably too infrequent.

Agency Response: *This minimum standard is established so that in times of critical staff shortages (such as those that might occur during a spending or hiring freeze), the state would not be out of compliance with waiver requirements.*

SCPD believes that adopting this minimum standard so the state would not be out of compliance with the regulations is not acceptable. It also infers that during times of economic restraint, case manager support positions would not be filled which would negatively affect case management levels. SCPD recommends that DHSS contact OMB and solicit agreement that waiver case management support positions will be filled even during hiring freezes so the safety of individuals with disabilities and the elderly who use these waiver services is not jeopardized.

Agency Response: *DHSS will engage in research to determine best practices in this regard and will develop operational procedures that are consistent with these standards.*

20. In the “fixing individual problems” section (p. 100), it would be preferable to include a reference to involving the participant in the resolution of the concern.

Agency Response: *In this section, fixing individual problems does not typically refer to fixing an individual’s problem, but rather, fixing a single-occurrence or isolated administrative problem (as opposed to a systemic one). This language is used as part of the application template.*

21. The DHSS table for participant direction of services contemplates 0 participants directing their own services in year 1 of the waiver (App. E-1; p. 111). This should be reconsidered. DHSS envisions 1616 waiver participants in year 1 (p. 156).

Agency Response: *The E&D Waiver is currently approved for a five-year period beginning 7-1-09. This amendment has an effective date of 12-1-10, which is five months into Year 2 of the approved waiver period. Because Year 1 of the waiver concluded on 6-3-10, the table correctly indicates that no participants self-directed services during that period.*

22. In the sections on grievances, critical events, and quality assurance, DHSS may wish to consider adding a reference to CLASI. CLASI is mentioned on p. 115 as a resource in the context of fair hearings. See, e.g., Title 16 Del.C. §§1102(7), 1134(e)(f)(g), and 1119C(b) [applicable to nursing and assisted living facilities].

Agency Response: *This section of the application was not addressed as part of the amendment. The suggestion will be kept on file for future reference.*

SCPD believes DHSS has the discretion to address this section as part of the amendment to the waiver. Council believes that the recommendation is fairly “benign” and is submitting the recommendation so it could be included in this amendment to the waiver, not a future amendment.

Agency Response: *DHSS will look into ways that CLASI could be a resource in the specific areas referenced in this section.*

23. There are several references to the Ombudsman and DLTCRP in the quality assurance context. However, the references uniformly limit the Ombudsman to “non-abuse related complaints”. See, e.g., pp. 117 and 120. To the contrary, the Ombudsman is statutorily required to address abuse and neglect concerns. See Title 16 Del.C. §1152(1)(5). Although DHSS has attempted to eschew this responsibility through an MOU, the validity of the MOU could be questioned.

Agency Response: *This section of the application was not addressed as part of the amendment. The comment will be kept on file for future reference.*

SCPD believes DHSS has the discretion to address this section as part of the amendment to the waiver. Council believes that the recommendation is important and is submitting the recommendation so it could be included in this amendment to the waiver, not a future amendment.

Agency Response: *SCPD is correct that DHSS has the discretion to address this section as part of the amendment. In order to focus on the major issues at hand, however, a decision was made to not open all sections of the application for revision and review during this amendment process. It is expected that this section will be researched and addressed with the next amendment.*

24. Appendix G-2 (pp. 122 and 123) recites that “the State does not permit or prohibits the use of restraints or seclusion.” Although Council would prefer that this were accurate, the statement is inconsistent with Title 16 **Del.C. § 1121(7)** and 16 **DE Admin. Code** Part 3201, §6.3.8.4.

Agency Response: *This section of the application was not addressed as part of the amendment. The*

comment will be kept on file for future reference.

SCPD believes DHSS has the discretion to address this section as part of the amendment to the waiver. Council believes that the recommendation is fairly "benign" and is submitting the recommendation so it could be included in this amendment to the waiver, not a future amendment.

Agency Response: *SCPD is correct that DHSS has the discretion to address this section as part of the amendment. In order to focus on the major issues at hand, however, a decision was made to not open all sections of the application for revision and review during this amendment process. It is expected that this section will be researched and addressed with the next amendment.*

25. The "medication administration" section (p. 126) is underinclusive. It refers to an exception to the Nurse Practice Act for assistance with medications by persons who have completed a training course. However, it fails to include a reference to Title 24 **Del.C.** §1921(19) or §1921(4); and 24 **DE Admin. Code**, Part 1900, §§7.7.1.4 and 7.9. Competent individuals can generally delegate administration of medications to personal attendants.

Agency Response: *The referenced section of the application pertains only to the administration of medication in licensed assisted living facilities.*

SCPD reviewed this section and believes that it is not clear that it literally refers only to the administration of medication in licensed AL facilities. DHSS may want to clarify that it only applies to AL facilities.

Agency Response: *SCPD is correct that the section does not literally refer only to licensed AL facilities. However, for practical purposes, assisted living (which is provided in licensed assisted living facilities) is the only services in the waiver to which this section is applicable. Specifically, the instructions 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 personal residences or in the home of a family member.

26. The reimbursement rate for personal care is listed as \$7.09 per 15-minute unit (e.g. \$28.36/hr.). The reimbursement rate for respite is listed as \$6.91 per 15-minute unit (e.g. 27.34/hr.). See p. 159. Clarification would be appropriate. Council does not believe that non-agency personal attendants and respite providers are paid at these rates.

Agency Response: *Personal care costs for Year 1 are estimates based on home health agency rates. The cost estimates in subsequent years are reduced significantly to account for the fact that personal care providers may include home health agencies, personal assistance services agencies (PASA), and personal attendants.*

27. Consistent with discussions with DSAAPD, personal care service specifications provide a guideline of 25 hours per week, but that there are not necessarily any service limits. SCPD continues to recommend that the 25 hour guideline be deleted.

Agency Response: *The application itself does not specify service limits with regard to personal care. We will consider your comments when developing personal care service authorization guidelines.*

SCPD would like to be included the development of the personal care service authorization guidelines.

Agency Response: *DHSS appreciates SCPD's offer to assist and will be in contact about this process.*

28. SCPD recommends more frequent assessment of waiver implementation, especially during the initial 12 months of implementation after December 1, 2010. Since waiver amendments can be submitted at any time, frequent data collection and assessments are critical to determine the emerging needs of participants in the waiver. For example, regular reports to the SCPD Brain Injury Committee (BIC) and/or SCPD would be appropriate. If monthly data were compiled, this information could be shared with the SCPD to facilitate review.

In addition, SCPD recommends that DHSS disaggregate the data collection/satisfaction survey responses for people with ABI because there could be an example in which, overall, people in the new consolidated waiver are very satisfied. However, there could be a subset of people with ABI in the consolidated waiver who are 100 dissatisfied and the overall survey of participants would not capture this data. Quality assurance methodology

needs to capture useful and meaningful data.

Agency Response: *DHSS is interested in gaining information about the quality of care provided to individuals under the waiver and is willing to consider ways to aggregate and report on these data to make them as meaningful as possible. However, it is important to keep in mind that DHSS has certain reporting obligations under the waiver, and data are developed and maintained in timeframes and in a manner consistent with those requirements. That being said, DHSS shares with SCPD an interest in ensuring that the needs of persons with ABI are not overshadowed in the process of creating programmatic efficiencies through the consolidation of waiver programs.*

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the August 2010 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation related to amending the Elderly and Disabled Waiver by combining three existing §1915(c) Home and Community-Based Services waivers - Elderly and Disabled, Assisted Living and Acquired Brain Injury - into one waiver is adopted and shall be final effective October 10, 2010.

Rita M. Landgraf, Secretary, DHSS

* **Please Note: The application is available in PDF format at the following link:**

[http://regulations.delaware.gov/register/august2010/proposed/1915\(c\).pdf](http://regulations.delaware.gov/register/august2010/proposed/1915(c).pdf) 1915(c).pdf

14 DE Reg. 461 (11/01/10) (Final)