

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. 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.

General

1. 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. 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.
 - 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.
2. 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.
3. **RFP** – AAGs Brendan Kreckel and Stanley Abraham are defending DHHS in an administrative appeal by the disgruntled bidder in the RFP for this program. My understanding is that this appeal is in its early stages, and no hearing has been scheduled yet. After an administrative hearing decision is issued (by the HO, Cmmr? Brendan?), 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 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 to ensure that the terms are consistent with what is in this rule,** and part of our advice is to update the rule accordingly. We should also review the draft contract between DHHS and the vendor (which, since this is a \$6M contract award, is required per [cite]). Can you please forward a draft of the contract? Copying AAG Emily Atkins here, who represents DAFS and may already be involved in the contract review.

For example, when the MaineCare non-emergency transportation program shifted to a brokerage in 2013, our offices worked together over many months both on the MaineCare rule, as well as the RFP and the NET broker contracts to ensure that what was required by rule did not conflict with what DHHS required for the brokers via contracts.

4. **Timing concerns:** because of the delayed implementation of this new program, there are various concerns about timing. The statute 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.
 - a. One issue is that the 24 month payment requirements for participants extend beyond 7/1/2022.
 - b. Also, per the RFP, the contract with the entity that shall administer the program for DHHS is effective through Sept. 30, 2022. 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.

One option is for the Department to work with its legislative liaison, Molly Bogart, to propose a legislative solution to this problem. 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.

Importantly, throughout the rule this program should be referenced as temporary so that all parties are on notice of same. We should also add language to the Basis Statement to explain these issues clearly.

5. **Concerns about vagueness:** 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. Rules govern not only the people who may be eligible for benefits, but also DHHS as an agency, and other parties affected by the regulation; here, the rule generally seems to avoid any restrictions on DHHS. There are numerous eligibility requirements, but 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.

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. This is permissible under 5 MRS 8052(5)(B) 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, then the revised rule would be post for an additional 30 day period of public comment.

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” - ?
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?
 - b. Citation to 22 MRS 3104 may be incorrect; this is the general statutory authority for SNAP program – no specific authority for FSET.
3. Add language to clearly indicate that this is a temporary program per 22 MRS 3769-F, and it shall expire as of July 1, 2022. At that point the Department must repeal the rule pursuant to the Maine APA, but parties should be on notice of the temporary nature, which will help protect DHHS in the event of future litigation when the program expires.
4. Remove “Philosophy” and shift that language up under “Authorization,” which should be called “Authorization and Scope.”
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).
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.
7. Why is the Department excluding self employment, which can be sustainable and a large segment of the population in Maine is self employed?
8. What does “any form of employment that involves a subsidy to the employer” mean?
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.
10. Subsection (C) – Funding Contingencies. This section is too vague and ambiguous. I suggest removal in its entirety. G

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? If possible, put specific dollar figures in the rules. Also 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.

- 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.*”
- 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.”
- 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.

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.

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.

b. Application (B) – says the Dept “shall develop a uniform application...” 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?

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.

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.

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.

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

14. Assessment – I can see why the Department would want a separate assessment process 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.

15. 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). **Our office should review and provide legal advice on the Transportation Agreements prior to finalization of this rule.**

16. Ownership of Vehicles: Content Specific to Vehicle Access Services: How does the Dept. intend to acquire these vehicles? Are these state-owned vehicles? Is title to the vehicle transferred to the applicant? If yes, and 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 will need to discuss further.

17. Additional Vehicle Access Provisions: again – let’s discuss. 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.

18. Program Graduation – 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.

19. 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.

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.

Summary of Comments and Responses, and List of Changes to Final Rule - we will have many suggested changes to this document with regard to responses to comments, and the list of changes to the final rule.

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

Thank you.

Halliday and Brendan