Kreckel, Brendan D

From: Moncure, Halliday
Sent: Tuesday, December 1, 2020 10:59 AM
To: Caron, Kerry; Johnson, Kimberly
Subject: FW: OAG review - 10-144 CMR Ch 607 draft changes to be adopted (ASPIRE Rule 25A - Working Cars Working Families)
Attachments: Rule Pages ASPIRE 25A (Clean) v10.docx; Rule Pages ASPIRE 25A (TC All) v10.docx; Rule Pages ASPIRE 25A (TC since OAG review) v10.docx

Sensitivity: Confidential

Please print this email in color, and second 2 attached Word docs in color (not the first "clean" version).

Thank you!

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From: Downs, Michael E <Michael.E.Downs@maine.gov>
Sent: Monday, November 30, 2020 5:08 PM
To: Moncure, Halliday <Halliday.Moncure@maine.gov>; Kreckel, Brendan D <Brendan.D.Kreckel@maine.gov>
Cc: Baer, Julian <Julian.Baer@maine.gov>; Sturtevant, Timothy <Timothy.Sturtevant@maine.gov>; Ray, Liz <Liz.Ray@maine.gov>
Subject: RE: OAG review - 10-144 CMR Ch 607 draft changes to be adopted (ASPIRE Rule 25A - Working Cars Working Families)
Sensitivity: Confidential

Good Afternoon Halliday and Brendan,

Thank you for your thorough review and for getting back to us so quickly. There are some items, below, that we can answer with some certainty now. Others, we believe, would benefit from some discussion. Many of these you also indicated you would like to discuss. I have attached the following documents for your review:

1) Rule pages, Clean, and Track Changes, as they would be delivered to the Commissioner
2) Rule pages that only track the changes since your last review and retain your highlighting and comments and our responses.

Item 2 is simply a tool and not part of the official rulemaking.

All of these documents and a full copy of the manual with changes tracked will up uploaded to the shared folder as soon as possible tomorrow.

Responses to your comments are below in red. (If color coded correspondence does not work well for one of you please let me know and we can switch to using different fonts or something of the like.)

Appreciatively,

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From: Moncure, Halliday <Halliday.Moncure@maine.gov>
Sent: Friday, November 20, 2020 5:22 PM
To: Downs, Michael E <Michael.E.Downs@maine.gov>
Cc: Kreckel, Brendan D <Brendan.D.Kreckel@maine.gov>; Abraham, Stanley <Stanley.Abraham@maine.gov>; Ray, Liz <Liz.Ray@maine.gov>; Baer, Julian <Julian.Baer@maine.gov>; Sturtevant, Timothy <Timothy.Sturtevant@maine.gov>
Subject: OAG review - 10-144 CMR Ch 607 draft changes to be adopted (ASPIRE Rule 25A - Working Cars Working Families)
Sensitivity: Confidential

Dear clients –

This shall serve as our review as to form and legality of the Department's draft final rulemaking documents for changes being made to 10-144 CMR Ch. 607, ASPIRE-TANF Program Rules, sent to us via email on 11/2/2020 (below), and the revised Summary of Comments document that was sent on 11/3/2020. The deadline for adoption is 12/18/2020.

As set forth, below, the rule needs quite a bit of work in order to clarify how, exactly, this new program is supposed to work, and to make the requirements legally enforceable. In addition, we suggest that the Department seek legislative action to amend 22 MRS 3769-F, which shall expire on July 1, 2022. Thus, after 6/30/2022, the Department has no authority to operate the WCFWF program.

The Department is seeking an extension to the program's end date pursuant to 22 M.R.S. § 3769-F which requires the Department to implement this program and specifies the funding source. That being said, the Department would not have the authorization to use TANF block grant funds in this way if it were not already permissible under federal law and regulation as follows:

1. 42 U.S.C. § 604(a) grants authority to enact programs tailored to TANF principles as it states, "GENERAL RULES.— Subject to this part, a State to which a grant is made under section 403 may use the grant— (1) in any manner

that is reasonably calculated to accomplish the purpose of this part, including to provide low income households with assistance in meeting home heating and cooling costs;. . . .” This provision of the Social Security Act grants authority to enact programs tailored to TANF principles.

2. 64 Fed. Reg. 17720-19931 (April 12, 1999):
   B. State Flexibility
   In the Conference Report to PRWORA, Congress stated that the best welfare solutions come from those closest to the problems, not from the Federal government. Thus, the legislation creates a broad block grant for each State to reform welfare in ways that work best. It gives States the flexibility to design their own programs, define who will be eligible, establish what benefits and services will be available, and develop their own strategies for achieving program goals, including how to help recipients move into the work force. Under the law and the proposed rules, we indicated that States could implement innovative and creative strategies for supporting the critical goals of work and responsibility. For example, they could choose to expend funds on refundable earned income tax credits or transportation assistance that would help low-wage workers keep their jobs. They could also extend employment services to noncustodial parents, by including them within the definition of ‘‘eligible families.’’

While the expiration of 22 M.R.S. § 3769-F removes the requirement that the Department operate this particular program, nothing in state or federal law restricts the Department from operating it beyond the expiration of the requirement.

General

1. **RFP and Contract**– AAGs Brendan Kreckel and Stanley Abraham are defending DHHS in an administrative appeal by the disgruntled bidder in the RFP for this program. A hearing has been scheduled for 12/9-12/10/2020. After a decision, then the parties shall have the right to further appeal to Superior Court per 5 MRS 11001 et seq. and MRCP 80C.

   a. The disgruntled bidder (Penquis) did not seek a stay of the contract award, so I assume that the Dept. intends to proceed with the selected vendor regardless of the appeal. Please confirm.
   b. We reviewed the RFP (attached) to ensure that the terms are consistent with what is in this rule, and part of our advice is to update the rule to reflect more of the specifics set forth in the RFP regarding how the program will work.
   c. **We should also review the draft contract between DHHS and the vendor** and work with DHHS on finalizing same. Since this is a $4-6M contract award, we understand that the contract shall also be reviewed by the State Purchasing Review Committee (per a March 3, 2016 Executive Order). Can you **please forward a draft of the contract?**

   Thank you for your assistance with the appeal. We do not have a contract drafted at this time, nor do we anticipate having one before the December 18 deadline for this rule. Your general comment in b, above, is fleshed out more in subsequent comments and comments imbedded in the rule. Those specific items are addressed there.

2. **Timing/Authority Concerns**: because of the delayed implementation of this new program, there are various concerns about timing. The statute, 22 MRS 3769-F, is repealed effective July 1, 2022, and thus as of that date, DHHS shall have no authority to administer the Working Cars for Working Families program. The program will no longer exist per the statute.
   a. Even if the rule is adopted by 12/18/2020, it is unclear when the contract will be finalized and the vendor will begin work. Per the RFP, the contract with the entity that shall administer the program for DHHS is effective through Sept. 30, 2022, beyond DHHS’s statutory authority to run the program. The RFP includes the option for DHHS to renew the contract two times, through Sept. 30, 2024. That is not currently authorized per 22 MRS 3769-F.

b. Another issue is that the 24 month payment requirements for participants extend beyond 7/1/2022.

Thank you for your concern. We appreciate your wholistic approach. As stated above, while the requirement in 22 M.R.S. § 3769-F does expire July 1, 2022, the Department has the authority to operate the program with or without the rule requiring it.

3. **<u>Legislative Action is Required</u>**. We urge the Department to work with its legislative liaison, Molly Bogart, to propose a legislative solution to this timing/authority problem as soon as possible. The statute could be revised so that it is effective beyond 7/1/2022, and/or it repeals when the $6M funds are exhausted. Our office would be happy to work with you and Molly on proposed language and the legislative issues.

   The Department is planning to propose legislation and agrees that amending 22 M.R.S. § 3769-F is preferred.

Importantly, throughout the rule this program should be referenced as temporary so that all parties are on notice of same, or, alternatively, that the program may extend beyond 7/1/2022 if the Legislature changes the law. The contract with the vendor should contain similar language to this effect. We should also add language to the Basis Statement to explain these issues clearly.

1) The Department agrees that referring to the program as "temporary" is prudent given the unpredictability of the longevity of the funding especially given the possibility that it may be re-allocated.
2) The authority to operate the program is not contingent upon the requirement to do so.
3) Yes. Once the dust settles on the actual rule language, there will certainly be adjustments that need to be made to the supporting documents.

4. **<u>Potential for state and/or federal audit</u>**. If the statute does not change to provide authority to run the program beyond 7/1/2022, and DHHS continues to spend the funds beyond that time regardless (through the vendor contract and/or the rule), there is a risk that the state auditor will determine that DHHS is not properly following state law, and the auditor could send such a finding to the federal government as well. *See* 5 M.R.S. § 243. We understand this has occurred with the Maine Department of Labor.

   Thank you for bringing this to our attention. The authority to administer the program is not contingent upon the requirement to do so, but we will have our compliance manager look more deeply into this specific concern.

5. **<u>Concerns about vagueness</u>**: as set forth in more detail below and attached, many provisions in the rule are vague, and it is hard to tell exactly how this program is supposed to work. *See, e.g.*, 5 M.R.S. § 8061 (rules must use plain and clear English which can be readily understood by the general public). Rules govern not only the people who may be eligible for benefits, but also those who provide the services, DHHS as an agency, and other parties affected by the regulation; here, the rule generally seems to avoid any restrictions on DHHS. For any given regulation, one should be able to determine: the services provided; who is eligible for the services; what requirements must be satisfied to receive the services; what individuals or entities may provide the services; any limits on the services, including when and how they may terminate; notice requirements; and appeal rights. Here, while there are numerous eligibility requirements, I cannot tell who gets the services/what people must do to get services. Also there is no description or definition of what, exactly is being provided in terms of services by this program. The rule does not reference the involvement of a vendor that will administer the program. The "Funding Contingencies" provisions should be removed. Too much discretion is reserved for DHHS (ie – there are few objective criteria or factors that would bind DHHS's determinations), making challenges via litigation highly likely, where it would be difficult to defend DHHS decision making based on this rule language. We made suggestions where we could, but as it stands it is difficult to tell how, exactly, the program is supposed to work.

   1) We have tried to add detail where appropriate. In some instances it has simply been a matter or reformatting or minor rewording to draw attention to details that already existed.

2) To your key points of what one should be able to determine from the rule —
   a) The services provided — These are in the rule within Subsection II and have been reformatted to be more prominent.
   b) Who is eligible for the services — Eligibility criteria are laid out in Subsections IV, and VI. These criteria are largely for program participation with some specific, additional, criteria for receiving a vehicle. It is not the function of the rule to lay out exactly what remedy should be used in each individual circumstance. Current ASPIRE rules allow for similar case by case tailoring of supports, and we do not have significant challenges via litigation.
   c) What requirements must be satisfied to receive the services — are laid out in Subsections III, and V.
   d) What individuals or entities may provide the services — Throughout the rule, it specifies that the Department is providing the services. Initially we considered the vendor to be covered as part of the Department per 22 M.R.S. § 3786. Upon further review, thanks to your observations, we have articulated that inclusion in the definitions section.
   e) Any limits on the services — The limits are: the availability of the funding (II(D)); The availability of the service (we may pay for driver ed, but a licensed school has to be offering it) (III(A)(3), (C), and (E); IV(D) first paragraph and (3); V(A), (B); and VI(D)(2) between (c) and (d)); and that it has to remedy a transportation barrier to employment(IV(B)). You laid out specific details detailed as follows:
      i) When and how they may terminate — This is addressed in subsections VI(D)(3) and VII.
      ii) Notice requirements — As you pointed out some of these used the vague language of "providing as much advance notice … as is reasonably practicable". This vague language has been replaced with concrete minimum time frames.
      iii) Appeal rights — This is addressed in VII(B).
3) Who gets the services? — Anyone who is eligible can receive services to the extent that there are available services that will remedy their transportation barriers to sustainable employment.
4) What requirements must be satisfied to receive the services? — Be eligible. Apply. Comply with subsequent meeting and reporting requirements.
5) What exactly is being provided in terms of services by this program — This program provides remedies to transportation barriers to sustainable employment. This is articulated and some examples are provided in Subsection II(B). Further specificity would be overly restrictive on the ability of the professionals administering the program to determine, with the input of the applicant/participant, the best remedy for a specific situation, or adapt to changing technologies and circumstances. (For example — If we had written the rule ten years ago, and been very prescriptive we wouldn't have included services such as Uber or Lift. Likewise, if we had written a prescriptive rule in 2017 we would have required Uber, Lyft or public transportation in certain circumstances. Those services may not be appropriate in light of COVID-19.)
6) Current ASPIRE supports are administered with similar discretion. The manual may determine that an individual is eligible for educational or transportation supports, but the exact form of those supports is determined on a case by case basis. We do not experience a significant amount of litigation coming out of that program.

6. **Major revisions should be made to make the rule more clear and enforceable**, which would likely make it "substantially different" than what was proposed under the APA. The substantially different determination is for the agency to make, and our office considers whether the determination is defensible. Under 5 MRS 8052(5)(B) the Department could still adopt a substantially different rule if, for example, changes are made pursuant to comments, or if the Department makes findings in support of the changes; it could make changes if it finds them necessary based on legal advice. If the Department agrees with this approach (and that the rule is substantially different), then the revised rule should be posted for an additional 30 day period of public comment.

   Alternatively, the Department could allow for the proposed rule to lapse, and then start over with a new proposed rule. Proceeding in this manner would allow our offices more time to work closely together both on the contract with the vendor, as well as on improving the rule language. In the meantime, we would also seek a change in the statute from the Legislature.

At this point, the changes are not substantially different. They can be addressed through formatting and minor rewording to clarify what is already there.

7. Many improvements could be made to the form of this rule in order to improve one's ability to read/understand it, for purposes of citation to various sections, and enforcement of the rule provisions. For example, the Table of Contents should set forth each of the rule's sections (ie, Introduction, Definitions); I suggest removal of the subject matter index. All rules should have page numbers, section numbers, and all sub sections should be labeled per standard practice. 5 M.R.S. § 8056-A(2). If there's time, the Department could make those changes in the definitions section at this juncture. Regardless, I am glad to see that the language about the new program is in proper rule format.

   Thank you
   1) We have fleshed out the TOC per your guidance.
   2) The Subject Matter Index is provided as a tool for the ease of the user (particularly non-Department users). The Department chooses to retain it.
   3) The Definitions section has been updated per your recommendation.

   a. Also typically our office prefers to review an entire regulation, not just an isolated section of a regulation that is being changed (similarly, the entire rule should be filed with the SOS, not just the particular pages with changes). Here it appears that you have sent just the definitions and Section 18. It is hard to determine the legality of changes in isolation where we cannot also review the context of the entire regulation as a whole. Going forward, we advise that OFI get into this practice, similar to how OMS does its MaineCare rulemaking.

      1) It is not prudent to open an entire chapter to comment when making changes to only some sections. We will continue to only publish those sections that are being changed for comment.
      2) In the past, we have only provided those sections that were being changed to the OAG. The intent of this practice was to focus the review on those parts being changed and not over-burden OAG staff with reading tens or hundreds of pages that were not being changed. It also kept what was provided to the OAG, the Commissioner's Office, and the public consistent. Going forward, we can provide the unchanged sections as well if that is what you prefer. The full manuals can also be found at https://www.maine.gov/sos/cec/rules/10/chaps10.htm.

8. Please ensure that what is ultimately filed with the SOS are two copies of (a) clean version of adopted rule; and (b) redline/strike through format of the adopted rule that reflects all changes being made to what the currently legally effective rule (in addition to the MAPAs). Below you also attach a version of the rule that reflects changes from what was proposed to what is being adopted. I did not review that rule because it is not required by the APA, and I find also that it can get confusing in terms of versions of rules exchanged as we proceed with the rule review process.

   Thank you. Yes. What you describe is our normal practice. The Commissioner's Office finds the track changes since proposed version a helpful tool. In the past, some AAGs have found it useful as well which is why we include it.

Rule (ASPIRE 25A TC All v5)

1. What is the authority for "definitions apply only to single parents with a child under age 6" for "Child care, affordable," and "Child care, appropriate" - ?

   It is a practical matter. The only place those terms are used, within the manual, is a determination that is specific to single parents with a child under 6.

2. Definition of Food Supplement Employment Training (FSET) program –

a. Citation to 7 CFR 273.3 is incorrect; this regulation governs residency requirements. Did you mean to cite to section 273.7?

Correct. Thank you for catching this.

b. Citation to 22 MRS 3104 may be incorrect; this is the general statutory authority for SNAP program – no specific authority for FSET.

There is nothing in Maine Statute specifically requiring an FSET program. However, per 7 C.F.R. 273.7(c)(4), if we have a Food Supplement program, we must have an FSET program. So, the Maine Statute that requires one, by extension, requires the other.

We just simplified the total definition.

3. **Temporary Program**. Add language to clearly indicate that this is a temporary program per 22 MRS 3769-F, and – without legislative action, it shall expire as of July 1, 2022. It could be that the rule repeals by law (without APA rulemaking) but we would want to consider that issue further in the future; likely it would be better to repeal via the APA as well. Parties should be on notice of the program's temporary nature, which will help protect DHHS in the event of future litigation when the program expires. We could massage this language so that it says something to the effect of, "without legislative action, the program expires 7/1/2022, or alternatively, it may be extended beyond that time."

1) The Department agrees that referring to the program as "temporary" is prudent given the unpredictability of the longevity of the funding especially given the possibility that it may be re-allocated.
2) The Department's authority to operate the program is not contingent upon the requirement to do so.

4. Remove "Philosophy" and shift that language up under "Authorization," which should be called "Authorization and Scope."

Thank you. Done.

5. The language under subpart (A) of Administration is vague and thus problematic. It appears that the Department (or its vendor) wishes to exercise limitless discretion in determining what options are best for any given program participant, and the participants cannot enforce any particular option against DHHS/vendor (ie – they cannot argue DHHS must provide a certain type of transportation).

Just as other aspects of the ASPIRE program rules permit the determination of supports based on an individual's needs and circumstances determined through the Assessment, the WC4WF program requires the same latitude.

6. Definitions (B): remove "For purposes of this Program…" – redundant and unnecessary. The definitions are embedded within the section describing Working Cars for Working Families, so we do not need to re-state this for every term.

Thank you. Done.

Suggest that you add definition for "Alternative Aid," per 22 MRS 3763(8), since this is one of the 3 types of eligibility defined by 3769-F. Also it's included in the RFP.

Thank you. Done.

For "Participant" – the definition states that it is a TANF recipient who is involved in TANF-ASPIRE activities. Consider broadening definition to include PaS participants and those eligible for alternative aid under 3763(8), since each of those types of eligibility could be a "Participant" in the WCFWF program. *See, e.g.,* definition of "Participant" in RFP.

Thank you. We have broadened the definition.

7. Why is the Department excluding self employment, which can be sustainable and a large segment of the population in Maine is self employed?

Transportation is not often a barrier to self-employment. To the extent that it is, transportation is generally a part of the income producing process. This program is not intended to subsidize those businesses.

8. What does "any form of employment that involves a subsidy to the employer" mean? Too vague.

   Thank you. Sometimes a term is clear to those who use it all the time and we forget to define it for others. This term is used in our work verification plan. Essentially it means that the employer is only employing the individual because they are receiving some public assistance to do so. It would be things like an individual being placed in on-the-job training through FSET or ASPIRE where that program pays part of the wage. Such employment is not considered "sustainable" because it is contingent upon the subsidy.

9. "Earned income" – suggest the rule should copy and paste the definition the Dept. seeks to use for this program, and state clearly any limits.

   Thank you. Done.

10. Subsection (C) – Funding Contingencies. This section is too vague and ambiguous. I suggest removal in its entirety.

It is unclear what factors the Department will use to determine if "funding is not sufficient" to maintain current programming or reduce services. Who is making these decisions for DHHS? What objective criteria will be applied? What funding would be considered insufficient ($500K, $250K, another amount)? If these provisions are retained, suggest you put specific dollar figures in the rules. As it stands, this part of the rule allows for DHHS to alter or terminate the program, based on unknown criteria, and outside the APA regulatory process. If retained, these provisions should state that participants will be given x days' advance notice, not "as much notice as is reasonably practicable." I suggest at least 14 days notice.

1) This wording is consistent with the wording in Section 15 of this chapter. The Department needs the ability to end the program when it runs out of money.
2) The objective criteria is — is there enough money to continue to offer services at the current rate. We cannot place a specific dollar amount as we do not know how many people will avail themselves of which services under the program, so we don't know what the rate of draw down will be. It may also change if the legislature decides to defund the program.
3) Thank you. Yes. We have added language giving a specific minimum timeframe for notification of the termination of the program.

a. What does this provision (in C2) mean: "*The Department shall effectuate reductions and eliminations under this subsection on a generalized and categorical basis, and shall not make case-by-case elimination or reduction decisions."*

   It means that if the program must be terminated we will apply the changes to the entire participant population. We are not discriminating based on the type of support or any other circumstances specific to an

individual. In the event of funding limitations, this language seeks to ensure that no specific individuals is aggrieved, but that reductions are applied across the board.

b. Subpart (C)(3) permits the Department to terminate all agreements and end all services "if funding is not sufficient" with "as much notice as is reasonably practicable." Remove.

Thank you. We changed it to 14 days' notice.

c. Remove subpart (C)(5), which says that "categorically applicable denials, reductions and service terminations based on funding limitations are not subject to administrative appeal." We don't know what "categorically applicable" means. We don't know how DHHS will make these decisions, based on what criteria/funding limits. Regardless, those aggrieved should be afforded the right to an administrative appeal based on principles of due process.

When services end because an entire program is terminated no individual is specifically aggrieved and appeal processes should not apply. This is also true within many programs when a group of individuals is no longer eligible or has their benefit reduced to do federally mandated changes to budgeting within TANF and Food Supplement.

The vague nature of this language indicates that it is unclear how, exactly, this program is going to work. These provisions are highly likely to lead to litigation by dissatisfied program participants. In the event of a challenge to the rule under the APA, it is likely a court would determine the rule arbitrary, capricious, or an abuse of discretion. 5 MRS 8058(1).

11. **Eligibility Determination Process**:

a. (A)(3) too vague. How does the Dept. determine that "participation is appropriate for the applicant?" How does it determine "whether there are available resources that would remediate transportation barriers?" Suggest that the rule sets forth eligibility criteria and an application process. If folks satisfy those criteria and follow the process, they should receive benefits.

1) Thank you. For clarity this reference to "appropriate" has been reworked to say if the individual is "eligible."
2) The application process is laid out in in this subsection. The eligibility criteria are laid out in the next subsection. If folks satisfy the criteria and follow the process they will receive benefits to the extent that a remedy is available.

b. Application (B) – rule says the Dept "shall develop a uniform application…" The RFP states that the vendor shall develop the application in conjunction with the Department. Either is fine, but if the Dept. seeks to enforce this rule, the rule should state clearly that people must do x to apply. It should include specifically how people can satisfy the application process, perhaps directing them to an application website link, or indicating where they can obtain the form. What is required for application?

Thank you. Clarification has been added to the definitions section that the vendor is an extension of the Department consistent with 22 M.R.S. § 3786. Clarification was also added to the end of this paragraph as to what the application date would be, the minimum information necessary for an application to be considered complete and that the Department will lend aid when an incomplete application is received. The rule already stated applications could be submitted at any DHHS office or location where ASPIRE services are provided.

c. Enrollment (C) – again, what is required for people to get services? This provision purports to set forth four factors (someone must be determined "eligible," attend an in person "assessment," Dept. reviews transportation needs, employment, and "suitability for the program," and people get services if there are sufficient resources to address their

needs). But they are so vague and contingent on so much discretion by DHHS that they are meaningless, or at least unenforceable.

Any eligible individual (per Subsection IV) who completes the process (per Subsection III) will receive services if there is an available service that will remedy their transportation barrier to employments (per Subsection II(B)). Exactly what, if any, services will act a remedy is the purview of the judgement of the professional doing the evaluation in conjunction with the participant as is done with other ASPIRE supports.

d. Waitlist (E) – suggest you extend the period of time within which a person must respond beyond 2 business days. Also – is it determined based on their date of receipt of notice or - ? Let's work on revising the last couple of sentences. It's confusing as currently drafted.

Thank you. Yes. Sometimes when you spend so much time crafting these it can be difficult to step back and read it as if it is the first time. We have reworked this piece for clarity and simplicity.

12. Sec. V(B)(2) Transportation Limitations: subpart (b) mandates that an applicant cannot get services under this program if any other adult living with the applicant has a working vehicle that isn't being used. This other adult could be a roommate with no legal responsibility for the applicant, so it seems too restrictive and over burdensome for DHHS to mandate this.

Thank you. We have reworded it to be the TANF household or filing unit. People within those relationships have an established financial responsibility to each other. A room-mate would not be included unless there were mutual children or some other relationship tying them together. These units are used earlier in Subsection IV(A) when determining financial eligibility.

A. Sec. V(D)(3) – additional eligibility criteria for vehicle access: add location specification for courses? Or can they be online?

   These courses are provided, almost exclusively, online. We did adopt language clarifying that fact.

B. Sec. V(D)(5) – down payment requirements. I am not sure whether the Dept. may restrict participants' use of benefits from ASPIRE, FSET or HOPE in this manner. Can you refer to authority for this?

   The Department has the authority to make these distinctions as part of its overall rule making authority. 22 M.R.S. §§ 42(1) (for rule making in general), 3790-A(6) for HOPE, 3782-A(6) and 3788(9) (for ASPIRE in general), 3769-F (for this program), and 3782-A(4) (for other ASPIRE case management); and 22-A M.R.S. § 212 (for defining eligibility in general).

13. Assessment – I can see why the Department would want a separate assessment process from the threshold eligibility determinations for purposes of evaluation, however, these provisions are extremely broad and leave much up to DHHS discretion, which could subject them to challenge in the event of disputes about the program. Also – we suggest that assessments could be done via phone or Zoom, etc. because COVID.

1) This Subsection details the second stage in the process. It does not lay out specific eligibility criteria.
2) Thank you for drawing our attention to the multiple in-person requirements. We have added language to allow for virtual meetings when necessary.

Based on review of the RFP, it appears that the Dept. contemplates doing the first step – determining whether someone is eligible (if they are in one of the 3 eligibility groups identified by statute), and then referring to the vendor to do the assessment portion of the review. This is fine if accurate, but the rule should state more detail about who is doing what.

The Department is not going to overly delineate what we will do directly and what will be done by the vendor, who we see as an extension of the Department consistent with 22 M.R.S. § 3786. (We have added a definition of the Department that clearly states this overlap.) These delineations may shift from time to time even to the extent that the Department may, at some point, operate this program directly without the assistance of a vendor. The lack of delineation within this Section is consistent with the ASPIRE program as a whole which has gone back and forth between being administered directly by the Department and by a vendor.

14. Transportation Agreement – the rule should include at least basic requirements for DHHS that will be in each of these Agreements (ie – in exchange for the applicant's agreements, the Dept. shall provide transportation services; provide x amount of notice before any change in services; etc). Is the TPA between DHHS and the Participant, or the Participant and the vendor (the RFP makes it sound as if it's the latter). The RFP states that the TPA will be "developed by the Dept in conjunction with the vendor." **Our office should review and provide legal advice on the Transportation Agreements prior to finalization of this rule as well as the contract between DHHS and the vendor.**

1) Thank you for offering to review the TPA. We have other review processes in effect for such documents.
2) The TPA will be between the Department (including any vendors acting on the Department's behalf) and the participant.
3) We have added language to this portion giving some basic requirements on the Department. The document will be consistent with the Family Contract and Family Contract Amendment that are currently used in the ASPIRE program. These documents detail commitments on behalf of the participant to continue to receive services. Noticing requirements, appeal rights, etc. are included in the rights and responsibilities that accompany all Department notices of decision (which would be provided to the applicant/participant each time eligibility is determined or re-determined).

15. Eligibility Monitoring – per RFP. Suggest that you add to rule. Participants should be on notice of all that is required of them to receive services under this program.

Thank you. These requirements were included in various parts of this section. However, we agree that reiterating them in one concise location would enhance the readability of the section. We have added a modified version of the requirements as Subsection VI(C).

16. Ownership of Vehicles: *Content Specific to Vehicle Access Services*: If the program participants own the cars, I am not sure that the various restrictions on applicants' ownership and use of a vehicle would be enforceable. Also, even if they are enforceable, how, exactly, is DHHS going to monitor and enforce the requirements? If the Dept. still holds title and remains owner of the vehicle, then there are numerous complicated issues to discuss about liability, insurance and other matters, and we likely would need to include DAFS and other AAGs from our office for purposes of same. Have you conferred with other state agencies about how these details are supposed to work? Are there other states with similar programs? We should discuss further.

Yes. We would be happy to meet with you 12/1 between 12:30 and 2:00 or 3:00 to 4:15. Otherwise please provide a more detailed written suggestion.

17. Additional Vehicle Access Provisions: again – let's discuss. Unlike with regular car loans, where the creditor retains title until a car is paid off, it appears that the Dept. does intend to transfer title to vehicles, but still require monthly premium payments to DHHS, where failure to pay results in return of the vehicle back to DHHS.

Yes. We would be happy to meet with you 12/1 between 12:30 and 2:00 or 3:00 to 4:15. Otherwise please provide a more detailed written suggestion.

Sec. 2(d) states that ASPIRE, FSET and HOPE services/support may not be used by Participants to pay monthly premiums. What is the authority for this restriction? How will DHHS or the vendor track what funds, exactly, a

Participant is using to make vehicle payments? May need to remove this provision because I'm not sure that authority exists, nor is it likely to be enforceable.

The department has the authority to make these distinctions as part of its overall rule making authority. 22 M.R.S. §§ 42(1) (for rule making in general), 3790-A(6) for HOPE, 3782-A(6) and 3788(9) (for ASPIRE in general), 3769-F (for this program), and 3782-A(4) (for other ASPIRE case management); and 22-A M.R.S. § 212 (for defining eligibility in general).

The Department reviews all support service payments. Enforcement would be addressed by that process.

18. Program Graduation(Sec. 3) – after 24 months of payments, people keep the car. But authority for this program expires 7/1/2022. The Dept. may need to shorten this to 12 months, particularly given that the RFP award has been appealed, and thus it is unlikely this program will be up and running until sometime later in 2021. Let's discuss.

Yes. We would be happy to meet with you 12/1 between 12:30 and 2:00 or 3:00 to 4:15, but it goes back to the idea that 22 M.R.S. 3769-F requires the program, but was not necessary to authorize it.

19. IPV (Sec. 4) – should state specifically what value of the car that the Dept is using if/when it seeks an IPV against a participant. Also, it seems unfair that the participant's payments on the car would not be credited in such a scenario.

Thank you. Yes. We have added language more clearly stating the value of the car and making allowances for those portions of the payments that were not used to support that vehicle.

20. **Add Vendor Requirements section** – perhaps before termination and appeals section. This should include at least some of the details from the RFP and the contract about what the vendor is required to do, including the assessments, determining and providing appropriate services, acquiring, storing and maintaining vehicles, processing and tracking of premium payments, how those payments must be used, providing limited warranty on the vehicle, wait lists, the vehicle return process, data/reporting and record keeping requirements. Also include that the vendor shall provide the services, with at least one physical location, open during regular business hours (M-F, 8-5).

The vendor is an extension of the Department (as clarified in the added definition and consistent with 22 M.R.S. § 3786). Furthermore, the Department may operate this program directly at some future date. No other OFI rules specify the office hours of the Department or its representatives.

21. Appeal Rights – ensure they are broad enough to encompass eligibility determinations as well as decisions on services (denial, reduction, suspension, termination). Suggest deletion of the last sentence that says services shall not continue if participant violated term of Agreement; if that is subject to appeal and appeal is timely made, it should be stayed.

1) The appeal rights do specify that they apply to application decisions (that includes denial) as well as program decisions (that includes reduction, suspension, or termination).
2) In other programs, if we continue to issue benefits or supports, it is a, relatively, simple matter to recoup the overpayment. This program is unique in that continued participation may include retaining a high value asset, with the potential to damage or deface that asset in the interim.

22. **Need to Add a Services Section**: the rule does not define what services shall be provided by this program. The services section should likely appear before or just after the eligibility section. Based on this draft rule, we cannot tell exactly what is contemplated in terms of specific services, other than that some folks may get cars. Based on the RFP, it appears that the Dept. sought for the bidders to submit detailed plans about how to "creatively and efficiently use program resources to remove work-related transportation barriers," and "provide both short term and sustainable long-term transportation solutions." Those plans are subject to approval by DHHS. From the plain

text of the rule, people who satisfy the rule's eligibility criteria should be able to determine what services they may be entitled to.

Based on the RFP, it appears that the services generally contemplated are:

i. Public or private transportation;
ii. Ride or vehicle sharing;
iii. Shuttle services;
iv. Driver education and training; and/or
v. Vehicle ownership to include financial preparation.

So you could have a general introductory part of the Services subsection setting forth these, and then get into details.

These services are laid out in Subsection II(B) which has been reformatted to articulate them more forcefully.

And here is the detailed description of services from the RFP. These should be included in the rule (with slightly modified language to reflect the services to which someone is entitled):

a. Driving Instruction:
    i. ~~Provide or facilitate~~ driver instruction, driving practice, and driver's test assistance.
        1) The vendor shall provide an assessment of need for levels of required driving instruction to determine if practice driving time is required or a full driver's education course is required for the Participant.
    ii. The vendor shall ensure only fully insured, inspected vehicles are used for driving instruction, driving practice, and during the road test of a driver's license examination.
        1) Vehicles used must have full insurance coverage that protects the Participant and the Department from all liability that may be incurred during driving instruction and tests.
b. Rides:
    i. The vendor shall provide and coordinate public or private transportation, ride sharing, van or shuttle services, or similar services, including but not limited to:
        1) Dispatching transportation services and Participant support;
        2) Mitigation plans for transportation service disruption;
        3) Reliable and safe drivers subject to background checks and minimum qualifications such as a valid driver's license and experience of a minimum of one (1) year operating a vehicle;
        4) Reliable and safe vehicles, with valid inspections, current insurance and up to date maintenance.
c. Vehicle Ownership:
    i. The vendor shall provide a third-party review of the eligibility determination prior to furnishing vehicles to Participants.
    ii. The vendor shall provide access of procured vehicles directly to Participants by:
        1) Transferring ownership to Participants within ninety (90) calendar days of eligibility determination;
        2) Providing education to Participants on driver safety and the responsibilities for owning and maintaining the vehicle prior to completion of the WC4WF Program, including but not limited to:
            (a) Repairs and maintenance; and
            (b) Financial literacy, budgeting household income, obligation and planning.
        3) Ensuring Participants:
            (e) Have a current valid driver's license in any state in the U.S;
            (b) Are at least twenty-one (21) years of age;

(c) Demonstrate the ability to responsibly own and maintain a vehicle;
(d) Have not been convicted of any a crime as determined by self-attestation and a Department background check, including:
  i. Operating Under the Influence, Driving Under the Influence or Driving While Intoxicated in the past ten (10) years.
  ii. More than two (2) moving violations and at-fault accidents in the past five (5) years, or any moving violation in the six (6) months immediately preceding enrollment.
  iii. Any crimes of violence leading to bodily injury of another.
(e) Pay a down payment as determined by the Department;
(f) Pay a monthly premium, for a duration of twenty-four (24) months, in an amount and frequency, as determined by the Department;
(g) Maintain current automobile insurance;
(h) Register vehicle in accordance with 29-A M.R.S. §351 - §562;
(i) Maintain current State inspection;
(j) Obtain timely service and repair of the vehicle as identified, as needed; and
(k) Comply with program rules and restrictions associated with vehicle ownership, as determined by the Department.

Need to ensure that the details in the rule about how the down payment and monthly payments are determined and collected are consistent with the vendor contract. It appears based on the rule that premiums will be $100-150.

Thank you for the suggestion. Yes. The amounts are $100 and $150 and can be found at Subsections IV(D)(5) and VI(D)(2). We will ensure the contract is consistent with these requirements.

Summary of Comments and Responses, and List of Changes to Final Rule – please see attached.

As many of your notes suggest, these modifications will depend largely on the final language of the rule. We would like to get that settled first.

1.Various references to sections of the rule may require updating as the rule changes.

2. Some of the internal references to numbers of other responses may require updates.

3. Regarding Commenter 41 (comments 69, 70, 71, 72, 84, 94, 95), as noted above, we advise that the Department add more detail to the rule about, among other things: the services provided; how, exactly, the Dept./its vendor will determine what type of service people will receive; title transfer; when/how vehicles must be returned if there are program violations. Importantly, the response to #95 must be revised to reflect that, without action by the Legislature, the Dept. has no authority to run this program beyond 7/1/2022. We revised the responses to these comment to reflect that the Dept. will update its rule.

4. Commenter 52 (comment 121, 124, 125) – the response to this comment (121) may change if the Department follows OAG advice and removes the "Funding Contingencies" provisions. We suggest you add detail to the rule to clarify who exactly is paying for the background checks (124): DHHS? The Vendor? Participants? Also add detail to make clear that payments should go back into the program (not used as profit by the vendor) (125).

Regarding comment 129 – if the state transfers title to participants, I agree that it may have difficulties trying to enforce the restrictions on the use of the vehicles, as well as if/when payments are not made, in getting the car returned. Generally one needs specific statutory authority to place liens on property, and I am unaware of such authority for this program.

5. Commenter 54 (MEJP) – we agree with many of these suggestions and think various changes should be made to the rule, as noted in the attached and in the rule. In particular –

a. Given that self employed people are eligible for TANF, Alternative Aid, HOPE, Pas, Food Supplements and General Assistance, there does not appear to be a rational basis for excluding self employed people from this benefit program, and this could be a risk of litigation if the rule remains as is.

b. Add the “good cause” bases from ASPIRE policy specifically in this rule so people are aware of what is required and options for appeal etc (referenced in response to comment 140). This applies to several other comments as well.

c. Comment 146 – agree. Dept. should remove restriction on services based on whether someone who an applicant lives with owns a car. See above.

d. Comment 159 – agree. Dept. should tighten up the language to make it less ambiguous. See above and attached. We can assist with revising language as needed.

e. Comment 172 – agree. Services should continue pending appeal. See advice above and MaineCare rules re member appeals. If there is other authority to the contrary, please refer that to us and let’s discuss.

6. Commenter 107 (Penquis) – had some good points/questions about the issue of use of car of another adult in the household, in person meetings, why the restriction on use of cars for mileage. We suggest that the rule be changed in response to some of these comments.

7. Depending on further discussion and how the rule is revised, the List of Changes to Final Rule will need amendment. Also, after we decide about changes, note that the Department will need to determine whether the final rule is “substantially different” than what was proposed. If it is substantially different, we advise that it be posted for another 30 day comment period. We can discuss this issue further.

Other MAPAs – given the extent of changes that likely will be required for this rule, the MAPAs will require revision, particularly the Basis Statement. We are happy to assist with those revisions. But let’s figure out the rule language first then revisit the MAPAs.

Agreed. Let’s get the rule language settled first.

After you’ve had a chance to review these comments, let’s schedule a time to discuss.

Thank you.

Halliday and Brendan

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From: Downs, Michael E <Michael.E.Downs@maine.gov>
Sent: Monday, November 2, 2020 9:00 PM
To: Kreckel, Brendan D <Brendan.D.Kreckel@maine.gov>; Moncure, Halliday <Halliday.Moncure@maine.gov>
Cc: Ray, Liz <Liz.Ray@maine.gov>; Baer, Julian <Julian.Baer@maine.gov>; Sturtevant, Timothy <Timothy.Sturtevant@maine.gov>

Subject: ASPIRE Rule 25A for OAG Review (Adopted Stage)
Sensitivity: Confidential

Good evening Brendan and Halliday,

We have another rule for review. This rule is the top priority with OFI.

For your reference, I have attached the following documents:

1) MAPA 3 ASPIRE25 No Fin (This document will go no further in the process, but it is our understanding your office likes to have it as a reference point.)
2) Fact Sheet ASPIRE25 v6 (This document will go no further in the process, but it is our understanding your office likes to have it as a reference point.)

I will provide the comments, hearing transcript, and a spread sheet that helps to cross-reference them via Teams Chat as the sheer volume will exceed the attachments limits in Outlook.

For your review, I have attached the following documents:

1) APA checklist ASPIRE25A v2
2) Basis Statement ASPIRE25A v3
3) MAPA 1 ASPIRE25A v3
4) MAPA 4 ASPIRE25A v3
5) Summary and Responses to Comments ASPIRE25 v8
6) Rule Pages ASPIRE 25A (Clean) v5
7) Rule Pages ASPIRE 25A (TC All) v5
8) Rule Pages ASPIRE 25A (TC since proposed) v5 (This copy will go to the commissioner's office, but not to the secretary of state).

The Commissioner deadline to adopt the rule is December 18, 2020. We estimate that the Commissioner will need 2 weeks to review and adopt the rule. We would like to have your initial review of the rule no later than Thanksgiving to allow enough time for changes you may propose and review of same. We apologize for the short time frame. It has taken us quite a while to respond to the 302 comments.

Please let me know if you need additional information or documents for your review, thank you.

Sincerely,

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