

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance (DHCF or the Department), pursuant to the authority set forth in An Act to enable the District of Columbia (District) to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat.774; D.C. Official Code § 1-307.02 (2016 Repl.)), and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption of an amendment to Section 9502 (Residency) of Chapter 95 (Medicaid Eligibility) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

DHCF, as the single state agency for the administration of the State Medicaid program under Title XIX of the Social Security Act and CHIP under Title XXI of the Social Security Act in the District, is responsible for supervising and administering the District of Columbia State Plan (State Plan) for Medical Assistance pursuant to 42 U.S.C. §§ 1396 *et seq.*, and amendments thereto. In that capacity, DHCF shall ensure that the State Plan establishes and/or maintains standards that govern DHCF, or its designee, in the administration of the District's Medicaid program.

The existing rules originally implemented changes to the District's eligibility policies and procedures in accordance with the Patient Protection and Affordable Care Act of 2010, approved March 23, 2010 (Pub. L. No. 111-148, 124 Stat 119), as amended, and supplemented by the Health Care and Education Reconciliation Act of 2010, approved January 5, 2010 (Pub. L. No. 111-152, 124 Stat. 1029; codified as amended in scattered sections of 42 U.S.C.))(collectively referred to as the Affordable Care Act) (ACA), and related regulations.

These rules amend Section 9502 (Residency) by defining when an individual, who is temporarily absent from the District, may satisfy residency criteria for Medicaid. It also identifies the conditions under which otherwise eligible foster care individuals placed outside of the District may satisfy eligibility criteria for Medicaid. These conditions include compliance with the federal designation of foster care at 45 C.F.R. § 1355.20; receipt of services by a provider enrolled in the District's Medicaid program at 29 DCMR § 9400; placement in an out-of-District foster home by the District's Child and Family Services Agency (CFSA); and taking into account the best interest of the individual when determining continued eligibility for and enrollment in the District's Medicaid program. DHCF projects no change in federal expenditures following implementation of this rule.

A Notice of Proposed Rulemaking was published in the in the *D.C Register* on February 10, 2017 at 64 DCR 001382. One (1) set of comments were received from the Children's Law Center (CLC). DHCF carefully considered CLC's comments and a number of technical changes and clarifications were made, as detailed below. No substantive changes were made to the rule.

Temporary Absence Day Limit

CLC identified an ambiguity in the rule with respect to the ninety (90) day limit referenced in §§ 9502.8(a) and 9502.8(b). The rule, as proposed, did not specify whether the 90 day limit is consecutive or cumulative. Further, if the day limit is cumulative, the rule was silent with respect to any timeframe within which the days accrue against the limit. DHCF agrees with CLC's recommendation to incorporate 'consecutive' into the rule in order to clarify the intended meaning of §§ 9502.8(a) and 9502.8(b).

Second, CLC expressed concern that the 90 day limit is too restrictive and will leave individuals without access to Medicaid coverage. CLC recommended that the District increase the day limit to one hundred twenty (120) consecutive days. The rule, as proposed, gives DHCF the ability to allow an individual who is absent from the District for 90 or more days to retain his or her status as a resident for good cause. Given the flexibility in the current proposal to allow for exceptions where needed, DHCF does not agree that an increase in the day limit is needed and is not making the recommended change.

'Good Cause' Age Limit

CLC recommended DHCF correct the good cause exception for 'school attendance' set forth in § 9502.8(b)(1) to include students up through the age of twenty-two (22). Under the Individuals with Disabilities Education and Improvement Act (IDEA) and corresponding District law, school districts are required to make available a free and appropriate public education to students with disabilities through the age of twenty-two (22). 5-E DCMR § 3002.1(b) specifies that an individual eligible for an educational placement under IDEA shall remain eligible through the end of the semester that he or she turns twenty-two (22). A technical correction was made to § 9502.8(b)(1) to clarify DHCF's intention that the good cause exception includes circumstances outlined in the District's special education rules. Further, the good cause exception is broadly constructed. As proposed, DHCF retained authority to allow students over twenty-one (21) to retain their residency for purposes of determining Medicaid eligibility. Therefore, DHCF does not believe substantive changes are needed.

'Best-Interest' Evaluation and Determination

CLC is concerned that the rule gives the District authority to make the best-interest determination, unilaterally, without any requirement that the District confer with critical parties, including the Guardian ad Litem, social workers, medical professional, and others. The language in the rule was proposed following extensive negotiation with and approval by CMS. The language is based on policies developed in collaboration with the Child and Family Services Administration (CFSA). Subsections 9502.24(d) and 9502.25(d), as proposed, require the District to evaluate 'all factors affecting the best interests of the individual'. Therefore, DHCF does not agree that a rule change, specifically requiring that the District confer with the Guardian ad Litem, social workers, medical professionals, and others, is necessary. However, DHCF will work with CFSA to update its Medicaid Eligibility policy guidance to for children in care in order to detail the factors CFSA shall consider when making the best-interest evaluation and determination to ensure the process for conferring with these entities is clearly outlined and understood by all stakeholders.

Geographic Distance

CLC suggested that, as proposed, Subsection 9502.25(a) of the rule was unclear. The language does not clearly indicate whether geographic distance refers to the distance from the provider or the distance from the location where services are provided. DHCF agrees that the language of the rule, as proposed, was potentially ambiguous. DHCF has clarified the language to ensure that all understand that by indicating that geographic distance in § 9502.25(a) refers to the distance 'from the location where services are provided.'

The following minor changes were made throughout the document to correct grammar and clarify intent: 1) an extra space was removed between 'her' and 'parents' in Subsection 9502.16(c); 2) two references were corrected in Subsection 9502.15; and 3) the 'is' before 'enrolled' was removed from Subsection 9502.24(b).

This final rulemaking correlates to a State Plan Amendment (SPA) to the District of Columbia State Plan for Medical Assistance. The SPA was approved by the U. S. Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS) on April 21, 2016 and by the Council of the District of Columbia on March 18, 2016 (PR21-0559).

The Director adopted these rules on July 31, 2017 and they will become effective upon publication of this notice in the *D.C. Register*.

Chapter 95, MEDICAID ELIGIBILITY, of Title 29 DCMR, PUBLIC WELFARE, is amended to read as follows:

Section 9502, RESIDENCY, is amended by replacing Subsections 9502.8 and 9502.15, inserting two (2) new subsections after Subsection 9502.23, and renumbering subsequent subsections to read as follows:

9502 RESIDENCY

- 9502.1 An individual shall be a resident of the District as a condition of Medicaid eligibility.
- 9502.2 An individual shall be considered incapable of stating intent to reside in the District if one of the following applies to the individual:
- (a) Individual has an I.Q. of forty-nine (49) or less or a mental age of seven (7) or less, based on tests acceptable to the District Department on Disability Services;
 - (b) Individual is judged legally incompetent; or
 - (c) Individual is found incapable of indicating intent by a physician, psychologist, or other similarly individual licensed in accordance with the

District of Columbia Health Occupations Revisions Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1201 *et seq.* (2012 Repl.)).

- 9502.3 A resident of the District shall be any individual who:
- (a) Meets the conditions of Subsections 9502.4 through 9502.19; or
 - (b) Meets the criteria specified in an interstate agreement under Subsection 9502.24.
- 9502.4 Subject to the exceptions identified in Subsections 9502.6, 9502.11, 9502.12, and 9502.14 below, an individual under age nineteen (19) who lives in the District shall be considered a resident of the District.
- 9502.5 Subject to the exceptions identified in Subsections 9502.6, 9502.11, 9502.12, and 9502.14 below, the state of residence of an individual who is age nineteen (19) through twenty (20) shall be where the individual resides or the state of residency of the parent or caretaker relative with whom the individual resides.
- 9502.6 An individual who is under the age of twenty-one (21), who is capable of stating intent to reside; who is married or emancipated, and who does not reside in an institution, shall follow the residency rules applicable to individuals who are the age of twenty-one (21) and older.
- 9502.7 An individual, who is the age of twenty-one (21) or older and who does not live in an institution, shall be considered a resident of the District if the individual is living in the District voluntarily and not for a temporary purpose; that is, an individual with no intention of presently leaving including individuals without a fixed address or who have entered the District with a job commitment or seeking employment, whether or not currently employed.
- 9502.8 For purposes of determining eligibility for Medicaid, an individual may retain his or her status as a resident of the District of Columbia if the individual considers the District to be his or her fixed place of residence to which he or she will return with the intent to reside following a temporary absence, and:
- (a) The individual is absent from the District for less than ninety (90) consecutive days; or
 - (b) The individual is absent from the District for more than ninety (90) consecutive days for good cause, as determined by DHCF, which may include, but not be limited to, the following:
 - (1) School attendance: an individual under the age of twenty-two (22) who is away from the District for the sole purpose of attending a

boarding school, other educational facility, or in an educational placement as set forth in Title 5-E DCMR § 3013.6, if otherwise eligible, may retain Medicaid eligibility;

- (2) Medical care: an otherwise eligible individual in need of medical care that temporarily resides outside of the District may retain Medicaid eligibility as long as the need for medical care continues; or
- (3) U.S. Military service: an individual with full-time employment in the U.S. military service, if otherwise eligible, may retain Medicaid eligibility while away from the District due to a duty assignment.

9502.9 Residence as defined for eligibility purposes shall not depend upon the reason for which the individual entered the District, except insofar as it may bear on whether the individual is there for a temporary purpose.

9502.10 Unless an exception applies, the State of residence for an individual who is age twenty-one (21) and over, and who is not living in an institution, but who is incapable of stating intent to reside, shall be the State where the individual lives.

9502.11 Where a District agency or designee arranges or makes an out-of-state placement for any individual aged eighteen (18) and older receiving diagnostic, treatment, or rehabilitative services related to intellectual or developmental disabilities, the District shall be the State of residence.

9502.12 The State of residence for an individual placed by the District in an out-of-District institution shall be determined as follows:

- (a) An individual who is placed in an institution in another State by a District agency or designee is a District resident;
- (b) If a District agency or designee arranges or makes the placement, the District is considered as the individual's State of residence, regardless of the individual's intent or ability to indicate intent;
- (c) Where a placement is initiated by a District agency or designee because the District lacks a sufficient number of appropriate facilities to provide services to its residents, the District, as the State making the placement is the individual's State of residence.

9502.13 Any action by a District agency or designee beyond providing information to the individual and the individual's family constitutes arranging, or making, an out-of-District placement in an institution.

- 9502.14 The State of residence for an individual of any age who receives a State supplementary payment (SSP) shall be the State paying the SSP.
- 9502.15 Except as provided in Subsections 9502.24 and 9502.25, the State of residence for individuals under the age of twenty-one (21) receiving adoption assistance, foster care, or guardianship care under title IV-E of the Social Security Act (the Act) shall be the State where the individual resides.
- 9502.16 The State of residence for an institutionalized individual under the age of twenty-one (21), who is neither married nor emancipated, shall be the following:
- (a) The parent's or legal guardian's State of residence at the time of placement;
 - (b) The current State of residence of the parent or legal guardian who files the application if the individual is institutionalized in that same State; or
 - (c) If the individual has been abandoned by his or her parents and has no legal guardian, the State of residence of the individual who files an application.
- 9502.17 For any institutionalized individual who became incapable of indicating intent before age twenty-one (21), the State of residence shall be:
- (a) That of the parent applying for Medicaid on the individual's behalf, if the parents reside in separate States (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's);
 - (b) The parent's or legal guardian's State of residence at the time of placement (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's);
 - (c) The current State of residence of the parent or legal guardian who files the application if the individual is institutionalized in that State (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); or
 - (d) The State of residence of the individual or party who files an application is used if the individual has been abandoned by their parent(s), does not have a legal guardian and is institutionalized in that State.
- 9502.18 For any institutionalized individual (regardless of any type of guardianship) who became incapable of indicating intent at or after age twenty-one (21), the State of residence is the State in which the individual is physically present, except where another State makes a placement.

- 9502.19 For any other institutionalized individual, the State of residence shall be the State where the individual is living and intends to reside.
- 9502.20 The Department shall not deny eligibility for Medicaid because an individual has not resided in the District for a specified period.
- 9502.21 The Department shall not deny eligibility for Medicaid to an individual in an institution, who satisfies the residency rules set forth in this section on the grounds that the individual did not establish residence in the District before entering the institution.
- 9502.22 The Department shall not deny or terminate an individual's eligibility for Medicaid because of the individual's temporary absence from the District if the individual intends to return when the purpose of the absence has been accomplished, unless another State has determined that the individual is a resident there for purposes of Medicaid.
- 9502.23 The District may extend eligibility for Medicaid to individuals who would traditionally be considered residents of a State other than the District under an interstate agreement.
- 9502.24 The Department may consider an individual under the age of twenty-one (21) who receives foster care assistance from the District under title IV-E of the Social Security Act and lives in an out-of-District foster home to be a resident of the District when:
- (a) The individual receives foster care as defined at 45 CFR § 1355.20;
 - (b) The individual receives services from a provider screened and enrolled in the District Medicaid program pursuant to 29 DCMR §§ 9400 *et seq.*;
 - (c) The District's Child and Family Services Agency (CFSA) places the individual in an out-of-District foster home for reasons related to the safety, permanence, and well-being of abused and neglected children and their families; and
 - (d) The District evaluates all factors affecting the best interests of the individual and determines that continued eligibility for and enrollment in the District Medicaid program is in the best interest of the individual.
- 9502.25 The District may determine that continued eligibility for and enrollment in the District Medicaid program is not in the best interest of an individual described in Subsection 9502.24 for the following reasons:
- (a) The individual cannot obtain services from a provider enrolled in the District's Medicaid program because of their geographic distance from the location where the services are provided;

- (b) The individual has special health needs that cannot be addressed by an available and accessible provider enrolled in the District's Medicaid program;
- (c) The individual, or someone acting responsibly for the individual, requests that the individual be enrolled in the state's Medicaid program where the individual is living; or
- (d) The District evaluates all factors affecting the best interests of the individual and determines that continued eligibility for and enrollment in the District Medicaid program is not in the best interest of the individual.

9502.26

Where two or more States cannot resolve which State is the State of residence, and in the absence of an interstate agreement between the District and another State governing disputed residency, the State where the individual is physically located shall be the State of residence.