



State of New Jersey

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OFFICE OF THE STATE COMPTROLLER
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November 16, 2021

Jennifer Langer Jacobs
Assistant Commissioner
Department of Human Services
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

Dear Assistant Commissioner Jacobs:

I write regarding issues that the Office of the State Comptroller, Medicaid Fraud Division (OSC) identified through audits of intensive in-community mental health rehabilitation and behavioral assistance providers (IIC Providers).¹ Specifically, OSC found that current requirements for IIC Providers are insufficient in ways that create risk to Medicaid beneficiaries who receive services from these providers, particularly when these requirements are compared to other practices inside and outside of government related to the protection of minors and other vulnerable persons.

Regulations promulgated by the Division of Medical Assistance and Health Services (DMAHS) require IIC Providers to ensure that Behavioral Assistants (BAs) meet minimum requirements, among others:

- *N.J.A.C. 10:77-4.9(g)* states that “[a]ll employees having direct contact with and/or rendering behavioral assistance services directly to the beneficiaries shall be required to successfully complete criminal background checks.” *N.J.A.C. 10:77-4.14(d)* requires IIC Providers to maintain written documentation for each BA showing “successful completion of a criminal background check conducted by a recognized and reputable search organization.”
- *N.J.A.C. 10:77-4.9(e)* states that “[a]ll direct care staff shall, at a minimum, have a high school diploma or equivalent.” *N.J.A.C. 10:77-4.14(c)* requires IIC Providers to maintain a copy of each BA’s “high school diploma or equivalent.”
- *N.J.A.C. 10:77-4.9(e)* states that “[a]ll employees shall have a valid driver's license if his or her job functions include the operation of a vehicle used in the transportation of the children/youth or young adults.” *N.J.A.C. 10:77-4.14(d)* requires IIC Providers to maintain

¹ See, e.g., https://www.nj.gov/comptroller/news/docs/adv_counseling_services.pdf

“[a] copy of [a BA’s] current valid driver's license, if driving is required to fulfill the responsibilities of the job.”

OSC evaluated whether IIC providers complied with these regulations and determined that they often did not. OSC observed egregious examples of IIC Providers that failed to conduct required checks on BAs prior to allowing these BAs to provide services to minors and then billed the Medicaid program for such services. OSC has identified the following serious flaws in the current approach to ensuring that BAs meet the minimum requirements imposed by these regulations:

- 1) The regulations place all of the obligations to conduct background checks of BAs on IIC Providers without any oversight by DMAHS. Audits and investigations, which may occur years after a BA is hired, if at all, currently provide the only oversight of which we are aware. In the absence of an audit or investigation, there is no means to determine whether IIC Providers who retain BAs to render services performed these background checks.
- 2) The criminal background check requirements for BAs are not clear and thus difficult to apply. For example, the regulation does not explain what it means to “successfully complete a background check conducted by a recognized and reputable search organization.” Likewise, it does not explain what derogatory information would be disqualifying, when the IIC Providers must first obtain a criminal background check on a BA (i.e., before the IIC Provider first bills for the BA’s services), and whether the IIC Provider must perform subsequent checks after having performed the original one. In comparison to the unclear requirement imposed by *N.J.A.C. 10:77-4.9(g)*, the Department of Children and Families (DCF) Office of Licensing (OOL) adopted extensive regulations addressing this issue in the context of child-care centers. The relevant OOL regulation requires providers to conduct background checks “[w]ithin two weeks after a new staff member begins working at the center” and provides that “[u]ntil the center receives the results of the CHRI background check for a new staff member from the Department of Human Services, the center shall ensure oversight of that person by another staff member and ensure that the person is not alone to supervise a child or group of children.” *N.J.A.C. 3A:52-4.11(b)2*. This regulation may provide a useful template for DMAHS to consider. See also <https://www.childcarenj.gov/Parents/Licensing> (frequently asked questions, including regarding comprehensive criminal background checks).
- 3) Similar to the criminal background check requirement, 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. Just as with the criminal background check requirement, DMAHS should provide detailed requirements for when and how a staff member is subject to the education and driver’s license verification.

These issues would be best addressed through comprehensive regulations of the sort adopted by OOL. In the absence of regulations, or in the interim, prior to and during the rulemaking process, DMAHS should consider providing guidance to IIC Providers who utilize BAs in their practice. Rules or guidance should require IIC Providers seeking to participate in the Medicaid program to

submit proof of satisfaction of the existing regulatory requirements as part of the application process. For existing IIC Providers, DMAHS could require a similar verification process before the submission of any BA service claims. In adopting and implementing rules or guidance, DMAHS may see fit to rely on existing OOL rules or those implemented by other government entities responsible for protecting minors.

We recognize that instituting a policy in which the IIC Provider is not solely responsible for screening BAs and in which there is a centralized screening process overseen by the State may require legislation and, thus, we urge DMAHS to pursue such legislation.

We look forward to engaging with your office to address the concerns identified above. We believe that addressing these concerns is an urgent matter that requires immediate action. Accordingly, we request that you advise by December 1, 2021 whether DMAHS will address these issues and, if so, what specific steps it intends to take and the timeframe it intends to take such steps.

Thank you for your attention to this matter.

Very truly yours,

KEVIN D. WALSH
ACTING STATE COMPTROLLER

By: Josh Lichtblau
Josh Lichtblau, Director
Medicaid Fraud Division



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KEVIN D. WALSH
Acting State Comptroller

JOSH LICHTBLAU
Director

February 6, 2023

By Electronic Mail

Jennifer Langer Jacobs
Assistant Commissioner
Department of Human Services
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

Dear Assistant Commissioner Jacobs:

I write as a follow-up to the November 16, 2021 letter in which the Office of the State Comptroller, Medicaid Fraud Division (OSC) notified the Division of Medical Assistance and Health Services (DMAHS) that, through audits of intensive in-community (IIC) mental health providers, it had identified serious vulnerabilities regarding the state's oversight of these providers (Attachment 1). OSC's letter explained that, among other deficiencies, Medicaid's requirements for IIC providers lacked an adequate criminal history check for behavioral assistants (BAs), which created risks to Medicaid beneficiaries who received services from IIC providers. It pointed to a significant flaw in DMAHS's regulatory framework – it placed all of the obligations to conduct background checks on providers without any oversight by DMAHS. The letter noted that "OSC observed egregious examples of IIC Providers that failed to conduct required checks on BAs prior to allowing these BAs to provide services to minors and then billed the Medicaid program for such services." Accordingly, OSC recommended that DMAHS address these serious risks by adopting comprehensive regulations, seeking legislative changes, or, more immediately, providing guidance to IIC providers.

In response to OSC's November 2021 letter, in early December 2021, DMAHS advised that its personnel would meet with personnel from the Department of Children and Families (DCF), the agency partially responsible for overseeing IIC providers, jointly develop a plan to address these issues, and, by the end of January 2022, "finalize the plan and operational steps for implementation." In September 2022, DMAHS issued a Newsletter (Volume 32, No. 24) that required existing BA/IIC providers that had failed to satisfy the background check requirement and new provider applicants to initiate a request for fingerprint-based background checks from the Children's System of Care (CSOC) within DCF. In a rule proposal dated January 17, 2023,

DMAHS proposed revisions to the BA/IIC provider regulation that did not include any change to the criminal background check requirement. *See* 55 N.J.R. 87(a).

Taken as a whole, DMAHS's efforts to address the serious issues that OSC identified more than 14 months ago amount to the following: a Newsletter that requires existing BA/IIC providers that failed to meet the background check requirement and new BA/IIC providers to contact CSOC to initiate a request for fingerprint-based background checks.

DMAHS's approach to date is insufficient because it continues to place the obligation to comply with the background check requirement on the individual provider, without any meaningful way for DMAHS to oversee each provider's compliance. OSC's audits suggest this approach is unlikely standing alone to adequately protect children because providers are already able – without detection - to avoid complying with the more lax criminal background check requirement in existing regulations; there is no reason to expect that they will, without more, comply with the Newsletter's additional and more stringent fingerprint-based background check requirement.

Based on DMAHS's response to date and the fact that OSC intends very soon to publish another audit highlighting another IIC provider's failure to obtain criminal background checks for BAs, OSC requests that DMAHS advise what steps it will take to address these serious problems. OSC recommends that DMAHS initiate rulemaking as soon as possible to address this vulnerability and, as part of such effort, institute an oversight process that ensures that IIC providers have fingerprinted a BA before the BA can provide services to a Medicaid beneficiary.

As part of the upcoming publication of OSC's audit findings, OSC intends to provide a timeline of its efforts to address the problems identified in OSC's November 2021 letter, DMAHS's efforts to date, and DMAHS's plans to address these problems. Accordingly, please advise in writing what steps DMAHS will take to address the problems identified above by no later than February 13, 2023. The information you provide may appear in a public letter, audit report, or other release by OSC.

Thank you in advance for your prompt attention to this important matter.

Very truly yours,

KEVIN D. WALSH
ACTING STATE COMPTROLLER

By: Josh Lichtblau
Josh Lichtblau, Director
Medicaid Fraud Division

Attachment 1 – Letter dated November 16, 2021

C: Vicki Mangiaracina, Chief Legal Officer, DMAHS