

## MEMORANDUM

DATE: March 30, 2007

TO: Mr. David Walton, Hearing Officer  
Division of Public Health

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: 10 DE Reg. 1376 [Regulations for Personal Assistance Services Agencies]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Public Health's (DPH) proposed *Delaware Regulations for Personal Assistance Services Agencies* published as 10 DE Reg. 1376 in the March 1, 2007 issue of the Register of Regulations. SCPD commented on an initial pre-publication draft of these regulations in September 2006 and a second pre-publication draft of these regulations in February 2007. DPH has incorporated many of SCPD's recommendations. We certainly appreciate DPH's consideration of Council's previous comments, but still have the following residual observations and recommendations that may have been overlooked. Comments which appeared in both the September and February letters are earmarked with an asterisk (\*).

1\*. In Section 1.1, the scope of services qualifying under the definitions of "companion" and "homemaker" are almost identical. Both definitions encompass housekeeping, cooking/meal preparation, and shopping/errands. Companion services and homemaker services are treated as distinct categories under the definition of "direct care worker". It would be preferable to adopt definitions clarifying distinctions between these categories.

2\*. Some personal assistance agencies (e.g. Comfort Keepers) include transportation (e.g. to store; medical appointment) within their menu of services. DPH should include this as an authorized service under one or more of the definitions in Section 1.1 (e.g. homemaker; companion; personal assistance). Section 5.1.4.1 requires the agency to include "transportation" within its personal assistance agreement with the consumer. It is inconsistent to treat transportation as a personal assistance service to be included in the agreement while omitting it from the definition section as a covered service. Finally, the definition of "personal assistance services" is strict, i.e., "services are limited" to a defined list. Omission of any reference to transportation means that it cannot qualify as a personal assistance service.

3. In Section 2.4, there are explicit due process protections applicable to some disciplinary sanctions. For example, suspensions and revocations of licenses require notice (Section 2.4.3.1) and opportunity for hearing (Section 2.4.3.1.3). However, it is unclear what due process is available in other disciplinary contexts. For example, if the Department imposes an administrative penalty under Section 2.4.2.7.1, is there advance notice and right to a hearing? The availability of due process is likewise unclear for other sanctions (e.g. placement on provisional status accompanied by suspension of all admissions; refusal to renew license; refusal to issue initial license).

4. Section 2.7.1 contemplates “periodic” inspections by DHSS. It would be preferable to include an “outside” timetable. Since licensing is annual, an annual inspection should be the minimum. The Section could then be amended to read as follows: “A representative of the Department shall conduct at least annual inspections of every personal assistance services agency...”

5. In Section 4.4.2.4, consider substituting “and” for “or” such that consumer satisfaction surveys are required, not optional.

6. In Section 4.4.2.6.6, there is a plural pronoun (their) with a singular antecedent (individual). Consider substituting “Individuals” for “Any individual”.

7. Section 4.5 could also benefit from inclusion of shopping-related financial documentation since shopping and running errands are included among personal assistance services. How should purchases and receipts be recorded? Should only cash transactions be done? Each agency must have “tight” policies and training in this context.

8. There is some “tension” between Section 5.1.3 and Section 7.0. Literally, Section 5.1.3 would authorize an agency to forego liability insurance while Section 7.0 would require it. It should be required.

9. In Section 5.3, it would be preferable to include a “reminder”, based on the definition of “service plan”, that it should include the scope, frequency, and duration of services. Perhaps a Section 5.3.4 could be added as follows: “The service plan shall include the scope, frequency, and duration of services.”

10. In Section 5.5.2, DPH may wish to consider requiring that the consumer’s signature be included on the activity logs. My impression is that most agencies require a consumer “sign-off” or acknowledgment of receipt of itemized services as a matter of practice. This reduces prospects for disputes over services.

11. Section 5.5.12.3.1 allows an agency 30 calendar days to submit a report on a “major adverse incident”, including unexpected death. This is too long and would compromise any State investigation of negligence.

12\*. In Section 5.6.3, it would be preferable to require 30 days notice prior to discharge rather than 2 weeks. Compare Title 16 Del.C. Section 1121(18). It may be very difficult for a consumer to obtain an alternate agency services plan within 2 weeks.

13. Section 5.6.3.2 authorizes a provider to discontinue services immediately upon its unilateral determination that the consumer should have a higher level of care. No notice would be required, leaving the consumer at great risk. In 2006, an assisted living agency unilaterally determined that a consumer (D.R.) exceeded the assisted living level of care and unilaterally terminated her services. The Division of Long-term Care Residents Protection conducted its own evaluation, determined the consumer eligible for assisted living services, and fined the provider who refused to reinstate services. Agencies make mistakes. Indeed, mistakes may be common in this context since the regulations allow the agency to make the level of care decision through persons with no credentials whatsoever. See Sections 5.2.1 and 5.3.1. If DPH allows abrupt, unilateral termination of services with no notice, this will create a huge “loophole” for agencies who simply want to stop services with no notice. Moreover, if a consumer has decompensated to the point of needing more care, an orderly transition period to a higher level provider would be more logical than complete termination of all services. The DPH approach would be akin to a nursing home determining that a resident needs a hospital level of care and abruptly discharging the resident to the street!

14. The exception of notice for non-cooperation or non-payment of charges (Section 5.6.3.3) is also highly objectionable. Contrast Title 16 Del.C. Section 1121(18), requiring 30 day notice of termination from a long-term care facility even for non-payment. Similarly, dispensing with notice “when service goals have been met” is subjective and objectionable. SCPD recommends adoption of a 30 day notice period and deletion of all exceptions (Sections 5.6.3.1-5.6.3.4) but for “emergency situations”, akin to Title 16 Del.C. Section 1121(18). Apart from notice, SCPD also recommends some authorization for consumer appeal of the decision.

15. In Section 7.0, DPH may wish to consider requiring that the insurance policy include a provision requiring notice to DHSS upon termination of the policy. For example, mortgagees routinely require homeowner policies to include such a notice. Otherwise, DPH may not know that a struggling agency’s insurance has lapsed.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulations.

cc: Ms. Mary Peterson  
Ms. Patricia Murphy  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council