

January 30, 2014

Sharon L. Summers
Planning & Policy Development Unit
Division of Medicaid and Medical Assistance
1901 North DuPont Highway
P. O. Box 906
New Castle, DE 19720-0906

RE: DMMA Proposed Pathways to Employment Medicaid Plan Amendment Regulation [17 DE Reg. 688 (January 1, 2014)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Medicaid and Medical Assistance (DMMA) proposal to adopt a Medicaid State Plan amendment to establish a "Pathways to Employment" program. The framework of the initiative is explained in the attached October 2013 concept paper entitled "Pathways to Employment: The Employment First Act- Putting Policy Into Practice" [hereinafter "Concept Paper"]. Unfortunately, although the Register recites that the actual amendment is available by following a link to the DMMA website, this is not accurate. DHSS was notified of the problem on January 2 and was advised by DMMA that it would follow up. As of January 9, the amendment was still not available on the website and still not finalized so our comments do not address the actual proposed amendment.

As background, DMMA notes that federal law authorizes states to adopt a §1915(I) State Plan amendment with two advantages compared to traditional Home and Community Based Services (HCBS) waivers. First, the amendment does not require participants to meet an institutional standard of care. Second, states cannot impose numerical limits on participation, i.e., individuals who qualify and apply must be served. DMMA proposes to seek Centers for Medicare and Medicaid Services (CMS) approval of the program effective July 1, 2014. The expected State cost in FY2015 is \$380,000. Participants would have to be Medicaid eligible. Participants would initially be limited to individuals between the ages of 14 and 25 subject to expansion at a later date. Only individuals with certain disability profiles would be eligible: 1) individuals with visual impairments; 2) individuals with physical disabilities, including brain injury; 3) individuals with intellectual disabilities, autism spectrum disorders, and Asperger's.

The following menu of services would be included in the program:

- 1) career exploration and assessment;
- 2) supported employment (small group);
- 3) supported employment (individual);
- 4) employment navigators;
- 5) benefits counseling;
- 6) financial coaching;
- 7) non-Medical Transportation;
- 8) personal care (including a self-directed care option); and
- 9) orientation and mobility training and assistive technology.

DMMA would oversee the program which would be jointly administered by the Division of Developmental Disabilities Services (DDDS), the Division of Services to Aging and Adults with Physical Disabilities (DSAAPD), and the Division for the Visually Impaired (DVI). A similar initiative is planned for individuals with mental illness through a §1115 waiver amendment.

The GACEC would share the following observations.

First, although DMMA identifies a financial income cap [150% of the Federal Poverty Level (FPL)], there is no mention of a resource limit. At 690. DMMA notes with approval the operation of the Medicaid Buy-in program (Medicaid Workers with Disabilities). Concept Paper at 3. That program has no resource cap. See 16 DE Admin Code 17000, §17906. It would be preferable to explicitly adopt a no-resource cap standard for the “Pathways” program.

Second, the “Pathways” program overlaps with the federal Ticket to Work program. Cf. 16 DE Admin Code 17000, §17900. Under the “Ticket” program, current Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) beneficiaries assign their “ticket” to an employment network (EN) which is paid to facilitate the employment of the beneficiaries. See attached Social Security Administration descriptions. DMMA needs to address the interplay between Medicaid beneficiaries who enroll in both the Ticket program and the Pathways program. For example, could a participant in both programs receive benefits counseling, financial coaching, supported employment, etc. through both an EN and a Pathways provider?

Third, in enacting the Ticket program, Congress recognized that many SSI/SSDI beneficiaries seeking employment face legal barriers, including employment discrimination in hiring, need for employer-provided reasonable accommodations and denials of support services. In response, Congress included a legal advocacy program as part of the Ticket legislation, the Protection and Advocacy for Beneficiaries of Social Security (PABSS) program. See attachment. DMMA could consider adding legal advocacy to the menu of services in the Pathways program. In Delaware, the Community Legal Aid Society, Inc. implements the PABSS program. DMMA could consider a contract with CLASI similar to the DSAAPD-CLASI contract using Older Americans funds for legal advocacy on behalf of seniors. This could be of critical importance for Pathways participants ages 14-21 who are enrolled in the special education system. The Concept Paper (at 4) indicates that the Pathways program will not provide services available under the IDEA. Query how this will be enforced in practice since the entire Pathways menu of services would qualify as IDEA services for students in transition. CLASI enjoys unique special education expertise and could represent Pathways participants in securing robust IEPs with employment-related components. For older Pathways participants, CLASI could address other barriers to employment, including employment discrimination.

Fourth, there will obviously be overlap between participants in the Pathways program and the Diamond State Health Plan Plus (DSHP+) program. There are also overlapping services, including assistive technology and personal/attendant services. DSHP+ Managed Care Organizations (MCOs), which are paid per person, have a financial incentive to deflect assistive technology and personal/attendant services costs to the Pathways program. DMMA should adopt disincentives and deterrents to such practices which could result in unnecessary cost to the Pathways program. For example, DMMA could require MCOs by contract to defer and cooperate with implementation of a Pathways services plan. Compare Title 16 Del.C. §214 (MCOs required to defer to IFSPs).

Fifth, as proposed, the Pathways program may present a "Catch-22" to participants. The income cap (150% of FPL) is relatively low. In contrast, the Medicaid for Workers with Disabilities income cap is 275% of FPL. See 16 DE Admin Code 17000, §17911. There are two "downsides" to a low income cap. First, an individual who is successful in employment with Pathway supports may swiftly lose financial eligibility as earnings reach the cap. Second, participants and providers will be unduly restrained in promoting employment since reaching the income cap results in termination of Pathways eligibility. DMMA should incorporate features in the Pathways program to address disincentives to full employment. For example, DMMA could allow participants to exceed the general earned income cap for a period of 3-4 months while engaging in Pathways-sponsored supported or competitive employment.

Sixth, for 14-17 year olds with covered disabilities, many will be financially ineligible based on consideration of parental income. Cf. 16 DE Admin Code 17000, §17910. DMMA may wish to consider an exception to parental deeming for the Pathways program. Alternatively, DMMA could adopt a partial "disregard" of some parental income for the Pathways program.

Seventh, the attached draft legislation was shared with policymakers in 2013 which would authorize a tax credit for hiring DDDS clients. A similar bill could be developed to authorize a tax credit for hiring Pathways participants. This would enhance prospects for the success of the program since employers would have a significant incentive to hire Pathways participants. As a practical matter, DMMA could spend \$380,000 to ensure that individuals are ready for employment but be unsuccessful if employers are disinclined to hire participants. Another advantage to the legislation is that it promotes retention of the individual for a specified time period in order to qualify for the credit.

Eighth, the regulation includes the following reference to the target population: "(i)ndividuals with physical disabilities, which may include individuals with brain injury". The use of "may" is highly problematic since it suggests that eligibility of individuals with Traumatic Brain Injury (TBI) and Acquired Brain Injury (ABI) is optional. Eligibility of individuals with brain injury should be made explicit and categorical.

Ninth, the Concept Paper (p. 6) envisions the establishment of a "cross-division workgroup". Council would suggest the inclusion of the State Council for Persons with Disabilities (SCPD) and the Governor's Advisory Council for Exceptional Citizens (GACEC) due to our work with the target populations.

Tenth, the menu of services is apparently oriented towards "physical" impairments. It would be preferable to include some services specific to individuals with brain injury (e.g. cognitive retraining) and other nonphysical impairments. In addition, Council recommends that the menu of services be sufficiently inclusive so that it would also cover self-employment. To the extent that there may be

some self-employment which is not considered supported employment (individual) or career exploration, the Department may want to consider adding another category.

Eleventh, the Concept Paper (p. 7) envisions inclusion of “strategies for solving conflict or disagreement”. It would be preferable to explicitly apply the Medicaid “Fair Hearing Practice and Procedures” regulation to the program. See 16 DE Admin Code 5000.

Thank you for your time and consideration in reviewing our observations and recommendations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

Terri A. Hancharick
TAH:kpc

CC: Mr. Stephen Groff, DMMA
Mr. Bill Love, DSAAPD
Ms. Jane Gallivan, DDDS
Mr. Dan Madrid, DVR
Mr. George Meldrum, Nemours
Ms. Deborah Gottschalk, DHSS
Employment First Oversight Commission

Attachments