



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

PO Box 712

TRENTON, NJ 08625-0712

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

February 17, 2023

By Electronic Mail

Josh Lichtblau
Director, Medicaid Fraud Division
Office of the State Comptroller
PO Box 025
Trenton, NJ 08625-0025

Dear Director Lichtblau:

Thank you for your follow-up letter of February 6, 2023 regarding action taken by the Division of Medical Assistance and Health Services (DMAHS) and the Children's System of Care (CSOC) within the Department of Children and Families (DCF). We are providing this formal response as quickly as possible to meet your request, and we are happy to discuss further at your convenience.

DMAHS received your original letter dated November 16, 2021 and immediately agreed that there were safety concerns related to providers of Behavioral Assistance and Intensive In-Community services. Without delay, DMAHS engaged CSOC and the DHS Office of Program Integrity & Accountability (OPIA) to collectively resolve the issues. Interagency discussions began on November 17, 2021 regarding concerns identified by MFD's investigation:

- Issue 1: Current regulations require the agency to conduct background checks on behavioral assistants (BA) and intensive in-community (IIC) providers with limited oversight by CSOC or DMAHS.
- Issue 2: The criminal background check requirements for BAs are not clear and thus difficult to apply. Regulations should define what it means to "successfully complete" a background check and should clearly list disqualifying offenses.
- Issue 3: The regulations do not clearly state whether the other requirements pertaining to educational achievement and drivers licenses must be satisfied before a BA is permitted to provide services to a Medicaid beneficiary and whether the IIC Provider must update these checks on an annual basis.

Issue 1: Current regulations require the agency to conduct background checks on BA and IIC providers with limited oversight by CSOC or DMAHS.

To address the first issue, DMAHS and CSOC decided to require the completion of State-monitored fingerprint-based background checks through OPIA's Employee Controls & Compliance Unit (ECCU) and to utilize CSOC's required electronic documentation system as a means to ensure compliance.

In this new system, providers are required to complete a federal fingerprint-based background check on all new employees and to obtain a “clear letter” indicating that there were no disqualifying events prior to the provision of services. Providers are required to submit a copy of the clear letter to CSOC, and CSOC will not grant access to their online documentation system (CYBER) until this process is complete. Limiting access to CYBER restricts the provider’s ability to enter clinical documentation necessary for compliant billing, thus restricting service provision until the clear letter is in place. At the suggestion of the Medicaid Fraud Division (MFD), language was added to the newsletter stating that any BA/IIC provider who is found to be non-compliant with the required background checks may face the potential consequences of denied Medicaid claims, sanctions, penalties and/or exclusion from the Medicaid program. The draft newsletter was shared with MFD and subsequent edits from MFD were incorporated. This was confirmed in a response sent to MFD on June 16, 2022.

The initial newsletter was issued on September 13, 2022. A coordinated training describing the new policy changes was held for impacted providers on October 4, 2022. Proposed amendments to NJAC 10:77 incorporating the changes described above were targeted for submission to the Office of Administrative Law by the end of 2022.

Issue 2: The criminal background check requirements for BAs are not clear and thus difficult to apply. Regulations should define what it means to “successfully complete” a background check and should clearly list disqualifying offenses.

DMAHS, CSOC, and OPIA initially intended to utilize the National Child Protection Act of 1993 to establish authority to require criminal background checks. To establish disqualifying events, the team relied on New Jersey P.L. 1999 c. 358 for guidance. This NJ law for the protection of children with developmental disabilities sets out disqualifying events, timelines for those offenses, and the appeal process required. DMAHS and OPIA utilized language from this act to develop clearly defined fingerprint guidelines for proposed regulations.

However, on October 25, 2022, the State Police raised new concerns to OPIA over using the National Child Protection Act as authority for background checks for this population of providers. This resulted in an unexpected delay while other options were considered. Because the FBI requires statutory authority for federal fingerprint-based background checks and the State Police would not authorize use of the National Child Protection Act, we were limited to using the NJ State Police background check only. MFD was immediately informed about this unexpected change, which required updates to the proposed regulatory amendments.

The proposed regulatory amendments then met an unforeseen delay in December of 2022 when we were asked to get Attorney General review of the proposed regulations to ensure that DMAHS had the legal authority to require these providers to undergo fingerprint-based criminal background checks. Because the existing regulations were set to expire and the Attorney General’s office needed time to review, DMAHS was obligated to propose the regulations for readoption without the background check language. DMAHS immediately informed MFD of this development, and advised that we would incorporate the background checks as a rule amendment when approved by the Attorney General’s office. Upon receipt of that approval in early 2023, DMAHS drafted the amendments incorporating the background check requirements and will, with all due haste, formally propose these changes to N.J.A.C. 10:77.

DMAHS is also issuing an updated newsletter reflecting the new authority and clarifying the start date for the new OPIA background check requirements. Additionally, as discussed with MFD, the updated newsletter will clarify that all existing staff are required to complete a fingerprint-based background check through OPIA. Background checks for the approximately 4,000 existing providers must be completed within two years of the newsletter date. This transition period is crucial to ensure provider availability and avoid disruption of services given the large universe of providers needing to move through the new process.

Issue 3: The regulations do not clearly state whether the other requirements pertaining to educational achievement and drivers licenses must be satisfied before a BA is permitted to provide services to a Medicaid beneficiary and whether the IIC Provider must update these checks on an annual basis.

To address the final concern, the pending regulatory amendment and newsletter language state that providers are now required to submit proof of a valid driver's license (where applicable) and evidence of the staff's highest educational level obtained along with their clear letter. Failure to do so will prevent enrollment into CYBER and prevent the staff from providing services.

Additionally, the pending regulations and updated newsletter describe an ongoing process to ensure that staff maintain a valid driver's license, where applicable. Providers are required to document that any individual who may transport Medicaid members as part of their job has a valid driver's license. The employer must submit a form annually to CSOC listing all employees that may provide transportation services and an affirmation that the staff's driver's license was visually inspected for validity and in their possession at the beginning of each year.

In order to monitor compliance with new requirements described above, DMAHS will include chart reviews and verification of staff credentials as part of our ongoing auditing of CSOC waiver services.

In closing, DMAHS appreciates the ongoing collaboration with MFD that supports thoughtful evaluation and improvement of our programs. DMAHS and CSOC have recognized the importance of addressing issues related to BA/IIC providers and have made every effort to complete the required program changes in a timely manner. Despite multiple external obstacles, the collaborating agencies maintained consistent focus and momentum to implement improved safety protocols as efficiently as possible. DMAHS will continue to work with CSOC and OPIA to ensure all providers are properly vetted.

Thank you for your partnership.

Sincerely,



Jennifer Langer Jacobs
Assistant Commissioner