

December 16, 2008

Mary Anderson  
Division of Developmental Disabilities Services  
101 Boyd Boulevard  
26351 Patriot's Way  
Georgetown, DE 19947

RE: DDDS Proposed Eligibility Criteria [12 DE Reg. 738 (December 1, 2008)]

Dear Ms. Anderson,

The Developmental Disabilities Council understands that the Division of Developmental Disabilities Services proposes to adopt revised eligibility standards. We understand that the intent is to limit eligibility for all DDDS services to persons who are Medicaid eligible. The Developmental Disabilities Council **strongly opposes** these proposed regulations.

In a nutshell, new applicants must meet financial (income/assets) limits for DDDS Medicaid waivers (§1.6). They must also meet an ICF/MR level of care. Existing clients may be “grandfathered” if they meet either: 1) the eligibility standards under which the individual initially established eligibility; or 2) the new requirements. Such “grandfathered” clients will only be eligible for non-Medicaid services offered by DDDS.

We offer the following observations.

First, although the Division has informally estimated that more than 90% of its existing clients will qualify under the more restrictive standards, we question the accuracy of this estimate. For example, many DDDS clients do not meet an ICF/MR standard of care. Consistent with the attached CMS glossary, the ICF/MR regulations limit eligibility to persons who need “24-hour supervision” [42 C.F.R. 1009] and “active treatment” [42 C.F.R. 483.440(a)], defined as follows:

(a) Standard: Active treatment.

(1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, ...

(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

[emphasis supplied] Many, if not most, individuals with Asperger's Syndrome do not meet this

standard. Likewise, individuals functioning in the EMD range of mental retardation may not meet the standard. Indeed, DSS adopts the position that persons functioning in the TMD range do not necessarily meet an ICF/MR level of care. See, e.g., the attached administrative hearing decision in In re J.L., a minor, DCIS No. 151936MI (DHSS January 17, 1997) [child with moderate mental retardation unqualified for Medicaid eligibility due to failure to meet ICF/MR level of care].

Although the Division may adopt a “liberal” interpretation of the ICF/MR standard, a CMS audit could result in significant financial penalties to the State.

Second, the categorical ICF/MR requirement may actually undermine the Division’s plan to have all clients enrolled in Medicaid. There may be DDS-eligible clients who qualify for Medicaid based on poverty bases or SSI. Not all SSI beneficiaries with mental retardation and related conditions will meet an ICF/MR standard. Compare 42 C.F.R. 435.225 [individuals must meet both SSI medical eligibility standard and level of care standard to qualify under Medicaid Katie Beckett program]. The DDS regulation results in the anomaly of current non-waiver Medicaid beneficiaries being excluded from DDS eligibility.

Third, DDS clients typically have co-occurring disabilities and health conditions. They may spend several weeks in a hospital (including DPC) or skilled care setting. In order to qualify for such settings, the clients must meet a hospital or NF level of care. Once they qualify for such level of care, DDS would have to terminate their DDS eligibility since they no longer meet an ICF/MR level of care. This is not the current practice but would be literally required by the new regulation.

Fourth, the regulations provide a disincentive for individuals to strive for financial independence since they must curb income and resources or else lose DDS eligibility. The Congressional background to the DSS Food Stamp regulation reviewed this month [12 DE Reg. 744] is instructive. Congress decided to raise financial eligibility criteria to encourage long-term independence:

On a bipartisan basis, policymakers agree that asset development is important to helping low-income Americans transition out of poverty. Accumulating assets allows low-income individuals to mitigate material hardships during periods of unemployment or illness, suffer less of a decline in their living standard during retirement, or make investments in their own education or housing that increase their financial stability.

See attached Center on Budget and Policy Priorities publication, “Implementing New Changes to the Food Stamp Program: A Provision By Provision Analysis of the 2008 Farm Bill” at 19. The DDS regulation essentially punishes productivity and encourages clients to remain in poverty to maintain DDS eligibility.

Fifth, we suspect that DDS intends to limit new clients to Medicaid enrollees to ensure a federal subsidy for services. However, literally, the standards only require an applicant to meet DDS waiver standards. The applicant could opt to not apply for Medicaid and still be eligible for DDS services. From the consumer perspective, this is a preferable outcome for multiple reasons.

If there are no open waiver slots, an individual meeting all waiver criteria may be on a waiting list. Moreover, some DDDS clients may opt to enroll in other DHSS waivers (e.g. ABI waiver; Elderly/Disabled waiver).

Considering the above remarks, the DD Council strongly opposes these proposed changes to the eligibility regulations. We urge the Division of Developmental Disabilities Services to reconsider these changes. Should you have any questions regarding our comments please contact our office at 739-3333.

Sincerely,

Jamie Wolfe  
Chair

cc. Governor – elect Jack Markell

Governor’s Commission on Community Based Alternatives for Individuals with Disabilities

Arc of Delaware

Autism Delaware

Lower Delaware Autism Foundation

United Cerebral Palsy

State Council for Persons with Disabilities

Governor’s Advisory Council for Exceptional Citizen

