

HUMAN SERVICES

DIVISION OF DEVELOPMENTAL DISABILITIES

Determination of Eligibility

Adopted Repeals and New Rules: N.J.A.C. 10:46

Proposed: October 1, 2012 at 44 N.J.R. 2269(b).

Adopted: December 11, 2012 by Jennifer Velez, Commissioner, Department of Human Services.

Filed: December 21, 2012 as R.2013 d.013, **with substantial and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 30:1-12, 30:4-25.2, and 30:6D-23 et seq.

Effective Date: January 22, 2013.

Expiration Date: January 22, 2020.

Summary of Public Comments and Agency Responses:

The Department of Human Services received comments from two groups of individuals:

Group I

Interested stakeholders, providers and advocacy groups: Thomas Baffuto, Executive Director, The Arc of New Jersey; Barbara Geiger-Parker, President and CEO, Brain Injury Alliance of New Jersey; Sue Gottesman, Public Policy Coordinator, New Jersey Council on Developmental Disabilities; Joseph B. Young, Executive Director, Disability Rights New Jersey; Kim Todd, Chief Executive Officer, New Jersey Association of Community Providers; Mike Brill, Chair, New Jersey Statewide Family Support Planning Council; Mary E. Scott, Executive Director, The Arc of Monmouth; John Roy and Kathryn Saxton-Granato, Co-Chairs, Southern Region Children's Coordinating Council; and Debra L. Wentz, Ph.D., Chief Executive Officer, New Jersey Association of Mental Health and Addiction Agencies, Inc.

Group II

Faculty and staff of the Center of Excellence for Mental Health Treatment for Persons with Intellectual Disabilities, University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine, Department of Psychiatry (UMDNJ/MHID) and parents and a friend of individuals receiving services at UMDNJ/MHID: Pamela Kane, Ph.D., Director, Andrew Levitas, M.D. Medical Director, and George McCandless, M.S.N., Senior Advanced Practice Nurse; Wilfredo and Angela Archilla; Sanford F. and Virginia A. Fisher; John and Leah Hopkins; Maryann B. Hunsberger; Carol and Joe Iannucci; Kathleen Lawless; Lois Levy; Deborah M. Piccurelli; Camelia Rivera; and Eileen Yovankin.

Group I Comments and Responses

1. COMMENT: N.J.A.C. 10:46-1.2. The majority of commenters object to the requirement in the proposed rule that individuals must be Medicaid eligible to receive Division services, and request either that the Division provide services to all individuals otherwise eligible regardless of Medicaid eligibility, or provide services for those individuals who, through no fault of their own, cannot become or may never become Medicaid eligible.

RESPONSE: The Division understands the concerns of the commenters. However, the Division's intent is to maximize Federal financial participation in the funding of services in order to more effectively distribute funding to eligible individuals with developmental disabilities in New Jersey. The Division provides services funded by Medicaid, and therefore it is appropriate that the Division require that the individuals it serves be Medicaid eligible. It would be fiscally irresponsible for the Division to provide State-only funds to pay for Medicaid services for individuals who do not meet the eligibility requirements for the Medicaid program; this is

particularly so in light of the waiting list maintained by the Division. The Division believes that the great majority of individuals it serves will be able to obtain and maintain Medicaid eligibility. There are various mechanisms to assist individuals to do so, including, among other things, the creation of special needs trusts and the New Jersey Workability program. The Workability program offers people with disabilities who are working, and whose income would otherwise make them ineligible for Medicaid, the opportunity to pay a small premium and receive full NJ Medicaid coverage. People with disabilities who are employed and are between the ages of 16 to 64 can qualify for the program with an annual gross earned income of up to approximately \$57,000. If an individual is ineligible for Medicaid because his or her assets exceed the Medicaid limit, the individual may be able to spend down those assets in accordance with Medicaid rules and reapply for Medicaid. Individuals who have the means may purchase services privately, in addition to accessing services available through other government, not-for-profit or private agencies.

2. COMMENT: N.J.A.C. 10:46-1.2. Several commenters assert that individuals who are not Medicaid eligible may not be wealthy enough to independently pay for their services, and suggest that a means of support be created to ensure that people receive the support they need whether or not they qualify for Medicaid. Similarly, another commenter suggested that the proposed rules reference other community services and supports for those individuals whose access to Division services will be impacted by the new rules. The commenters note some examples of individuals who they believe may never qualify for Medicaid under the rules. One commenter suggests creating an exception for individuals who attempt every means necessary to become Medicaid eligible, but still fail.

RESPONSE: The Division understands these concerns, however the Division feels this section is necessary to effectively serve individuals with developmental disabilities. As stated in the Response to Comment 1, if an individual is ineligible for Medicaid because his or her assets exceed the Medicaid limit, the individual may be able to spend down those assets in accordance with Medicaid rules and reapply for Medicaid. Information regarding other community services and supports are readily available from sources such as the Division of Disability Services, as well as other governmental and non-governmental agencies. These rules concern eligibility, and are not the appropriate place to include such information. The Division believes that the rules will provide ample opportunity for individuals with available assets or income to plan to meet the requirements of Medicaid eligibility before entering Division services. Pursuant to the adopted rules, individuals may apply for services at the age of 18, and will have three years to become Medicaid eligible before they can receive services from the Division at age 21. The Division will provide information regarding resources to assist individuals in becoming Medicaid eligible. These resources will be available through the Division website, Division staff, and other government and non-government entities.

3. COMMENT: N.J.A.C. 10:46-1.2. One commenter noted that the ability for people to be gainfully employed will put their Medicaid eligibility at risk. This commenter hopes that as a newly formed Employment First state, the State will consider an extension of Medicaid for a transition period to ensure access to healthcare during any probationary period or period of unavailability of healthcare through their employer until the Affordable Care Act is implemented.

RESPONSE: The Division is strongly committed to Employment First. Individuals are encouraged to work, and it is possible to work and maintain Medicaid eligibility in order to receive services offered by the Division. The New Jersey Workability program will allow individuals who are competitively employed to continue to maintain their Medicaid eligibility. In addition, the Division has created a fact sheet entitled “Employment and the Community Care Waiver,” available on its website, which provides answers to frequently asked questions about this topic and includes resources to obtain additional information.

4. COMMENT: N.J.A.C. 10:46-2.1. Several commenters expressed concern that individuals currently receiving services from the Division who are not eligible for Medicaid will not be able to continue receiving services. One commenter requested information as to how many current clients will be affected, what the plan for their transition is, and what systems of care have been identified for individuals who may not qualify for Medicaid. This commenter suggests that the State determine how it will play a supportive role for such individuals.

RESPONSE: The Division has begun preliminary outreach to individuals receiving services who are not currently Medicaid eligible. These individuals will be given time to apply for Medicaid eligibility. The Division will assist these individuals with information about the application process. The Division believes that the vast majority of these individuals are able to become Medicaid eligible. Individuals who choose not to apply for Medicaid or who are denied eligibility may lose services on a case-by-case basis depending on the circumstances. The Division has changed the rule upon adoption to include an initial period of 60 days during which the individuals currently receiving services may continue to receive services, followed by an additional 30 days in the case of extenuating circumstances, rather than solely a period of 30

days in extenuating circumstances, as was provided for in the rule proposal. In the event that the Division does terminate services to an individual, the individual will be given the right to appeal as a safeguard against arbitrary, capricious or unreasonable actions by the Division, as set forth at N.J.A.C. 10:48. As is the current practice, individuals will be provided with information about various sources for services and supports, including the Division of Disability Services, the Division of Vocational Rehabilitative Services, and other governmental, not-for-profit and private agencies.

5. COMMENT: N.J.A.C. 10:46-1.2. Several commenters expressed that the Division can best serve individuals with developmental disabilities if eligibility practices incorporate sufficient flexibility to serve individuals who may become Medicaid-ineligible for limited periods of time. The commenters suggest that in these instances the Division provide an extension to the 30-day grace period proposed by the rules.

RESPONSE: The Division agrees to this suggestion and has changed the proposed rule to include the initial extension of temporary services for 60 days, provided that the individual or his or her guardian has complied with all requirements as determined by the Division, including, but not limited to, completing all necessary paperwork in an expedited manner and acknowledging, in writing, that the services are time-limited, and with the approval of the Assistant Commissioner. One additional extension for a period of 30 days is also provided for with approval from the Assistant Commissioner. The 30-day extension is intended to provide individuals with necessary temporary services in only the most extenuating circumstances. The Division believes these extensions will alleviate the commenters concerns.

6. COMMENT: N.J.A.C. 10:46-2.1. Several commenters expressed concern over the criteria for establishing an intellectual disability. The commenters believe that the Division's requirement that an individual have an IQ score of 70 or below and a chronic and substantial impairment in adaptive behavior is an outdated measure of intellectual disability and establishes IQ as a bright line test, and that the proposed amendment adds an additional criterion for eligibility.

RESPONSE: As indicated in the proposed rule, this provision was intended to supplement, and did not supplant, the definition of developmental disability, and therefore did not add an additional criterion for eligibility. The Division intended this subsection as an improvement over the existing rule, which relies more heavily on distinctions based upon IQ scores. The Division agrees, however, that this subsection may cause confusion regarding the definition of developmental disability, and has not adopted this subsection from the proposed rule. This will clarify that individuals must satisfy the functional definition of developmental disability whether or not they present with an intellectual disability.

7. COMMENT: N.J.A.C. 10:46-1.3. One commenter believes that the Division is attempting to restrict the definition of developmental disability to solely intellectual impairments and neurological disorders, contrary to Federal and State statutes. The commenter notes that the State statutory definition of developmental disabilities contains no limitation on the types of physical impairments that can lead to a developmental disability, and encourages the Division to make clear that it is retaining the full functional definition intended by the Federal and State statutes, rather than a definition that will disqualify individuals with some diagnoses from obtaining services regardless of functional impairment.

RESPONSE: The Division disagrees with the commenter's interpretation of the rule. The Division, in explaining the classification of neurological impairment, intends to clarify that a neurological impairment is not a diagnosis itself, but that diagnoses related to neurological impairments may establish a developmental disability. The proposed amendment to the definition of intellectual disability was intended to supplement and not supplant the definition of developmental disability. For the reasons discussed in the Response to Comment 6, the Division has removed N.J.A.C. 10:46-2.1(g) regarding intellectual disability from the proposed rules. The Division intends to retain the functional definition of developmental disability, as set forth in the rules.

8. COMMENT: A commenter expressed disappointment that the Division has not streamlined the eligibility process, particularly for individuals who have already established eligibility for related State programs. This commenter also welcomed the inclusion in the proposed rules of timelines for completing eligibility determinations, and believes that the Division has taken too long to process eligibility applications in the past. This commenter also believes that it is "cruel" for the Division to require individuals who have completed the application process, but who have been waiting for the Division to make a decision, to begin the application process over from the beginning.

RESPONSE: The Division believes that the eligibility process outlined in the rules will promote efficiency. Individuals may apply for eligibility as early as 18, in order to begin receiving services at the age of 21. Moreover, children may begin to receive transitional information at the age of 16, in order to better prepare them for anticipated Division services at the age of 21. The Division wishes to clarify that the adopted rules do not require adult individuals who have

completed the application process, but are awaiting a decision, to begin the process anew.

Rather, N.J.A.C. 10:46-3.2(f) requires that individuals who have started, but not completed the application process, or have not yet been found fully eligible for functional services, will be subject to the requirements of the rules.

9. COMMENT: N.J.A.C. 10:46-3.1. The adopted rules provide that an individual 18 years of age or older or the individual's guardian may apply for services. One commenter requests that the Division expand this to include parents and those acting *in loco parentis*. The commenter believes that the rule as currently written will cause parents to feel pressure to obtain guardianship as soon as their children turn 18 and will discriminate against families with limited financial means.

RESPONSE: The individual is his or her own decision-maker unless the individual has a legal guardian. Therefore, decision making authority is held by the individual or the legal guardian. The Division feels that the inclusion of parents who are not legal guardians or those acting *in loco parentis* would not be appropriate, because once an individual becomes 18 years of age he or she is presumed to be his or her own decision-maker, unless adjudicated differently by a court of competent jurisdiction. The Division does not believe that this provision will discriminate against families with limited financial means because an individual can seek assistance with the application process without having to seek a guardianship matter in court.

10. COMMENT: N.J.A.C. 10:46-2.2. Among other things, this section of the proposed rule provides that if an individual has a guardian, the guardian must live in the State at the time of application for eligibility in order to establish residency, unless the guardianship determination does not include residential decision making. One commenter believes this requirement may be

legitimate if the guardian is a parent, but that a lifelong resident of the State should not be required to move if his or her parents retire to another state, or if his or her parents die and an out-of-State relative or institution assumes guardianship. The commenter believes this provision may have the unintended consequence of encouraging parents not to pursue guardianship when it is needed.

RESPONSE: The Division disagrees with the commenter's interpretation of this provision. The Division intends this provision to ensure that the applicant and guardian are residents of the State of New Jersey at the time of application. Once an individual has been determined to be eligible, if the guardian moves out-of-State, the individual may remain in Division services. Additionally, the guardian is free to request a discharge from services or can seek services in the new state of residence. The Division does not believe this provision will have the consequence of discouraging necessary guardianships.

11. COMMENT: A commenter questions whether there are other immigration statuses other than permanent alien resident that would allow an individual to obtain Division services.

RESPONSE: The adopted rules provide that only permanent alien residents who are eligible for Medicaid meet the residency requirements for Division eligibility.

12. COMMENT: One commenter noted that they were appreciative of the realignment of services the Division has taken, particularly consolidating services under one department or division by age, which will make awareness of these services, as well as applying for them, to some degree easier for the families and individuals being served. The commenter noted that the

detailing of the eligibility criteria under the new scope is helpful, as well as is the mention of transitional planning.

RESPONSE: The Division agrees and hopes that the notice and the availability of transitional information will help to provide for a smooth transition process.

13. COMMENT: One commenter noted that the Division must inform individuals and caregivers of the right to appeal. The information must be provided in language that is easy to comprehend before any action to terminate services. When an appeal is filed the individual should continue to receive all Division services until the appeal rights have been exhausted and a final determination has been made.

RESPONSE: The Division's procedures for appeals are contained in N.J.A.C. 10:48. Individuals receiving Medicaid services will also have a right to fair hearing pursuant to applicable Medicaid law and regulations. The Division will follow all relevant law pertaining to informing individuals of their appeal rights and the provision of services during appeals.

Group II Comments and Responses

14. COMMENT: N.J.A.C. 10:46-1.2. Life experiences of persons with developmental disabilities and co-existing psychiatric disorders may be quite different from those of neurotypical individuals. Life histories must typically be gathered from knowledgeable caregivers, as well as from the patient. There must be ongoing review and follow-up with knowledgeable caregivers. The commenters are concerned that this process is not supported by the Medicaid reimbursement model. The commenters are also concerned that Medicaid providers not experienced with this population will be unaware of the patients' particular needs

with respect to psychiatric and psychological therapies. UMDNJ/MHID states that it would be unable to provide its specialized services at the Medicaid reimbursement rate. Parents of patients at UMDNJ/MHID also expressed concern that because UMDNJ/MHID is not a Medicaid provider, this section of the rule will mean that their children and many other individuals would not be able to receive the type of care they currently receive.

RESPONSE: The Division believes that it is the function of the Medicaid Managed Care Organization (MCO) to make similar and comparable behavioral services available to individuals by the MCO. The Division has provided these services to individuals through a contract with UMDNJ/MHID utilizing State funds. It would be inappropriate for the Division to continue to contract for services that are part of the Medicaid State Plan.

15. COMMENT: N.J.A.C. 10:46-1.3 and 2.1(g). Proposed new criteria for eligibility for services call for “an IQ of 70 or below.” By definition, this excludes persons with diagnoses of Asperger’s Disorder (AspD) and those with so called “High-functioning Autism” (HfA). Assuming that such individuals are eligible for Medicaid services, would they be covered or eligible for Division services as they are at present?

RESPONSE: As stated in the Response to Comment 6, N.J.A.C. 10:46-2.1(g), regarding intellectual disability was intended to supplement and not supplant the definition of developmental disability. However, in order to avoid confusion, this subsection has been removed from the rule. Individuals with diagnoses of Asperger’s Disorder or “High-functioning Autism” must meet the definition of developmental disability in order to receive Division services, as is current practice.

16. COMMENT: Who under age 21 will continue to receive Division services? Will criteria for services for those who must re-apply for services at age 18 be kept as at present, or will they change? If the latter, will those currently deemed eligible be “grandfathered” in? If not, and services are interrupted, serious health consequences can be expected.

RESPONSE: Pursuant to the legislation setting forth the realignment of services to children between the Department of Children and Families (DCF) and the Division, upon agreement between DCF and the Department of Human Services, the Division may continue to provide services to individuals under 21 years of age determined eligible for services prior to the effective date of that legislation. This provision allows for flexibility during the transition to effectuate the realignment. Some eligible individuals who are over 18, but under 21 years of age have not been transitioned to the DCF and will continue to receive Division services, to avoid these individuals having to undergo two transitions in the agencies serving them in a relatively short period of time. Other eligible individuals under 21 years of age, such as those currently being served through the Community Care Waiver, may also continue to receive Division services. The criteria for functional eligibility for individuals who apply for services at the age of 18 years will be those set forth in this chapter, which are based upon the Federal and State statutory definition of developmental disability and have not been changed. This chapter provides that individuals determined eligible for Division services prior to January 22, 2013 (the effective date of this chapter) shall be presumed eligible when they reach 21 years of age, except any individual born on or after January 1, 1997, who must reapply for eligibility after they reach 18 years of age. The Division does not expect individuals to experience any service interruptions because of the introduction of transitional planning and the three-year period between when an

individual may first apply for services at 18 and the transition to Division services at 21 years of age.

17. COMMENT: “The Division has outlined a process for individuals who fail to maintain eligibility for Medicaid.” What is this process? If individuals who lose eligibility for Medicaid are unable to pay for necessary care how is this to be handled? What will be the consequences to health (not only psychiatric care?).

RESPONSE: The proposed rules provided that individuals who lose eligibility for Medicaid would, upon approval of the Assistant Commissioner, be given up to 30 days of temporary State-funded services to become eligible and reapply. In response to concerns expressed by commenters, the Division has changed the proposed rule to include the initial extension of temporary services for 60 days, provided that the individual or his or her guardian has complied with all requirements as determined by the Division, including, but not limited to, completing all necessary paperwork in an expedited manner and acknowledging, in writing, that the services are time-limited, and with the approval of the Assistant Commissioner. One additional extension for a period of 30 days is also provided for, with approval of the Assistant Commissioner. The 30-day extension is intended to provide individuals with necessary temporary services in only the most extenuating circumstances. With regard to services for those individuals who may lose Medicaid eligibility, see the Response to Comments 1 and 2.

18. COMMENT: Residency requirements. What happens to New Jersey residents currently placed out-of-State who cannot be accommodated in or cannot find (that is, are not accepted by)

placements in New Jersey? “If ... the most appropriate services is not available. The Division shall, if practicable, provide an alternative service.” What exactly does this mean?

RESPONSE: It is the Division’s goal to serve all New Jersey residents in the State of New Jersey. If the Division experiences a delay in identifying an in-State placement the individual may remain in the out-of-State placement until the Division offers an in-State alternative. The quoted language appears in adopted N.J.A.C. 10:46-4.2, Notice requirements, and references the Division’s statutory authority to place individuals on a waiting list for the most appropriate service if it is not available, while providing an alternative service, if practicable.

Federal Standards Statement

The adopted new rules state that the Division provides services through Medicaid waivers and requires that individuals maintain Medicaid eligibility in order to maintain eligibility. A Medicaid waiver is authorized by the Federal Centers for Medicare and Medicaid Services (CMS), pursuant to a program in which states request permission from CMS to provide a broad array of services, excluding room and board, that are not otherwise covered under the Medicaid program. The proposed new rules do not exceed Federal standards. Therefore, a Federal standards analysis is not required.

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

10:46-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Application” means the form available at Division offices or on the Division website

at: [*\[www.nj.state.us/humanservices/ddd/services/apply/application.html\]*](http://www.nj.state.us/humanservices/ddd/services/apply/application.html)

[*www.state.nj.us/humanservices/ddd/services/apply/application.html*](http://www.state.nj.us/humanservices/ddd/services/apply/application.html) (see N.J.A.C. 10:46-

3.2(a)). The term includes any supporting documentation deemed necessary by the Division to make an informed determination with regard to applicant eligibility, including medical information. Supporting documentation may include, but is not limited to, educational, psychiatric, psychological, vocational, rehabilitation, medical, and social service records.

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SUBCHAPTER 2. ELIGIBILITY CRITERIA

10:46-2.1 General eligibility

(a)-(b) (No change from proposal.)

(c) An otherwise eligible individual who is not eligible for Medicaid*[, including individuals previously eligible for Medicaid who lose Medicaid eligibility,]* shall receive time-limited services from the Division, not to exceed 30 days, when the following are met:

1. – 3. (No change from proposal.)

***(d) An otherwise eligible individual receiving services from the Division, who was previously eligible for Medicaid and loses Medicaid eligibility, shall receive time-limited services not to exceed 60 days from the time of Medicaid ineligibility, provided that:**

1. The individual or his or her guardian complies with all requirements as determined by the Division, including, but not limited to, completing all necessary

paperwork in an expedited manner and acknowledging, in writing, that the services are time-limited for a period of 60 days unless the individual becomes eligible for Medicaid within that timeframe; and

2. The written authorization of the Assistant Commissioner has been obtained.

(e) An individual receiving services under (d) above shall receive services for an additional time-limited period not to exceed 30 days, provided the conditions in (c)1, 2, and 3 above are met.

(f) Individuals receiving services from the Division on January 22, 2013, who are not Medicaid eligible shall continue to receive services for a period not to exceed March 23, 2013. The individual shall receive services for an additional time-limited period not to exceed 30 days, provided the conditions in (c)1, 2, and 3 above are met.*

Recodify proposed (d)-(e) as ***(g) – (h)*** (No change in text from proposal.)

[(f)]* *(i) At age 16, individuals may seek transitional planning from the Division. At age 18, individuals may apply for eligibility from the Division. The Division will not provide services to individuals, other than transitional planning, until the individual reaches 21 years of age.

1. Individuals who were determined eligible for services prior to ***[(the effective date of this rule)]* *January 22, 2013***, shall be presumed eligible to receive Division services when they reach 21 years of age, except any individual born on or after January 1, 1997. Individuals born on or after January 1, 1997 shall be required to reapply to the Division for eligibility after they reach 18 years of age.

***[(g)** Intellectual disability is characterized by significantly subaverage intellectual functioning. For applicants who present documentation of intellectual disability, the criteria for establishing

the presence of intellectual disability shall be an IQ score of 70 or below and a chronic and substantial impairment in adaptive behavior.

1. Adaptive behavior refers to an individual's effectiveness in functioning at an age and culturally appropriate level.

2. The intellectual disability must have been manifest before the age of 22 years.

3. The criteria in (g) above supplement and do not supplant the definition of developmental disability.

4. The applicant retains the burden of demonstrating the requirements of (g) above.]*

Recodify proposed (h) and (i) as ***(j) and (k)*** (No change in text from proposal.)

10:46-3.1 Who may apply

(a) (No change from proposal.)

(b) Pursuant to P.L. 2012, c. 16, sec. 158, the Division may continue to provide services to certain individuals under age 21 whom it is serving on *[(the effective date of these rules)]* ***January 22, 2013***.

(c) (No change from proposal.)

10:46-3.2 How to apply

(a) – (b) (No change from proposal.)

(c) Minimum information submitted shall include, but not be limited to:

1. – 5. (No change from proposal.)

6. Information for the individual's financial information sheet including basic information, such as Social Security number and the amount and type of benefits received, and

those documents as required under N.J.A.C. 10:46D, Contribution*[s for]* ***to* Care **and Maintenance Requirements*****;

7. – 8. (No change from proposal.)

(d) – (e) (No change from proposal.)

(f) An application shall be deemed complete when there is sufficient information to make a determination of eligibility. An applicant has one year from the date of the submission of the initial application to submit all supporting documentation to constitute a complete application or a new application will be required. Individuals who have started, but not completed, the full application process or have not yet been determined fully eligible for functional services as of ***[(the effective date of this rule)]* ***January 22, 2013*****, will be subject to all requirements of this chapter.