

July 15, 2016

Ms. Trina Dutta
Special Projects Officer
DC Department of Health Care Finance
441 Fourth St. NW
922a
Washington, DC 20001

VIA EMAIL: dhcpubliccomments@dc.gov

Dear Ms. Dutta:

We write on behalf of the Legal Aid Society of the District of Columbia (“Legal Aid”)¹ to provide written comments on the proposed By-Laws and Procedures (“Proposed By-Laws”) for the Medical Care Advisory Committee (MCAC).

As a longstanding member of MCAC, Legal Aid has appreciated the opportunity that MCAC meetings provide to obtain crucial information and updates from the Department of Health Care Finance (DHCF) that inform our efforts to advocate for beneficiaries. In addition, we appreciate the opportunity to provide insight at these meetings about beneficiaries’ experiences, insight that we hope informs DHCF’s own efforts to craft and implement its policies and procedures.

We write to suggest several changes to the proposed By-Laws that we believe are essential to facilitate transparency and public awareness, namely: (1) expressly requiring compliance with certain procedural safeguards in the D.C. Open Meetings Act before executive sessions can occur; (2) specifying the grounds that justify termination of an MCAC member and requiring written notice and explanation if such termination occurs; and (3) requiring that meetings be held more frequently.

I. EVENTS LEADING TO PROPOSAL OF NEW BY-LAWS

Many of the concerns raised below are informed by the events that preceded the proposal of the new Proposed By-Laws. In order to provide full context and background, we enumerate these events below.

On December 14, 2015, Mr. Wesley Rivers, Policy Analyst with the D.C. Fiscal Policy Institute and then-Chair of MCAC, published a blog post expressing concern about the potential

¹ Legal Aid was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Over the years, Legal Aid attorneys and volunteers have served tens of thousands of the District’s neediest residents. Legal Aid represents and advocates on behalf of Medicaid beneficiaries to ensure that they are able to access and retain Medicaid coverage for themselves and their families.

effect of Medicaid IT problems on beneficiaries' ability to obtain and retain Medicaid coverage. See "DC Medicaid IT Problems Threaten to Leave Thousands of Residents Without Coverage, Unless Addressed Soon," Dec. 14, 2015, <http://www.dcfpi.org/wp-content/uploads/2015/12/12.14.15-Medicaid-2.pdf>. As part of the blog post, Mr. Rivers summarized data regarding Medicaid applications and renewals that had been presented at prior MCAC meetings. On December 14, 2015, an article was also published in the Washington City Paper discussing Mr. Rivers' blog post and quoting comments by him. See Andrew Giambrone, "Technical Problems May Soon Leave Thousands of DC Residents Without Medicaid," Washington City Paper (Dec. 14, 2015), <http://www.washingtoncitypaper.com/news/city-desk/blog/13070243/technical-problems-may-soon-leave-thousands-of-d-c-residents-without-medicaid>.

On December 22, 2015, the law firm of Terris, Pravlik, & Millian, LLP filed a preliminary injunction motion in the long-running litigation of *Salazar v. District of Columbia*. Mr. Rivers, Legal Aid, and other MCAC members submitted declarations in support of the motion discussing Medicaid application and renewal problems that had impacted beneficiaries on whose behalf we advocate.

On January 21, 2016, Mr. Wayne Turnage, Director of DHCF, sent an email to all MCAC members informing them that Mr. Rivers was "no longer serving as chair of MCAC" and that DHCF would be "reshaping the Committee and revising operating procedures." See Attachment 1. The email specified that DHCF would be "develop[ing] new bylaws" that would build in "the necessary protections to guard against the release of sensitive information that is not appropriate for distribution to the general public." *Id.*

During an MCAC meeting held on January 27, 2016, advocates raised questions about why Mr. Rivers had been terminated from his position as MCAC Chair and, in particular, whether Mr. Rivers had been terminated because he published a blog post and provided comments to a reporter that were critical of the District's performance related to Medicaid applications and renewals. During the meeting, Director Turnage stated that one of the reasons underlying Mr. Rivers' termination was that he had not consulted with DHCF and given the agency an opportunity to respond before publishing the blog post or providing comments to the reporter. Advocates also raised concerns about whether other MCAC members might be asked to resign in the future if they made public statements critical of DHCF without first consulting the agency or engaged in other activities that DHCF believed to be inappropriate.²

We understand that the Proposed By-Laws on which we now comment are those that Director Turnage discussed developing in his January 21, 2016 email. This context is important in understanding many of our concerns with the Proposed By-Laws, as detailed below.

² The recitation of what occurred at the January 27, 2016 meeting is based on the notes and recollections of individuals who attended that meeting. Legal Aid reached out to Ms. Carmelita White of DHCF to obtain official minutes of this meeting but was told that none were currently available. See Attachment 2.

II. PROPOSED CHANGES

A. The By-Laws Should Enumerate Specific Procedures for the Convening of Executive Sessions to Ensure Compliance with the D.C. Open Meetings Act.

Section 7.8 of the Proposed By-Laws states that meetings of the MCAC are open to the public “unless an executive session is called, pursuant to D.C. Code 2-575(b).” Although the By-Laws state that “[t]he MCAC shall abide by the DC Open Meetings Act,” *id.*, the By-Laws nowhere require the MCAC to follow the specific procedures set forth in that statute.

1. The By-Laws Should Make Clear That Only a Narrow List of Topics May Be Discussed in Executive Session.

Section 2-575(b) of the D.C. Open Meetings Act permits only very narrow topics to be discussed in closed sessions, such as discussion of collective bargaining negotiations, trade secrets, and disciplinary matters. *See* D.C. Code § 2-575(b). Once in closed session, *only* these matters may be discussed. In other words, the Executive Session may not convene for one of the purposes enumerated in Section 2-575(b) and then move on to discuss other topics. *See id.* § 2-575(d) (“A public body that meets in closed session shall not discuss or consider matters other than those matters listed under subsection (b) of this section.”).

Although the Proposed By-Laws reference D.C. Code § 2-575(b), there is no clear statement that only the matters enumerated therein may be discussed in Executive Session. The Proposed By-Laws should therefore be modified to state that only the topics enumerated in D.C. Code § 2-575(b) can justify the calling of an Executive Session and that, once in Executive Session, no other topics may be discussed in accordance with Section 2-575(d).

2. The By-Laws Should Expressly Require Adherence to the Procedures in Section 2-575(c) of the D.C. Open Meetings Act Before An Executive Session Can Be Called.

The Proposed By-Laws do not specify the procedure to be followed in deciding whether an Executive Session will be held. The D.C. Open Meetings Act makes clear that, “[b]efore a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of the members of the public body present vote in favor of closure.” D.C. Code § 2-575(c)(1). In addition, the presiding officer must “make a statement providing the reason for closure, including citations from subsection (b) of this section, and the subjects to be discussed. A copy of the roll call vote and the statement shall be provided in writing and made available to the public.” D.C. Code § 2-575(c)(2).

The By-Laws therefore lack the crucial safeguards established by the D.C. Open Meetings Act, namely: (1) that the Executive Session only occur if the majority of the members of the public body approve such closure; and (2) that the presiding officer provide a statement in writing of the reason for the closure and the matters to be discussed therein and make this statement available to the public. These procedures should be specifically enumerated in the By-Laws.

These safeguards are particularly important in light of the events immediately preceding the proposal of these By-Laws. Director Turnage raised concerns about the need to “develop new by-laws” that would build in “the necessary protections to guard against the release of sensitive information that is not appropriate for distribution to the general public,” *see* Attachment 1, immediately after data presented in public MCAC meetings was incorporated into a blog post, a newspaper article, and declarations supporting litigation against the District. Given this background, and given the seeming inapplicability of many of the topics enumerated in D.C. Code § 2-575(b) to the MCAC’s work, it will be important to ensure that Executive Sessions are not used to circumvent the disclosure of information of public concern to advocates or to the public at large. Inclusion of the procedures articulated in D.C. Code § 2-575(c) will accomplish this goal by requiring that the presiding officer specifically identify the exception that justifies closure under Section 2-575(b) and by giving the public body an opportunity to scrutinize the proffered explanation and vote in favor of or against closure.

B. The By-Laws Should Specify the Grounds that Justify Termination of an MCAC Member and Require Written Notice and Explanation if Such Termination Occurs.

Section 6.1 of the Proposed By-Laws states that members of the MCAC “serve at the pleasure of the Director.” No explanation is given of the grounds on which the Director may terminate a member, nor is there any requirement for the Director to provide notice or explanation if such termination occurs.

The By-Laws should be altered to: (1) specify the grounds that justify termination of an MCAC member; and (2) require that the Director provide written notice and explanation to both the member and the MCAC member body as a whole if termination occurs.³

Members should have a clear understanding of the grounds on which they might face termination from the Committee. Under the Proposed By-Laws, members owe certain duties towards the MCAC—such as regular attendance of meetings and active engagement (see Section 6.13)—and, in turn, the Committee owes members a clear understanding of what conduct might result in termination of their membership. Providing clarity about the conduct that justifies termination and requiring the Director to articulate the reasons for termination in each specific instance will promote transparency and ensure that there is no chilling effect on the conduct of advocates and other MCAC members who may engage in activities that are critical of DHCF.

C. The By-Laws Should Provide For More Frequent Meetings.

The Proposed By-Laws reflect reduced frequency of meetings. While the MCAC previously convened more or less monthly, Section 7.1 of the Proposed By-Laws envisions only a minimum of quarterly meetings. We recommend that the By-Laws be altered to require monthly meetings.

³ This requirement to provide an explanation would, of course, be subject to any necessary privacy protections concerning the member facing termination.

Federal regulations make clear that an MCAC “must have opportunity for participation in policy development and program administration, including furthering the participation of beneficiary members in the agency program.” See 42 C.F.R. § 431.12(e). Interpreting this provision, several courts have carved out a robust role for State MCACs, including an affirmative duty for the State Medicaid agency to consult with the MCAC before adopting policy changes. See, e.g., *Kansas Hosp. Ass’n v. Whiteman*, 835 F. Supp. 1556, 1573 (D. Kan. 1993) (State Medicaid agency violated federal regulations by failing to consult with MCAC before adopting increase in the co-pay amount for inpatient hospital services); *Morabito v. Blum*, 528 F. Supp. 252, 264 (S.D.N.Y. 1981) (“[T]he Court concludes that the scope of [the MCAC’s] advisory authority is intended to cover the entire field of state decision-making with respect to the Medicaid program . . .”). In addition, new regulations regarding Medicaid Managed Care Organizations require that the MCAC be consulted on specific topics, such as drafting or revising Managed Care State quality strategies. See 42 C.F.R. § 438.340(c)(1)(i).

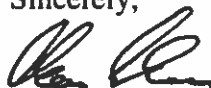
In order to allow the MCAC to carry out this robust advisory authority, it is important that meetings be held more frequently. This will ensure that sufficient time is available not only for the District to present proposed policy changes but also for members to raise questions and concerns and to offer advice and recommendations.

III. CONCLUSION

The Proposed By-Laws make clear that a crucial purpose of the MCAC is “[f]acilitating transparency, creating public understanding, and ensuring that DC services meet the needs of the people served at a reasonable cost to the taxpayer.” (Section 3.1.4.). We believe that the changes articulated above will advance this purpose by ensuring that information of concern to the public is presented in public session, that MCAC members do not fear or face termination for oversight or advocacy efforts, and that the MCAC has sufficient meeting time to engage in robust debate and discussion.

Legal Aid appreciates the opportunity to submit these comments, and we look forward to working with DHCF to continue to improve the Medicaid program for our shared client community.

Sincerely,



Chelsea Sharon
Staff Attorney

Jennifer Mezey
Supervising Attorney

ATTACHMENT 1

From: Turnage, Wayne (DHCF) [mailto:wayne.turnage@dc.gov]

Sent: Thursday, January 21, 2016 2:30 PM

To: jbowens@dcpca.org; dcbbehavioralhealth@gmail.com; jlevy@iona.org; hchung@dckids.org; rflintrop@hftcc.org; apatterson@legalaiddc.org; cdeyoung@law.gwu.edu; sgreer@childrenslawcenter.org; [\[walker.org\]\(mailto:walker.org\); \[ddarby@rcmofwashington.com\]\(mailto:ddarby@rcmofwashington.com\); \[bloyd@sjcs.org\]\(mailto:bloyd@sjcs.org\); \[vdamesyn@dchca.org\]\(mailto:vdamesyn@dchca.org\); \[ipalmer@dcha.org\]\(mailto:ipalmer@dcha.org\); \[cyd.campbell@medstar.net\]\(mailto:cyd.campbell@medstar.net\); \[tduncan@trustedhplan.com\]\(mailto:tduncan@trustedhplan.com\); \[staylor@hscsn.org\]\(mailto:staylor@hscsn.org\); \[kdale@amerihealthdc.com\]\(mailto:kdale@amerihealthdc.com\); \[ilanier@aarp.org\]\(mailto:ilanier@aarp.org\); \[Arthur.ginsburg1@gmail.com\]\(mailto:Arthur.ginsburg1@gmail.com\)](mailto:ELou bier@whitman-</p></div><div data-bbox=)

Cc: Wes Rivers <rivers@dcfpi.org>; Schlosberg, Claudia (DHCF) <claudia.schlosberg@dc.gov>; Chaudhuri, Sumita (DHCF) <sumita.chaudhuri@dc.gov>; Chaudhuri, Sumita (DHCF) <sumita.chaudhuri@dc.gov>; Johnson, Sheryl (DHCF) <sheryl.johnson@dc.gov>; Shaffer, Darrin (DHCF) <darrin.shaffer@dc.gov>; Evans, Kenneth (DHCF) <kenneth.evans@dc.gov>; Byrd, Melisa (DHCF) <melisa.byrd@dc.gov>; Smith, Dawn (DHCF) <dawn.smith@dc.gov>

Subject: Important MCAC Governance Issues

Importance: High

MCAC Members:

The purpose of this email is to transmit the attached agenda for the next MCAC meeting scheduled for January 27, 2016 and outline DHCF's plans for reshaping the Committee and revising operating procedures. These plans for change are based, in part, on recently expressed views by the Executive Committee in a December memorandum to the Medicaid Director. As indicated by the agenda, we will dedicate the entirety of the upcoming meeting to a discussion of governance issues and our plans for reforming the current structure and operational processes for MCAC.

However, recent circumstances require that I first address the leadership of the current Committee. Effective January 27, 2016, Wes Rivers is no longer serving as Chair of MCAC. Accordingly, I am appointing the current Vice-Chair, Jacquelyn Bowens, as the Interim Chair and will solicit names for a permanent replacement from the soon to be reconstituted Committee.

In reconstituting the Committee, we intend to more closely align membership with the language of the federal statute while concomitantly reducing the size of MCAC to a number that makes our shared goal for a more proactive engagement of the Committee practical. Equally important, we would like to develop new bylaws that are reflective of this goal of increased engagement, building in of course, the necessary protections to guard against the release of sensitive information that is not appropriate for distribution to the general public.

It is my expectation that efforts to redefine the governance structure for MCAC will require a significant focus over the next few months working closely with the new Chair. Thus, I would like to stress the importance of your active participation, beginning with full attendance at the next two meetings.

Of course we will share more details on January 27th, but please feel free to contact me, Melisa Byrd, or Claudia Schlosberg, if you have questions or concerns.

Regards.
WT

ATTACHMENT 2



Sharon, Chelsea <csharon@legalaiddc.org>

MCAC Email List

White, Carmelita (DHCF) <carmelita.white@dc.gov>

Wed, Jul 13, 2016 at 3:24 PM

To: "Sharon, Chelsea" <csharon@legalaiddc.org>

Good Afternoon Ms. Sharon,

Currently, we do not have an email list. We will be developing a ListServ for the MCAC as we are transitioning while we are making changes to the membership and bylaws over this summer. In the meantime, all information regarding the MCAC can be found on DHCF's website under the MCAC webpage. Minutes of the meeting are on the webpage as well. Unfortunately, I do not have minutes from the Jan 2016 meeting. The webpage for the minutes will be updated over the summer as well. We are currently in a state of transition. Sorry for any inconvenience.

As we await these changes, I will add your email address to the Outlook Invite so that you will be informed of committee meeting dates and changes.

If you have any further questions or concerns, please feel free to contact me.

Respectfully,

Respectfully,

Carmelita White

From: Sharon, Chelsea [mailto:csharon@legalaiddc.org]

Sent: Wednesday, July 13, 2016 3:06 PM

To: White, Carmelita (DHCF)

Subject: MCAC Email List

Hello:

Could I please be added to the MCAC email list? In addition, would it be possible to have the minutes from the Jan. 2016 meeting emailed to me, as I don't believe they are on the website?

Thank you very much.

Best,

7/15/2016

Legal Aid Society Mail - MCAC Email List

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