

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(i) Home and Community-Based Services Waiver Renewal Application

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) / Division of Developmental Disabilities Services (DDDS) initiated proceedings to notify the public that a 1915(c) Home and Community-Based Services Waiver (HCBS) waiver renewal application has been submitted to the Centers for Medicare and Medicaid Services (CMS). 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 April 2014 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by April 30, 2014 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 Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Services (DMMA)/Division of Developmental Disabilities Services (DDDS) has submitted a 1915(c) Home and Community-Based Services (HCBS) Waiver renewal application to the Centers for Medicare and Medicaid Services (CMS).

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*
- 42 CFR §447.205, *Public Notice of Changes in Statewide Methods and Standards for Setting Payment Rates*

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 waiver to provide home and community-based services to developmentally disabled adults was developed by the Division of Developmental Disabilities Services (DDDS) and the Division of Social Services (DSS) in 1982, received approval from the Center for Medicare and Medicaid Services (CMS), and became effective on July 1, 1983. The waiver includes support services necessary to maintain individuals in the community as an alternative to institutionalization. The cost of the Home and Community-Based Services Waiver for the Developmentally Disabled (HCBS/DD) shall not exceed the cost of care of the Intermediate Care Facility for the Developmentally Disabled (ICF/DD).

DDDS is the agency that has primary responsibility for administering the HCBS/DD waiver as well as providing, or contracting for the provision of, most of the services. Providers of Pre-Vocational Training, Supported Employment and Residential Habilitation services are certified by DDDS and contract directly with the Delaware Medical Assistance Program (DMAP).

Summary of Proposal

Pursuant to the public notice requirements of section 1902(a)(13)(A) of the Social Security Act, 42 CFR 447.205, 42 CFR 441.304 and Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services/Division of Medicaid and Medical Assistance/Division of Developmental Disabilities Services (DHSS/DMMA/DDDS) is seeking public comments on the 1915(c) Home and Community-Based Services (HCBS) Waiver renewal application. The current waiver expires on June 30, 2014 and must be renewed every five (5) years.

Draft of Proposed Waiver Renewal Application

A draft of Delaware's waiver renewal application and a summary of proposed changes are currently available for review on the Division of Developmental Disabilities Services website at

<http://www.dhss.delaware.gov/ddds/>.

The provisions of this waiver renewal application 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

The Delaware Developmental Disabilities Council (DDDC), 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. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

DDDC - March 10, 2014 Letter and GACEC and SCPD - March 12, 2014 Memorandum

The Delaware Developmental Disabilities Council (DDDC) and the State Council for Persons with Disabilities (SCPD) have reviewed the Department of Health and Social Services/Division of Developmental Disabilities Services' (DDDS) application to CMS for a §1915(c) Home and Community-Based Services Waiver.

On February 28, 2014, the Division of Developmental Disabilities Services forwarded a notice to the DD Council and other agencies that its draft waiver renewal was available for review on its website. We are providing the following analysis of the document. Given time constraints, this critique should be considered preliminary and non-exhaustive. Parenthetically, since the notice recites that DDDS intends to submit its application to CMS "not later than the end of the week of March 10th", the DD Council is sending these comments for consideration.

Agency Response Note: Thank you for your thoughtful comments on the renewal application for the DDDS HCBS Medicaid Waiver on behalf of DDDC and SCPD (The Council). With regard to your specific comments, please note that each "Agency Response" provided below was developed and prepared by the Division of Developmental Disabilities Services (DDDS).

1. Preliminarily, the Council would like to express concern with the truncated opportunity for comment. The "Public Input" section (p. 8) recites that DDDS will publish notice of the renewal in the Register of Regulations and establish a 30-day comment period. In contrast, no notice has appeared in the Register of Regulations and the February 28 notice emailed to the DD Council offers only a 2-week comment period since DDDS plans to submit its application during the week of March 10. In practice, DHSS submits its proposed waivers to the Register with at least a 30-day comment period. Compare 17 Del. Reg. 156 (August 1, 2013); 17 DE Reg 688 (January 1, 2014); and 17 DE Reg. 930 (March 1, 2014).

Agency Response: The public will have additional opportunities to comment before the waiver renewal is finalized. Notice regarding the waiver renewal appeared in the April 1, 2014 issue of the Delaware Register of Regulations and allows for the full thirty (30) day comment period. The completion of the waiver renewal document was delayed and in order to allow sufficient time for the Centers for Medicare and Medicaid Services (CMS) review and for public comment; those processes are running concurrently.

2. Delaware DHSS has included participant direction into its recent waiver initiatives, including personal care/ attendant services in both the "Pathways to Employment" waiver [17 DE Reg. 688 (January 1, 2014) and the Diamond State Health Plan Plus waiver [16 DE Reg. 1140 (May 1, 2013)]. CMS explicitly encourages states to include participant direction in their waivers:

CMS urges states to afford all waiver participants the opportunity to direct their services. Participant direction of services includes the participant exercising decision-making authority over workers who provide services, a participant-managed budget or both. CMS will confer the Independence Plus designation when the waiver evidences a strong commitment to participant direction.

At 91. The first explicit objective for the DDDS waiver is to "(p)romote independence for individuals enrolled in the waiver...". At 4.

In contrast, DHSS certifies (p. 90) that "(t)his waiver does not provide participant direction opportunities." This rejection of participant direction opportunities is reiterated throughout the document. See, e.g., pp. 5, 41, and 43.

The rejection of participant direction opportunities is an anachronism.

Agency Response: At the present time, DDDS does not have the infrastructure to support participant directed services.

3. The DDDS eligibility regulation [16 DE Admin Code 2100] includes individuals with brain injury. In contrast, the

waiver contains zero (0) references to brain injury. It explicitly covers (p. 20) persons with intellectual developmental disability, autism spectrum disorder, and Prader Willi Syndrome. This may be cause for alarm, particularly among proponents of services for individuals with brain injury who are being manifestly omitted from waiver coverage.

Agency Response: The criteria in the waiver renewal application do not specifically reference individuals with brain injury, but they are nevertheless included in the waiver target group. The waiver application references the DDDS eligibility criteria as one of the criteria for waiver eligibility. The current DDDS eligibility criteria refer to "mental retardation" and "brain injury". DDDS is in the process of revising its division eligibility to replace the term "mental retardation" with "intellectual disability". The proposed terminology in the proposed DDDS eligibility criteria of "intellectual disability" encompasses individuals with brain injury (if it occurred within the developmental period) if they also meet functional limitations as specified in the DDDS criteria. It is our hope that the proposed DDDS eligibility criteria will be in effect before the effective date of the waiver renewal on July 1, 2014 so that the language will be consistent. Because several other groups and individuals raised this same concern, DDDS will ask CMS to add the term "brain injury" to the waiver application to make it clear that this population is included.

4. DDDS proposes (p. 20) no upper or maximum age limit for participants. However, although the current waiver covers children ages 4 and up, DDDS proposes (pp. 1 and 20) to restrict eligibility to children age 12 and older. This is objectionable and short-sighted for several reasons.

A. Historically, DDDS has offered shared living/foster care for children with families with special interest and expertise in caring for individuals with developmental disabilities. If approved, DDDS could no longer pay for this service on behalf of children under age 12 with the federally subsidized waiver funds.

B. The attached DDDS enabling statute [Title 29 Del.C. §7909A] imposes a "duty" to provide "foster care placements", "neighborhood homes", and "supported living" without any exclusions based on age. In the absence of a statutory authorization to discriminate based on age, DDDS cannot limit its services to certain age groups without violating the Age Discrimination Act and its implementing regulations. When the Division adopted a policy of excluding minors from its group home system in the past, it was "prompted" to settle an HHS OCR complaint by rescinding the policy. See attachments. Cf. attached OCR directive to Division of Public Health that presumptive age limit for nursing home admission violates Age Discrimination Act and attached DSAAPD letter to DFS successfully challenging age limit on foster parents based on Age Discrimination Act. If CMS approves the age restriction in the waiver, DDDS will still have to provide residential and other waiver services to children under age 12. It will simply have to do so with no federal Medicaid match.

C. The DDDS enabling statute [§7909(c)(4)] requires DDDS to provide early intervention services to children ages 0-3. Early intervention services under the DHSS implementation of IDEA-Part C include a lengthy list of supports and services. See, e.g. Title 16 Del.C. §212. Moreover, some children with developmental disabilities are eligible for IDEA-Part B at birth. The Interagency Collaborative Team (ICT) [Title 14 Del.C. §3124] could prompt DDDS to provide residential programming to such children. If the children are ineligible for the waiver based on age, DDDS will have to provide residential services solely with state funds.

D. In the past, DDDS investigated systemic neglect of young children with developmental disabilities in a nursing facility (Harbor Health). See attached News Journal articles. The availability of waiver-funded residential options on an emergency basis would be an important resource if such a situation recurred. If the Division "ties its hands" by excluding pre-teens from the waiver, it loses capacity to address this type of situation.

Agency Response: As referenced in the waiver application, DDDS has used Medicaid claims data to verify that no one under the age of twelve (12) has ever received a DDDS waiver service. Based on the services included in the waiver benefit package, it is not designed for children. The DDDS eligibility criteria still allow the division to serve individuals age four (4) and above as part of its state mandate if they otherwise meet the DDDS eligibility criteria. The citation from the Delaware Code referenced by the Council only relates to services provided by the Division using state funds and does not govern services provided under a federal Medicaid waiver. So-called "Comprehensive" Medicaid HCBS waivers, such as the DDDS Waiver, are commonly limited by age. The early intervention services referred to by the Council are provided by the Division of Public Health (DPH) and the Birth to Three programs in the Division of Management Services (DMS) and not by DDDS. The department is in the process of requesting an amendment to the statute to correct the operating responsibility for this program.

5. Although the waiver document (p. 69) generally suggests that the "State does not impose a limit on the amount of waiver services", the State imposes (pp. 55-56) an absolute weekly cap of forty (40) hours on supported living. The effect will be "creaming", i.e., only individuals with modest to mild needs will be able to live in supported apartments or their own homes since support services are capped. Perhaps this is why DDDS projects 825 waiver participants in group homes and only thirty (30) participants in supported living in the first year of implementation. See pp. 148-149. The absolute cap on supported living undermines "choice" and the recently published CMS policy preference for provision of waiver services in integrated settings [79 Fed. Reg. 2948 (January 16, 2014)]. The revised CMS regulation [42 C.F.R. 441.745; 79 Fed Reg at 3038] recites that "a State may not limit access to services based upon....the cost of services."

Agency Response: The response to the waiver section indicating whether the State proposes to place additional limits on waiver services, except as provided in Appendix C, is correct. There are no proposed limits other than those imposed in Appendix C. Supported Living is the only service for which a limit in the number of units a member can receive is specified. Limits on individual services are allowed by CMS. The limit proposed for Supported Living is based on the amount of

support currently received by individuals paid for by DDDS with State funds. No individual currently receives more than thirty-five (35) hours per week and the majority of the individuals receive fifteen (15) hours. The number of projected waiver members receiving this service is also based on the individuals currently receiving this service and how many of them are likely to meet waiver eligibility rules.

6. The waiver document recites that shared living providers offer residential habilitation services and "are paid at the Medicaid rate for the hours of support they provide up to a maximum of the support hours indicated by the member's ICAP score." At p. 139. It is unclear if there is an absolute cap on payment under the ICAP system. If there is a cap, this may limit "choice" and the ability of high-need individuals to avoid institutional placement.

Agency Response: The Inventory for Client and Agency Planning (ICAP) is an assessment instrument that assists agencies such as DDDS in determining the support needs of individuals with intellectual developmental disabilities. The assessment scores are translated into a recommended number of support hours per day for each client. The number of support hours is then multiplied by the hourly rate that is applicable to each waiver service. For residential habilitation providers, this computation results in a per diem payment arrangement (ICAP hours x hourly rate). The limit of ICAP hours per day is twenty-four (24) if the client is supported in a 1:1 arrangement. The hourly rates for residential habilitation were developed independent of the ICAP assessments. States use different assessment tools to determine the level of direct support needed for each client.

7. The waiver document (p. 59) contains the following description of neighborhood group homes: "Each resident must have their own bedroom unless they express a preference to share a room". This is of questionable accuracy. The DDDS neighborhood regulation [16 DE Admin Code 3310, §8.0] does not contain such a standard. Parenthetically, private rooms must be an available option in waivers based on a participant's choice. See 79 Fed Reg at 2964.

Agency Response: DDDS does not believe that there is a conflict. This language in the waiver application communicates DDDS's expectations for waiver recipients who reside in Neighborhood Group Homes. The Division of Long Term Care Residents Protection (DLTCRP) regulations govern all facilities in Delaware that are licensed as Neighborhood Homes for Persons with Developmental Disabilities. Not all residents of neighborhood homes are enrolled in the DDDS HCBS waiver. The statement in the waiver only applies to waiver members.

8. The waiver document authorizes relatives to serve as providers of both "shared living" and "supported living" services. See pp. 2, 55-56 and 61. The CMS templates allows the State to authorize "guardians" to serve as providers as well. Id. However, DHSS has rejected this option. Id. This is unfortunate for several reasons.

A. Other DHSS programs do not bar provision of services by guardians. DDDS has suggested that, in the common situation in which parents are co-guardians of an adult child, a Chancery Court petition could be filed to remove one parent as guardian so the "removed" parent could qualify as a waiver service provider. This is a rather byzantine approach.

B. DDDS has experienced great difficulty in promoting relatives to petition for guardianship when necessary. The exclusion of guardians from serving as waiver providers will simply provide an additional disincentive to relatives considering pursuit of guardianship.

C. One of the purposes of the waiver is to "promote the engagement of family ...supports whenever possible." At p. 4. This objective is undermined by the ban on guardian providers.

Agency Response: By making this change, DDDS is opening the opportunity for family members to become Shared Living Providers for the first time in this waiver. The CMS Technical Guide, states "*When payments are to be made to a legal guardian, the waiver should include safeguards for determining that the provision of services by a legal guardian are in the best interest of the waiver participant, especially when the legal guardian exercises decision making authority on behalf of the participant in the selection of waiver providers*". DDDS believes that it does not have sufficient infrastructure to guarantee sufficient safeguards for the waiver participant at this time. Once this current change has been approved by CMS, DDDS is willing to work with family members who are guardians and would like to become Share Living Providers to create safeguards to comply with CMS expectations and amend the waiver in the future.

9. It is our belief that DDDS has approved a parent to serve as a prevocational service provider. The waiver document would apparently disallow any relative from serving as a prevocational provider since the "check-off" for relatives is blank. See p. 43. Likewise, a relative could not provide individual supported employment. See p. 49.

Agency Response: For each waiver service, DDDS must indicate whether the service is "provider managed" or "participant directed". For the Pre-vocational Service, DDDS has indicated that the service will be provider managed. Agencies that provide this service may hire any individual to provide the direct support as long as they meet the hiring qualifications, such as training or education, possession of a valid driver's license and the criminal background check, etc. Agencies are not prohibited from hiring relatives of waiver members if they otherwise meet all applicable qualifications. Under the arrangement described above, the box for "Relatives" should not be checked for Prevocational Service in the waiver application.

10. The qualifications for a DDDS case manager are "meager". See p. 70. A high school diploma is not even necessary.

Agency Response: The qualifications for the DDDS case managers are the qualifications for the State of Delaware Merit System classification of Senior Social Worker/Case Manager. Qualifications for all State Merit classifications are developed by the Delaware Office of Management and Budget. In addition to the minimum qualifications, case managers must receive a core curriculum of training as specified in DDDS policy after they are hired.

11. Although there is one outlier reference to diversion from a nursing facility, the waiver generally adopts an ICF/IID level of care standard. See pp. 3, 20, 31, and 147. Since some waiver participants could lack an intellectual disability (e.g. DDDS autism eligibility regulation does not require intellectual deficit), the State could consider multiple level of care settings for inclusion in the waiver. For example, the attached December, 2013 DDDS census report lists 37 DDDS clients in nursing homes.

Agency Response: This waiver is designed to meet the needs of individuals with an intellectual developmental disability. Therefore, the institutional standard for which the home and community based services offered under this waiver are provided "in lieu of" is the ICF/IID level of care and not a nursing facility level of care. The thirty-seven (37) individuals listed on the DDDS census report that are indicated as residing in nursing facilities are individuals that have been determined to have an intellectual disability as a result of a pre-admission screen (a PASRR Pre-Admission Screening and Resident Review Level 2 screen) and have been determined to need "specialized services" to address their disability. Per OBRA 1987, DDDS is the designated DD authority and is required to provide the specialized services these individuals need. These individuals are eligible for nursing facility services which are provided by a managed care organization under the 1115 waiver in Delaware. Per the terms and conditions of the 1115 waiver, individuals cannot be simultaneously enrolled in the 1115 waiver (which includes the Diamond State Health Plan Plus Long Term Care benefits) and the DDDS waiver. Furthermore, states are prohibited from providing waiver services to a person who resides in an institution per 42 CFR 441.301(b)(1)(i) (see citation below)

(b) If the agency furnishes home and community-based services, as defined in §440.180 of this subchapter, under a waiver granted under this subpart, the waiver request must-

(1) Provide that the services are furnished-

(ii) Only to beneficiaries who are not inpatients of a hospital, NF, or ICF/IID;

12. The waiver document contains multiple recitals that the waiver will limit services to participants to those "not otherwise available to the individual through a local educational agency under the Individuals with Disabilities Education Act (IDEA)..." See pp. 7, 47, and 49. This may contravene federal law. See attachments. See also 34 C.F.R. §303.222.

Agency Response: Per the CMS technical assistance guide, states are required to include the language in question in HCBS waiver applications that include certain statutory services. Language at 42 CFR 440.180 (a)(3)(i) and (ii) contain this prohibition against covering services under a waiver that could otherwise be covered via IDEA or the Rehabilitation Act. The waiver language does not contravene federal law but is instead in compliance with the law as it applies to all HCBS waivers under Section 1915(c). The regulatory language is excerpted below:

(3) Services not included. The following services may not be included as habilitation services:

(i) Special education and related services (as defined in sections 602(16) and (17) of the Education of the Handicapped Act) (20 U.S.C.1401 (16) and (17)) that are otherwise available to the individual through a local educational agency.

(ii) Vocational rehabilitation services that are otherwise available to the individual through a program funded under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. 730).

13. The section on restraints (pp. 100 and 103) is not entirely accurate. It recites that the sole standard applied by providers is "Mandt" protocols which limit personal restraints to "the one and two person side body hug and the one and two arm supporting technique." In practice, DDDS has recently authorized some providers (e.g. AdvoServ) to use non-Mandt approved "supine" restraint.

Agency Response: Appendix G-2 b. i. of the waiver application indicates that "All contracted providers are required to participate in the Mandt system crisis intervention training or a DDDS approved equivalent." The language referenced by The Council in Appendix G-2 a. i. "Permitted planned personal restraints are limited to the one and two person side body hug and the one and two are supporting technique as described in the Mandt protocol" should have included the additional statement, "or other equivalent procedures and protocols approved by the Division." DDDS will ask CMS for permission to revise this language in the waiver application.

14. The description of case manager activities in connection with ELP development (pp. 71-72) appears to be either inflated or hortatory. The document describes robust pre-planning activities beginning months prior to the actual ELP meeting.

Agency Response: The process described in the waiver renewal application is one that has been under development in the Essential Lifestyle Plan (ELP) Committee for several months and is in the process of being tested. The plan is to implement the new process in July 2014, concurrent with the effective date of the renewal application.

15. The waiver previously included reporting to CMS on the offer of choice between institutional and waiver services. DDDS proposes to delete the reporting while continuing to "track" data. See pp. 2 and 6. This is unfortunate since the election is "key" to a central purpose of the waiver, i.e., to divert individuals from institutions. It would be preferable to maintain data reporting to CMS in this context.

Agency Response: The requirement for states to offer choice between an institutional or community setting for waiver enrollees is still a requirement under CFR 441.302(d)(2). New guidance issued by CMS in July 2013 regarding quality

performance measures that must be reported to CMS on the annual "372" report has removed this measure. DDDS will continue to document that this choice is offered to all waiver applicants.

16. CMS requires the State to project the number of participants in the waiver. See 42 C.F.R. 441.745 amended by 79 Fed Reg. 2948, 3038 (January 16, 2014). The reported authorized number of participants in the waiver may be too low. In year 1, DDDS envisions 1,000 participants. See pp. 22-23 and 147. We assume this covers the period from July 1, 2014 to June 30, 2015. In contrast, the attached DDDS December, 2013 monthly census report lists 992 clients already receiving community-based residential services. I suspect this number will exceed 1,000 prior to the inception of the waiver.

Agency Response: The counts of individuals reported on the DDDS monthly census report as residing in a DDDS community residential placement includes individuals that are not enrolled in the DDDS waiver for which DDDS pays for their care with 100% state general funds. All individuals in the Emergency and High Risk categories on the DDDS Registry who apply for the waiver are screened against the waiver financial eligibility criteria. There is both an income and a resource limit. Some individuals do not meet the waiver income or resource limits, most often because they are receiving Social Security survivor's benefits in excess of the waiver income limit. The Governor and the Legislature have been most generous in appropriating funds each year that enable DDDS to serve these individuals in addition to those individuals who are eligible for the DDDS HCBS waiver. As of January 2014, there were 941 individuals receiving services under the DDDS waiver.

17. The waiver contains "quality" measures which focus on "safety" and absence of abuse/neglect. See pp. 112-119. The waiver would benefit from some measures assessing satisfaction with services and quality of life.

Agency Response: After several years of not participating, DDDS has resumed its participation in the National Core Indicators (NCI) project. The annual surveys have been sent to waiver members and the responses are beginning to be received. It is DDDS's plan to include measures from NCI in the waiver in the future, after benchmarks can be established for the measures.

18. DHSS may need to amend its HCBS waiver standards to include safeguards related to leases and protection from eviction. See 42 C.F.R. §441.530 [revised by 79 Fed. Reg. 3032 (January 16, 2014)] and commentary at 79 Fed Reg 2960-61.

Agency Response: The new rules become effective March 17, 2014 and apply to new waivers, amendments and renewals which are submitted after that date. The DDDS waiver renewal was submitted to CMS on March 12, 2014 and will not initially be subject to the rule but will be given the opportunity to come into compliance in the future. DDDS will need to undergo a complete assessment of its service system in order to develop a plan to come into compliance with the new rule that will address this in addition to the other requirements.

19. The waiver document (p. 25) contains a countable income cap of 250% of the SSI Federal Benefit Rate (FBR). The State could have elected a "300%" standard. The Council may wish to encourage adoption of the higher benchmark.

Agency Response: Delaware has chosen to use the same income standard for all of its long term services and supports to facilitate client movement between settings as their needs change. The current standard is the nursing facility standard of 250% FBR. If the state wishes to raise the income standard, a fiscal note for all HCBS services, including those provided under 1915(c) waivers and also the 1115 waiver that subsumed the former Elderly and Disabled and AIDS waivers, and for all nursing facility services would have to be developed and funded in the state's annual operating budget.

GACEC - April 28, 2014 Letter

The GACEC and other councils commented on the draft renewal application in March. Since the content of the waiver renewal has not changed, the GACEC would like to reiterate our earlier comments and add a few additional comments. We would also like to note that although many of our observations are similar to the comments submitted by the other councils, such as the State Council for Persons with Disabilities (SCPD), there are differences so we ask that you take that into consideration as you review our commentary.

In Paragraph 3 of our earlier comments, the GACEC objected to changing the minimum age of eligibility from four to 12 for a number of reasons. We would like to reiterate our objection and remind DHSS that it was prompted to terminate the license and contract of a major DDDS provider on an expedited basis when an investigation team issued a report documenting numerous violations of standards. See *Growth Horizons v. Nazario*, No. 1:94-cv-00132-RRM (D. Del. August 9 1994) (Stipulation). The rushed termination of a DHSS or Interagency Collaborative Treatment Team (ICT)-funded pediatric provider could be repeated, resulting in the need to provide alternative residential services quickly. If children under 12 are ineligible for the waiver, DHSS would have no available waiver-funded placement options, including shared living, group homes, and emergency temporary living arrangements (ETLAs). Eliminating the waiver eligibility of children between age four and 12 would also undermine the implementation of the DDDS-Division of Services for Children, Youth and their Families (DSCY&F) Memorandum of Understanding (MOU). For example, Section II.B.2 contemplates the availability of DDDS foster home/shared living placements for eligible children requiring residential services due to abuse, neglect or dependency. Licensed foster home/shared living arrangements are covered by the DDDS waiver.

In Paragraph 10, the GACEC suggested that DHSS consider adding levels of care apart from ICF/IID (Intermediate Care Facility for Individuals with Intellectual Disabilities). Council observed that the DDDS census listed 37 DDDS clients in nursing homes. In addition to our earlier comment, Council would also like to note that DHSS, while funding pediatric nursing home care, has historically confirmed its commitment to "make every effort to support a child's needs in a

community setting if they can be met". See DHSS commentary at 11 DE Reg. 312 (9/1/07):

The placing of children in any nursing facility needs to be an option for Medicaid eligible children in Delaware. Some children have needs that must be addressed in an inpatient nursing care facility. Medicaid will make every effort to support the client's needs in a community setting if they can be met. Delaware is fortunate to be able to offer inpatient nursing care facility services to its citizens within Delaware. Previously, Delaware children who required these services had to be placed out-of-state.

It would enable diversion from pediatric nursing facility placement and transition from nursing facility placements, if pediatric waiver-funded residential options were available. DHSS could consider listing both ICF/IID and nursing level of care in the waiver.

Agency Response: Thank you for your additional comments from April 28th on the renewal application for the DDDS HCBS Medicaid Waiver on behalf of the Governor's Advisory Council for Exceptional Citizens. DMMA offers the following additional information provided by DDDS to address your additional comments.

You should be aware that in its response to CMS's informal questions, Delaware has asked CMS for permission to revise the waiver application to make the following changes:

- Add the phrase "including brain injury" where the target group for the waiver is described as individuals with an "intellectual disability".
- Increase the number of waiver slots by adding 50 slots to each demonstration year above what is currently in the application to ensure that any legislatively funded growth is accommodated. The new slot numbers would be as follows:
 - Year 1: 1100
 - Year 2: 1150
 - Year 3: 1200
 - Year 4: 1250
 - Year 5: 1300
- Insert the phrase "other equivalent procedures and protocols approved by the Division" into the sentence in Appendix G-2 a. i. that reads, "Permitted planned personal restraints are limited to the one and two person side body hug and the one and two are supporting technique as described in the Mandt protocol".

GACEC Issue #1: Despite DDDS's assurance that no one under age 12 will be denied a needed service just because they will not be served under the DDDS waiver, the Council continues to be concerned about the division's proposal to raise the minimum waiver age from 4 to 12. It cites the DDDS enabling statute, the Age Discrimination Act and subsequent HHS OCR complaint and the MOU with DSCYF as compelling reasons for not making this change to the DDDS Medicaid waiver.

Agency Response: As referenced in the waiver application, DDDS has used Medicaid claims data to verify that no one under the age of 12 has ever received a DDDS waiver service, including shared living, formerly called Adult Foster Care. DDDS continues to contend that based on the services included in the waiver benefit package, it is not designed for children. No one under the age of 12 will be denied a service that is required under the DDDS enabling statute. DDDS will continue to provide services to individuals under age 12 who meet the DDDS eligibility criteria, including the provision of foster care/shared living when necessary. DDDS will also continue to honor the MOU with DSCYF which requires it to participate in "residential placement of DFS children in DDDS homes and respite care." DDDS believes that the rare occasions when specialized foster care may need to be provided to individuals under age 12 is best addressed using state funds under the DDDS state mandate to allow for flexibility that may not be available under the structure of a waiver service.

Since the Harbor Healthcare settlement, a new nursing facility specializing in pediatric care, Exceptional Care for Children, has opened in Delaware to provide specialized care for children who meet a nursing facility level of care. To address the needs of medically fragile children who are eligible for DDDS services, DDDS works in collaboration with DMMA to ensure that Private Duty Nursing, and other services available under the Medicaid State Plan, are provided to these clients in the child's home or other appropriate home setting. There are currently no direct nursing services covered under the DDDS Waiver.

While Medicaid State Plan services cannot be restricted to particular age groups, Medicaid HCBS waivers can be, and often are, limited by age. This is considered part of the HCBS waiver "target" criteria of age, diagnosis or condition. Appendix B-1 "Specification of the Waiver Target Group(s)" of the HCBS waiver pre-print instructs states to "select one waiver target group, check each of the subgroups in the selected target group that may receive services under the waiver, and specify the minimum and maximum (if any) age of the individuals served in each subgroup."

GACEC Issue #2: The Council continues to recommend that DDDS should add a nursing facility level of care to the waiver application in addition to the current designation of ICF/IID.

Agency Response: Per CMS regulations at 42 CFR 441.301(b)(1)(iii) states must indicate that waiver services will only be provided to recipients who, in the absence of waiver services would require the Medicaid covered level of care in a hospital, nursing facility, or ICF/IID. States may only select a single institutional level of care for the target group for which the cost of waiver services will be compared to the cost of institutional services. Nursing facility costs are significantly less

than ICF/IID costs. If DDDS was able to include such a level of care under the DDDS waiver, it would have the effect of lowering the projection of "without waiver" spending that is compared to "with waiver" spending to demonstrate budget neutrality as required under 42 CFR 441.302(e). This waiver is designed to meet the needs of individuals with an intellectual developmental disability. Therefore, the ICF/IID institutional level of care standard is the appropriate standard for this target group.

The 37 individuals listed on the DDDS census report that are indicated as residing in nursing facilities are tracked by DDDS because DDDS is responsible for providing the specialized services these individuals need to address their intellectual developmental disability as required under OBRA 1987. These individuals are covered under the Diamond State Health Plan Plus Long Term Care benefit which uses a nursing facility level of care to determine eligibility for long term care services. The specialized services provided to nursing facility residents with an intellectual developmental disability, including children residing at the Exceptional Care for Children nursing facility, can be paid for under the Medicaid State Plan or by DDDS with state funds for services that are not covered under the State Plan. Per 42 CFR 441.301(b)(1)(iii) individuals that reside in a hospital, nursing facility or ICF/IID are not eligible to receive HCBS waiver services.

DMMA hopes these responses are helpful.

SCPD - April 30, 2014 Memorandum

As background, on February 28, 2014, the Division of Developmental Disabilities Services (DDDS) forwarded a notice to the SCPD and other agencies that its draft waiver renewal was available for review on its website. The renewal document noted that DDDS intended to submit the renewal application to CMS during the week of March 10. Given the short timetable, SCPD submitted comments on an expedited basis. The Department has now published the waiver renewal as a proposed regulation with a 30-day comment period. Since the content of the waiver renewal has not changed, SCPD is providing the attached March 12th memorandum supplemented by the following observations. Please review these documents carefully since the attached April 17th response from DHSS/DMMA is confusing as it attempts to address SCPD's previous March 12th comments even though it specifically references "the DD Council". The Division appears to have "mixed-up" its responses with the intended councils and, in any event, does not address the following observations.

In Par. 4, SCPD objected to changing the minimum age of eligibility from 4 to 12 for a variety of reasons. As a supplement, SCPD is reminding DHSS that it was prompted to terminate the license and contract of a major DDDS provider on an expedited basis when an investigation team issued a report documenting numerous violations of standards. See *Growth Horizons v. Nazario*, No. 1:94-cv-00132-RRM (D. Del. August 9 1994) (Stipulation). Expedited termination of a DHSS or ICT-funded pediatric provider could recur, resulting in the need to provide alternative residential services quickly. If children under 12 are ineligible for the waiver, DHSS would have no available waiver-funded placement options, including shared living, group homes, and emergency temporary living arrangements (ETLAs). Eliminating waiver eligibility of children between age 4 and 12 would also undermine implementation of the attached DDDS-DSCY&F MOU. For example, Section II.B.2 contemplates the availability of DDDS foster home/shared living placements for eligible children requiring residential services due to abuse, neglect or dependency. Licensed foster home/shared living arrangements are covered by the DDDS waiver.

In Par. 11, SCPD suggested that DHSS consider adding levels of care apart from ICF/IID. The Council observed that the DDDS census listed 37 DDDS clients in nursing homes. As a supplement, SCPD notes that DHSS, while funding pediatric nursing home care, has historically confirmed its commitment to "make every effort to support a child's needs in a community setting if they can be met". See DHSS commentary at 11 DE Reg. 312 (9/1/07):

The placing of children in any nursing facility needs to be an option for Medicaid eligible children in Delaware. Some children have needs that must be addressed in an inpatient nursing care facility. Medicaid will make every effort to support the client's needs in a community setting if they can be met. Delaware is fortunate to be able to offer inpatient nursing care facility services to its citizens within Delaware. Previously, Delaware children who required these services had to be placed out-of-state.

It would facilitate diversion from pediatric nursing facility placement, and transition from nursing facility placements, if pediatric waiver-funded residential options were available. DHSS could therefore consider listing both ICF/IID and nursing level of care in the waiver.

In summary, SCPD is resubmitting its earlier commentary plus the above supplemental remarks.

Agency Response: Thank you for your additional comments from April 30th on the renewal application for the DDDS HCBS Medicaid Waiver on behalf of the State Council for Persons with Disabilities (The Council). DMMA offers the following additional information provided by DDDS to address your additional comments.

You should be aware that in its response to CMS's informal questions, Delaware has asked CMS for permission to revise the waiver application to make the following changes:

- Add the phrase "including brain injury" where the target group for the waiver is described as individuals with an "intellectual disability".
- Increase the number of waiver slots by adding 50 slots to each demonstration year above what is currently in the application to ensure that any legislatively funded growth is accommodated. The new slot numbers would be as follows:

Year 1: 1100
Year 2: 1150
Year 3: 1200
Year 4: 1250
Year 5: 1300

- Insert the phrase "other equivalent procedures and protocols approved by the Division" into the sentence in Appendix G-2 a. i. that reads, "Permitted planned personal restraints are limited to the one and two person side body hug and the one and two are supporting technique as described in the Mandt protocol".

SCPD Issue #1: Despite DDDS's assurance that no one under age 12 will be denied a needed service just because they will not be served under the DDDS waiver, the Council continues to be concerned about the division's proposal to raise the minimum waiver age from 4 to 12. It cites the DDDS enabling statute, the Age Discrimination Act and subsequent HHS OCR complaint and the MOU with DSCYF as compelling reasons for not making this change to the DDDS Medicaid waiver.

Agency Response: As referenced in the waiver application, DDDS has used Medicaid claims data to verify that no one under the age of 12 has ever received a DDDS waiver service, including shared living, formerly called Adult Foster Care. DDDS continues to contend that based on the services included in the waiver benefit package, it is not designed for children. No one under the age of 12 will be denied a service that is required under the DDDS enabling statute. DDDS will continue to provide services to individuals under age 12 who meet the DDDS eligibility criteria, including the provision of foster care/shared living when necessary. DDDS will also continue to honor the MOU with DSCYF which requires it to participate in "residential placement of DFS children in DDDS homes and respite care." DDDS believes that the rare occasions when specialized foster care may need to be provided to individuals under age 12 is best addressed using state funds under the DDDS state mandate to allow for flexibility that may not be available under the structure of a waiver service.

Since the Harbor Healthcare settlement, a new nursing facility specializing in pediatric care, Exceptional Care for Children, has opened in Delaware to provide specialized care for children who meet a nursing facility level of care. To address the needs of medically fragile children who are eligible for DDDS services, DDDS works in collaboration with DMMA to ensure that Private Duty Nursing, and other services available under the Medicaid State Plan, are provided to these clients in the child's home or other appropriate home setting. There are currently no direct nursing services covered under the DDDS Waiver.

While Medicaid State Plan services cannot be restricted to particular age groups, Medicaid HCBS waivers can be, and often are, limited by age. This is considered part of the HCBS waiver "target" criteria of age, diagnosis or condition. Appendix B-1 "Specification of the Waiver Target Group(s)" of the HCBS waiver pre-print instructs states to "select one waiver target group, check each of the subgroups in the selected target group that may receive services under the waiver, and specify the minimum and maximum (if any) age of the individuals served in each subgroup."

SCPD Issue #2: The Council continues to recommend that DDDS should add a nursing facility level of care to the waiver application in addition to the current designation of ICF/IID.

Agency Response: Per CMS regulations at 42 CFR 441.301(b)(1)(iii) states must indicate that waiver services will only be provided to recipients who, in the absence of waiver services would require the Medicaid covered level of care in a hospital, nursing facility, or ICF/IID. States may only select a single institutional level of care for the target group for which the cost of waiver services will be compared to the cost of institutional services. Nursing facility costs are significantly less than ICF/IID costs. If DDDS was able to include such a level of care under the DDDS waiver, it would have the effect of lowering the projection of "without waiver" spending that is compared to "with waiver" spending to demonstrate budget neutrality as required under 42 CFR 441.302(e). This waiver is designed to meet the needs of individuals with an intellectual developmental disability. Therefore, the ICF/IID institutional level of care standard is the appropriate standard for this target group.

The 37 individuals listed on the DDDS census report that are indicated as residing in nursing facilities are tracked by DDDS because DDDS is responsible for providing the specialized services these individuals need to address their intellectual developmental disability as required under OBRA 1987. These individuals are covered under the Diamond State Health Plan Plus Long Term Care benefit which uses a nursing facility level of care to determine eligibility for long term care services. The specialized services provided to nursing facility residents with an intellectual developmental disability, including children residing at the Exceptional Care for Children nursing facility, can be paid for under the Medicaid State Plan or by DDDS with state funds for services that are not covered under the State Plan. Per 42 CFR 441.301(b)(1)(iii) individuals that reside in a hospital, nursing facility or ICF/IID are not eligible to receive HCBS waiver services.

DMMA hopes these responses are helpful.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the April 1, 2014 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to publish for public comment a draft of the Division of

Developmental Disabilities Services (DDDS) 1915(c) Home and Community-Based Services Waiver (HCBS) waiver renewal application is adopted and shall be final effective June 10, 2014.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATION #14-21

DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES 1915(C) HOME AND COMMUNITY-BASED SERVICES WAIVER RENEWAL APPLICATION

In accordance with the public notice requirements of section 1902(a)(13)(A) of the Social Security Act, 42 CFR 447.205, 42 CFR 441.304 and Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS), Division of Medicaid and Medical Assistance (DMMA), Division of Developmental Disabilities Services (DDDS) gives notice that it has submitted a waiver renewal application to the Centers for Medicare and Medicaid Services (CMS). The current waiver expires on June 30, 2014 and must be renewed every five (5) years.

Draft of Proposed Waiver Renewal Application

A draft of Delaware's waiver renewal application and a summary of proposed changes are currently available for review on the Division of Developmental Disabilities Services website at <http://www.dhss.delaware.gov/ddds/>.

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

Hard copies are available for review at the following three (3) locations from 8:00 a.m. - 4:30 p.m.:

- 1) Division of Developmental Disabilities Services
Fox Run Office
2540 Wrangle Hill Road
2nd Floor
Bear, Delaware 19701
(Visitor parking is designated by signs and is close to the entrance of the building)
- 2) Division of Developmental Disabilities Services
Woodbrook Professional Center,
1056 South Governor's Avenue
Suite 101
Dover, Delaware 19904
(Visitor parking is designated by signs and is close to the entrance of the building)
- 3) Division of Developmental Disabilities Services
Community Services Administrative Office - Stockley Center
101 Boyd Boulevard
26351 Patriots Way
Georgetown, Delaware 19947
(Visitor parking is designated by signs and is close to the entrance of the building)

The proposed draft was also presented to the Medicaid Medical Care Advisory Committee and the State Council for Persons with Disabilities, as follows:

Medical Care Advisory Committee

September 11, 2013
February 19, 2014
9:00 a.m. - 11:00 a.m.
Easter Seals
61 Corporate Circle
New Castle, Delaware 19720

State Council for Persons with Disabilities

March 17, 2014
1:30 p.m. - 4:00 p.m.
Appoquinimink State Service Center
122 Silver Lake Road
Middletown, Delaware 19709

In addition, three (3) public hearings were held on March 3rd (New Castle County), March 4th (Sussex County) and March 6th (Kent County) to allow for a presentation of the proposed waiver renewal application by agency staff and public input.

Public Comments

The public is invited to review and comment on the State's proposed waiver renewal request that expires on June 30, 2014. Written comments may be sent to: Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or via fax to 302-255-4425. For consideration, written comments must be received by 4:30 p.m. on April 30, 2014. Please identify in the subject line: Proposed Division of Developmental Disabilities Services 1915(c) Home and Community-Based Services Waiver Renewal Application.

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.

Stephen M. Groff, Director
Division of Medicaid and Medical Assistance
March 12, 2014

17 DE Reg. 1179 (06/01/14) (Final)