

**BOARD OF REVIEW FOR ANTI-DEFICIENCY VIOLATIONS****NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Board of Review for Anti-Deficiency Violations (the "Board"), pursuant to the authority set forth in Mayor's Order 2004-125, August 2, 2004, hereby gives notice of the adoption of the following emergency Guidelines (the "Guidelines") by adding a new Chapter 11 to Title I, DCMR. Pursuant to the District Anti-Deficiency Act of 2002, effective April 4, 2003 (D.C. Law 14-285; D.C. Official Code § 47.355.01 *et seq.* (2004 Supp.)) (the "Act"), the Board is to advise and make recommendations to the Mayor, the Chief Financial Officer, the Inspector General and the Council concerning reported violations of the Act by officers and employees of the District of Columbia government. The purpose of the Guidelines is to implement the Board's operating procedures regarding the Board's duties pursuant to the Act.

The Act requires that the Board convene to investigate the causes of a reported violation of the Act within 30 days of learning of such a violation. The Board has been informed that the Office of the Chief Financial Officer will provide the Board with the first reports of violations of the Act within the next few days, thus necessitating commencement of the Board's investigation before proposed rules could take effect. Thus, to ensure that any investigations of employee conduct which may lead to termination of employment are conducted in a manner so as to immediately protect the public safety, welfare and morals, action was taken on July 21, 2004, to adopt the following Guidelines on an emergency basis, effective August 4, 2004. These Guidelines will remain in effect for up to 120 days from August 4, 2004, or upon publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever occurs first.

The Board, pursuant to the authority set forth in Mayor's Order 2004-125, dated August 2, 2004, hereby also gives notice of its intent to adopt the following Guidelines, in not less than 30 days from the date of publication of this Notice in the *D.C. Register*. The purpose of the Guidelines is to implement the Board's operating procedures regarding the Board's duties pursuant to the Act. The Guidelines will create the following new Chapter 11 in Title I, DCMR, entitled "Guidelines of the Board of Review for Anti-Deficiency Violations."

**CHAPTER 11      GUIDELINES OF THE BOARD OF REVIEW FOR  
ANTI-DEFICIENCY VIOLATIONS****1100              SOURCE OF AUTHORITY**

1100.1            The Board of Review for Anti-Deficiency Violations of the Government of the District of Columbia ("Board") was established by the Mayor of the

District of Columbia ("Mayor"), pursuant to the District Anti-Deficiency Act of 2002 (the "Act"), effective April 4, 2003 (D.C. Law 14-285; D.C. Official Code § 47.355.01 *et seq.* (2003 Supp.)), Mayor's Order 2003-60, dated May 16, 2003, and Mayor's Order 2003-156, dated November 7, 2003.

1100.2 These Guidelines are issued pursuant to the authority vested in the Mayor by sections 422(2), (6) and (11) of the District of Columbia Home Rule Act of 1973, as amended, 87 Stat. 790, Pub. L. No. 93-198, D.C. Official Code § 1-204.22(2), (6) and (11) (2001). Pursuant to Mayor's Order 2004-125, dated August 2, 2004, the Mayor has delegated to the Board the authority to promulgate these Guidelines.

#### 1101 PURPOSE

1101.1 The purpose of these Guidelines is to implement the authority delegated to the Board by establishing an effective, efficient, and fair system of independent review and resolution of reported violations of the Act.

1101.2 The purpose of the Board is to advise and make recommendations to the Mayor, the Chief Financial Officer (CFO), the Inspector General (IG), and the Council of the District of Columbia (Council) with respect to reported anti-deficiency violations by officers and employees of the District of Columbia government. Because maintaining the fiscal integrity of the Government of the District of Columbia is of paramount importance, it is critical that reports of violations of the Act be evaluated by a credible, independent investigative board, which will assess culpability and recommend appropriate action.

#### 1102 MEMBERS

1102.1 The direction, control, and management of the affairs and funds of the Board shall be vested in the members, who shall pursue such policies and activities in accordance with the provisions of the relevant laws of the District of Columbia and the United States.

1102.2 Pursuant to Mayor's Order 2003-156, the Board is comprised of five (5) District government employees (Members), as follows: two (2) representatives who serve at the pleasure of the CFO, one (1) of whom shall serve as Chairperson of the Board; two (2) representatives who serve at the pleasure of the Mayor; and one (1) representative who serves at the pleasure of the IG.

1102.3 Each Member shall be appointed to a term of three (3) years. The Chairperson may excuse a Member from a meeting of the Board for an emergency reason. Any Member who fails to attend three (3) consecutive

meetings shall be deemed removed from the Board, and a vacancy created. Such vacancies shall be filled by the appropriate appointing authority as outlined in section 102.2.

- 1102.4 A Member may resign at any time by giving notice thereof in writing to that Member's appointing authority, with a courtesy copy to the Chairperson of the Board.
- 1102.5 A Member may serve beyond the end of his or her term until re-appointed, or replaced, by the appropriate appointing authority as outlined in section 102.2. No person may serve more than two (2) full terms.
- 1102.6 The officers of the Board shall be a Chairperson and a Vice-Chairperson, and such other officers as may from time to time be deemed advisable by the Board. Unless otherwise provided in the Act or these Guidelines, officers shall be chosen by a majority vote of the Board.
- 1102.7 Unless otherwise provided by the Act or these Guidelines, the officers of the Board shall hold their offices for such terms as shall be determined from time to time by the Board and shall exercise such powers and perform such duties as shall be specified by the Board and, if not inconsistent therewith, as are customarily exercised by corporate officers holding such offices.
- 1102.8 The officers shall hold office until their successors are chosen and qualified. Unless otherwise provided in the Act or these Guidelines, any officer may be removed at any time by a majority of the Members, with or without cause, and any vacancy occurring in any office may be filled by the vote of a majority of the Members.

**1103 MEETINGS OF THE BOARD**

- 1103.1 The Chairperson of the Board shall preside at all meetings of the Board at which he or she is present and shall perform such other duties as may be required of him or her by the Board.
- 1103.2 The Vice-Chairperson of the Board shall, in the absence of the Chairperson, preside at meetings of the Board and shall perform such other duties as may be required of him or her by the Board.
- 1103.3 Meetings of the Board may be called at the discretion of the Chairperson or at the request of any two Members. At least forty-eight (48) hours in advance of each meeting of the Board, notice shall be given to each Member.

1103.4 Notice of a meeting of the Board shall specify the date, time and place of the meeting. The notice may be delivered by methods including, but not limited to, telephone, email, government mail or announcement at a previous meeting. A Member may waive notice of any meeting by written statement filed with the Secretary. Attendance at a meeting also shall constitute a waiver of notice.

1103.5 The Board shall convene within thirty (30) days of receipt of a notice of a violation to investigate the causes of the violation.

1103.6 Meetings of the Board shall be closed except to those requested to attend.

#### **1104 QUORUM**

1104.1 Except as otherwise provided in the Act or in these Guidelines, three Members shall constitute a quorum for the Board to conduct a meeting or for the transaction of business.

1104.2 No Member may vote on any matter by proxy or by any attorney-in-fact.

1104.3 No vacancy in Membership shall impair the right of a quorum to exercise all rights and perform all duties of the Board.

1104.4 Any Member may participate in a meeting of the Board, or a committee of the Board, by means of a conference telephone or by any means of communication by which all persons participating in the meeting are able to hear one another, and such participation shall constitute presence in person at the meeting.

#### **1105 CONFLICT OF INTEREST**

1105.1 The Board shall consider all reported anti-deficiency violations in a fair and impartial manner. A Member who has a personal conflict, or the appearance thereof, in the resolution of any reported violation shall not participate in the Board's review of the matter. Examples of personal bias include, but are not limited to: familial relationship or friendship with a party or parties accused of the violation or making the accusation of the violation; having witnessed or participated in events material to the inquiry from a non-neutral perspective; being a party to the inquiry or having the potential of providing information relevant to the inquiry; or having a financial interest in the outcome of the inquiry.

1105.2 Any person involved in the reported violation may file a challenge for cause against a Member. The challenge must be filed with the Chairperson (or the Vice Chairperson if the Chairperson is challenged) in writing within ten (10) working days of the point at which the individual

filing the challenge becomes aware of potential personal bias of the Member or prior to the alleged violation being considered by the Board, whichever is earlier. The challenge must describe in detail the basis for the personal bias.

1105.3 If a Member is challenged for cause, the Chairperson shall contact the challenged Member as soon as possible. If the Member agrees that the challenge is for good cause, or otherwise agrees, the Member shall remove himself/herself from the particular inquiry. If the challenged Member does not agree that the challenge is for good cause, the Chairperson shall poll the other Members, and if a Quorum agrees that the challenge is for good cause, the Chair shall notify the challenged Member and remove the Member from that inquiry. If a challenge to a Member is rejected under the above procedure, the written challenge and the Member's written response, as well as the official minutes of the meeting at which the matter was considered, shall be incorporated in the investigative file as part of the record.

1105.4 Should any Member be removed or remove himself/herself from consideration of an alleged violation due to challenge, voluntary removal on the Member's own initiative, or good cause, the matter shall proceed before a quorum of the Board.

#### 1106 **COMPENSATION**

Members of the Board shall serve without compensation (beyond their salary as employees of the District Government), except that a Member may be reimbursed for reasonable expenses incurred in the authorized execution of official Board duties, if approved in advance by the CFO or his/her designee.

#### 1107 **ORGANIZATION**

1107.1 The Board may establish committees as needed, including standing committees. The Board shall determine who shall be members of any such committees. Committees may include District Government employees who are not Members, provided that each committee is chaired by a Member. Unless specified by the Board, the individual committees shall determine their dates, times, and locations of meetings and whether or not to keep records of committee meetings.

1107.2 The Board may establish its own bylaws and rules of procedure.

**1108 ADMINISTRATION**

- 1108.1 The Office of the Chief Financial Officer (OCFO) shall provide administrative and staff support to the Board.
- 1108.2 The OCFO shall designate an OCFO employee to serve as Staff Director of the Board. The Staff Director may designate an OCFO employee to serve as Secretary of the Board, as well as coordinate administrative and substantive support from other District employees to the Board. Board staff will assist the Board in carrying out its duties and responsibilities, including providing the necessary support to the Board to obtain information needed to perform its review. The Board, however, shall not delegate core responsibilities, such as the assessment of culpability, the determination of any justification and the recommendation of disciplinary or other action.
- 1108.3 The Secretary shall be responsible for keeping accurate minutes of the proceedings of all meetings of the Board. This includes providing administrative support associated with the needs of the Board, such as arranging meetings, and providing notices of meetings.
- 1108.4 Upon majority vote of the Members present at a duly called meeting at which a quorum is present, the Staff Director and Secretary of the Board may be removed from these positions at any time, without cause.
- 1108.5 The Board shall continuously maintain in the District of Columbia a principal office at such place as may be designated by the Members.
- 1108.6 The Board staff shall create a case file for each report, designate a case number, and enter the case in a database. The Chairperson or his or her designee will notify the Members when an allegation has been received and will schedule, in consultation with Members, the earliest possible date for the Members to meet.

**1109 LEGAL ADVICE**

- 1109.1 The Board may consult with and seek advice from the Office of the Attorney General, in coordination with the Office of General Counsel in the Office of the Chief Financial Officer, in the course of the Board's review of each reported violation.
- 1109.2 In making recommendations for disciplinary action, the Board shall consult with and seek advice from the D.C. Office of Personnel and/or the applicable personnel authority for the subject agency.

**1110 INVESTIGATIVE ASSISTANCE**

The Board shall seek investigative assistance, as necessary, from the Office of the Inspector General (OIG), the OCFO, the Office of the Attorney General, and other agencies of the District of Columbia in the course of the Board's review of a reported violation.

**1111 ACCESS TO DISTRICT OF COLUMBIA RECORDS**

In executing its responsibilities, the Members and the representatives of and investigators for the Board are authorized to:

- (a) Access all facilities, files and databases of the District Government agencies in order to obtain files, electronic and paper records, reports and documents, and other material available to the District Government agencies, which may relate to the Board's inquiry into a reported violation of the Act.
- (b) Request such information or assistance as may be necessary for carrying out the duties and responsibilities of the Board, as provided in Mayor's Order 2003-156, from any District, Federal, State, or local government agency.
- (c) Seek information from parties outside the District government, including government contractors, which may be relevant to an investigation.

**1112 RESPONSIBILITIES OF EMPLOYEES OF THE DISTRICT OF COLUMBIA TO THE BOARD**

1112.1 Inquiries by the Board are official inquiries by the Government of the District of Columbia. All officers, employees, and members of boards, commissions, and councils of the Government of the District of Columbia are required to respond to questions truthfully, whether orally or in writing, and must provide documents and other matters of official interest when requested by a representative of the Board. No employee shall prevent or prohibit the Board from initiating, carrying out, or completing any investigation within the jurisdiction of the Board.

1112.2 Because all materials provided during employment by the District of Columbia Government are the property of the District of Columbia Government, an employee must provide all documents produced while on the job to the Board or its investigators as requested.

## 1113 VIOLATIONS

1113.1 For purposes of the Board, the term:

- (a) "Agency" means an agency, office, department, board, commission, or independent agency or instrumentality of the District government.
- (b) "Apportionment" means the division of an agency's appropriated budget authority by periods within a fiscal year.
- (c) "Appropriation" means authority to spend funds appropriated by Congress and financed by District revenues.
- (d) "Capital project" means the development, modernization, or replacement of facilities and infrastructure used for public purposes.
- (e) "Disbursement" means the outflow or payment of cash, whether by check or electronic transfer of funds.
- (f) "Employee" means an individual who performs a function of the District government, including a contract employee (excluding independent contractors), and who receives compensation for the performance of that function
- (g) "Encumbrance" means an amount of funds committed for the payment of goods and services ordered but not yet received.
- (h) "Expenditure" means a payment for goods or services received.
- (i) "Full Time Equivalent (FTE)" means an employment indicator that translates the total number of hours worked in a year by all employees, including part-time workers, to an equivalent number of work years. For example, one FTE equals 2,080 hours and .75 FTE equals 1,566 hours.
- (j) "Fund" means a budgeting and accounting device used to establish accounts for separating revenues and their related obligations, and expenditures for one purpose from those revenues, obligations, and expenditures for other purposes.
- (k) "Grant" means a contribution of assets (usually cash) by one government unit to another government unit or organization. Typically, these contributions are made to local governments from State and Federal governments for specified purposes.

- (l) "Manager" means an individual chosen or appointed to manage, direct, or administer some affairs of the agency, including the expenditure of funds.
- (m) "Nonpersonal services" means a budget category that includes budget objects for reporting other than personnel-related expenditures. Non-personal services includes supplies, utilities, communications and rent, other services and charges, subsidies and transfers, equipment rental, and debt service.
- (n) "Object class" means a budgetary classification that breaks down the general budget categories of personal services and nonpersonal services into more specific types of expenditure, such as Fringe Benefits (Object Class 14) or Supplies (Object Class 20).
- (o) "Obligations" means the amount of expenditure already made as well as the cost of commitments requiring future payments.
- (p) "Operating budget" means the budget that encompasses the day-to-day District activities. The operating budget includes employee salaries, supplies, and other non-personnel items related to current activities. The operating budget also includes debt services and overhead costs related to daily operations.
- (q) "Personal services" means a budget category that includes budget objects for reporting personnel-related expenditures.
- (r) "Program" means the highest level, for budgeting and expenditure control, within the agency that the District of Columbia government uses for a specific purpose for appropriated budget authority. A program may consist of multiple activities, which combined achieve the stated purpose and goals.
- (s) "Reprogramming" means a specific kind of authorized budget change to reallocate funds to or from an agency's budget, without a new appropriation.
- (t) "Revenues" means the annual income or receipts of the District from taxes, charges, grants, and investments.
- (u) "Spending plan" means an agency's projection by month of planned spending by object class, by fund.

1113.2 The following actions are defined as violations by the Act and must be reported promptly to the CFO (or to the IG if there would be a conflict of interest for the CFO) for referral to the Board:

- (a) Making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund.
  - (i) For purposes of operating appropriations, the Act will be enforced at the level of agency, fund, and program level.
  - (ii) For purposes of capital appropriations, the Act will be enforced at level of agency, fund and project, by year.
- (b) Involving the District in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.
- (c) Approving a disbursement without appropriate authorization.
  - (i) Appropriate authorization means:
    - (A) The signature of an authorizing official of the agency;
    - (B) The signature of the agency chief financial officer certifying the availability of funds;
    - (C) The signature of a contracting officer indicating through a valid purchase order or contract that the disbursement is authorized; and
    - (D) A valid invoice.
- (d) Deferring the recording of a transaction incurred in the current fiscal year to a future fiscal year.
- (e) Allowing an expenditure or obligation to exceed apportioned amounts.
  - (i) For purposes of operating appropriations, this Act will be enforced at the level of agency, by fund by quarter.
  - (ii) Adherence to apportionment will be defined as not exceeding apportionment. All overspending will be recognized as violations of the Act.
- (f) Not submitting a required plan or projection in a timely manner.

- (g) Knowingly reporting incorrectly on spending to date or on projected annual spending.
- (h) Failing to adhere to a spending plan.
- (i) For purposes of operating appropriations, the Act will be enforced at the level of agency and fund. Although all overspending will be recognized as violations of the Act, attention of the Board will be focused on cases of overspending that are greater than (A) five percent (5%) of the budget or greater, or (B) one million dollars (\$1,000,000), regardless of the percentage.

## 1114

**PROCEDURES FOR REPORTS TO THE BOARD**

## 1114.1

The standard process for the Board learning of a violation is through the receipt of a report of a violation from the CFO on a form that the Board shall prescribe. However, the Board may also receive a report from the IG in instances where there is a conflict of interest for the CFO. The CFO (or IG) shall conduct a preliminary investigation and provide the Board, at a minimum, with the following information:

- (a) The appropriation or fund account, the amount involved for each violation, and the date on which the violation occurred;
- (b) The name(s), position(s), and agencies of the employee(s) involved with the violation;
- (c) All facts pertaining to the violation, including the type of violation (for example, over-obligation of an appropriation), the primary reason or cause, valid justification, and any germane report by the agency's fiscal official and/or the agency's counsel;
- (d) A statement from the responsible employee(s) that fully addresses the employee's actions in this matter so that the Board has the benefit of the employee's description of what transpired and the basis for the employee's action, mitigating factors, justification, etc. when it considers culpability and recommends appropriate administrative action. If the employee declines to provide a written statement, a statement to that effect from the agency head (or Deputy Mayor, if the agency head is the alleged violator);
- (i) In the case where an employee is suspected of willfully and knowingly violating the Act, a statement as to whether, and when,

this matter has been reported to the IG and/or the United States Attorney for the District of Columbia;

- (j) A statement regarding the adequacy of the system of administrative controls;
- (k) A statement of any additional action taken by, or at the direction of, the head of the agency (or Deputy Mayor, as appropriate), including any new safeguards provided to prevent recurrence of the same type of violation; and
- (l) If another agency is involved, a statement concerning the steps taken to coordinate the report with the other agency.

1114.2 In extraordinary circumstances, the Board may vote to accept a report from an alternative source.

#### **1115 REVIEW OF REPORTS**

1115.1 Upon receipt of a report of a violation, the Chairperson shall convene the Board to review the report.

1115.2 If the report is complete, the Board will proceed to assess culpability and recommend appropriate action.

1115.3 If the report is not complete or the facts in dispute require further investigation, the Board will determine whether to direct additional inquiry.

1115.4 The Board shall promptly notify an employee that a violation has been reported, that the Board has received the report, and that the matter is under the purview of the Board. This notification shall describe the role of the Board any rights that the employee may have regarding the Board's investigation of the reported violation.

1115.5 When the Board meets to evaluate a report, no employees other than members of the Board are entitled to be present. However, upon request by an employee who is subject to disciplinary action under this Act, the Board may allow the employee to appear before the Board. The Board may require any employee of the District Government, including any employee who is the subject of a report, to appear before the Board.

**1116 ASSESSMENT AND EVALUATION OF PENALTIES**

- 1116.1 In recommending disciplinary action, the Board will consult with legal and personnel professionals, as needed.
- 1116.2 The Board may recommend that no action be taken where it finds a justification for the violation. Justification may include overspending as a result of court orders, entitlements, or explicit authorization in an appropriations act.
- 1116.3 The decision of the Board to adopt a report of its findings and recommendations is determined by an affirmative vote of at least three Members present.
- 1116.4 The Board has adopted a table of penalties, intended to be used as a non-binding guide that categorizes violations under three broad headings: (a) Reporting; (b) Budget Adherence; and (c) Accounting and Disbursement. Within each category, the Board has prescribed penalties for first, second and third violations, including: a letter of warning, official reprimand, ten (10)-day suspension, demotion, and termination of employment (removal). [See "Table of Appropriate Penalties", attached.]

**1117 REFERRAL OF POTENTIAL CRIMINAL VIOLATIONS**

- 1117.1 The Board shall report any reasonable grounds believed to be a violation of criminal law to the IG, in accordance with established policies and procedures. The Board shall send copies of all relevant files to the IG (or the U.S. Attorney) maintain a record of each referral and ascertain and record the disposition of each referred matter.
- 1117.2 If the IG declines in writing to pursue the matter, the Board shall resume consideration of the violation.

**1118 REPORTING RESULTS OF BOARD'S INVESTIGATION**

- 1118.1 The Chairperson shall issue the Board's findings and recommendations to the head of the agency or Deputy Mayor involved.
- 1118.2 Within thirty (30) days of receipt of the findings and recommendations of the Board, the Agency or Deputy Mayor shall notify the Board in writing of the actions it took.
- 1118.3 Upon receipt of the agency's or Deputy Mayor's response, the Board shall issue a report, determined by an affirmative vote of at least three Members present, to the Council indicating the violation, the name and title of the employee or employees who were responsible for the violation,

any justification, and a statement of the action taken or proposed to be taken.

**Table of Appropriate Penalties**

	<b>First Offense</b>	<b>Second Offense</b>	<b>Third Offense</b>
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**Reporting**

6-3. Not submitting a required plan or projection in a timely manner	Tier 1 e.g., Letter of Warning	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand
6-4. Knowingly reporting incorrectly on spending to date or on projected total annual spending	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand	Tier 3 e.g., 10 Day Suspension

**Budget Adherence**

6-5. Failure to adhere to a <b><u>spending plan</u></b>	Tier 1 e.g., Letter of Warning	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand
6-2. Allowing an expenditure or obligation to exceed <b><u>apportioned</u></b> amounts	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand	Tier 3 e.g., 10 Day Suspension
2-1. Make or authorize an expenditure exceeding an amount available in an <b><u>appropriation</u></b> or fund			
(m) Program level	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand	Tier 3 e.g., 10 Day Suspension
(n) Agency level	Tier 2 e.g., Official Reprimand	Tier 2 e.g., Suspension	Tier 3 e.g., Demotion / Removal
2-2. Involve the District in a contract or obligation for the payment of money before an appropriation is made unless authorized by law	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand	Tier 3 e.g., 10 Day Suspension

**Accounting and Disbursement**

2-3. Approve a disbursement without appropriate authorization	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand	Tier 3 e.g., 10 Day Suspension
2-4. Defer recording a transaction incurred in the current fiscal year to a future fiscal year	Tier 1 e.g., Letter of Warning	Tier 2 e.g., Official Reprimand	Tier 3 e.g., 10 Day Suspension

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All persons desiring to comment on the subject matter of the emergency and proposed Guidelines should file comments in writing not later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with Jo Ann Smoak, Board Secretary, Office of Integrity and Oversight, 810 1<sup>st</sup> Street, N.E., Suite 349, Washington, D.C. 20002. Copies of these emergency and proposed Guidelines may be obtained without charge at the above address.

## DEPARTMENT OF HEALTH

## NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in an Act to enable the District of Columbia (the District) to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat.744; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of a new section 946 to Chapter 9 of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR), entitled "Residential Habilitation Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid program for residential habilitation services provided by qualified professionals to participants with mental retardation in the Home and Community-Based Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver). These rules also authorize Medicaid reimbursement for residential habilitation services for persons with mental retardation and developmental disabilities..

On December 5, 2003, a notice of emergency and proposed rulemaking was published in the *D.C. Register* (50 DCR 10443). These emergency and proposed rules supercede and replace the rules previously published on December 5, 2003 by amending the reimbursement methodology and making other technical changes. Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of residential habilitation services.

The emergency rulemaking was adopted on June 25, 2004 and will become effective on the date of publication of this notice of emergency and proposed rulemaking in the *D.C. Register*. The emergency rules will remain in effect for 120 days or until October 23, 2004 unless superceded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

**Title 29 (Public Welfare)(May 1987) of the District of Columbia Municipal Regulations is amended by adding a new section 946 to read as follows:**

**SECTION 946 RESIDENTIAL HABILITATION SERVICES**

946.1 Residential habilitation services shall be reimbursed by the Medicaid Program for each participant with mental retardation and developmental disabilities in the Home and Community Based Waiver

for Persons with Mental Retardation and Developmental Disabilities (Waiver) subject to the requirements set forth in this section.

- 946.2 In order to qualify for reimbursement under this section, residential habilitation services shall be provided in a group home for mentally retarded persons (GHMRP), that has at least four (4) but no more than six (6) clients.
- 946.3 Each GHMRP shall be licensed pursuant to the Health Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code §44-501 *et seq.*) and comply with the requirements set forth in Chapter 35 of Title 22 of the District of Columbia Municipal Regulations, except as set forth in these rules.
- 946.4 Residential habilitation services shall only be available to clients with a demonstrated need for continuous training, assistance and supervision, and shall be authorized and provided in accordance with the client's individual habilitation plan (IHP) or individual support plan (ISP) and Plan of Care.
- 946.5 Each provider of residential habilitation services shall assist with the acquisition, retention and improvement in skills related to activities of daily living, such as personal grooming, household chores, eating and food preparation, and other social adaptive skills necessary to enable the client to reside in the community.
- 946.6 Consistent with the requirements set forth in section 3521 of Chapter 35, Title 22 DCMR, each provider of residential habilitation services shall ensure that each client of the GHMRP receive training and habilitation, when appropriate, which shall include but not be limited to the following areas:
- (a) Eating and drinking;
  - (b) Toileting;
  - (c) Personal hygiene;
  - (d) Dressing;
  - (e) Grooming;
  - (f) Health care;
  - (g) Communication;
  - (h) Interpersonal and social skills;
  - (i) Home management;
  - (j) Employment and work adjustment;
  - (k) Mobility;
  - (l) Time management;
  - (m) Financial management;
  - (n) Academic and pre-academic skills;

- (o) Motor and perceptual skills;
- (p) Problem-solving and decision-making;
- (q) Human sexuality;
- (r) Aesthetic appreciation; and
- (s) Opportunity for social, recreational and religious activities utilizing community resources.

946.7 Consistent with the requirements set forth in section 3520 of Chapter 35, Title 22 DCMR, each provider of residential habilitation services shall ensure that each client receives the professional services required to meet his or her goals as identified in the client's IHP or ISP. Professional services shall be provided by programs operated by the GHMRP or personnel employed by the GHMRP or by arrangements between the GHMRP and other service providers, including both public and private agencies and individual practitioners. Professional services may include, but are not limited to the following disciplines or services:

- (a) Medicine;
- (b) Dentistry;
- (c) Education;
- (d) Nutrition;
- (e) Nursing;
- (f) Occupational Therapy;
- (g) Physical Therapy;
- (h) Psychology;
- (i) Social Work;
- (j) Speech and language therapy; and
- (k) Recreation.

946.8 Each provider of residential habilitation services shall ensure the provision of transportation services to enable the clients to gain access to Waiver and other community services and activities. Each provider of transportation services shall have a current District of Columbia Medicaid Provider Agreement that authorizes the provision of transportation services under the Waiver.

946.9 The minimum daily ratio of on-duty, direct care staff to clients in each GHMRP that serves severely physically handicapped clients, clients who are aggressive, assaultive or security risks, clients who manifest severely hyperactive or psychotic-like behavior, and other clients who require considerable adult guidance and supervision shall be not less than the following:

- (a) 1:4 during the waking hours of the day, approximately 6:00 a.m. to 10:00 p.m., when clients remain in the GHMRP during the day; and

- (b) 1:6 during sleeping, approximately 10:00 p.m. to 6:00 a.m.
- 946.10 The minimum daily ratio of on-duty, direct care staff to clients present in each GHMRP that serves clients who require training in basic independent-living skills shall be not less than the following:
- (a) 1:6 during the waking hours, approximately 6:00 a.m. to 2:00 p.m., when clients remain in the GHMRP during the day;
  - (b) 1:4 during the period of approximately 2:00 p.m. to 10:00 p.m., and
  - (c) 1:6 during sleeping hours, approximately 10:00 p.m. to 6:00 a.m.
- 946.11 The minimum daily ratio of on-duty direct care staff to clients in each GHMRP that serves clients who are in day programs such as sheltered workshops, vocational training, supported or competitive employment programs, and who have acquired basic independent-living and survival skills shall not be less than 1:6 at all times that clients are in the GHMRP.
- 946.12 The minimum daily staffing levels set forth in sections 946.9 through 946.11 in each GHMRP shall be increased if required by the client, as indicated in the client's IHP or ISP.
- 946.13 Each provider of residential habilitation services shall:
- (a) Be a non-profit or other business entity;
  - (b) Be a member of the interdisciplinary team;
  - (c) Have a current District of Columbia Medicaid Provider Agreement that authorizes the provider to bill for residential habilitation services under the Waiver;
  - (d) Maintain a copy of the most recent IHP or ISP and Plan of Care that has been approved by the Department of Human Services, Mental Retardation and Developmental Disabilities Administration (MRDDA) for each client;
  - (e) Have a current Human Care Agreement with MRDDA for the provision of residential services;
  - (f) Ensure that all residential habilitation services staff are qualified and properly supervised;
  - (g) Ensure that the services provided are consistent with the client's IHP or ISP;
  - (h) Offer the Hepatitis B vaccination to each person providing services pursuant to these rules;
  - (i) Provide staff training in infection control procedures consistent with the standards established by the federal Centers for Disease Control and Prevention (CDC);

- (j) Ensure that each staff member or employee has been screened for communicable disease six months prior to providing services to any client, in accordance with the guidelines issued by the CDC, and that each employee or staff member is certified to be free of communicable disease; and
- (k) Ensure compliance with all of MRDDA's policies governing reporting of unusual incidents, human rights, behavior management and protection of clients' funds.

946.14 Each person providing residential habilitation services for a provider under section 946.13 shall meet all of the following requirements:

- (a) Be at least eighteen (18) years of age;
- (b) Be screened annually for communicable disease, according to the guidelines issued by the CDC and demonstrate that he or she is free of communicable disease;
- (c) Be able to read and write the English language;
- (d) Agree to carry out the responsibilities to provide residential habilitation services consistent with the client's IHP or ISP and Plan of Care;
- (e) Have a high school diploma or general educational development (GED) certificate;
- (f) Have a minimum of one year work experience; and
- (g) Comply with the requirements of the Health-Care Facility Unlicensed Personnel Criminal Background Check Act of 1998, effective April 20, 1999 (D.C. Law 12-238), as amended by the Health-Care Facility Unlicensed Personnel Criminal Background Check Amendment Act of 2002, effective April 13, 2002 (D.C. Law 14-98; D.C. Official Code § 44-551 et seq.).

946.15 Each client's case manager shall monitor the delivery of services by conducting visits at least eight (8) times per calendar year to ensure that services are delivered in accordance with the IHP and ISP and Plan of Care.

946.16 Each provider of residential habilitation services shall maintain progress notes monthly or more frequently if indicated, conduct periodic reviews of progress and maintain financial records of expenditures of public funds for each client.

946.17 Each provider of residential habilitation services shall maintain all records and reports for at least six (6) years after the client's date of discharge.

946.18 Residential habilitation services shall not be reimbursed when provided by a member of the client's family.

- 946.19 Reimbursement for residential habilitation services shall not include:
- (a) The cost of room and board;
  - (b) The cost of facility maintenance, upkeep and improvement; or
  - (c) Activities or supervision for which a payment is made by a source other than Medicaid.
- 946.20 The reimbursement rate for residential habilitation services shall be \$120.00 per day, per client.
- 946.21 The provision of skilled nursing services and preventative, consultative and crisis support services while residing in a GHMRP shall be subject to the following limitations:
- (a) Skilled nursing services shall not be billed in excess of the initial assessment and one (1) visit per month; and
  - (b) Preventative, consultative and crisis support services shall not be billed in excess of the initial assessment and one (1) visit per month.
- 946.22 Residential habilitation services shall not be billed concurrently with the following Waiver services:
- (a) Environmental Accessibility Adaptation;
  - (b) Homemaker;
  - (c) Attendant care;
  - (d) Independent Habilitation;
  - (e) Personal Care Services;
  - (f) Respite;
  - (g) Chore;
  - (h) Adult Companion; or
  - (i) Personal Emergency Response System (PERS).
- 946.23 Residential habilitation services shall not be billed when the client is hospitalized, on vacation or for any other period in which the client is not residing at the GHMRP.
- 946.24 MRDDA shall be responsible for payment of nursing services for the administration of medication to clients when the client is unable to self-administer or take medication independently. Nursing services attributable to the administration of medication shall not be billed as Waiver services.
- 946.99 **DEFINITIONS**

When used in this section, the following terms and phrases shall have the meanings ascribed:

**Client**-an individual who has mental retardation and a developmentally disability and has been determined eligible to receive services under the Home and Community-Based Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

**Communicable Disease**-that term as set forth in Section 201 of Chapter 2 of Title 22, District of Columbia Municipal Regulations.

**Direct Care Staff**- individuals employed to work in the GHMRP who render the day-to-day personal assistance clients require in order to meet the goals of their IHP or ISP.

**Group Home for Mentally Retarded Persons or GHMRP**- a community residence facility, other than an intermediate care facility for persons with mental retardation, that provides a home-like environment for at least four (4) but no more than six (6) related or unrelated mentally retarded individuals who require specialized living arrangements and maintains necessary staff, programs, support services and equipment for their care and habilitation.

**Individual Habilitation Plan or IHP**-that term as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.3).

**Individual Support Plan or ISP**- the successor plan to the individual habilitation plan (IHP) as defined in the court-approved *Joy Evans* Exit Plan.

**Interdisciplinary team**- a group of persons with special training and experience in the diagnosis and habilitation of mentally retarded persons which has the responsibility of performing a comprehensive evaluation of each client and participating in the development, implementation, and monitoring of the client's IHP or ISP.

**Plan of Care**- A written document prepared by the MRDDA Waiver unit which describes medical and other services to be furnished to the client, the frequency of the services and the type of provider to furnish the services. The Plan of Care shall be consistent with the IHP and ISP.

Comments of the proposed rules should be sent in writing to Robert Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5<sup>th</sup> Floor, Washington, D.C. 20002, not later than thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.