

May 28, 2013

Mary Peterson, Director
Division of Long Term Care Residents Protection
3 Mill Road, Suite 308
Wilmington, DE 19806

RE: DLTCRP Proposed LTC Transfer, Discharge and Readmission Regulation [16 DE Reg. 1130 (May 1, 2013)]

Dear Ms. Peterson:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Long-term Care Residents Protection (DLTCRP) proposal to adopt a "complete revision" of its standards covering transfers and discharges from long-term care facilities. The GACEC would like to share the following observations.

First, Section 1.2 contains the following exclusion:

This regulation does not extend to decisions of DHSS or any of its Divisions, to deny, suspend, delay, reduce or terminate benefits. The regulation governing appeals related to benefit eligibility are found at 16 DE Admin Code §5000.

This exclusion is highly problematic.

The "5000" series regulation recites that it only applies to Division of Medicaid and Medicare Assistance (DMMA) and the Division of Social Services (DSS). See 16 DE Admin Code 5000, §5001. Thus, if a non-Medicaid resident of a Department of Health and Social Services (DHSS)-run nursing facility, (Governor Bacon Health Center (GBHC); Delaware Hospital for the Chronically Ill (DHCI); Bissell) were being discharged, the resident would have no right to an impartial hearing under Title 16 Del.C. §1121(18) or the "5000" series. Likewise, a resident of a DSAMH-sponsored group home would have no right to an impartial hearing under §1121(18) or the "5000" series. A non-waiver Division of Developmental Disabilities Services (DDDS) resident of a group home or shared living/adult foster home would have no right to an impartial hearing under §1121(18) or the "5000" series. The purported exclusion is inconsistent with §1121(18). Conversely, a Medicaid-funded nursing facility resident is not limited to the DLTCRP 3102 regulation to contest a discharge/transfer. Under federal law and DHSS regulation, such an individual is entitled to a hearing from the Medicaid agency to contest a nursing facility discharge/transfer. See 42 C.F.R. §431.206(b)(3) and §431.201(a) and 16 DE Admin Code 5000, §5001, Par. 2.C. Section 1.1 of the proposed regulation suggests that the DLTCRP 3102 regulation is the exclusive hearing system for appeals of LTC facility discharges/transfers. There is no analog to §4.6.2 (covering Medicare-funded residents) for Medicaid-funded residents of nursing facilities.

Second, in §2.0, definition of "facility", Council recommends cross referencing Title 16 Del.C. §1102(4). If the full text is retained, the Division should substitute "Title 16" for "this title".

Third, §3.1.1.5 could be improved to better address episodic conditions or those subject to remission and flare-ups. If someone's condition has temporarily improved, this should not be the basis for discharge. Consider amending the reference to "...services provided by the facility on a long-term basis".

Fourth, in §3.2.1.3, the reference to “treatment team” is problematic. There is no definition of “treatment team” and some facilities (e.g. shared living/foster home) may lack a “treatment team”.

Fifth, in §3.3.1, consider the following revision: “(b)efore a facility ~~transfers or discharges~~ proposes to transfer or discharge a resident...” This would be more consistent with the 30-day advance notice requirement in §3.3.2.1.

Sixth, there is some “tension” between the definition of “transfer and discharge” in §2.0 (limiting “transfer” to movement outside the facility) and use of the word “transfer” in §§3.3.2.2.2 and 3.6.1.1 in the context of intra-facility changes of roommates.

Seventh, in §3.3.3.1.3.1, substitute “facility’s” for “facilities”.

Eighth, in §3.3.3.1.7.6, consider deletion of “nursing”. Compare §3.3.1.2.

Ninth, in both §§3.7.2.1 and 3.7.2.2, delete the term “nursing”.

Tenth, there is some “tension” between §3.3.3.1.7 and 4.1.2.3. An attorney for a facility could argue that a resident who submits a timely hearing request to the DLTCRP, but does not “copy” the facility or Ombudsman, has not “perfected” an appeal. Indeed, §3.3.3.1.7 does not specifically include the requirement to “copy” the facility and Ombudsman in the facility notice so a resident may not be aware of the requirement. The DLTCRP has previously shared its view that “copying” the Ombudsman and facility is “directory” and not a basis for dismissal of an appeal. However, the regulation should be revised for clarity. Consider the following revision: “Copied to the facility and the State LTC ombudsman; provided that delay in providing a copy shall not result in denial or dismissal of a hearing request.”

Eleventh, §4.6.1.1 contains an “unusual” right for the facility to inspect the resident’s records. This is not the general DHSS approach. Compare 16 DE Admin Code 5000, §5311E and F and §5403. The GACEC recommends substitution of the following in §4.6.1.1: “Complete any inspection and duplication of records pursuant to a request under Title 16 Del.C. §1121(19).”

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

Sincerely,

Terri A. Hancharick
Chairperson

TAH:kpc