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Via email: DHCFPubliccomments@dc.gov

March 9, 2017

Claudia Schlosberg, Senior Deputy Director
Department of Health Care Finance
441 4th Street NW, Suite 900S
Washington, DC 20001

Re: Comments on Amendments to Section 9502 of Chapter 95 (Medicaid Eligibility) of Title 29 (Public Welfare) regarding Residency Criteria for Medicaid for Certain Out-of-District Individuals

Dear Ms. Schlosberg:

Thank you for the opportunity to comment on the proposed rulemaking by the Department of Health Care Finance regarding D.C. Medicaid residency criteria for individuals temporarily absent from the District and for otherwise eligible foster care individuals placed outside the District, published in the D.C. Register on February 10, 2017. I am submitting these comments on behalf of Children's Law Center (CLC),[1] which, in the last year, provided services to more than 5,000 low-income children and families, with a focus on children in foster care and children with special health and education needs. Almost every one of CLC's clients is a Medicaid beneficiary. Our comments are based upon our experience representing those children and families.

Children's Law Center offers the following comments in order to highlight the impact that the proposed rule may have for individuals similarly situated to the clients we serve and to make recommendations to DCHF to revise these proposed regulations as detailed below.

Subsection 9502.8: Residency criteria for individuals temporarily absent from the District

The proposed 90-day limit upon the allowed duration of "temporary absence" under 29 D.C.M.R. § 9502.8 should be removed.

The proposed subsection 9502.8 imposes a 90-day limit (subject to limited "good cause" exceptions) upon the allowed duration of "temporary absence" when an individual can be absent from the District but still retain his or her status as a resident of the District of Columbia to continue to be eligible for D.C. Medicaid.

In contrast, the current subsection 9502.8 does not impose any time limit upon the duration of the "temporary absence," and instead defines the term as follows: "Temporary absence from the District, with subsequent returns to the District, or intent to return when the purposes of the absence have been accomplished, shall not interrupt continuity of residence."[2]

That existing rule is virtually identical to the definition of "temporary absence" in Maryland under corresponding Maryland Medicaid regulations, which does not impose a time limit upon the temporary absence definition. See Code of Maryland Regulations (COMAR) 10.09.24.05-3(F)(2).[3]

We have concerns that the 90-day limit is too restrictive and may unintentionally exclude individuals with legitimate reasons to be absent from the District for more than 90 days beyond those reasons set forth in the three limited "good cause" exceptions in proposed section 9502.8(b). For example, individuals or families often leave the District during the summer months to visit with family or to travel for a duration in excess of ninety days, with a bona fide intention to return to the District afterwards. In such circumstances, the 90-day limit would leave these individuals without D.C. Medicaid coverage and would cause undue disruption and administrative hassles with multiple exits and re-entries back into the system.

Also, as written, the 90-day limit is confusing because it does not specify whether it is a non-consecutive 90-day period totaled cumulatively over the course of a year that would cause an individual to lose their D.C. residency status or whether instead the rule contemplates 90 consecutive days. While common sense would dictate that the 90-day threshold presumes that the days are consecutive days, the language as written is ambiguous and raises concerns. Were the rule to be read as 90 non-consecutive days, that interpretation would be extremely disruptive and detrimental to many families, including for instance one common scenario involving visitation with a noncustodial parent that could easily exceed a 90 non-consecutive day threshold over the course of a year.

For these reasons, CLC has significant concerns with the 90-day limit imposed by proposed subsection 9502.8 and recommends that DHCF revert back to the status quo existing definition of "temporary absence" set forth in the current subsection 9502.8. That would provide DHCF with needed flexibility to accommodate individual circumstances to ensure that individuals are not left without Medicaid coverage. In the alternative, should DHCF decline to follow this recommendation, CLC believes that the 90-day threshold be increased to 120 days and that the rule be clarified to specify that the time limit contemplates consecutive days for the reasons stated above. To that end, we recommend that the proposed subsection 9502.8(a) and 9502.8(b) be revised as follows:

> For purposes of determining eligibility for Medicaid, an individual may retain his or her status as a resident of the District of Columbia if the individual considers the District to be his or her fixed place of residence to which he or she will return with the intent to reside following a temporary absence, and:
>
> > (a) The individual is absent from the District for less than one hundred and twenty consecutive ~~ninety~~ (120~~90~~) days; or
> >
> > (b) The individual is absent from the District for more than one hundred and twenty consecutive ~~ninety~~ (120~~90~~) days for good cause, as determined by DHCF, . . .

The good-cause exception for "school attendance" set forth in proposed subsection 9502.8(b)(1) should be revised to include students up through the age of twenty-two.

Under proposed subsection 9502.8(b)(1), the good-cause exception for school attendance only applies to "individuals under the age of twenty-one (21). That age restriction, however, is too restrictive because it excludes students with disabilities above the age of 21 who are in educational placements outside the District made by D.C. public schools. Under the Individuals with Disabilities Education and Improvement Act (IDEA) and corresponding D.C. law, school districts are required to make available a free and appropriate public education to students with disabilities through the age of twenty-two (22).[4] In addition, D.C. law further specifies that an individual eligible for IDEA educational placements "shall remain eligible through the end of the semester that he or she turns twenty-two." 5E D.C.M.R. § 3002.1(b).[5] Accordingly, IDEA educational placements (both in and outside the District) often continue beyond the age of twenty-one. As such, we are concerned that the proposed rule capping the age at twenty-one (21) will exclude from D.C. Medicaid coverage those students who are in an IDEA educational placement outside the District beyond the age of twenty-one (21). In these situations under the proposed rule, these individuals will be forced to give up their D.C. Medicaid coverage in order to stay in their IDEA educational placements. To ensure that these individuals retain their D.C. Medicaid eligibility for the duration of their out-of-District IDEA educational placements, CLC recommends that the language in proposed section 9502.8(b)(1) be changed as follows:

> (1) School attendance: an individual under the age of twenty-<u>two</u>~~one~~ (2<u>2</u>~~1~~) who is away from the District for the sole purpose of attending a boarding school or other educational facility, if otherwise eligible, may retain Medicaid eligibility~~;~~ <u>and an individual who turns twenty-two during the school year may retain Medicaid eligibility through the end of the semester he or she turns twenty-two.</u>

<u>Subsections 9502.15, 9502.24, 9502.25 - Residency status for individuals in out-of-District foster home placements</u>

The current Subsection 9502.15 provides that individuals under age 21 (who are receiving adoption/foster care/guardianship assistance) are residents of the State in which they actually live (even if adoption, foster care or guardianship payments originate from the District). The proposed Subsection 9502.15 allows for individuals placed by CFSA into out-of-District foster home placements to retain D.C. Medicaid eligibility in certain circumstances, as set forth in proposed subsections 9502.24 and 9502.25. While we fully support creating flexibility in the regulations to enable individuals in out-of-District CFSA foster home placements to retain D.C. Medicaid eligibility, CLC has several concerns with subsections 9502.15, 9502.24 and 9502.25, as set forth below.

The typographical errors in subsection 9502.15 have substantive impact and should be corrected.

Before detailing our concerns with sections 9502.24 and 9502.25, CLC calls attention to the following typographical error in proposed subsection 9502.15 -- specifically, the proposed subsection 9502.15 incorrectly references "Section 9202.24 and 9202.25." These are incorrect citations as neither citation could be found in DCHF regulations. Instead, the language should be corrected to "Subsections 9502.24 and 9502.25" (which are the two new subsections proposed in this February 10 rulemaking) to read as follows:

> 9502.15 Except as provided in Subsection 9~~52~~02.24 and 9~~52~~02.25, the State of residence for individuals under the age of twenty-one (21) receiving the adoption assistance, foster care, or guardianship care under title IV-E of the Social Security Act (the Act) shall be the State where the individual resides.

The typographical error in proposed subsection 9502.24(b) needs to be corrected to avoid unnecessary confusion.

Proposed subsection 9502.24(b) states that "an individual receives services from a provider screened and is enrolled in the District Medicaid Program pursuant to 29 D.C.M.R. §§ 9400 et seq." That sentence is confusing because it contains an unnecessary word "is" which causes confusion as to whether the screening and enrollment requirements refer to the individual or the Medicaid provider. Read correctly, it is obvious that the screening and enrollment requirement is intended to apply to the Medicaid provider not to the individual, as confirmed by the reference to "29 D.C.M.R. §§ 9400 et seq" which sets forth regulatory requirements that Medicaid providers and suppliers must meet. So proposed subsection 9502.24(b) should be corrected as follows:

> (b) The individual receives services from a provider screened and ~~is~~ enrolled in the District Medicaid program pursuant to 29 DCMR §§ 9400 et seq.;

The reference to "out-of-District" in proposed subsection 9502.24(c) is redundant and should be deleted.

Because the general language in proposed subsection 9502.24 already specifies that it is intended to apply only if an individual is living in an "out-of-District" foster home, the subsequent reference to "out-of-District" in proposed subsection 9502.24(c) is redundant and should be deleted as follows:

> 9502.24 The Department may consider an individual under the age of twenty-one (21) who receives foster care assistance from the District under title IV-E of the Social Security Act and lives in an out-of-District foster home to be a resident of the District when:
>
> . . .

(c) The District's Child and Family Services Agency (CFSA) places the individual in a ~~n out-of-District~~ foster home for reasons related to the safety, permanence, and well-being of abused and neglected children and their families; and

The District should consult with the individual's Guardian ad Litem and other relevant parties in making the best-interests determination contemplated in proposed subsections 9502.24(d) and 9502.25(d).

Proposed subsection 9502.24(d) provides that "[t]he District will evaluate all factors affecting the best interests of the individual and determine" whether continued D.C. Medicaid eligibility and enrollment is in the "best interest of the individual." Proposed subsection 9502.25(d) contains similar language placing unilateral authority of the best-interests determination upon the District. CLC is concerned that this language requires the District to make this best-interests evaluation and determination unilaterally without input from critical parties, including the Guardian ad Litem, social workers, medical professionals, etc. The question of whether or not to keep an individual on D.C. Medicaid can often entail a fact-intensive inquiry requiring input from a range of professionals. For that reason, it is important that the District consult with relevant parties in making the best-interests determination. In light of that concern, CLC recommends that the proposed subsections 9502.24(d) and 9502.25(d) be revised to include the following language requiring the District to consult with relevant parties in making the best-interests determination:

9502.24(d) The District, in consultation with the Guardian ad Litem and all relevant parties, evaluates all factors affecting the best interests of the individual and determines that continued eligibility for and enrollment in the District Medicaid program is in the best interest of the individual.

9502.25 The District, in consultation with the Guardian ad Litem and all relevant parties, may determine that continued eligibility for and enrollment in the District Medicaid program is not in the best interest of an individual described in subsection 9502.24 for the following reasons:

. . .

(d) The District, in consultation with the Guardian ad Litem and all relevant parties, evaluates all factors affecting the best interests of the individual and determines that continued eligibility for and enrollment in the District Medicaid program is in the best interest of the individual.

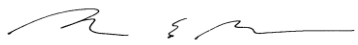
The language in subsection 9502.25(a) is confusing and should be clarified to specify that the relevant inquiry should focus on the distance between the individual and the location of services.

Proposed subsection 9502.25(a) is confusing as to whether "their geographic distance" refers to the distance from the provider or instead the distance from the location where the services are provided. The relevant inquiry should focus on the distance between the individual and the location of services. To remove that confusion, CLC recommends revising the language as follows:

> (a) The individual cannot obtain services from a provider enrolled in the District's Medicaid program because of the~~ir~~ individual's geographic distance from the location where the services are provided."

Thank you considering these comments and questions. If you have any questions about these comments, please feel free to contact me at (202) 467-4900 ext. 565, or sgreer@childrenslawcenter.org.

Respectfully,



Sharra Greer
Policy Director

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[1] Children's Law Center envisions a future where every child in the District of Columbia can grow up with a loving family, good health and a quality education. Judges, pediatricians and families turn to CLC to be the voice for children who are abused or neglected, who aren't learning in school, or who have health problems that can't be solved by medicine alone. With 100 staff and hundreds of pro bono lawyers, Children's Law Center reaches 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year.

[2] 29 D.C.M.R. § 9502.8.

[3] Similar to the current D.C. regulations, COMAR 10.09.24.05-3(F)(2) provides that "[t]emporary absence from a state, with the intent to return to the state when the purpose of the absence is accomplished, does not interrupt continuity of residency, unless another state's Medical Assistance program determines that the individual is a resident of the other state. *See also* COMAR 10.09.24.05-3(F)(3) ("An individual who is routinely absent from a state for a protracted period of time retains residency in that state if the individual (a) declares the intent to remain a resident of the state; (b) has an established residential address in the state; and (c) Is not certified for Medical Assistance or receiving public assistance in another state.").

[4] See 34 C.F.R. § 300.101(a). See also 5E D.C.M.R. § 3002.1(a) ("The LEA shall make a free and appropriate public education (FAPE) available to each child with a disability, ages three to twenty-two, who resides in, or is a ward of, the District.").

[5] 5E D.C.M.R. § 3002.1(b) ("A child with a disability found by the [school district] to be eligible for special education and related services shall remain eligible through the end of the semester he or she turns twenty-two."). *Compare with* 5E D.C.M.R. § 3002.1(c) ("If a child with a disability turns twenty-two during the summer, he or she shall be ineligible for further special education and related services under this chapter.").