

April 30, 2012

The Honorable Susan Del Pesco, Director
Division of Long Term Care Residents Protection
3 Mill Road, Suite #308
Wilmington, DE 19806

RE: DLTCRP Proposed LTC Discharge and Impartial Hearing Regulation [15 DE Reg. 1405 (April 1, 2012)]

Dear Judge Del Pesco:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Health and Social Services/Division of Long Term Care Residents Protection (DLTCRP) proposal to adopt Long Term Care Discharge and Impartial Hearing regulations, published as 15 DE Reg. 1405 in the April 1, 2012 issue of the Register of Regulations. The GACEC believes the published regulation conflicts with the statute and would like to share the following observations.

1. Current Section 1.1 literally recites that the DLTCRP regulation "governs" all discharges from a licensed facility. Fifty-seven percent of Delaware nursing facility residents are funded by Medicaid. See excerpt from Mercer, "Promoting Community-Based Alternatives for Medicaid Long-Term Services and Supports for the Elderly and Individuals with Disabilities". These individuals have a federal right to contest a discharge or transfer with protections not reflected in the proposed regulation. See 42 C.F.R. §431.201, definition of "Action"; and 42 C.F.R. §431.220(a)(3). DMMA is responsible for providing such hearings. See 42 C.F.R. §431.205. DHSS regulations specifically apply the hearing procedures codified at 16 DE Admin Code Part 5000 to nursing home notices and hearings. See 16 DE Admin Code 5001, Par. 2.C; 16 DE Admin Code 5200; and 16 DE Admin Code 5401, Par. 1. C.3. The DLTCRP omits any reference to such entitlements. As a consequence, nursing homes which rely on the DLTCRP regulation for discharge/transfer notices and procedures for Medicaid patients will violate federal law and residents will be affirmatively misled. For example, such patients have 90 days to request a hearing to contest a discharge. See 42 C.F.R. §431.221(d); and 16 DE Admin Code 5307C.2. Medicaid patients also have a right to be advised of the specific regulation(s) upon which the discharge is predicated [16 DE Admin Code 5000, definition of "adequate notice"]; a fair hearing summary [16 DE Admin Code 5312] and many other specific protections in 16 DE Admin Code Part 5000.

At an absolute minimum, the regulation should include a cross reference or note alerting the reader that proposed discharges and transfers of Medicaid-funded patients of licensed long-term care facilities are subject to 16 DE Admin Code Part 5000. The better approach would be to adopt or incorporate the Part 5000 regulations as the standards for discharges and transfers from all licensed long-term care facilities. If desired, 16 DE Admin Code 5304 could be amended to

include any supplemental provisions related to long-term care discharges and the definition of “DHSS” in Section 5000 could be amended to include DLTCRP in connection with discharges from long-term care facilities. There would then be a single set of standards to apply rather than one set of standards for Medicaid patients and one set of standards for non-Medicaid patients.¹

2. Section 1.1.1 is defective in several major contexts. First, the scope of entities authorized to file an appeal is narrower than the statute. Compare Title 16 Del.C. §§1121(34) and 1122. Second, while the statute confers at least a 30 day time period to request a hearing, and Medicaid patients have at least a 90 day period to request a hearing, the third sentence effectively truncates the appeal period to 20 days. This is highly objectionable. Third, the last sentence requires the resident to identify the attorney or person who will represent the resident at the hearing as a categorical requirement (“the notice must also include”) in the request for hearing. This is also highly objectionable. A resident should be allowed to appeal even if he/she has not yet hired an attorney or representative.

3. Section 1.1.2 contemplates issuance of a notice to the facility by DHSS “that the patient or resident is not to be discharged during the time the appeal is underway.” It would be preferable to modify §1.1.1 to include a bar on discharge once the facility receives the notice of appeal. Otherwise, the facility could discharge prior to the DHSS five-day notice and literally not violate any part of the regulation. Moreover, in a 2010 case, a facility “filled the only bed” during the pendency of a hearing in which a resident was trying to return from an acute care setting. In re Proposed Discharge - J.H. Jr (DHSS July 7, 2010)(Steinberg, H.O.). The proposed regulation does not address this scenario. The regulation should be amended to require a respondent facility to not fill at least one “bed” in the latter situation. Consider the following standard:

If the appeal (hearing request) is filed on behalf of a patient returning from transfer to an acute care facility, the facility shall refrain from filling one available opening during the pendency of proceedings.

4. Section 1.1.3 requires the hearing officer to issue a decision within 30 days of the hearing. The time frame for issuance of a decision involving discharge of a Medicaid patient is 90 days from the date of appeal. See 16 DE Admin Code 5500, §1. It would be preferable to have a conforming time line.

5. Section 2.0 defines “discharge” as “movement of a patient or resident to a bed in a separately licensed facility”. This is unduly constrictive. It categorically presumes that all persons whose residency is terminated by a facility go to another licensed facility. To the contrary, involuntarily discharged residents, including those discharged for “nonpayment”, may go to an unlicensed setting, a homeless shelter, or “the street”. Under the proposed definition, the regulation would be completely inapplicable to such terminations of residency and a facility would not even have to provide “notice of discharge” to residents being “evicted” to “the street”.

¹Apart from Medicaid-funded nursing home patients, residents of DDDS waiver-funded group homes, shared living/foster homes, IBSER placements, etc. facing discharge also have a right to a Medicaid hearing. See 16 DE Admin Code 5000, definition of “DHSS”; 16 DE Admin Code 2101, §5.0. Likewise, residents of an array of long-term care facilities funded through the expanded DSHP Plus waiver would ostensibly have a right to a Medicaid hearing to contest discharge or transfer.

6. The relevant statute, Title 16 Del.C. §1121(18), contemplates a right to notice and a hearing for either discharge or “transfer”. The regulation does not mention “transfer”. The term should either be included in the definition of “discharge” or included in a separate definition. It would be preferable to include the term “transfer” in the definition of “discharge” so all later references could continue to simply refer to “discharge” rather than “transfer or discharge”.

7. Section 2.0, definition of “party”, merits revision. It defines as a “party” an entity which has not yet been joined as a party. This would literally result in the right of mere applicants for joinder to enjoy all rights enumerated in Section 4.0. Even if that were preferred, it is illogical to only include applicants seeking party status “as of right” while excluding applicants seeking party status in the discretion of the hearing officer. It would be preferable to simply delete “,or properly seeking and entitled as of right to be admitted as a party to the agency proceeding”. A person or agency can apply for intervention or party status and, if the application is granted, the person or agency then enjoys party status.

8. In §2.0, consider adding a definition of “resident” which includes a “patient”. Then, the rest of the sections can merely refer to “resident” and avoid many references to “patient or resident”.

9. In §3.1, first sentence, insert “written” between “30 days” and “notice” to reinforce the implication in the balance of the section that an oral notice would not suffice.

10. In §3.1, third sentence, substitute a colon for the semicolon after the word “include”.

11. Section 3.1 contemplates notice to the resident, the DLTCRP, and the Ombudsman. The notice should also be given to individuals and agencies qualifying under either Title 16 Del.C. §§1121(34) or 1122. This is not limited to situations in which the resident lacks competency. For example, if a “sponsoring agency” such as DDDS or APS places a client in a nursing home or group home, the facility should notify DDDS or APS of the planned termination. Likewise, the representative payee appointed by the Social Security Administration should receive notice.

12. Section 3.0 is deficient since it does not tell the recipient of the time period and method for filing an appeal. The notice should explicitly identify the time period (at least 30 days for non-Medicaid patients). Moreover, since §1121(18) does not require appeals to be in writing, “silence” in the notice may result in many telephonic appeals. Section 3.1.4 requires the discharge notice to include “a statement the patient or resident has the right to appeal the action” but omits any information describing how to appeal. This deficiency is then compounded by Section 1.1.1 which is very prescriptive in its requirements for submission of a request for hearing. For example, query how the resident would know that a copy of any appeal must be sent to the facility and include the identity of the resident’s representative. The resident should be advised in the notice of the procedure to request a hearing. Compare 16 DE Admin Code 5300, §1.B.

13. Since facility residents may often have sensory, vision, or cognitive impairments, it would be preferable to insert the following second sentence in §3.1: “The facility shall accommodate the known disability-related impairments of the patient or resident when communicating the notice of discharge.” For example, this should “prompt” a facility to consider a large-print notice to a

resident with a known visual impairment.

14. Section 3.0 omits any reference to “the circumstances under which ‘assistance’ is continued if a hearing is requested.” Compare 16 DE Admin Code 5000, definition of “adequate notice”. Section 3.0 is silent on whether the request for hearing “tolls” the discharge. Section 1.1.2 contemplates “tolling” of the discharge upon filing of a request for hearing but this should be disclosed in the notice to provide the resident with important information and “peace of mind”. In cases involving a resident returning from an acute care setting, it would also be preferable to disallow “filling” the resident’s bed during the pendency of proceedings.

15. Section 3.0 omits “the specific regulations supporting such action.” Compare 16 DE Admin Code 5000, definition of “adequate notice”. For example, if an assisted living facility proposed discharge based on its view that the resident has an “unstable” peg tube, it should cite 16 DE Admin Code 3225, Section 5.99. This is “basic” due process and required by the Third Circuit’s Ortiz v. Eichler decision.

16. For discharges of Medicaid patients, the notice would have to be detailed, i.e., allow the resident to tell from the notice alone the accuracy of the basis for discharge. Compare 16 DE Admin Code 5300, §2.D and Ortiz v. Eichler. Thus, in non-payment cases, the notice must include the calculations upon which the discharge is based. This should be clarified in §3.0.

17. Merely providing the mailing address of agencies in §§3.1.5 and 3.1.6 may hinder contact. Many individuals in long-term care facilities may lack the wherewithal to write a letter to the Ombudsman or DHSS divisions and the time to act is very limited. The phone numbers of the agencies should be included in the notice.

18. In §3.1.8, the term “phone number” was apparently omitted between “mailing address and” and “of the agency”. Compare §3.1.9.

19. In §3.1.9, the term “residents who are mentally ill” explicitly violates Title 29 Del.C. §608(b)(1)a. Consider substituting “residents with mental illness”.

20. Although Sections 3.1.8 and 3.1.9 are helpful, consider expansion. For example, the Community Legal Aide Society Inc. (CLASI) elder law program (funded in part through DSAAPD Older Americans Act revenue) could represent elderly patients at no cost. Likewise, the CLASI Disabilities Law Program (DLP) represents individuals with disabilities apart from those with a mental illness or developmental disability (e.g. those with late onset disabilities such as M.S. or cancer). DSS standard notices provide information on sources of free or low cost legal services, i.e., CLASI. The DLTCRP could require a broader disclosure in Section 3.0.

21. Section 4.0 does not address the resident’s right to review the facility’s records pertaining to the resident, including financial records in cases involving discharge based on non-payment. Compare Title 16 Del.C. §1121(19) and 16 DE Admin Code 5403. The following provision could be added:

To examine all facility records pertaining to the resident in the possession, custody, or

control of the facility.

In a related context, §4.1.1 is “odd” since it contemplates review of records submitted to the hearing officer prior to the hearing. There is no requirement that records be submitted prior to hearing and such a requirement may violate due process if there is no opportunity for objection prior to hearing officer review of the document. The common maxim is that nothing can be used as evidence which has not been introduced as such.

22. Section 4.0 does not differentiate between rights accorded the resident versus the facility. Literally, this means a facility could request interpreters, the facility could withdraw a hearing request, and a corporate entity could proceed without a licensed attorney. Cf. Delaware Supreme Court Rule 72. It would be preferable to differentiate between rights pertaining to the resident from the rights pertaining to the facility. Parenthetically, there is an extraneous “/” in Section 4.1.2.

23. Section 6.0 omits an opening sentence or clause (e.g. “(t)he hearing officer will:”) Compare 16 DE Admin Code 5406. Section 6.7 is a sentence in contrast to Sections 6.1 - 6.7. It should be converted to a clause for grammatical consistency. Consider the following alternatives:

- Issue a decision which shall have the effect of a final ruling by the Department.
- Issue a decision which shall be considered a final ruling by the Department.

24. In Section 6.1, the reference to “runs the hearing” is somewhat colloquial. Compare 16 DE Admin Code 5406 (“regulate the conduct of the hearing to ensure an orderly hearing in a fashion consistent with due process”).

25. Sections 6.2 and 6.6 are overlapping and somewhat redundant.

26. Section 6.0 omits multiple provisions in the comparable 16 DE Admin Code 5406.

27. In Section 7.0, insert “and persuasion” after “proof” to reinforce Section 5.1. Compare Title 14 Del.C. §3140.

28. Section 8.0 is a bit unusual. DHSS publishes redacted copies of all of its fair hearing decisions on its Website at <http://dhss.delaware.gov/dhss/dmma/fairhearings.html>. Moreover, the decisions would be subject to a FOIA request.

Thank you in advance for your time and consideration of our comments and recommendations. Please feel free to contact me or Wendy Strauss should you have questions.

Sincerely,

Terri A. Hancharick
Chairperson
TAH:kpc

