

July 27, 2012

Susan Del Pesco, Director
Division of Long Term Care Residents Protection Program
3 Mill Road, Suite 8
Wilmington, DE 19806

RE: DLTCRP Proposed Long Term Care Discharge and Impartial Hearing Reg. [16 DE Reg. 24 (July 1, 2012)]

Dear Ms. Del Pesco:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Long Term Care Residents Protection (DLTCRP) proposal to adopt Long Term Care Transfer (LTC), Discharge and Readmission Procedures which were published in the July 1, 2012 Delaware Register of Regulations.

As background, the GACEC submitted comments on the earlier version of this DLTCRP regulation published in April 2012. Please see the enclosed GACEC letter dated April 30, 2012 which highlights our concerns on the April regulations. The Division has now completely revised the proposed regulation; unfortunately, Council still has a number of concerns with the proposed regulation.

1. In our April 30 commentary, Par. 1, the GACEC noted that 57% of Delaware nursing home patients are funded by Medicaid. These patients have a federal right to contest a discharge or transfer with certain protections that were not included in the April version of the regulation. Delaware Health and Social Services (DHSS) regulations specifically apply the hearing procedures codified at 16 DE Admin Code Part 5000 to appeals by Medicaid beneficiaries of proposed nursing home discharges and transfers. The GACEC therefore commented that "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." Instead of adopting this approach, the July version of the regulation has two sets of standards applicable to the following facilities: 1) Section 3.0 applies to nursing facilities which participate in the Medicaid or Medicare programs; and 2) Section 4.0 applies to State-licensed long-term care facilities. There are several problems with this approach:

A. A discharge from an Intermediate Care Facility for persons with Mental Retardation (ICF/MR) (e.g. Stockley; Mary Campbell) is not covered by Section 3.0 (since exempt from 42 C.F.R. §483.5) and the procedures in Section 4.0 are not co-terminous or exactly the same as those in 42 C.F.R. §§431.210 - 431.246.

B. If the State proposed to discharge a Medicaid beneficiary from a State-run nursing facility (Governor Bacon Health Center (GBHC); Delaware Hospital for the Chronically Ill (DHCI); Emily P. Bissell Hospital), the beneficiary has a right to a Medicaid hearing under 16 DE

Admin Code Part 5000 which conforms to the procedures mandated by Ortiz v. Eichler. Neither Section 3.0 nor Section 4.0 of the DLTCRP regulation complies with Ortiz and the regulation will confuse Medicaid beneficiaries of State-run nursing facilities into believing that only the DLTCRP process applies.

C. Section 3.0 applies to nursing homes participating in the Medicare program pursuant to 42 C.F.R. §483.5. Federal law authorizes Medicare beneficiary appeals of proposed nursing home discharges through a Quality Improvement Organization (QIO). See attached Quality Insights Delaware publication, “How to Appeal if Your Services Are Ending”. Time periods to contest the discharge are very short. Medicare beneficiaries will likely be confused concerning the overlapping Medicare and DLTCRP appeal systems. At a minimum, the DLTCRP regulation should include an explanatory comment or note highlighting the availability of both appeal systems.

D. For nursing facilities which are covered by both Section 3.0 (Medicaid/Medicare enrolled) and Section 4.0 (State licensed under 16 Del.C. Ch. 11), it is unclear if only Section 3.0 applies or both Sections 3.0 and 4.0 apply.

2. In Section 2.0, the definition of “transfer and discharge” is problematic. The definition is as follows:

“Transfer and discharge” includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility.

The April version of the regulation contained a similar definition which limited “transfer and discharge” to removal to another facility. The GACEC objected to the narrow definition which, while based on 42 C.F.R. §483.12(a)(1), categorically presumes that all persons whose residency is terminated go to another facility. To the contrary, involuntarily discharged residents, including those discharged for nonpayment, may go to a relative’s home, a homeless shelter, or “the street”. Under the proposed definition, the regulation (and its protections) would be inapplicable to terminations of residency if the resident is expected to go to a relative’s home, a homeless shelter, or “the street”.

3. Section 3.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and 1122.

Notify the resident and, if known, a family member or legal representative of the resident, including an agent authorized to act on the resident’s behalf pursuant to Title 16 Del.C. §1121(34) and 1122, of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of “legal representative” in Section 2.0 as follows:

“Legal representative” includes a resident’s guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

4. Section 3.3.2 would benefit from revision. It is loosely based on 42 C.F.R. §483.12(a)(6). First,

references to “developmentally disabled individuals” and “mentally ill individuals” are not “people-first” and violate Title 29 Del.C. §608(b)(1)a. Second, unlike the federal regulation, it is ambiguous in defining when notice should be given to the Protection and Advocacy (P&A). The facility would, with no guidance, determine if such notice is “applicable” and may have to “guess” at the identity of the P&A. Third, there are other key agencies which should also receive notice, including the DSHP Plus MCO and any DHSS agency (Adult Protective Services (APS); Division of Developmental Disabilities Services) involved in the placement. Consider the following substitute:

3.3.2. Provide a copy of the notice to the Division; the State LTC ombudsman; the resident’s Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident’s placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.

5. In §3.4.2.4, delete the comma after the word “needs”.

6. Sections 3.5.6 and 3.5.7 are based on 42 C.F.R. §§483.12(a)(6). Council recommends combining §§3.5.6 and 3.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Delaware’s P&A for individuals with developmental disabilities and mental illness is the same agency.

7. As applied to Medicaid-funded residents, §3.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J, DCIS No. 036864 (Del. DES 1987). Thus, if the discharge is based on nonpayment, the notice must include the calculations. The notice must include the citations to the regulation(s) supporting discharge. The notice must “contain any information needed for the claimant to determine from the notice alone the accuracy of the agency’s intended action” and “provide a detailed individualized explanation of the reason(s) for the action being taken”. These requirements should be added to §3.5.

8. Section 3.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

9. Section §3.8 could result in violations of State law. The implication is that a facility can change a resident’s room within the same building as of right. This is reinforced by §4.8. However, State law requires the facility to honor the room request of a resident unless impossible to accommodate. See Title 16 Del.C. §1121(28) and compare §4.8.3. Moreover, a facility must honor the requests of spouses to share a room if feasible and not medically contraindicated. Section 3.8 should be amended to clarify that a facility’s discretion to transfer residents to another room in the same

building is limited by Title 16 Del.C. §§1121(13) and 1121(28).

10. If §3.0 is a “stand alone” regulation which excludes application of §4.0, §3.9.3 would violate State statute [Title 16 Del.C. §1121(18)] since readmission is not limited to Medicaid beneficiaries. Every LTC resident who is returning from an acute care facility is entitled to be offered the next available bed.

11. Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, if the Division is disinclined to strictly enforce resident readmission rights accorded by §3.9.3 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §3.11 to read as follows:

3.11 If a facility issues a discharge notice rather than permitting a resident’s readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident’s readmission or place limitations on the facility’s admissions to preserve one bed. In exercising its discretion, the Department will consider the following:

3.11.1 Historical bed turnover rates in the facility;

3.11.2 Availability of public or private funding for costs of care;

3.11.3 Adverse health and quality of life consequences of delaying readmission; and

3.11.4 Federal and State public policy preferences for provision of services in the least restrictive setting.

12. Consistent with the commentary under Par. 3 above, §4.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and 1122:

Notify the resident and, if known, a family member or legal representative of the resident, including an agent authorized to act on the resident’s behalf pursuant to Title 16 Del.C. §1121(34) and 1122, of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of “legal representative” in Section 2.0 as follows:

“Legal representative” includes a resident’s guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

13. Consistent with the commentary under Par. 7 above, §4.5 would also benefit from revision. As applied to Medicaid-funded residents, §4.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J, DCIS No. 036864 (Del. DES 1987). Thus, if the discharge is based on nonpayment, the notice must include the calculations. The notice must

include the citations to the regulation(s) supporting discharge. The notice must “contain any information needed for the claimant to determine from the notice alone the accuracy of the agency’s intended action” and “provide a detailed individualized explanation of the reason(s) for the action being taken”. These requirements should be added to §4.5.

14. Section 4.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

15. As noted under Par. 6 above, §§ 4.5.6 and 4.5.7 are based on 42 C.F.R. §§483.12(a)(6). Council recommends combining §§4.5.6 and 4.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Delaware’s P&A for individuals with developmental disabilities and mental illness is the same agency.

16. Consistent with the comments under Par. 9 above, §4.8 could result in violation of State law. The implication is that a facility can change a resident’s room within the same building as of right subject only to §4.8.3. A facility must honor the requests of spouses to share a room if feasible and not medically contraindicated. Section 4.8 should be amended to clarify that a facility’s discretion to transfer residents to another room in the same building is limited by both Title 16 Del.C. §§1121(13) and 1121(28).

17. Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, consistent with Par. 11 above, if the Division is disinclined to strictly enforce resident readmission rights accorded by §4.9.2 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §4.9.3 to read as follows:

4.9.3 If a facility issues a discharge notice rather than permitting a resident’s readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident’s readmission or place limitations on the facility’s admissions to preserve one bed. In exercising its discretion, the Department will consider the following:

4.9.3.1 Historical bed turnover rates in the facility;

4.9.3.2 Availability of public or private funding for costs of care;

4.9.3.3 Adverse health and quality of life consequences of delaying readmission;
and

4.9.3.4 Federal and State public policy preferences for provision of services in the least restrictive setting.

18. In §4.9, there is no definition of “acute care facility”, the term used in Title 16 Del.C. §1121(18). The following definition should be added to §2.0:

“Acute care facility” means a health care setting providing intensive services of a type or level not readily available in the current facility, including, without limitation, settings licensed or certified pursuant to chapters 10, 11, 22, 50, or 51 of Title 16.

19. There is some “tension” between §§5.1.1.2-5.1.1.3 versus §§3.5.4 and 4.5.4. The hearing request should be submitted to the State, not to the provider with a “cc” to the State. Moreover, it is unclear if §5.1.1.3 (contemplating a “cc” to the DLTCRP and Ombudsman) is “directory” or a sine qua non for perfection of the appeal. In the latter case, a pro se resident who did not send a copy to the Ombudsman could have his/her appeal dismissed. This would be an unfortunate result.

20. Section 5.1.1.2 categorically applies a minimum 30-day appeal timeline. A Medicaid beneficiary requesting a hearing to contest discharge from a State-run nursing facility, an ICF/MR, or other LTC facility would ostensibly have 90 days to request a hearing. Compare 42 C.F.R. §§431.206(c)(3) and 431.221(d); and 16 DE Admin Code Part 5000, §§5001, Par. 2 C; 5307, Par. C.2; and 5401, Par. C.3. This is not addressed anywhere within the DLTCRP regulation.

21. Section 5.4 omits the right to examine case records regardless of their lack of intended use in the proceedings. Compare 42 C.F.R. §431.242(a)(1); 42 U.S.C. §483.10(b)(2); Title 16 Del.C. §1121(19); and 16 DE Admin Code, Part 5000, §5403. A reference to this right should be added.

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

Sincerely,

Terri A. Hancharick
Chairperson

TAH:kpc

CC: The Honorable Rita Landgraf, Secretary, DHSS
The Honorable Edward S. Osienski, Delaware House of Representatives
Debbie Gottschalk, DHSS

Enclosures