

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES

Statutory Authority: 29 Delaware Code, Section 7909(A) (29 Del.C. §7909(A))

FINAL

ORDER

2101 Agency Appeal Process

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department")/ Division of Developmental Disabilities Services (DDDS) regarding the agency internal appeal processes. The Department's proceedings to propose new regulations were initiated pursuant to 29 **Delaware Code**, Section 7909 (A).

The Department published its notice of proposed new regulations pursuant to 29 **Delaware Code** Section 10115 in the March 2010 *Register of Regulations*, requiring comments and written materials from the public concerning the proposed new regulations.

SUMMARY OF PROPOSED CHANGES

Statutory Authority

- 29 **Delaware Code**, Section 7909(A)

Summary of Proposed Changes

DDDS 2101: Agency Appeal Process: The purpose of the proposed regulations was to publish a description of the Division of Developmental Disabilities Services' appeal process. The published regulations include a definition of appeal, issues that can be appealed, the time requirements for requesting and appeal, how the process works and how to request an appeal.

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 comments and recommendations delineated below. The Division of Developmental Disabilities Services has carefully considered each and responds as follows:

First, DDDS is to be applauded for publishing a proposed regulation in this context as juxtaposed to a "policy". Although its enabling legislation [Title 29 7909A] contemplates DDDS issuance of regulations, it has only adopted a single regulation since its inception, i.e, its eligibility standards which have been amended a few times. See 16 DE Admin. Code 2100.

DDDS Response: Thank-you.

Second, DDDS should consider overlapping appeal processes apart from Medicaid. For example, if DDDS proposes action covered by the long-term care bill of rights (16 Del.C. §1121) (e.g. changing a roommate in group home or Stockley), the client could initiate a "grievance" with Delaware Health and Social Services (DHSS) pursuant to 16 Del.C. §1121(28) and 1125. Moreover, if an applicant desired institutional versus Home and Community Based Services (HCBS) care (covered by §2.1 of the DDDS policy), and the decision was Preadmission Screening and Annual Resident Review (PASARR)-related, a DSS hearing is available to even non-Medicaid beneficiaries. See 16 DE Admin. Code Part 5000, Section 5304.1. Therefore, it would be prudent to include a non-supplanting provision in the DDDS regulation. Consider the following amendment to §11.0:

11.0 A DDDS Appeal shall not be a pre-requisite for requesting a DSS Medicaid Fair Hearing nor shall the availability of a DDDS appeal supplant or preclude access to appeal and review processes otherwise available under law or Departmental policy.

DDDS Response: Recommendation from the councils accepted but re-worded in non-legal terms to be more understandable by lay people. As the first part of the suggested recommendation to 11.0 currently exists in proposed 11.0, the DDDS shall amend proposed 11.0 with only "nor shall the availability of a DDDS appeal take the place of or prevent access to other review processes otherwise available under law or Departmental policy", just before the existing period.

Third, §3.0 could be interpreted as categorically requiring exhaustion of informal resolution methods prior to appealing DDDS. This could be problematic since it could result in dismissal of an appeal based on perceived "insufficient efforts" to resolve dispute informally. Moreover, literally, it would require a client dissatisfied with the outcome of a rights complaint to try to negotiate a different disposition with Chris Long prior to appeal. It would be preferable to "encourage" but not categorically "require" resolution efforts prior to filing for appellate review.

DDDS Response: Acknowledged and accepted. DDDS re-worded the proposed reg. 3.0 as: "The Division encourages the appellant to attempt to resolve the situation being contested, prior to requesting an appeal, although all informal resolution avenues do not need to be exhausted, as a pre-requisite."

Fourth, in §3.0, the reference to "an appeal DDDS" makes no sense. Consider substituting "an appeal under this regulation."

DDDS Response: Acknowledged and recommendation accepted. Thank-you.

Fifth, in §9.0, the comma after the word "appealed" should be deleted.

DDDS Response: Acknowledged and recommendation accepted. DDDS removed the comma, in proposed reg. 9.0, after the word "appealed" and replaced the word "with" (following the removed comma) with the word "within".

Sixth, in §10.0, the comma after the word "disposition" should be deleted.

DDDS Response: Acknowledged and corrected. DDDS removed the comma following the word "disposition", in proposed reg, 10.0.

Seventh, in §4.0, consider adding the following amendment: "The implementation..., unless it has already been implemented or by agreement of the appellant and DDDS." There may be situations in which the parties agree to "roll back" action pending the processing of the appeal. It would be preferable to authorize DDDS discretion in this context.

DDDS Response: Acknowledged and accepted. DDDS added "or by agreement of the appellant and the Division.", just before the existing period, in proposed reg. 4.0.

Eighth, under §5.0, the 90 day time period to request a Medicaid hearing is not tolled during the pendency of the DDDS appeal. It would be preferable to reach an accord with DSS that would allow tolling. A January 27, 2000 policy letter from Medicaid Director, Phil Soule, authorizes tolling of the 90 day Medicaid fair hearing request period during the pendency of internal MCO review.

DDDS Response: Thank-you for the recommendation. It is currently under advisement with the applicable agencies.

Ninth, in §2.4, it would be preferable to insert "limitations" after "reduction, ". Compare 18 DE Admin code Part 1403, §2.0, definition of "adverse determination" and 18 DE Admin. Code Part 1301, §2.0, definition of "adverse determination".

DDDS Response: Acknowledged and no changes were made to the proposed reg. 2.4 as it currently states "denial, reduction, suspension or termination of services" and the reference to the Insurance Administrative Code refers to "deny, reduce, limit, or terminate". There is no significant difference.

Tenth, in §2.0., it would be preferable to include the following: "2.6 Decisions involving the content or implementation of an ELP".

DDDS Response: Acknowledged. No changes were made as the ELP is a person driven document and should be addressed with the person, family/guardian/advocate and the team. DDDS does not want to get into the

practice of the Division Director, via the Appeals Committee (who don't ordinarily even know the person receiving services), overturning an ELP. If a right is being violated and cannot be addressed at the team level, the appellant should address it via the DDDS Client Rights Complaint Process (reference second comment).

Eleventh, in §2.0, it would be preferable to include a "catch-all" such as "2.7. Other adverse DDDS action or refusal to act with significant impact on appellant."

Acknowledged. Not recommended.

FINDINGS OF FACT:

The Department finds that the proposed new regulations as set forth in the March 2010 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed new regulations of the Division of Developmental Disabilities Services (DDDS) regarding agency appeal process be adopted and shall be final effective May 10, 2010.

Rita M. Landgraf, Secretary, DHSS

2101 Agency Appeal Process

1.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

"Appeal" means a DDDS internal evidentiary review of a decision by an objective committee assigned by the Division Director or designee.

"Applicant" means any person who is applying for services from the DDDS.

"Individual Rights Complaint" means the DDDS formal process for asserting that the rights of an individual served have been violated, an internal review concerning the reported rights violation and the identification of a plan to improve the situation.

"Risk Management Committee" means the internal Division committee responsible for reviewing identified focus areas situations that present actual or potential danger to individuals served and staff; subsequently developing risk reduction strategies.

2.0 Situations/issues that are eligible to be reviewed via the DDDS appeals process include the following:

- 2.1 Decisions that involve the omission of choice between institutional care and home and community based services.
- 2.2 Denial of eligibility for DDDS services.
- 2.3 Denial of service provider of choice.
- 2.4 Denial, reduction, suspension or termination of services.
- 2.5 Dissatisfaction with the outcome of an Individual Rights Complaint.

3.0 ~~[Efforts shall be made to resolve the situation being contested prior to requesting an appeal DDDS. The Division encourages the appellant to attempt to resolve the situation being contested, prior to requesting an appeal, although all informal resolution avenues do not need to be exhausted, as a pre-requisite.]~~

4.0 The implementation of a DDDS decision shall be postponed pending the decision of a DDDS appeal or Medicaid Fair Hearing, unless it has already been implemented [or by agreement of the appellant and the Division].

5.0 A Medicaid recipient may request a Division of Social Services (DSS) Medicaid Fair hearing at any point in the appeals process, up to ninety (90) days following receipt of a written notice of the DDDS decision that the recipient decides to appeal.

6.0 The DDDS Appeals Committee chairperson shall make efforts to contact the appellant within five (5) working days of receiving the appeals request, unless that appeal is for a disputed eligibility decision. In that case, the DDDS Appeals Committee chairperson shall request a copy of the appellant's intake record within five (5) days of receiving the appeal request and make efforts to contact the appellant within five (5) working days of receiving a copy of the intake record.

7.0 The DDDS Appeals Committee chairperson shall review the appeals request with the appellant, provide clarification as necessary, explain the appeals process and schedule an appeal review at the following month's appeal hearing contingent on providing a 14 calendar days notice.

8.0 The DDDS Appeals Committee shall meet with the appellant in person, unless otherwise requested, and listen to the reason(s) that a decision is disputed. The appellant has the right to invite guests to the appeal hearing and present additional information for consideration. The appellant shall have the opportunity to ask questions, request clarification and receive answers. The person or designee who initially made the decision being disputed shall also appear at the appeal hearing and explain the rationale for his/her decision.

9.0 The Division Director shall be notified of the Appeals Committee's recommendations relative to the issue(s) being appealed, with five (5) working days of the appeal hearing.

10.0 The Division Director shall send written notification to the appellant of the final appeal disposition, within fifteen (15) working days of the appeal hearing. The notification shall include a notice regarding the right to request a Division of Social Services (DSS) Medicaid Fair Hearing, if the aggrieved person is a Medicaid recipient or applying for a Medicaid service.

11.0 A DDDS Appeal shall not be a pre-requisite for requesting a DSS Medicaid Fair Hearing [nor shall the availability of a DDDS Appeal take the place of or prevent access to other review processes otherwise available under law or Departmental policy].

12.0 The DDDS Risk Management Committee shall review appeal statistics and trends, on an annual basis or as requested by the committee chair or Division Director.