

April 28, 2014

Deborah Harvey
Division of Public Health
417 Federal Street
Dover, DE 19901

RE: DPH Proposed Cancer Treatment Program Regulation [17 DE Reg. 955 (April 1, 2014)]

Dear Ms. Harvey:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Public Health (DPH) proposal to revise its "technical, financial, and residency eligibility requirements for the Delaware Cancer Treatment program." At 955. Council would like to share the following observations.

First, DPH adds a new definition of "uninsured" as follows:

- 1.2. Definition of "uninsured" for purposes of this regulation - a person who meets all technical, financial, and residency requirements of this regulation.

This definition is counterintuitive and makes no sense. Literally, someone who is insured but not a Delaware resident would be considered "uninsured". Likewise, someone who is insured but "over income" would be considered "uninsured". If the Division wishes to retain the reference, consider substituting "a person who meets §§4.1.4 - 4.1.6 of this regulation".

DPH should consider the creation of a "definitions" section rather than inserting a definition in the "purposes" section. See Delaware Administrative Code Style Manual, §3.1. Indeed, the Manual recites as follows: "Define a term only if it is important and it is used more than once in the regulation." The term "uninsured" is only used once (§1.1) in the regulation so there is technically no need for a definition of "uninsured". The better approach would be to establish a "definitions" section, substitute "Be uninsured" for "Have no health insurance" in §4.1.4, and then include all definitions in the definitions section, including "uninsured" and "inmate" and "public institution" (currently defined in §4.3.1).

Second, the regulation limits authorization for treatment to a "physician". See §§4.1.1, 4.2.1, and 11.2. DPH may wish to consider adding references to "advanced practice nurse". See 24 Del.C. §1902(b)(1). Alternatively, DPH could adopt a generic term (e.g. "licensed health care professional" and add a definition of the term to cover physicians and advanced practice nurses.

Third, in §3.1, the Division may wish to consider deletion of the unnecessary "acting" in the second sentence.

Fourth, in §3.1, the third sentence lists protected classes. Some classes have been omitted. See Title 6 Del.C. §§4501, 4502(14), and 4503.

Fifth, in §4.1.5.1, DPH should consider correcting the grammar. There should be parallel form in lists. In this section, some items begin with nouns and some items begin with verbs. See Delaware Administrative Code Drafting & Style Manual, §6.2.3.

Sixth, the regulation is inconsistent in the context of retroactivity. On the one hand, §4.2.4 authorizes three months of retroactive coverage for children with no corresponding authorization for adults in §4.1. It is unclear why three-months retroactive coverage would be authorized for children but not adults. Moreover, 12 month retroactivity for children and adults is authorized by §12.7. The Division may wish to clarify its intention and adopt a uniform standard.

Seventh, the references to “inmate of a public institution ... as used in the Delaware Medicaid program” do not provide much guidance. It would be preferable to provide a citation to 16 DE Admin Code 14120 for clarity and ease of reference.

Eighth, the Division is switching from a net income to a gross income standard for most forms of earned income. See §§5.3.5 and 5.3.6. This creates an abnormality since rental income (§5.3.11 and 5.3.12) is reduced by expenses to amount to net income. Obviously, it would be more consumer-oriented to continue to count net earned income.

Ninth, the Division proposes to change the residency standard as follows:

- 6.1. A Delaware resident is an individual who lives in Delaware with the intention to remain permanently ~~or for an indefinite period~~ or where the individual is living and has entered into a job commitment, or seeking employment whether or not currently employed.

The deletion of “or for an indefinite period” is highly objectionable. Residency does not require an intention to remain in the State permanently. See 16 DE Admin Code 14110.5 -14110.8. See also 17 DE Reg. 386 (10/1/13). The term “or for an indefinite period” should be retained. DPH may wish to consult its assigned Attorney General for guidance.

Tenth, the Division proposes the following deletion:

Eligibility: ...

- ~~6.3.2. Will not be denied because of a durational residence requirement.~~

The implication of the change is to reinforce the proposed requirement in §6.1 that residency must be “permanent” to be eligible for the program. This is objectionable. Residency can be established without meeting a “permanency” standard. Section 6.3.2 should be retained.

Eleventh, the Division proposes the following revision:

- 7.4 Failure to provide requested documentation ~~may~~ will result in denial or termination of eligibility.

It would be preferable for the Division to retain discretion in how it addresses lack of documentation rather than adopting an inflexible standard. For example, an individual may lack competency or attempt unsuccessfully to obtain documentation from other sources.

Twelfth, Council would like to point out that although sections 9 through 15 have been re-numbered, the section headers have not been renumbered leading to “910.0 Changes In Circumstances And Personal Information”,

“1011.0 Termination Of Eligibility” and continuing.

Thirteenth, the grammar in §9.3 could be improved. The reference to “regardless as to if the individual” is somewhat awkward. Consider substituting “regardless of whether the individual”.

Fourteenth, in §10.1, the Division is modifying a reference to read “his/her”. The Delaware Administrative Code Drafting & Style Manual (§3.3.2.1) discourages the use of “him/her” and similar references. It would also be preferable to revise the multiple references to “his/her” in §5.6.2 and the reference to “his or her” in §3.2.

Fifteenth, §11.2 recites as follows:

11.2 If eligibility is terminated, it may only be renewed for an individual who is diagnosed with a new primary cancer.

Literally, if someone became ineligible for one month due to excess earnings, or if eligibility of the individual was terminated due to lack of documentation which is then located, this section would categorically prevent reinstatement or continued therapy in following months. This would be a severe result. The section should be reconsidered. For example, for someone with variable income, could benefits be subject to “suspension” in a high-income month rather than outright termination of eligibility. Alternatively, if the eligibility is terminated (per §7.4) for lack of documentation and the requested documentation is then acquired and submitted, reconsideration of eligibility should be allowed.

Sixteenth, the Division could consider deletion of §12.8 since no one would ostensibly be affected by this section in 2014 or later.

Seventeenth, appeal rights under §16.0 are limited and do not include even basic due process. Compare Goss v. Lopez, 397 U.S. 254 (1970). Cf. Title 29 Del.C. §10121-10129. DHSS could consider applying 16 DE Admin Code 5000 to the program.

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

Sincerely,

Terri A. Hancharick
Chairperson

TAH:kpc

CC: Dr. Karyl Rattay
Jeanne Nutter, AARP