



September 29, 2023

Melisa Byrd
Interim Director
Department of Health Care Finance
441 4th St. NW, Suite 900S
Washington, DC 20001

VIA EMAIL: dhcfpubliccomments@dc.gov

Re: Medicaid Reimbursable Autism Spectrum Disorder Services Regulations

Dear Ms. Byrd:

These comments are submitted on behalf of Disability Rights DC at University Legal Services (“DRDC”). Disability Rights DC is a private, non-profit organization that serves the District of Columbia’s federally mandated protection and advocacy system for people with disabilities. DRDC provides individual representation, performs investigations of abuse and neglect, training, and advocates for systemic change.

At the core of DRDC’s advocacy is the commitment to defending the right of individuals with disabilities to be fully included in their communities. DRDC applauds DHCF for taking steps to clarify the Medicaid services available to children who are diagnosed with autism spectrum disorder (“ASD”) or displaying signs of ASD. To help ensure that these services are provided broadly and efficiently, DRDC submits the following comments.

i. DHCF Must Eliminate Unnecessary Barriers to Reimbursable ASD Services.

Disability inclusion means ensuring that persons with disabilities have the same opportunities to participate in public life as their non-disabled peers.¹ An integral part of disability inclusion is accessing health care and ensuring that health care organizations have policies and practices that eliminate barriers for persons with disabilities.²

Among other things, DHCF has proposed that Medicaid-reimbursable ASD treatment services shall include “Applied Behavior Analysis (ABA) Therapy,” “Psychological Services,” “Physical Therapy,” “Occupational Therapy,” and “Speech Language Pathology and Audiology.”³ These services “shall also be described in the beneficiary’s treatment plan or plan of care.”⁴ Beneficiaries’ treatment plans

¹ Ctrs. for Disease Control, *Disability Inclusion*, <https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html>.

² *Id.*

³ Medicaid Reimbursable Autism Spectrum Disorder Services, Notice of Proposed Rulemaking (proposed Aug. 30, 2023) (to be codified at 29 DCMR § 29 DCMR § 1104.1(a)-(e)).

⁴ *Id.* at § 1104.1.

must, among other requirements, be “individualized to meet the specific needs of the beneficiary,” be “centered on the beneficiary’s and family’s needs and goals,” and be “submitted to DCHF every six (6) months for review and prior approval, along with the screening, diagnostic evaluation, and supporting clinical documentation.”⁵ While the proposed regulations defer to physicians and qualified providers to “indicate whether evidence-based ASD services are medically necessary and recognized as therapeutically appropriate,”⁶ there is no information about how DCHF will evaluate these treatment plans in order to approve them. Nor are their standards for the required six-month review.

The preamble to the proposed regulations states that children who receive Medicaid are covered under the Medicaid Early and Periodic Screening, Diagnostic and Treatment (“EPSDT”) benefit when medically necessary. The EPSDT benefit is a broad entitlement for beneficiaries under age 21 which provides medically necessary behavioral health services that are targeted to ameliorate identified conditions.⁷ This means that if a service is listed under 42 USC § 1396(d)(a), and the service is medically necessary, the state must provide the service.⁸ This mandate applies to all categories of medical assistance, even if the service is generally classified as an “optional” service or is not included as covered under the state’s Medicaid plan.

As currently drafted, the proposed regulations appear to place limitations on the services available to children with ASD, which may violate the Medicaid statute. DCHF’s 6-month review and prior approval requirement may usurp the authority and expertise of the child beneficiary’s physician and treatment team about what is “medically necessary” for the child, including medical services needed to address social, communication, and behavioral challenges. To ensure this does not happen, DCHF should include in its final regulations provisions which explain the purpose of the DCHF six-month review, the evaluation criteria for approval and six-month reviews, the titles of DCHF personnel who will review treatment plans, and timelines for review from the date of submission. DCHF should state in the regulations that beneficiaries’ services can continue throughout the review process and that the medical professional and the treatment team determine what service is medically necessary.

DCHF must ensure that reimbursable ASD services are fully inclusive and do not pose any additional barriers to children and families who need medically necessary services. Children with autism have the right to fully engage in community life and should receive all supports to make that reality.

⁵ *Id.* at § 1103.3

⁶ *Id.* at § 1102.2(b)

⁷ 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r); see also *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 590 (5th Cir. 2004) (services that are appropriately defined as “medical assistance” under the Medicaid regulations and are medically necessary to correct or ameliorate a condition” must be provided to children under 21).

⁸ CMS, Medicaid Guidance on the Scope and Payments for Qualifying Community-Based Mobile Crisis Intervention Services, (Dec. 28, 2021), <https://www.medicaid.gov/federal-policyguidance/downloads/sho21008.pdf> (“The Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) benefit for eligible children under 21 also provides for all 1905(a) benefits to treat or ameliorate health conditions, including mental health and SUD conditions. This means that states must provide coverage of all medically necessary services for children under 21 that are included within the categories of mandatory and optional services listed in section 1905(a) of the Act, regardless of whether such services are covered under the State plan for adults.”) (emphasis in the original).

ii. DHCF Must Allow for Due Process.

The proposed regulations are silent about how DHCF will resolve disputes should beneficiaries' approval for services be denied, or if they are terminated altogether. Along with specifying what DHCF will evaluate when reviewing providers' treatment plan submissions, the Agency should specifically delineate due process provisions, including notice of denial and explanation of the right to appeal and the right to a fair hearing - which should include review at the Office of Administrative Hearings. Parents or legal guardians of child beneficiaries should have the opportunity to be heard regarding unfavorable decisions by DHCF. Such rights will ensure that beneficiaries' rights to medically necessary ASD treatment are protected.

By including specific due process provisions in these proposed regulations, DHCF will create a consistent system that protects the rights of Medicaid beneficiaries and their families.

DRDC appreciates the opportunity to offer input on these proposed regulations. Please contact DRDC at (202) 547-0198 with any questions regarding these comments.

Respectfully,

/s/

Maeve Sullivan
Staff Attorney
Disability Rights DC