DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL 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. 744; D.C. Official Code § 1-307.02 (2014 Repl. & 2016 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 of an amendment to Section 1919, entitled "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 District of Columbia Municipal Regulations (DCMR).

These final 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 ID/DD Waiver was approved by the Council of the District of Columbia (Council) and renewed by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, for a five-year period beginning November 20, 2012. An amendment to the ID/DD Waiver was approved by the Council through the Medicaid Assistance Program Amendment Act of 2014, effective February 26, 2015 (D.C. Law 20-155; D.C. Official Code § 1-307.02(a)(8)(E) (2014 Repl. & 2016 Supp.)). CMS approved the amendment to the ID/DD Waiver effective September 24, 2015.

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on April 15, 2016, at 63 DCR 005788, which amended the rules by: (1) clarifying words and/or phrases to reflect more person-centered language and to simplify interpretation of the rule; (2) modifying service definition to reflect a tiered service utilizing low, moderate and high intensity behavioral supports with annual limits on each level of service; (3) adding clarifying language regarding services delivered by Licensed Graduate Social Workers; and (4) increasing the rates for diagnostic assessments and behavioral supports provided by professionals and paraprofessionals. The emergency rulemaking was adopted on April 4, 2016, became effective immediately, and shall remain in effect until August 2, 2016, or it is superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

DHCF received no comments to the emergency and proposed rulemaking and no changes have been made. The Director of DHCF adopted these rules as final on July 15, 2016, and they shall be effective on the date of publication of this notice in the *D.C. Register*.

Chapter 19, HOME AND COMMUNITY-BASED SERVICES WAIVER FOR INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Section 1919, BEHAVIORAL SUPPORT SERVICES, 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 people who exhibit behavior that inhibits their ability to live safely in the community and/or who need support to:

(a) Build alternative and more communication skills;

(b) Achieve positive personal outcomes including their Individualized Support Plan (ISP) goals, based on what is important to and important for people; and

(c) Interact more effectively in the community.

1919.3 Medicaid reimbursable behavioral support services shall be:

(a) Recommended by the person's support team;

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

(c) Approved by the Department on Disability Services (DDS) Restrictive Controls Review Committee or Health and Wellness Unit for one-to-one behavioral supports;

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

(e) Prior authorized by DDS before the commencement of services.

1919.4 Medicaid reimbursable behavioral support services may include the following activities, as needed by the person:

(a) Development of a Diagnostic Assessment Report (DAR) in accordance with the requirements described under Subsections 1919.22 to 1919.23;

(b) Development of a Behavior Support Plan (BSP) in accordance with the requirements described under Subsections 1919.24 to 1919.26;

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

(d) Training of the person, his or her family, support team, and providers of their residential services and day services, to implement the BSP;

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

(f) Consultation services for the person, his or her family and/or support team;

(g) Counseling services for the person, if pre-approved by DDS; and

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

1919.5 Behavioral support services shall be provided in one of three tiers, based upon the assessed needs of the person:

(a) Tier 1, or Low Intensity Behavioral Support, shall assist a person with behavior that is not dangerous to himself or herself or others but whose behavior may interfere with the person's ability to achieve ISP goals;

(b) Tier 2, or Moderate Behavioral Support, shall assist a person whose behavior impacts his or her ability to retain a baseline level of independence or that interferes with the person's quality of life; and

(c) Tier 3, or Intensive Behavioral Support, shall assist a person who exhibits behavior that is extremely challenging and may be complicated by medical or mental health factors.

1919.6 Medicaid reimbursement for Tier 1 Low Intensity Behavioral Support Services shall provide up to twelve (12) hours of support per year for the services listed below. Services provided that exceed the limitations shall not be reimbursed except as provided in Subsection 1919.10.

(a) Training of the person, his or her family, the support team, and residential and day staff; and

(b) On-site consultation and observations.

1919.7 Medicaid reimbursement for Tier 2 Moderate Behavioral Support Services shall provide up to fifty (50) hours of support per year for the services listed below; and

Medicaid reimbursement for Tier 3 Intensive Behavioral Support Services shall provide up to one hundred (100) hours of support per year for the services listed below. Services provided that exceed these limitations shall not be reimbursed except as provided in Subsection 1919.10.

(a) Development of a new BSP;

(b) Reviewing and updating the existing BSP, which shall be limited to up to three (3) hours for Tier 2 and eight (8) hours for Tier 3;

(c) Training of the person, his or her family, the support team, and residential and day staff;

(d) On-site consultation and observations;

(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;

(f) Completion of quarterly reports, diagnostic updates and monitoring monthly data; and

(g) Participation in psychotropic medication review meetings to deliver notes.

1919.8 In order to be eligible for Medicaid reimbursement, requests for more than seventy-five (75) hours of behavior support services must be reviewed and approved by a DDS designated staff member.

1919.9 In addition, a person receiving Tier 2 Moderate Behavioral Support Services may receive up to twenty-six (26) hours of counseling per year, if approved by DDS; and a person receiving Tier 3 Intensive Behavioral Support Services may receive up to fifty-two (52) hours of counseling per year, if approved by DDS.

1919.10 In order to be eligible for Medicaid reimbursement, requests for additional hours beyond the annual limits may be approved by DDS upon the submission of a diagnostic update to amend the DAR and accompanying worksheet.

1919.11 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.

1919.12 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;

(e) Exhibit self-injurious behavior that poses a serious risk to the person's safety; or

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

1919.13 Medicaid reimbursable one-to-one behavioral supports related to a medical condition must be approved by DDS, and shall be based upon a physician or APRN order for one-to-one behavioral supports associated with a medical condition that meets the requirements of DDS's policies and procedures. The order must include, but is not 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.

1919.14 Medicaid reimbursable one-to-one behavioral support services provided by a Direct Support Professional (DSP) shall not be provided concurrently with in-home supports, day habilitation, companion or individualized day supports one-to-one services unless authorized by DDS, required by court order or otherwise necessary to support a person or persons who have complex behaviors or medical needs that involve a risk to the health, safety or well-being of the person based on the intensity of the person's behavioral or medical needs.

1919.15 Within the service authorization period, a provider of Medicaid reimbursable behavioral supports services shall:

(a) Complete the diagnostic assessment;

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

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

1919.16 The DAR shall be effective for three (3) years except as indicated in Subsection 1919.17, or for a person receiving one-to-one behavioral supports, which shall be updated annually. Reauthorization of behavioral support services within the three (3) year period shall be requested in a diagnostic update with accompanying referral worksheet submitted to the DDS Service Coordinator.

1919.17 When a person experiences changes in psychological or clinical functioning, the behavioral supports provider shall submit a diagnostic update with an accompanying worksheet to amend the DAR to the DDS Service Coordinator at any time during the three (3) year period, upon the recommendation of the support team.

1919.18 The worksheet accompanying the DAR shall include the number of hours requested for professional services, paraprofessional services, and one-to-one behavioral support services to address recommendations in the DAR.

1919.19 The diagnostic update shall include a written clinical justification supporting the reauthorization of services.

1919.20 The diagnostic update shall be reviewed by the person and his or her support team in consultation with behavioral supports staff.

1919.21 The BSP shall be effective for up to two (2) calendar years, which shall correspond with the person's ISP year unless revised, updated or discontinued when no longer necessary in accordance with the recommendations of the DAR and accompanying worksheet.

1919.22 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) An explanation of how existing environmental, psychological, and/or medical influences impact the occurrence of behavioral problems.

1919.23 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 positive, non-restrictive or 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.

1919.24 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 or her residence and in the community, if applicable; and

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

1919.25 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.

1919.26 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.

1919.27 Each provider of behavioral support services shall comply with Sections 1904 (Provider Qualifications) and 1905 (Provider Enrollment) of Chapter 19 of Title 29 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 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.

1919.28 In order to be eligible for Medicaid reimbursement, each MHRS agency shall 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.

1919.29 Individuals authorized to provide professional behavioral support services without supervision shall consist of the following professionals:

(a) A psychiatrist;

(b) A psychologist;

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

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

1919.30 Individuals authorized to provide paraprofessional behavioral support services under the supervision of qualified professionals described under Subsection 1919.29 shall consist of the following behavior management specialists:

(a) A licensed Professional Counselor;

(b) A licensed Social Worker (LISW);

(c) A licensed Graduate Social Worker (LGSW);

(d) A board Certified Behavior Analyst;

(e) A board Certified Assistant Behavior Analyst; and

(f) A registered Nurse.

1919.31 In order to receive Medicaid reimbursement, the person who drafts the BSP shall be a psychologist with at least a master's level degree working under the supervision of a licensed psychologist or an LICSW.

1919.32 In order to receive Medicaid reimbursement, the minimum qualifications for a person providing consultation are: a master's level degree in psychology, an APRN, an LICSW, an LGSW or a 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.

1919.33 In order to receive Medicaid reimbursement, an LGSW may only 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 DCMR.

1919.34 In order to receive Medicaid reimbursement, each DSP providing behavioral support services /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; and

(b) Possess specialized training in physical management techniques where appropriate, and all other training required for implementing the person's specific BSP.

1919.35 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.

1919.36 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, as applicable:

(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.

1919.37 The Medicaid reimbursement rate for each diagnostic assessment shall be two hundred and forty seven dollars and two cents ($247.02) and the assessment shall be at least three (3) hours in duration, and include the development of the DAR and accompanying worksheet.

1919.38 The Medicaid reimbursement rate for behavioral support services provided by professionals identified in Subsection 1919.29 shall be one hundred and five dollars and eighty-eight cents ($105.88) per hour. The billable unit for fifteen (15) minutes is twenty-six dollars and forty-seven cents ($26.47) per fifteen (15) minute billable increment for at least eight (8) continuous minutes.

1919.39 The Medicaid reimbursement rate for behavioral support services provided by paraprofessionals identified in Subsection 1919.30 shall be sixty-five dollars and twenty cents ($65.20) per hour. The billable unit for fifteen (15) minutes is sixteen dollars and thirty cents ($16.30) for each fifteen (15) minute billable increment for at least eight (8) continuous minutes.

1919.40 The Medicaid reimbursement rate for one-to-one behavioral support services provided by DSPs shall be twenty-three dollars and ninety-six cents ($23.96) per hour. The billable unit for fifteen (15) minutes is five dollars and ninety-nine cents ($5.99) 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.

Diagnostic Assessment Report – A report that summarizes the person's psychological and behavioral functioning to determine whether the person may benefit from a Behavioral Support Plan based upon the person's presenting problems and individual goals.

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.

Mental Health Habilitation Services – Mental health services provided by a Department of Behavioral Health (DBH) certified community mental health provider to consumers to assist consumers in partially or fully acquiring or improving skills and functioning in accordance with the District of Columbia State Medicaid Plan, the DHCF/DBH Interagency Agreement, and Chapter 34 of Title 22-A DCMR.

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.

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