

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF SOCIAL SERVICES
Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)

ORDER

ERRATA

20700.5-20700.5.8 Acquired Brain Injury Waiver Program

*** PLEASE NOTE: THIS FINAL REGULATION WAS ORIGINALLY PUBLISHED IN THE OCTOBER 2004 ISSUE OF THE REGISTER. HOWEVER, DUE TO AN ERROR ON THE PART OF THE REGISTRAR'S OFFICE CERTAIN TEXT WAS INADVERTENTLY OMITTED. THE CORRECT VERSION IS PUBLISHED BELOW.**

Nature Of The Proceedings:

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend the Division of Social Services Manual (DSSM) regarding the Acquired Brain Injury Medicaid Waiver Program (ABIMWP). The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the August 2004 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by August 31, 2004 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary Of Proposed Changes

The Acquired Brain Injury Medicaid Waiver Program (ABIMWP) is a community-based services program funded by the Division of Social Services (DSS), Delaware Medical Assistance Program (DMAP) and operated by the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). It is targeted to individuals with acquired brain injury who meet Medicaid nursing facility admission criteria.

The proposed set forth the rules and regulations governing the administration of the ABIWP, and describe the types of services available under the program. The regulations being proposed would also define the eligibility criteria that must be met by applicants for the services and the scope of services available to eligible applicants.

The earliest ~~effective implementation~~ date for the ABIMWP is October 10, 2004.

Summary Of Comments Received With Agency Response And Explanation Of Change(s)

The State Council for Persons with Disabilities (SCPD) reviewed the proposed *Acquired Brain Injury Medicaid Waiver Program (ABIMWP)* regulation and offered the following summarized observations and recommendations:

First, DSS recites that the earliest effective date for the waiver is October 10, 2004. This is inconsistent with DSAAPD representations that the waiver was effective in the Spring of 2004. If DSAAPD enrolls anyone in the waiver prior to October 10, 2004, the proposed regulation might provide a basis for CMS denial of federal matching funds.

Agency Response: October 10, 2004 is the proposed date of implementation.

Second, in Section 20700.5.1 3.b., SCPD recommended insertion of "at least" before "one". Otherwise, a participant would literally not qualify for the waiver program if the participant needed more than one waiver service apart from case management.

Agency Response: Inserted "at least" before "one", as recommended.

Third, in Section 20700.5.3, the word "were" should be substituted for "was" in the first sentence for proper grammar (subjunctive mood).

Agency Response: Corrected the typographical error.

Fourth, in Section 20700.5.3, SCPD recommended insertion of the following second sentence: "This determination is made on an aggregate basis which considers all ABIMWP recipients." In response to a Council inquiry, DSAAPD clarified in a November 12, 2003 letter that the waiver is based on an aggregate, not individual, cost cap. The proposed regulation literally requires an individual cost assessment.

Agency Response: Inserted the second sentence, as recommended.

Fifth, Section 20700.5.7 (2nd paragraph), disallows an assisted living facility from providing services to an individual bedridden for seven consecutive days without a physician certification of safety. There is some tension between this provision and waiver provisions specifically authorizing respite care in an assisted living facility for individuals unable to care for themselves. Moreover, it would be logical, given the heading of "hospitalization or illness", to include a reference to respite care since a recipient unable to care for himself/herself could transfer to a nursing facility for up to twenty-nine days annually as part of the waiver program.

Agency Response: Revised the second paragraph to include a reference to the Assisted Living Facilities Regulations outlined in section 63.409.

Finally, the regulation states that, without physician certification after seven days, waiver services terminate. This would literally eliminate even case management and personal response system services and is therefore overbroad.

Agency Response: This was not the intent of DSS; therefore, the sentence is deleted.

Findings Of Fact:

The Department finds that the proposed changes as set forth in the August 2004 Register of Regulations should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual regarding the Acquired Brain Injury Medicaid Waiver Program (ABIMWP) is adopted and shall be final effective October 10, 2004.

Vincent P. Meconi, Secretary, DHSS
9/15/04

DSS FINAL ORDER REGULATION #04-20

NEW:

20700.5 Acquired Brain Injury Medicaid Waiver Program

The Acquired Brain Injury Medicaid Waiver Program (ABIMWP) is a home and community-based services program funded by the Division of Social Services (DSS), Delaware Medical Assistance Program (DMAP) and operated by the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). It is targeted to individuals with acquired brain injury who meet Medicaid nursing facility admission criteria.

The earliest ~~effective implementation~~ date for the ABIMWP is October 10, 2004.

20700.5.1 Eligibility Criteria

To be eligible for the ABIMWP, an individual must:

1. be a Delaware resident
2. be between 18 and 64 years of age (persons who enter the waiver before age 65 may remain in the waiver after age 65)
3. meet the financial and medical criteria for the DSS Long Term Care Medicaid Program and meet nursing facility admission criteria.

Medical eligibility is determined by the Pre-Admission Screening Unit of DSAAPD.

Financial eligibility is determined by DSS.

Program eligibility is determined by DSAAPD. An individual must meet all of the following criteria:

- a have an injury to the brain which is not hereditary or congenital (Acquired Brain Injury)
- b have a need of [at least] one waiver service, in addition to case management, on a monthly basis
- c have a physical, cognitive and/or behavioral symptom of an acquired brain injury and currently reside in a nursing facility or is at risk for placement in a nursing facility
- d have completed or would no longer benefit from intensive, inpatient, post-trauma or rehabilitation programs

e accept and maintain case management services

20700.5.2 Number of Recipients

There is a maximum number of recipients who may be served under the ABIMWP each fiscal year. The total unduplicated number of recipients served under the program cannot exceed the maximum number approved by the Centers for Medicare and Medicaid Services (CMS). DSAAPD will monitor the number of individuals receiving ABIMWP services so the maximum number will not be exceeded.

20700.5.3 Cost Effective Requirement

In order for an applicant to be eligible for the ABIMWP, the applicant's cost of care cannot exceed the cost of their care if the same applicant [was were] institutionalized. [This determination is made on an aggregate basis which considers all ABIMWP recipients.] An average monthly cost for institutionalized individuals is used to determine the amount that may be spent on ABIMWP recipients. A DSAAPD worker determines cost effectiveness.

20700.5.4 Approval

Upon approval, DSS will send a notice of approval to the applicant or the applicant's representative and the ABIMWP provider. The notice to the provider will include the effective date of Medicaid coverage, the patient pay amount, and the Medicaid identification number.

20700.5.5 Post Eligibility Budgeting

See DSSM 20720 and 20995.1 for patient pay calculation.

For recipients residing in Assisted Living facilities, the personal needs allowance is equal to the current Adult Foster Care rate. Collection of the patient pay amount from the recipient or the recipient's representative is the responsibility of the assisted living provider.

For recipients residing in community-based settings, the personal needs allowance is equal to 250% of the Federal SSI Benefit Rate. Collection of the patient pay amount from the recipient or the recipient's representative is the responsibility of the provider who is providing the most costly service.

20700.5.6 Days Appropriate for Billing

The waiver provider may not bill for any day that the recipient is absent from the program or facility for the entire day. The waiver provider may bill for services for any day that the recipient is present in the facility or program for any part of the day.

If the recipient resides in an assisted living facility, the waiver provider may not bill Medicaid for room and board.

20700.5.7 Hospitalization or Illness

Waiver services will terminate upon hospitalization. There are no Medicaid bed hold days for hospitalization. DSS will redetermine eligibility for continued Medicaid coverage. Waiver services may restart after hospital discharge as determined by DSAAPD staff.

~~**[If the recipient is a resident of an assisted living facility, the waiver provider shall not provide services to a recipient that has been bedridden for seven (7) consecutive days unless a physician certifies that the individual's needs may be safely met by the service agreement. If a physician certification is not obtained, waiver services will terminate and DSS will redetermine eligibility for continued Medicaid coverage.]**~~

If the recipient is a resident of an assisted living facility, the waiver provider shall not provide services to a recipient in accordance with the Delaware Regulations for Assisted Living Facilities outlined in section 63.409.]

20700.5.8 ABIMWP Services

Acquired brain injury waiver services will include the following:

Case Management

Personal Care

Respite Care

Adult Day Expanded Services
Specialized Medical Equipment and Supplies
Personal Emergency Response Systems (PERS)
Assisted Living Program
Behavioral and/or Cognitive Services

8 DE Reg. 616 (11/01/04)