

November 30, 2015

Jamie Mack
Division of Public Health
417 Federal Street
Dover, DE 19901

RE: DPH Proposed Personal Assistance Services Regulations [19 DE Reg. 392 (November 1, 2015)]

Dear Mr. Mack:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Public Health proposal to revise its personal assistance services regulations in order to comply with House Bill No. 107. This recently enacted legislation removes a ban on the provision of personal assistance services in hospitals and nursing facilities.

The preamble describes the purpose of the changes as follows:

One purpose of the amendments is to allow for the provision of services by these agencies in nursing facilities and hospitals. This change will allow consumers to receive the services necessary to safely achieve their highest level of independence and optimal quality of life while residing in their own home or during a necessary hospitalization. In addition, amendments were made to update the requirements to ensure patients receive safe and quality care.

At 392.

Council would like to share the following observations on the proposed regulations.

First, in §1.0, definition of "Personal Assistance Services Agency", first sentence, Council recommends a grammatical correction. There are singular pronouns (his/her) with a plural antecedent (consumers). This may be corrected by substituting "their" for "his/her".

Second, in §1.0, definition of "Personal Assistance Services Agency", the second sentence reads as follows: "The personal assistance services agency shall only provide services in the county in which the agency is located and/or the county(ies) which are immediately adjacent." This new

limitation may be ill-conceived. A “Personal Assistance Services Agency” “located” in Kent County could serve the entire State. However, an Agency “located” in New Castle County (NCC) could not serve clients in Sussex and an Agency “located” in Sussex could not serve clients in NCC. The rationale for this change is not provided. The term “located” is not defined. It is not based on statute. See 16 Del.C. §122(3)x. Delaware is a small state and this limitation may unnecessarily restrict the choice of providers by residents.

Incidentally, inclusion of this limitation in a definition violates Section 4.3 of the Delaware Administrative Code Style Manual since it creates a substantive standard in a definition.

Third, in §5.4.2.2, simple fingernail care by a direct care worker is authorized. However, toenail care is categorically banned. This is counterintuitive. If someone can trim a fingernail, the same skills would logically apply to trimming toenails. For example, simple “soaking of fingernails” is authorized but soaking of toenails is banned. Moreover, the ban would apparently conflict with the statutory authorization that authorizes personal assistance workers to provide “those other services set out in §1921(a)(15) of Title 24”, i.e. acts individuals would normally perform themselves but for functional limitations. [16 Del.C. §122(3)x2]. Individuals could normally provide their own toenail care. The Division may wish to consider whether a categorical ban on toenail care is justified.

Fourth, the following new limitation is added:

Section 3.13. The personal assistance services agency must not use the word “healthcare”, or any other language that implies or indicates the provision of healthcare services, in its title or in its advertising.

Since personal assistance workers, by statute, can perform acts individuals could normally perform themselves but for functional limitations, the restriction is “overbroad”. See 16 Del.C. §122(3)x2 and 24 Del.C. §1921(a)15). Many of the services authorized by statute would amount to “healthcare”. Indeed, the above statutes specifically authorize personal care workers to perform “healthcare acts”.

Thank you for your consideration of our observations. If you have any questions, please contact me or Wendy Strauss at the GACEC office.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc