HUMAN SERVICES

DIVISION OF DEVELOPMENTAL DISABILTIES

Notice of Administrative Corrections to Proposal

Determination of Eligibility

Proposed Amendments: N.J.A.C. 10:46-1.1,1.2, 1.3, 2.1, 3.2, 3.3, 4.2 and 5.1

Proposed Repeals: N.J.A.C. 10:46-2.5, 2.6 and 6

Proposed Repeal and New Rule: N.J.A.C. 10:46-5.1

Proposed Recodification with Amendment: N.J.A.C. 10:46-7.1 as 6.1

Take notice that the Department of Human Services, Division of Developmental Disabilities has discovered errors in the notice of proposal of amendments, repeals and new rule at N.J.A.C. 10:46, Determination of Eligibility, published in the July 21, 2003 New Jersey Register at 35 N.J.R. 3015(a). While the amended rules provide that individuals must apply and maintain eligibility for Medicaid in order to be eligible for "waiver services" as proposed to be defined in N.J.A.C. 10:46-1.3, the Department's intention was that eligibility would be determined by application and maintenance of eligibility for the Community Care Waiver, discussed in the third paragraph of the Summary. In order to make this clear, the Department is correcting the references to "Medicaid" in the proposal Summary and Economic Impact, and in the proposed rule text of N.J.A.C. 10:46-1.1, 1.3 and 2.1, through this notice of administrative corrections.

Take further notice that the Department is extending the public comment period on the notice of proposal, only in relation to comments on the corrections to the proposal as set forth in this notice, to October 17, 2003. Submit written comments on that amendment by that date to:

James M. Evanochko
Administrative Practice Officer

Division of Developmental Disabilities
PO Box 726
Trenton, New Jersey 08625-0726

This notice of administrative correction is published pursuant to N.J.A.C. 1:30-2.7.

Full text of the corrected proposal Summary and Economic Impact follows (additions to proposal indicated in boldface thus; deletion from proposal indicated in brackets [thus]):

Summary

The Department adopted eligibility criteria for services from the Division of Developmental Disabilities on September 17, 1990, as N.J.A.C. 10:46-2. The rules were amended in 1998 to incorporate requirements for contributions by the individual for his or her cost of care and maintenance while in residential settings.

This chapter is now being amended to relocate the requirement for contribution into its own chapter, N.J.A.C. 10:46D, proposed elsewhere in this issue of the New Jersey Register, and clarify new requirements established in Commissioner Harris' new and expanded options plan announced in September 2002. That plan called for all Federal revenues to be maximized and re-invested in services for individuals living at home.

The new and expanded options plan identified New Jersey as an outlier in how it utilizes its Community Care Waiver (CCW). The CCW waiver is a Medicaid program, which allows the State to waive certain Federal Medicaid eligibility criteria for individuals who meet eligibility for Division of Developmental Disabilities services and require an intermediate care facilities for the mentally retarded/developmentally disabled (ICF/MR) level of care which is that this individual is substantially functionally limited in three of six major life areas, one of which is self-care. The waiver is the primary funding source, across the country, for services to individuals with developmental disabilities. It allows states to receive matching funds from the Federal government for every state dollar it invests. It allows individuals who would otherwise be eligible for

institutional services to be provided services in t he community. I n N ew Jersey, this means that individuals can have income up to three times the Social Security Income Federal benefit level and still be eligible, if they meet the other criteria.

In the past, New Jersey has had individuals enter programs first and then asks the individual or their representative payee to apply for [Medicaid] the Community Care Waiver. This has resulted in a significant loss of Federal revenues. Other states have required that the individual become [Medicaid] Community Care Waiver eligible prior to entering a waiver-funded program. The Division is including this requirement in its eligibility procedures. This requirement ensures that Federal funds will be maximized.

N.J.A.C. 10:46-1.1 clarifies that New Jersey, in order to maximize revenue, will now require that individuals or their representative payee apply for all benefits for which they are eligible (primarily [Medicaid] the Community Care Waiver and SSI) and comply with all requirements of eligibility, prior to the delivery of waiver services. By increasing the number of individuals who are Federally funded, the State will be able to increase revenues and re-invest in services to more individuals, primarily those living at home.

N.J.A.C. 10:46-1.2 has been amended to delete the requirement that the individual be assessed for his or her financial ability to pay if admitted to a residential service. This requirement will be incorporated into the new rule, N.J.A.C. 10:46D, proposed elsewhere in this issue of the New Jersey Register.

The definitions section, N.J.A.C. 10:46-1.3, is amended to delete those definitions that deal with the financial assessment process. These will be incorporated into proposed N.J.A.C. 10:46D. Definitions of "benefits," "residential placement" and "waiver services" have been added to further explain the new requirements to apply for all benefits.

Subchapter 2 deals with general eligibility requirements. References to the requirement to contribute to the cost of care and maintenance have been deleted. N.J.A.C. 10:46-2.1(a) through (d) outline the requirement to apply for and maintain eligibility for benefits. This subchapter also

specifies that any individual who applies for [Medicaid] the Community Care Waiver and complies with all eligibility requirements and who is not found [Medicaid] Community Care Waiver eligible, will not be denied waiver services. N.J.A.C. 10:46-2.1(e) through (h) address educational entitlements and the eligibility criteria for persons with mental retardation.

Subchapter 2 specifies that once an individual is [Medicaid] Community Care Waiver eligible they must comply with an annual redetermination and maintain eligibility (assets below $2,000). If individuals lose [Medicaid] Community Care Waiver eligibility, their services must be paid for with 100 percent State funds and funds will not be available for re-investing in services for individuals living at home.

If individuals lose [Medicaid] Community Care Waiver eligibility due to excess resources, they will be notified that they have 30 days to comply. If they have not complied, they will be given a 6 0-day n otice t hat t hey w ill n o 1 onger b e e ligible for w aiver se rvices a nd w ill o nly b e eligible for non-Federally reimbursed or State funded services, which are available. If at any time during this period, individuals reestablish eligibility by lowering their assets, they will be able to remain in the waiver service.

In order to be determined eligible, an individual must have a severe and chronic disability attributable to a mental and/or physical impairment. That disability must be manifested before age 22 and must result in substantial limitation in three or more of the following major life areas: self-care, receptive and expressive language, learning, mobility, self-direction, and capacity for independent living or economic self-sufficiency.

The rule clarifies that the mental or physical impairment cannot be based upon a mental illness. Individuals who are found eligible, but have a mental illness, may receive services while being treated for that mental illness. The individual on whose behalf an application is made for services must be a resident of New Jersey.

N.J.A.C. 10:46-2.5 and 2.6 are proposed for repeal because the subject matter is incorporated in N.J.A.C. 10:46D, proposed elsewhere in this issue of the New Jersey Register.

Subchapter 3 describes the application requirements. The only amendment proposed is an address correction for the Division's Lower Central Region.

Subchapter 4 describes the determination process. N.J.A.C. 10:46-4.2 deletes subsections (e), (f) and (g) b ecause they deal with the contributions for c are which are treated i n N.J.A.C. 10:46D, proposed elsewhere in this issue of the New Jersey Register.

New N.J.A.C. 10:46-5.1, Offer of placement, contains a reference to the proposed new rule, N.J.A.C. 10:46D, which outlines the specific responsibilities of the individuals and their legally responsible relatives. Those same requirements are proposed to be deleted here and proposed elsewhere in this issue of the New Jersey Register, as a new rule in N.J.A.C. 10:46D.

Subchapter 6, Termination, steps to be taken by the Division in the event that an individual does not contribute to the cost of his or her care, is proposed for repeal here, but contained in the proposed new rule, N.J.A.C. 10:46D.

Because the Division has provided a 60-day comment period on this notice of proposal, this notice is exempted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Economic Impact

The proposed amendments, new rule and repeals will have a significant impact on those individuals awaiting services. The requirement to apply for [Medicaid] Community Care Waiver and other benefits will help the Division maximize Federal revenues. This will allow the Division to serve more people waiting for services within its existing budget. The requirement to apply for and maintain eligibility for benefits is a keystone in the Commissioner of Human Services' plan to develop new options for services The Division anticipates no increased administrative costs associated with the amendments and repeals.

Full text of the corrected proposal rule text of N.J.A.C. 10:46-1.1, 1.3 and 2.1 follows, with portions of the proposed text not affected by these corrections indicated by "(No change from proposal.)." (additions t o proposal indicated i n italicized boldface *thus;* deletions from proposal indicated in cursive brackets {thus}):

10:46-1.1 Purpose; authority

Caj Pursuant to N.J.S.A. 30:1-12, 30:4-27.2, 30:4-25.2, Application for determination of eligibility, N.J.S.A. 30:4-25.9, 30:6D-1 et seq. (P.L. 1985, c.145) and 30:4-60 et seq. (P.L. 1995, c.155), the Division of Developmental Disabilities, Department of Human Services (Division), intends this chapter to establish guidelines and criteria for determination of eligibility for services, to individuals with developmental disabilities [and their financial ability and that of their legally responsible relatives to contribute to the cost of care and maintenance in providing residential services]. The Division intends this chapter to clarify that before services covered under the waiver are provided by the Division, the individual and/or representative payee is responsible to apply for all benefits, primarily IMedicaid] *Community Care Waiver* and Social Security SSI, and comply with all the requirements of eligibility for these benefits. The individual is also responsible to maintain those benefits by ensuring they have no more than $2,000 in cash assets. All other eligibility criteria in this chapter remain the same.

(b) (No change from proposal.)

10:46-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

["Assets or resources" means, but is not limited to, cash, trusts, bank accounts, certificates of deposit, stocks, bonds, mutual funds, real estate and savings bonds and personal property

pursuant to N.J.S.A. 30:4-25.la(8).]

["Assignment" means the written agreement of the individual to give the Department of Human Services the right to receive and collect any and all proceeds due to the individual from such items as insurance policies, annuities and law suit settlements.]

"Benefits" means all current and future sources of cash and health assistance from Federal, State or private entities including, but not limited to Social Security SSI, Medicare, fMedicaidl *Community Care Waiver* State and Federal funds and any third party support pursuant to State, rule order or by contract.

["Burial fund" means an identifiable fund which is clearly designated and set aside for an individual's burial expenses.]

["Consumer Price Index (CPI)" means the measure of the average change in prices over time in a fixed group of goods and services, as issued by the U.S. Department of Labor.]

["Cost o f c are a nd m aintenance" m eans t he d aily rate s et b y t he S tate B oard o f H uman Services for the residential placement of the individual or the daily rate set by the Commissioner of the Department of Human Services for community care homes (except respite homes) regulated under N.J.A.C. 10:44B multiplied by the number of days the individual is or was in the placement.]

["Dependent" means an individual who meets the State and Federal income tax requirements for being claimed by the individual or the LRR(s) on State and Federal income tax forms.]

["Disposable income" means the total income from any and all sources, less Federal and State Income taxes, FICA and deductions allowable in accordance with N.J.A.C. 10:46-2.5.]

["Family" means the LRR(s), any dependent minors and any other person(s) who are claimed on the LRR(s)' income tax forms, and the individual receiving Division services.]

["Family maintenance standard (FMS)" means the income needed to meet a family's minimum needs. The FMS establishes the lower limit on the charges to the individual and/or the LRR for the individual's care and maintenance. See N.J.A.C. 10:46-2.5.]

["Fixed income" means that the person is retired, receiving disability benefits, receiving public assistance or is not otherwise actively employed.]

["Income" means wages, benefits, interest earned, pensions, **annuity payments, and support from** a third party pursuant to statute, rule or order or by contract or any other receipt pursuant to N.J.S.A. 30:4-25.la(7). Income does not include income earned by an individual receiving services, which is below the minimum wage rate.]

["Legally responsible relative (LRR)" means a spouse, mother, father or adult child of an individual receiving services who is statutorily responsible for the cost of care and maintenance pursuant to N.J.S.A. 30:4-66.]

["Marginal income" means the total amount remaining after the cost of the FMS is subtracted from the disposable income.]

["Medical cost standard (MCS)" means the minimum amount needed to meet a family's

medical cost. The MCS establishes a maximum limit on the charges to be included in the FMS. See N.J.A.C. 10:46-2.5.]

["Other interested party" means representative payee, trustee or executor, or guardian of the property, as applicable.]

["Plan to achieve self-support (PASS)" means a written course of action approved by the Social Security Administration in accordance with 20 C.F.R. § 416.1226. A PASS allows an individual t o s et a side income and/or resources for a specified period of time for a work goal. Resources set aside under a PASS are not counted toward the $2,000 resource limit for SSI eligibility purposes. If income is set aside under a PASS, it is not counted in determining the SSI benefit payment amount. A PASS may be used to set aside money for education, vocational training, or starting a business.]

"Residential placement" means that the individual's living arrangement is funded, fully or partially- by the Division in an appropriately licensed program including, but not limited to, community residences as defined in N.J.A.C. 10:44A, Private licensed facilities for persons with developmental disabilities, as defined in N.J.A.C. 10:47, and appropriately licensed out- of-State facilities under contract with the Division.

["Termination of services" means action taken by the Division under the circumstances set forth in N.J.A.C. 10:46-6 when an individual, LRR(s) or any other responsible party fails to make the assessed payment.]

["Treasury Formula-DDD" means the method of determining the financial ability of an individual or LRR(s) to pay for care and maintenance for an individual receiving services, in accordance with N.J.A.C. 10:46-2.5.]

"Waiver services" means the waiver is a Medicaid program which allows the State to waive certain Federal Medicaid eligibility criteria for individuals who meet eligibility for Division of Developmental Disabilities services and require an intermediate care facilities for the mentally retarded/developmentally disabled (ICF/MR) level of care which is that this individual is substantially functionally limited in three of six maior life areas, one of which must be self-care. Waiver services is a wide array of Home and Community-Based Care under (42 CFR 441 Subpart G) *known in New Jersey as the Community Care Waiver,* for eligible individuals with developmental disabilities who would otherwise require institutional care in ICF/MR. Waiver services may include any of the following or any other services covered under the Home and Community-Based Care Waiver applications to the Federal government:

1. Case Management;

2. Individual Supports;

3. Habilitation-,

4. Respite Care;

5. Integrated Therapeutic Network; and

6. Environmental/Vehicle Accessibility Adqptations.

10:46-2.1 General eligibility

(a) [An individual determined to be developmentally disabled as defined in N.J.A.C. 10:46-1.2, and who is a resident of the State of New Jersey, shall be eligible for services of the Division contingent upon cooperation with the financial assessment investigation and payment of any fees assessed.] An individual must be determined eligible for services under this chapter before the Division can provide services. In order to receive waiver services (a Federal Medicaid program), the individual and/or representative payee is responsible to make application for all benefits and comply with the requirements of eligibility for which they are entitled, primarily f Medicaid) Community Care Waiver and Social Security SSI. The individual is also responsible to maintain Medicaid} Community Care Waiver eligibility by ensuring that they have no more than $2,000 in cash assets.

(1) The individual is required to make a good faith effort to apply for these benefits, primarily of Medicaid Community Care Waiver and Social Security SSI and comply with all the requirements of those programs, for which he or she may be eligible. If the individual is denied benefits, after having complied with the requirements, he or she shall provide documentation of the denial to the Division, which shall be part of the client record. Eligibility for services shall not be denied under these instances, if the other eligibility criteria are met.

(c) Individuals must maintain eligibility for Medicaid) Community Care Waiver (assets below $2,000) in order to be eligible for waiver services. If (Medicaid) Community Care Waiver is lost because assets are over $2,000, the individual or representative payee will be notified that they have 30 days to comply with the asset requirement, in order to continue in a waiver program. If the individual or representative payee does not comply, they will receive notification that they will no loner be eligible for waiver services if they don't comply in 60 days. Loss of eligibility for Medicaid Community Care Waiver will mean the individual will be eligible for only those State-funded services that are available at that time. If a t anytime during t his period, the individual reestablishes eligibility by lowering their assets, the individual will be able to remain in the waiver service.

(d) - (k) (No change from proposal.)