

**Maryland General Assembly  
Department of Legislative Services**

**Proposed Regulations  
Department of Health and Mental Hygiene  
(DLS Control No. 14-242)**

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**Overview and Legal and Fiscal Impact**

The regulations modify provisions that govern the provision and reimbursement of community-based substance use disorder services under the Maryland Medical Assistance Program (Medicaid).

The regulations present one legal issue of concern.

There is no fiscal impact on State or local agencies.

**Regulations of COMAR Affected**

**Department of Health and Mental Hygiene:**

Medical Care Programs: Community-Based Substance Use Disorder Services:  
COMAR 10.09.80.01-.12

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**Legal Analysis**

**Background**

For the past several years, the Department of Health and Mental Hygiene has been examining the issue of integrating mental health and substance abuse care. This process was prompted by observations that the current service delivery system for mental and substance abuse services was fragmented and suffered from a lack of connection (and coordination of benefits) with general medical services; had fragmented purchasing and financing systems with multiple, disparate public funding sources, purchasers, and payers; had uncoordinated care management including multiple service authorization entities; and had a lack of performance risk with payment for volume, not outcomes.

As a result of these deliberations, the department chose to move forward with a carve-out of behavioral health services from the managed care system with added performance risk. Specifically, all substance abuse/specialty mental health services will be carved out from managed care organizations (MCOs) and delivered as fee-for-service care through an administrative services organization (ASO) (the current Mental Hygiene Administration model). The ASO contract will include incentives/penalties for performance against set targets. In the fiscal 2015 budget approved by the General Assembly, funding for Medicaid-eligible specialty mental health and substance abuse services for Medicaid enrollees is located in the Medicaid program.

In a related action, Chapter 460 of 2014 merged the former Mental Hygiene Administration and Alcohol and Drug Abuse Administration into a new Behavioral Health Administration (BHA), effective July 1, 2014. BHA is led by a director, under the Deputy Secretary for Behavioral Health and Developmental Disabilities.

In accordance with a language in the fiscal 2015 budget bill, the department submitted a report to the General Assembly on June 20, 2014 that clarifies the following roles and responsibilities for BHA and Medicaid:

- For clinical oversight, BHA will manage evidence-based practices and promising clinical interventions for behavioral health services generally; BHA will establish, refine and monitor clinical standards for Medicaid-financed services to ensure that payment policies support clinical care; and BHA will ensure clinical criteria for grant-based services.
- For financial management, Medicaid will pay provider claims that are Medicaid-related while BHA will manage State fund only claims. ASO expenses will be administered by Medicaid with guidance from BHA.

On September 3, 2014, the Board of Public Works awarded a 5-year \$77.1 million contract to ValueOptions, Inc. to provide the ASO for the Public Behavioral Health System. ValueOptions has been providing the ASO for the specialty mental health system.

## **Summary of Regulations**

The regulations modify provisions that govern the provision and reimbursement of community-based substance use disorder services under Medicaid. More specifically, the regulations define terms and establish or clarify, among other things, requirements, and conditions for provider participation, eligibility and referral procedures, services covered, requirements for service authorization, payment procedures, and procedures for the imposition of sanctions.

### **Definitions**

Among other terms, the regulations define “Administrative Services Organization (ASO)” to mean the contractor procured by the State to provide the department with administrative support services to operate the Maryland Public Behavioral Health System. A “[c]ommunity-based substance use disorder program” is defined to mean a program that provides services in community settings not regulated by the Health Services Cost Review Commission. The regulations also repeal as a defined term the “Alcohol and Drug Abuse Administration” and add a definition for the “Behavioral Health Administration.”

### **Requirements and Conditions for Provider Participation**

Under the regulations, a community-based substance use disorder provider must be certified by the department in accordance with specified regulations. An opioid maintenance therapy provider must also be certified by the department in accordance with specified regulations and also maintain approval by the Drug Enforcement Administration. The regulations also specify conditions a community-based substance use disorder provider must meet to participate in Medicaid, such as maintaining verification of licenses and credentials of all

professionals employed by or under contract with the provider in their respective personnel files and having clearly defined, written, patient care policies.

### **Eligibility and Referral**

The regulations specify that a participant may self-refer or be referred to substance use disorder treatment by a provider or by a family member or caregiver. The ASO must have a toll free telephone line to accept referrals and help participants find an appropriate substance use disorder provider.

The ASO must authorize medically necessary services according to certain guidelines. Substance use disorder services are services for which the participant's diagnosis and treatment provider meet the criteria specified under certain regulations. The regulations also require the ASO to reimburse substance use disorder providers.

### **Services Covered**

The regulations modify provisions that establish the services Medicaid must cover. Among other changes, the new term *substance use disorder* is substituted for the former term *substance abuse*. In addition, the regulations specify that Medicaid covers Level I group and individual substance use disorder counseling, and that such counseling must include family members, if necessary, as long as the participant is also present in the group counseling session. The regulations also specify that Medicaid covers Level II.5 partial hospitalization and opioid maintenance therapy services that include certain services. An opioid maintenance therapy service must include, for example, a comprehensive substance use disorder assessment that is updated every 90 days for the first year of treatment.

The regulations identify certain services that are not covered by Medicaid, such as services that are provided in a hospital inpatient or outpatient setting or in an intermediate care facility for behavioral health. The regulations also specify certain services for which a provider may not be reimbursed by Medicaid. For such services, the regulations specify that providers must charge other members of the public in full for the service rendered, use a sliding fee scale based on the other's individual income, waive all or part of the fee for a specific individual, or bill the other insurance company and agree to accept what the third party pays as payment in full, whether or not the provider bills individuals who lack third party coverage.

### **Authorization Requirements and Payment Procedures**

The regulations establish authorization requirements and payment procedures for community-based substance use disorder services. A community-based substance use disorder program is required to notify the ASO and obtain authorization to provide specified substance use disorder services from the ASO. The ASO agent must authorize services that are medically necessary and of a type, frequency, and duration that are consistent with expected results and cost-effectiveness. Payment may not be rendered for services that have not been authorized. The regulations also specify rates for and billing conditions on partial hospitalization and opioid maintenance therapy services, include provisions establishing criteria for the payment of Medicare claims, and modify other provisions relating to payment procedures.

## **Procedures for the Imposition of Sanctions**

Under the regulations, the department must give to a provider reasonable written notice of the department's intention to impose sanctions. In the notice, the department must establish the effective date of and reasons for the proposed action, as well as advise the provider of the right to appeal.

## **Legal Issue**

As noted above, the regulations require the ASO to perform certain functions relating to the management of substance use disorder services, such as authorizing services. In addition, the regulations require the ASO to reimburse substance use disorder providers. These provisions reflect a shift of responsibility for management of and payment for substance abuse services delivered to MCO enrollees from the MCOs to the Medicaid fee-for-service program, to be administered by an ASO under the oversight of the new Behavioral Health Administration. This shift of responsibility has been in the works for several years and has included periodic reporting to the General Assembly and ample discussion through legislative deliberations on the State budget. Nevertheless, the regulations, reflecting this shift, do not fully comport with State law. Although Chapter 460 of 2014 established the Behavioral Health Administration, the law did not make changes to Medicaid law that are needed to shift responsibility for management of and payment for substance abuse services away from the MCOs.

Specifically, § 15-103(b)(9)(vi) of the Health – General Article requires each MCO to provide or assure alcohol and drug abuse treatment for substance abusing pregnant women and all other enrollees of MCOs who require these services. Section 15-103(b)(21) requires the department to establish a delivery system for specialty mental health services for enrollees of MCOs, under the Mental Hygiene Administration. Section 15-103(b)(21)(iv)2 requires the delivery system, for enrollees who are dually diagnosed, to coordinate the provision of substance abuse services *provided by the MCOs* of the enrollees.

The Department of Legislative Services (DLS) believes that these provisions need to be altered, in order for the regulations to comport with State law. DLS staff have relayed this concern to the department. Department staff indicates that the stakeholder workgroup, convened by the department as required by Chapter 460 of 2014, will consider the matter and recommend any statutory changes needed to fully integrate mental health and substance use disorder treatment and recovery support and promote health services.<sup>1</sup>

## **Statutory Authority and Legislative Intent**

The department cites § 8-204(c)(1) and 15-103(a)(1) of the Health – General Article as authority for the regulations. Section 8-204(c)(1) formerly required the Director of the Alcohol and Drug Abuse Administration (ADAA) to adopt regulations to carry out the provisions of law that govern ADAA and programs under its jurisdiction. However, this provision was repealed by

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<sup>1</sup> Chapter 460 of 2014 requires the Secretary of Health and Mental Hygiene to convene a stakeholder workgroup to make recommendations on issues related to behavioral health, including statutory and regulatory changes to fully integrate mental health and substance use disorder treatment and recovery support and promote health services. The department is required to report the findings and recommendations of the workgroup to the Governor and General Assembly by December 1, 2014.

Chapter 460 of 2014, effective July 1, 2014. Section 15-103(a)(1) gives the Secretary of Health and Mental Hygiene broad authority to administer Medicaid.

Although not cited by the department, § 2-104(b) of the Health – General Article authorizes the Secretary of Health and Mental Hygiene to adopt regulations to carry out the provisions of law that are within the jurisdiction of the Secretary. Section 15-103(a)(2) requires Medicaid to provide medical and other health care services for specified individuals, subject to the limitations of the State budget. Section 15-105 requires the department to adopt regulations for the reimbursement of providers under Medicaid.

Except as noted above under “Legal Issue” and with the addition of §§ 2-104(b), 15-103(a)(2), and 15-105 of the Health – General Article (along with an omission of the reference to § 8-204(c)(1)), the statutory authority is correct and complete, and the regulations comply with the legislative intent.

### **Technical Corrections and Special Notes**

As proposed, Regulation 10.09.80.03 reads: “Provider shall be community-based substance use disorder programs that meet all conditions for participation set forth in COMAR 10.09.36.03.” This provision requires grammatical correction, perhaps by having the regulation read, instead, that “[p]roviders” shall be community-based programs that meet all conditions for participation set forth in COMAR 10.09.36.03.

In addition, Regulation 10.09.80.08H, which is included in a category or provisions relating to payment procedures, is merely a sentence fragment, stating: “Services not authorized consistent with COMAR 10.09.80.07C.” Regulation 10.09.80.07C provides that “[n]o payment shall be rendered for services that have not been authorized [by the ASO].” The intent of proposed Regulation 10.09.80.08H may, therefore, be to prohibit payment for services that have not been authorized by the ASO. But it is unclear whether this is the intent of the regulation, and it should be corrected.

The department has been notified of the corrections needed above, and indicates that it will address the matter.

### **Fiscal Analysis**

There is no fiscal impact on State or local agencies.

### **Agency Estimate of Projected Fiscal Impact**

The regulations modify provisions regarding the provision and reimbursement of community-based substance use disorder services. These modifications reflect the carve-out of behavioral health services from Medicaid MCOs. Services will instead be delivered under Medicaid fee-for-service through an ASO (as is currently done for specialty mental health services). The department indicates that the regulations do not alter covered services or the amount of payment for substance use disorder services but reflect the shift in payment from MCOs to an ASO; thus, there is no fiscal impact. DLS concurs.

## **Impact on Budget**

There is no impact on the State operating or capital budget.

## **Agency Estimate of Projected Small Business Impact**

The department advises that the regulations have minimal or no economic impact on small businesses in the State. DLS

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