DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia 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 (2012 Repl. & 2014 Supp.)) 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, on an emergency basis, of an amendment to Section 1919, entitled "Behavioral Support Services" of Chapter 19 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

These emergency and proposed rules establish standards governing reimbursement of behavioral support services provided to participants in the Home and Community-Based Services Waiver for Individuals with Intellectual and Developmental Disabilities (Waiver) and conditions of participation for providers.

The Waiver was approved by the Council of the District of Columbia and renewed by the U.S. Department of Health and Human Services, Centers for Medicaid and Medicare Services for a five-year period beginning November 20, 2012. These rules amend the previously published final rules by increasing the rates, using the approved rate methodology, to reflect the increase in the D.C. Living Wage to comply with the Living Wage Act of 2006, effective June 8, 2008 (D.C. Law 16-118; D.C. Official Code §§ 2-220.01 *et. seq.* (2012 Repl.)).

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of ID/DD Waiver participants who are in need of behavioral support services. The ID/DD Waiver serves some of the District's most vulnerable residents. The rate increase is necessary to ensure a stable workforce and provider base. In order to ensure that the residents' health, safety, and welfare are not threatened, it is necessary that that these rules be published on an emergency basis.

The emergency rulemaking was adopted on September 12, 2014 and became effective on that date. The emergency rules shall remain in effect for one hundred and twenty (120) days until January 10, 2015, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*. The Director of DHCF also gives notice of the intent to take final rulemaking action to adopt these proposed rules in not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

Section 1919, BEHAVIORAL SUPPORT SERVICES, of Chapter 19, HOME AND COMMUNITY-BASED SERVICES WAIVER FOR INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, of Title 29, PUBLIC WELFARE, of the DCMR is amended to read as follows:

1919 BEHAVIORAL SUPPORT SERVICES

1919.1 The purpose of this section is to establish standards governing Medicaid eligibility for behavioral support services for persons enrolled in the Home and Community-Based Services Waiver for Individuals with Intellectual and Developmental Disabilities (Waiver), and to establish conditions of participation for providers of behavioral support services.

1919.2 Behavioral support services are designed to assist persons who exhibit behavior that is extremely challenging and frequently complicated by medical or mental health factors.

1919.3 To qualify for Medicaid reimbursable behavioral support services, the person shall have specific behavioral support needs that jeopardize their health, safety, and wellbeing and/or interfere with their ability to gain independence and acquire community living skills.

1919.4 Medicaid reimbursable behavioral support services shall:

(a) Be recommended by the person's support team;

(b) Be identified in the person's ISP and Plan of Care;

(c) Be prior authorized by DDS before the commencement of services; and

(d) Be recommended by a physician or Advanced Practice Registered Nurse (APRN) if the services are one-to-one behavioral supports related to a medical condition.

1919.5 To qualify for Medicaid reimbursable one-to-one behavioral supports, a person shall meet one (1) of the following characteristics:

(a) Exhibit elopement resulting in serious risk to the safety of self or others;

(b) Exhibit behavior that is life threatening to self and others;

(c) Exhibit destructive behavior causing serious property damage;

(d) Exhibit sexually predatory behavior; or

(e) Have a medical condition that requires one-to-one services.

1919.6 In order to be eligible for Medicaid reimbursement, a physician or APRN shall issue an order for one-to-one behavioral supports associated with a medical condition which shall meet the requirements of DDS's policies and procedures and shall include and not be limited to the following information::

(a) A specific time period or duration for the delivery of services;

(b) A description of the medical condition that causes the person's health or safety to be at risk ; and

(c) The responsibilities of each staff person delivering supports; and

(d) A justification for the need for one-to-one behavioral supports.

1919.7 Medicaid reimbursable behavioral support services shall consist of the following activities:

(a) Development of a Diagnostic Assessment Report (DAR) in accordance with the requirements described under Section 1919.16;

(b) Development of a Behavior Support Plan (BSP) in accordance with the requirements described under Sections 1919.17 through 1919.19;

(c) Implementation of positive behavioral support strategies and principles based on the DAR and BSP;

(d) Training of the person, their family, and support team to implement the BSP;

(e) Evaluation of the effectiveness of the BSP by monitoring the plan at least monthly, developing a system for collecting BSP-related data, and revising the BSP;

(f) Counseling and consultation services for the person and their support team; and

(g) Participating in the person's quarterly medication review.

1919.8 Within ninety (90) days of service authorization, a provider of Medicaid reimbursable behavioral supports services shall:

(a) Administer the diagnostic assessment;

(b) Complete the DAR based on the results of the diagnostic assessment and the accompanying behavioral support referral worksheet ("worksheet"); and

(c) Complete the BSP when recommended by the DAR.

1919.9 The DAR shall be effective for three (3) years except as indicated in Section 1919.10, or for persons receiving one-to-one behavioral supports, which shall be

updated annually. The behavioral supports provider shall submit a diagnostic update to amend the DAR and accompanying worksheet to the Department on Disability Services (DDS) Service Coordinator.

1919.10 When a person experiences changes in psychological or clinical functioning, the behavioral supports provider shall submit a diagnostic update to amend the DAR and accompanying worksheet to the DDS Service Coordinator at any time during the three (3) year period, upon the recommendation of the support team.

1919.11 The worksheet accompanying the DAR shall include the number of hours requested for professional and paraprofessional staff services to address recommendations in the DAR.

1919.12 The diagnostic update shall include a written clinical justification supporting the reauthorization of services.

1919.13 The diagnostic update shall be reviewed by the person and their support team in consultation with behavioral supports staff.

1919.14 The BSP shall be effective for one (1) calendar year which shall correspond with the person's ISP year, unless revised or updated in accordance with the recommendations of the DAR and accompanying worksheet.

1919.15 To be eligible for Medicaid reimbursement, the diagnostic assessment shall include the following activities:

(a) Direct assessment techniques such as observation of the person in the setting in which target behaviors are exhibited, and documentation of the frequency, duration, and intensity of challenging behaviors;

(b) Indirect assessment techniques such as interviews with the person's family members and support team, written record reviews, and questionnaires; and

(c) A written evaluation of the correlation between the person's environmental, psychological, and medical influences and the occurrence of behavioral problems.

1919.16 To be eligible for Medicaid reimbursement, the DAR shall include the following:

(a) The names of individuals to contact in the event of a crisis;

(b) A summary of the person's cognitive and adaptive functioning status;

(c) A full description of the person's behavior including background, and environmental contributors;

(d) The counseling and problem-solving strategies used to address behavioral problems and their effectiveness;

(e) A list of less restrictive interventions utilized, the results, and an explanation of why the interventions were unsuccessful;

(f) A list of proposed goals for achieving changes in target behaviors; and

(g) The recommendations to initiate, continue, or discontinue behavioral support services.

1919.17 In order to be eligible for Medicaid reimbursement, the BSP shall be developed utilizing the following activities:

(a) Interviews with the person and their support team;

(b) Observations of the person at his/her residence and in the community; and

(c) Review of the person's medical and psychiatric history including laboratory and other diagnostic studies, and behavioral data.

1919.17 In order to be eligible for Medicaid reimbursement, the behavioral supports staff that develops the BSP shall be responsible for:

(a) The coordination of the delivery of behavioral support services in the person's residential and day activity settings; and

(b) Obtaining the person's written informed consent and the approval of the person's substitute decision-maker, the support team, the provider's human rights committee, and DDS, when required by DDS's policies and procedures.

1919.19 In order to be eligible for Medicaid reimbursement, the BSP shall include the following:

(a) A clear description of the targeted behavior(s) that is consistent with the person's diagnosis;

(b) The data reflecting the frequency of target behaviors;

(c) A functional behavioral analysis of each target behavior;

(d) A description of techniques for gathering information and collecting data;

(e) The proactive strategies utilized to foster the person's positive behavioral support;

(f) The measurable behavioral goals to assess the effectiveness of the BSP;

(g) If restrictive techniques and procedures are included, the rationale for utilizing the procedures and the development of a fade-out plan; and

(h) Training requirements for staff and other caregivers to implement the BSP.

1919.20 Each provider of behavioral support services shall comply with Sections 1904 (Provider Qualifications) and 1905 (Provider Enrollment) of Chapter 19 of Title 29 of the DCMR and consist of one (1) of the following provider types:

(a) A professional service provider in private practice as an independent clinician, as described in Section 1904 (Provider Qualifications) of Chapter 19 of Title 29 DCMR;

(b) A Mental Health Rehabilitation Services agency (MHRS) certified in accordance with the requirements of Chapter 34 of Title 22-A of the DCMR;

(c) A home health agency as described in Section 1904 (Provider Qualifications), of Chapter 19 of Title 29 DCMR; or

(d) A HCBS Provider, as described under Section 1904 (Provider Qualifications), of Chapter 19 of Title 29 DCMR.

1919.21 In order to be eligible for Medicaid reimbursement, each MHRS shall agency serve as a clinical home by providing a single point of access and accountability for the provision of behavioral support services and access to other needed services.

1919.21 Individuals authorized to provide professional behavioral support services without supervision shall consist of the following professionals:

(a) Psychiatrist;

(b) Psychologist;

(c) APRN or Nurse-Practitioner (NP) ; and

(d) Licensed Independent Clinical Social Worker (LICSW).

1919.23 Individuals authorized to provide paraprofessional behavioral support services under the supervision of qualified professionals described under Subsection 1919.22 shall consist of the following behavior management specialists:

(a) Licensed Professional Counselor;

(b) Licensed Social Worker (LISW);

(c) Licensed Graduate Social Worker (LGSW);

(d) Board Certified Behavior Analyst;

(e) Board Certified Assistant Behavior Analyst; and

(f) Registered Nurse.

1919.24 In order to receive Medicaid reimbursement, the minimum qualifications to draft a BSP shall be master's level degree psychologist working under the supervision of a psychologist or a LICSW.

1919.25 In order to receive Medicaid reimbursement, the minimum qualifications for providing consultation are a master's level psychologist, APRN, LICSW, LGSW or licensed professional counselor, with at least one (1) year of experience in serving people with developmental disabilities. Knowledge and experience in behavioral analysis shall be preferred.

1919.26 In order to receive Medicaid reimbursement, a LGSW may provide counseling under the supervision of an LICSW or a LISW in accordance with the requirements set forth in Section 3413 of Chapter 34 of Title 22-A of the DCMR.

1919.27 In order to receive Medicaid reimbursement, each DSP providing behavioral support services and/or one-to-one behavioral supports shall meet the following requirements:

(a) Comply with Section 1906 (Requirements for Persons Providing Direct Services) of Chapter 19 of Title 29 DCMR;

(b) Possess specialized training in physical management techniques where appropriate, positive behavioral support practices, and all other training required to implement the person's specific BSP; and

(c) When providing one-to-one supports, the DSP shall not be assigned other duties so that he/she can ensure the person's safety, health, and well-being.

1919.28 Each provider of Medicaid reimbursable behavioral support services shall meet the requirements established under Section 1908 (Reporting Requirements) and Section 1911 (Individual Rights) of Chapter 19 of Title 29 DCMR.

1919.29 In order to be eligible for Medicaid reimbursement, each provider of Medicaid reimbursable behavioral supports services shall maintain the following documents for monitoring and audit reviews:

(a) A copy of the DARs and accompanying worksheets;

(b) A copy of the BSPs;

(c) A current copy of the behavioral support clinician's professional license to provide clinical services;

(d) The documentation and data collection related to the implementation of the BSP;

(e) The records demonstrating that the data was reviewed by appropriate staff; and

(f) The documents required to be maintained under Section 1909 (Records and Confidentiality of Information) of Chapter 19 of Title 29 DCMR.

1919.30 Medicaid reimbursement for behavioral support services shall be limited on an annual basis as set forth below. Services provided that exceed the limitations shall not be reimbursed except as provided in Subsection 1919.31:

(a) Development of a new BSP shall be limited to ten (10) hours;

(b) Reviewing and updating the existing BSP shall be limited to six (6) hours;

(c) Training of the person, their family, the support team, and residential and day staff, shall be limited to twelve (12) hours;

(d) On-site counseling, consultation and observations shall be limited to twenty-six (26) hours;

(e) Participation in behavioral review or treatment team meetings, delivering notes including emergency case conferences, hospital discharge meetings, interagency meetings, pre-ISP and ISP meetings, and human rights meetings shall be limited to twelve (12) hours;

(g) Quarterly medication reviews, reports and monthly data monitoring shall be limited to eight (8) hours; and

(h) Participation in psychotropic medication review meetings to deliver notes shall be limited to three (3) hours.

1919.31 In order to be eligible for Medicaid reimbursement, requests for additional hours beyond the annual limits described in Subsection 1919.30 may be approved by the DDS upon the submission of a diagnostic update to amend the DAR and accompanying worksheet.

1919.32 In order to be eligible for Medicaid reimbursement, requests for counseling as a behavioral support service shall be approved by a DDS designated staff member and shall be limited to counseling services that are not available under the District of Columbia State Plan for Medical Assistance.

1919.33 Medicaid reimbursable one-to-one behavioral support services provided by a DSP shall not be provided concurrently with day habilitation one-to-one services.

1919.34 The Medicaid reimbursement rate for each diagnostic assessment shall be two-hundred and forty dollars ($240.00) and shall be at least three (3) hours in duration, and include the development of the DAR and accompanying worksheet.

1919.35 The Medicaid reimbursement rate for behavioral support services provided by professionals identified in Subsection 1919.21 shall be one-hundred and three dollars and twenty cents ($103.20) per hour. The billable unit for fifteen (15) minutes is twenty-five dollars and eighty cents ($25.80) per fifteen (15) minute billable increment for at least eight (8) continuous minutes.

1919.36 The Medicaid reimbursement rate for behavioral support services provided by paraprofessionals identified in Subsection 1919.22 shall be sixty dollars ($60.00) per hour. The billable unit for fifteen (15) minutes is fifteen dollars ($15.00) for each fifteen (15) minute billable increment for at least eight (8) continuous minutes.

1919.37 The Medicaid reimbursement rate for one-to-one behavioral support services provided by DSPs shall be twenty-three dollars and seventy-six cents ($23.76) per hour. The billable unit for fifteen (15) minutes is five dollars and ninety-four cents ($5.94) per fifteen (15) minute billable increment for at least eight (8) continuous minutes.

Section 1999 (DEFINITIONS) is amended by adding the following:

Advance Practice Registered Nurse (APRN) or Nurse-Practitioner (NP) - An individual who is licensed to practice nursing pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1202 *et seq.*), or licensed to practice nursing in the jurisdiction where the services are being provided.

Behavior Management Specialist - An individual who has the training and experience in the theory and technique of changing the behavior of individuals to enhance their learning of life skills and adaptive behaviors, and to decrease maladaptive behaviors, and who works under the supervision of a licensed practitioner.

Board Certified Behavior Analyst - An individual with at least a Master's Degree and a certificate from the Behavioral Analyst Certification Board (BCABA), in the jurisdiction where the credential is accepted.

Board Certified Assistant Behavior Analyst - An individual with at least a Bachelor's Degree and a certificate from the Behavioral Analyst Certification Board (BCABA), in the jurisdiction where the credential is accepted.

Fade-out plan - A plan used by providers to ensure that the restrictive technique or processes utilized are gradually and ultimately eliminated in the person's plan of care.

Functional Behavioral Analysis – A comprehensive and individualized process for identifying events that precede and follow a target behavior in order to develop hypotheses regarding the purpose of the target behavior and identify positive changes to be made.

Licensed Independent Clinical Social Worker - An individual who is licensed to practice social work pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1208 *et seq.*) or licensed to practice social work in the jurisdiction where the services are being provided.

Licensed Graduate Social Worker - An individual who is licensed to practice social work pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1208 *et seq.*) or licensed to practice social work in the jurisdiction where the services are being provided.

Licensed Independent Social Worker - An individual who is licensed to practice social work pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1208 *et seq.*) or licensed to practice social work in the jurisdiction where the services are being provided.

Licensed Professional Counselor - An individual who is licensed to practice counseling pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C.

Official Code §§ 3-1207 *et seq.*) or licensed to practice counseling in the jurisdiction where the services are being provided.

Positive behavioral support strategies – An alternative to traditional or punitive approaches for managing challenging behaviors that focuses on changing the physical and interpersonal environment and increasing skills so that the person is able to get his/her needs met without having to resort to challenging behavior.

Proactive strategies – Specific interventions such as staff actions or environmental modifications that prevent the occurrence of target behaviors.

Psychiatrist - An individual licensed to practice psychiatry pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1202 *et seq.*) or licensed as a psychiatrist in the jurisdiction where the services are being provided.

Psychologist - An individual licensed to practice psychology pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1202 *et seq.*) or licensed as a psychologist in the jurisdiction where the services are being provided.

Registered Nurse- An individual who is licensed to practice nursing pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1202 *et seq.*), or licensed to practice nursing in the jurisdiction where the services are being provided.

Sensorimotor - Functioning in both sensory and motor aspects of bodily activity.

Target behavior - The challenging behaviors to be addressed by staff.

Comments on the emergency and proposed rule shall be submitted, in writing, to Claudia Schlosberg, Acting Senior Deputy Director/State Medicaid Director, Department of Health Care Finance, 441 4th Street, NW, 9th Floor, Washington, D.C. 20001, via telephone on (202) 442-8742, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days after the date of publication of this notice in the *D.C. Register*. Copies of the emergency and proposed rule may be obtained from the above address.