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: dhcfpubliccomments@dc.gov

Dear Ms. Dutta:

I am writing on behalf of the DC Fiscal Policy Institute to provide written comments on the proposed By-Laws and Procedures for the DC Medical Care Advisory Committee (MCAC).

The Provisions Regarding the Holding of Executive Sessions Lack the Necessary Specificity to Comply 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 DC 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 Section 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 DC 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.

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

The first change is necessary because 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. The second change is necessary to ensure transparency regarding the reasons for termination.

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.

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.

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.

Thank you for the opportunity to submit these comments

Sincerely,

Ed Lazere
Executive Director
DC Fiscal Policy Institute