

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

Concurrent Hospice Care for Children Under Age 21 Years

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Title XIX Medicaid State Plan regarding *concurrent hospice care for children under age 21 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 September 2011 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by September 30, 2011 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 amend the Title XIX Medicaid State Plan regarding election of hospice services for children under age 21 years.

Statutory Authority

- Patient Protection and Affordable Care Act (Pub. L. No. 111-148 as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152)), together known as the Affordable Care Act
- 1905(o)(1) of the Social Security Act, *Hospice care*
- 2110(a)(23) of the Social Security Act, *Hospice Care*

Background

Specifically, this regulatory action provides for the mandatory implementation of section 2302 of the Affordable Care Act, entitled “Concurrent Care for Children.” Section 2302 of the law amends sections 1905(o)(1) and 2110(a)(23) of the Social Security Act to remove the prohibition of receiving curative treatment upon the election of the hospice benefit by or on behalf of a Medicaid or Children’s Health Insurance Program (CHIP) eligible child.

Hospice services are covered under the Medicaid and CHIP programs as an optional benefit. However, the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provision requires Medicaid and CHIP programs operating as Medicaid expansions to provide all medically necessary services, including hospice services, to children under age 21. In order to qualify for the hospice service in either Medicaid or CHIP, a physician must certify that the eligible person is within the last 6 months of life.

The Affordable Care Act does not change the criteria for receiving hospice services; however, prior to enactment of the new law, curative treatment of the terminal illness ceased upon election of the hospice benefit. This new provision requires States to make hospice services available to children eligible for Medicaid and children eligible for Medicaid-expansion CHIP programs without forgoing any other service to which the child is entitled under Medicaid for treatment of the terminal condition. These services and supports may include pain and symptom management and family counseling provided by specially-trained hospice staff. Implementation of this new provision is vitally important for children and their families seeking a blended package of curative and palliative services.

States are required to comply with these requirements in advance of amending their state plans.

This provision was effective upon enactment of the Affordable Care Act on March 23, 2010 and is subject to approval by the Centers for Medicare and Medicaid Services (CMS).

Summary of Proposal

While the State already covers this service, the State plan is amended in accordance with the provisions of Section 2302 of the Affordable Care Act. This provision allows hospice care to be available to recipients under age 21 without forgoing any other medically necessary curative services to which the child is entitled under Medicaid or the Delaware Healthy Children Program. Attachment 3.1-A is amended by establishing hospice care for children concurrent with curative treatment of the child’s terminal illness.

The Affordable Care Act (ACA) does not change the eligibility criteria for receiving hospice care. The ACA only removes the prohibition of receiving curative treatment upon the election of the hospice benefit.

Please note that States, like Delaware that currently cover hospice services in its CHIP program do not need to submit a State Plan amendment (SPA) to modify the hospice definition, but States are expected to implement these services in compliance with the Affordable Care Act. Hospice policy of the Delaware Healthy Children Program will remain consistent with Medicaid hospice policy.

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

Fiscal Impact

The proposed amendment imposes no increase in costs on the General Fund.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The Governor’s Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows.

GACEC and SCPD endorse the proposed regulation and have the following observations.

As background, there was an historical anomaly in provision of hospice care to individuals under age 21 under both the Medicaid and CHIP programs. If parents elected to obtain hospice services for a child, the child became categorically ineligible for “cure-directed” treatment. The federal Patient Protection and Affordable Health Care Act removed this “one or the other” approach so that a parent does not have to forego all curative treatment as a condition of a child receiving hospice services. DMMA is now implementing the new law through a Medicaid State Plan amendment. DMMA has also agreed to implement the new law in the CHIP program.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the September 2011 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Title XIX Medicaid State Plan regarding *concurrent hospice care for children under age 21 years* is adopted and shall be final effective November 10, 2011.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATION #11-48

REVISION:

Revision: HCFA-PM-86-20 (BERC)
SEPTEMBER 1986

ATTACHMENT 3.1-A
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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: Delaware

AMOUNT, DURATION AND SCOPE OF MEDICAL AND REMEDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

18. Hospice care (in accordance with section 1905(o) of the Act).

- | | | | | | |
|-------------------------------------|-------------------|--------------------------|----------------|-------------------------------------|--|
| <input checked="" type="checkbox"/> | Provided: | <input type="checkbox"/> | No limitations | <input checked="" type="checkbox"/> | <u>Provided in accordance with section 2302 of the Affordable Care Act</u> |
| <input type="checkbox"/> | With limitations* | <input type="checkbox"/> | Not provided. | | |

*Description provided on attachment.
15 DE Reg. 661 (11/01/11) (Final)