



DISABILITIES LAW PROGRAM

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MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: September 13, 2012

I am providing my analysis of eight (8) regulatory initiatives published in the September issue of the Register of Regulations. Given time constraints, the commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Nursing Home Facility Quality Assessment Reg. [16 DE Reg. 309 (9/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in July, 2012. The Councils shared only a single technical observation, an ostensible conflict between the enabling legislation (S.B. No. 227) and the proposed regulation in the context of exempt facilities.

The Division of Medicaid and Medical Assistance has now adopted a final regulation with no changes. DMMA included a lengthy response to the Councils' technical observation which explains the discrepancy in the exemptions.

Since the regulation is final, and the Division fully addressed the Councils' only concern, I recommend no further action.

2. DMMA Final Medicaid Telemedicine Regulation [16 DE Reg. 314 (9/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in July, 2012. A copy of the GACEC's July 27 letter is attached for facilitated reference. The Division of Medicaid & Medical Assistance has now adopted a final regulation incorporating amendments prompted by the commentary:

First, the Councils endorsed the concept of authorizing telemedicine. The Division acknowledged the endorsement.

Second, the Councils recommended incorporation of a reference to “effective communication” consistent with the ADA. The Division agreed and adopted a slight variation on the sentence proffered by the Councils:

The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modification, where required under the Americans with Disabilities Act (ADA), to ensure effective communication.

Third, the Councils identified a grammatical and spelling error in §27. The Division observed that this was a publication error which was corrected.

Fourth, the Councils objected to a reference to “illness or injury” since it would exclude diagnoses and treatment of conditions such as cerebral palsy and epilepsy. The Division agreed and modified the language.

Since the regulation is final, and the Division corrected all identified concerns, I recommend no further action.

3. DMMA Final LTC Ombudsman Regulation [16 DE Reg. 312 (9/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in July, 2012. A copy of the GACEC’s July 27 letter is attached for facilitated reference.

The Councils endorsed the regulation but requested an update on a DHSS commitment in 2011 to address conflicts between the Ombudsman and Office of the Secretary and to provide for independent counsel. The Division responded as follows:

The proposed Medicaid state plan amendment simply identifies a change in the administrative authority over the State Long-term Care Ombudsman Program. DMMA will forward your request for additional information to the Office of the Secretary. No change was made to the regulation as a result of the comment.

At 313.

I recommend that the SCPD follow up with the Secretary’s Office on the 2011 commitment.

4. DSS Final Child Subsidy Program Tech. Eligibility Reg. [16 DE Reg. 319 (9/1/12)]

The SCPD commented on the proposed version of this regulation in July, 2012. The Division of Social Services has now adopted a final regulation with one amendment.

First, the Council recommended correction of a reference to “asylee”. The Division incorporated an amendment.

Second, the Council observed that, while the current regulation included punctuation, the new regulation omitted punctuation in several sections. The Division declined to effect any amendments based on the following rationale:

Agency Response: According to the Gregg Reference manual, the suggested punctuation is not required in this style of writing. No change to the regulation was made as a result of this comment.

At 320. This is an “odd” response for the following reasons:

A. The attached Delaware Administrative Code Drafting & Style Manual [hereinafter “Delaware Manual”] is the preferred reference guide for publication of regulations, not the “Gregg Reference manual”.

B. The illustrations of regulations in the Delaware Manual uniformly use punctuation. See, e.g., §6.2.3.

C. The Delaware Manual recites that “(r)egulations should be uniform in style and language conventions and be drafted in a clear and concise manner...” At p. 2. All of the DSS regulations surrounding the new §11003 use commas, semicolons, periods, and standard punctuation. It is not “uniform” to have 1 “outlier” regulation which is devoid of punctuation within an extensive set of regulations with punctuation.

Third, the Council recommended amending Section 1.C (sic Section 3.C) for consistent form with Section 1.B. The Division expressed confusion over the reference since the Councils inadvertently referred to “1.C.” rather than “3.C” but DSS did correct the numbering in the latter section.

I recommend that the SCPD communicate with Sharon Summers and provide a copy of the Delaware Manual and analysis under Par. 2 above. A courtesy copy should be shared with Deborah Gottshalk and the Division Director since the Division may otherwise adopt an on-going practice of omitting punctuation in prospective regulations.

5. DLTCRP Final LTC Discharge & Impartial Hearing Reg. [16 DE Reg. 296 (9/1/12)]

The SCPD and GACEC submitted a lengthy set of comments on the proposed version of this regulation in July. A copy of the July 27 GACEC letter is attached for facilitated reference. The Division of Long Term Care Residents Protection has now adopted a final regulation incorporating some amendments prompted by the commentary.

1. A. The Councils observed that ICF/MRs were not covered by Section 3.0. The Division amended the section to add coverage of ICF/MRs.

1. B. The Councils observed that Sections 3.0 and 4.0 were not consistent with Medicaid law in the context of Medicaid-funded residents of State-run nursing facilities. The Division added language excluding application of the DLTCRP regulation to DHSS decisions to terminate benefits (e.g. discharge beneficiary from LTC facility). The citation to the DMMA fair hearing system is provided.

1.C. The Councils observed that Medicare beneficiaries have a right to appeal a proposed nursing home discharge through a Quality Improvement Organization. The Councils recommended inclusion of an explanatory comment or note highlighting the availability of both appeal systems. In response, the Division merely “parrots” its response under §1.C. The response makes absolutely no sense. The comment addressed the right to a Medicare appeal, not a Medicaid appeal.

1.D. The Councils recommended clarification of whether facilities covered by Section 3.0 (Medicaid/Medicare enrolled) were also covered by Section 4.0 (State licensed under 16 Del.C. Ch. 11). The Division clarified that such facilities would be covered by both Sections 3.0 and 4.0.

2. The Councils objected to a narrow definition of “transfer and discharge” that categorically presumed that all persons whose residency was terminated go to another facility. The Division amended Section 2 to recite as follows: “‘Transfer and discharge’ is defined separately in Section 3.0 and 4.0.” Section 4.1 is then amended to read as follows: “‘Transfer and discharge’ includes movement of a resident to a location outside the licensed facility.” This is acceptable. However, the Division ostensibly forgot to include any definition of “transfer and discharge” in Section 3.0.

3. The Councils recommended addition of a definition of “legal representative”. The Division adopted a slight variation of the definition proffered by the Councils.

4. The Councils recommended an amendment to expand the scope of agencies to whom a copy of the notice of discharge should be given, including the DSHP Plus MCO and DHSS agency involved in the resident’s placement. The Division agreed and adopted the Councils’ amendment verbatim.

5. The Councils recommended deletion of a comma. The Division deleted the comma.

6. The Councils recommended combining two sections into a single section. The Division agreed and adopted the Councils’ proposed amendment verbatim.

7. The Councils observed that the “notice” provisions in §3.5 did not comport with Medicaid regulations and caselaw. In response, the Division added 4 subsections to the “content of notice” section.

8. The Councils recommended incorporating a requirement that the notice include the procedure for requesting a hearing. The Division added a requirement that the notice include the “method by which the resident may request a hearing”.

9. The Councils recommended an amendment to clarify that a facility's discretion to transfer residents to another room is limited by Title 16 Del.C. §§1121(13) and 1121(28). The Division agreed and inserted a conforming sentence.

10. The Councils noted that Section 3.0 omitted the right to readmission after a stay in an acute care facility. The Division added a reference to the applicable statute covering readmission.

11. The Councils recommended strict enforcement of the readmission statute [Title 16 Del.C. §1121(18)]. However, in the absence of strict enforcement, the Councils recommended adding a regulation memorializing the Division's discretionary authority to direct readmission or preserve one bed during the pendency of a hearing. The Division declined to honor the recommendation, commenting as follows: "The Division has no legal authority to impose bed holds before a decision that a discharge was improper." [emphasis supplied] This is problematic for multiple reasons.

A. First, a resident who requests a hearing to contest a proposed discharge could be involuntarily evicted from a facility during the pendency of proceedings 30 days after the issuance of the discharge notice. The Division's interpretation means it would have no authority to direct maintenance of the status quo, i.e., preserving the resident's bed. For example, if the resident requested a hearing on the 30th day after receiving a discharge notice, the regulations would not prevent the facility from physically evicting the resident the next day. The April version of the proposed regulation contained the following protection:

1.1.2. Within 5 days of the receipt of the notice of appeal the Division shall notify the facility that an appeal has been filed and that the patient or resident is not to be discharged during the time the appeal is underway.

15 DE Reg. 1405, 1406 (April 1, 2012)

The final regulation omits any such safeguard to deter discharge during the pendency of proceedings. This is a major omission.

B. The Division's interpretation of its authority represents an unfortunate abdication of responsibility and a reversal of DLTCRP practice. The attached decision in Pioneer House, Carelink v. DLTCRP, 2007 WL 4181670 (Del. Super. November 5, 2007) is illustrative. In this case, the facility attempted to discharge a resident who was returning from acute care treatment. The Division did not defer action until issuance of a hearing officer's decision. The Division directed the facility to readmit the resident during the pendency of proceedings. When the facility refused to comply, the Division imposed civil money penalties which were upheld by the Court.

C. The Division's interpretation is contrary to the recent DHSS administrative hearing decision in In re: Proposed Discharge - J. H., resident of PTA (DHSS August 14 2012). In that case a facility filled the only available bed after a hearing but prior to disposition. The hearing officer noted that Title 16 Del.C. §1113 authorizes DHSS to suspend admission to a long-term care facility if the facility is violating Chapter 11. At 26. If the facility wishes to contest a DHSS notice suspending admission, it must request a hearing to contest the merits. See Title 16 Del.C. §1114. DHSS is not "impotent" when faced with facial violations of Chapter 11.

12. The Councils reiterated its recommendation to include a definition of "legal representative" in connection with §4.3.1. See Par. 3 above. The Division added the definition to the final regulation.

13. Consistent with Par. 7 above, the Councils recommended embellishment of the "content of notice" provisions in §4.5. The Division added four subsections..

14. Consistent with Par. 8 above, the Councils recommended incorporating a requirement in §4.5.4 that the notice include the procedure for requesting a hearing. The Division added a requirement that the notice include the "method by which the resident may request a hearing"

15. Consistent with Par. 6 above, the Councils recommended combining two sections into a single section. The Division agreed and adopted the Councils' proposed amendment verbatim.

16. Consistent with Par. 9 above, the Councils recommended an amendment to clarify that a facility's discretion to transfer residents to another room is limited by Title 16 Del.C. §§1121(13) and 1121(28). The Division agreed and inserted a conforming sentence.

17. Consistent with Par. 11 above, the Councils recommended strict enforcement of the readmission statute [Title 16 Del.C. §1121(18)]. However, in the absence of strict enforcement, the Councils recommended adding a regulation directing readmission or preserving one bed during the pendency of a hearing. The Division declined to honor the recommendation, commenting as follows: "The Division has no legal authority to impose bed holds before a decision that a discharge was improper." This is problematic for the reasons compiled in Par. 11.

18. The Council recommended adding a definition of "acute care facility" as follows:

"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.

The Division declined to adopt the recommendation, responding as follows:

The generally accepted meaning of "Acute Care" is short-term medical treatment, usually in a hospital for patients having an acute illness or injury or recovering from surgery. There is no indication that any broader meaning of "Acute Care Facility" was intended by the statute.

19. The Councils recommended that the appeal request be submitted to the State, not the facility. The Councils also expressed concern that the requirement of sending a copy to various agencies could be construed as necessary to "perfect" an appeal. The Division rejected the recommendation based on the following:

The facility and the resident are the parties to a discharge. As such, the facility is aware of the date that the discharge notice was received by the resident, and is aware of when the 30 days for requesting a hearing expires. In addition, it is likely to be easier for resident to provide notice to the facility than to the DLTCRP, or the State LTC Ombudsman. The copies to the DLTCRP and the State LTC Ombudsman do not have a time requirement and would not be the basis for a technical dismissal.

This makes little sense. Medicaid beneficiaries do not submit an administrative hearing request to an MCO or facility. They submit it to the State. The DLTCRP's commentary suggests that the facility will assess the timeliness and content of the appeal rather than the State. This is a dangerous approach since the facility is not impartial. Indeed, it could simply assert that it never received the request for appeal and then argue that the time period to appeal has lapsed! For example, in the Pioneer House/Carelink case described in Par. 11 above, the facility declined to forward the resident's request for hearing to the Division. See attached July 31, 2006 DLP letter to DLTCRP.

20. The Councils noted that §5.1.1.2 categorically applied a 30-day appeal timeline while a Medicaid beneficiary could have 90 days to appeal under both federal and State regulations. The Division responded that "a Medicaid beneficiary requesting a hearing to contest a discharge has 30 days to do so." This is arguable. The federal Medicaid regulation generally identifies a 90-day notice period [42 C.F.R. §§431.206(c)(3) and 431.221] but elsewhere establishes a minimum 30-day notice period. See 42 C.F.R. §483.12. DHSS can have standards which exceed the minimum and the DHSS regulations suggest that a 90-day period would apply. See 16 DE Admin Code Part 5000, §§5001, Par. 2.C; §5307, Par. C.2; and §5401, Par. 1.C.

21. The Councils recommended an amendment to clarify a resident's right to examine case records regardless of their lack of intended use in the proceedings. In response, the Division added a general reference to additional rights. See new §5.5.6.

I recommend that the SCPD "open a dialog" or request a meeting with DHSS representatives to discuss Pars. 1.C, 11, 17, and 18.

6. DOE Final Early Childhood Teacher Regulation [16 DE Reg. 286 (9/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in June, 2012. A copy of the June 20, 2012 GACEC letter is attached for facilitated reference. The Councils identified only grammatical and formatting concerns. The Department of Education acknowledged the comments and effected all (11) of the suggested corrections.

Since the regulation is final, and the DOE adopted all suggested changes, I recommend no further action.

7. DOE Final Health Exams and Screening Regulation [16 DE Reg. 283 (9/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in July, 2012. A copy of the SCPD's July 23 letter is attached for facilitated reference.

The Councils shared a preference for implementation of the substantive standards in the 2012-13 school year while noting its understanding of the rationale for deferral to the 2013-14 school year. The Department of Education acknowledged the comment and adopted the final regulation with no further changes.

I recommend no further action.

8. DelDOT External Equal Employment Opportunity Complaint Reg. [16 DE Reg. 270 (9/1/12)]

The Department of Transportation proposes to amend its external equal employment opportunity complaint procedures.

As background, the Federal Highway Administration (FHWA) has jurisdiction to investigate and resolve complaints of discrimination filed under several anti-discrimination laws, including the ADA and Section 504. See attached FHWA Office of Civil Rights publication, "Investigating External Complaints of Discrimination". Aggrieved parties may file a complaint directly with the U.S. DOJ, FHWA or the local State Highway Agency ("SHA"). See attached FHWA OCR Publication, "Procedures Manual for Processing External Complaints of Discrimination", §2-1, Pars. A and E.B.3. DelDOT's proposed regulation covers its procedures for processing complaints it receives against an entity with a "Federal-aid contract with the Department". See §2.0, Coverage.

I have the following observations.

First, the regulations clarify that Title VI and ADA complaints are treated somewhat differently than other complaints, i.e., DelDOT does not issue a probable cause finding or final determination. Rather, it submits its investigation file and report to the FHWA which issues the determination (Letter of Finding). See §§6.3, 6.5, 6.6, and 6.7. This is consistent with FHWA guidance. See FHWA OCR publication, "Investigating External Complaints of Discrimination", §2-1, Par.E.A4. However, it is unclear what process applies to a distinct §504 complaint (without ADA allegations) or a combined §504/ADA complaint. The federal guidance suggests that §504 complaints are treated like ADA complaints since there are several references to "Section 504/ADA" complaints. I recommend that DelDOT consult the FHWA OCR for direction. If §504 complaints are treated like ADA complaints, the DelDOT regulation should specifically address §504.

Second, the proposed regulation indicates that “(c)omplaints must be filed no later than 180 days” from the date of the act of discrimination, awareness of the discrimination, or latest instance of discrimination if there has been a continuing course of conduct [§4.3]. In contrast, the OCR Procedures Manual authorizes extensions beyond the 180-day period. See §2-1, Par. D. The DelDOT regulation is facially misleading since it does not identify such exceptions.

Third, in §7.3, it would be preferable to insert “or Department of Labor” after “Delaware Human Relations Commission” since it is a core employment anti-discrimination agency. Section 7.3 specifically mentions the federal EEOC and its state counterpart is the State DOL.

Section 4.5.7 authorizes discretionary dismissal of a complaint if “(t)he same complaint allegations have been filed with another Federal, State or local agency”. In contrast, the federal Procedures Manual only authorizes such dismissal if the other agency’s complaint system meets certain standards for processing and remedies:

Section 2-2, Par. I. Dismissals

...A complaint may be dismissed for the following reasons:

...5. The complaint has been investigated by another agency and the resolution of the complaint meets USDOT/FHWA regulatory standards; e.g., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet USDOT’s standards; or

...8. The same complaint allegations have been filed with another Federal, State, or local agency, or through a respondent’s internal grievance procedures, including due process proceedings, and FHWA anticipates that the respondent will provide the complainant with a comparable resolution process under comparable legal standards; e.g., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet USDOT’s standards; ...

It would be preferable to conform §4.5.7 to the federal guidance.

I recommend sharing the above observations with DelDOT with a courtesy copy to its Title II ADA coordinator, John McNeal; and the FHWA OCR.

Attachments

8g:legreg/912bils
f:pub/bjh/leg/2012p&l/912bils

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

GEORGE V. MASSEY STATION
516 WEST LOCKERMAN STREET
DOVER, DELAWARE 19904
TELEPHONE: (302) 739-4553
FAX: (302) 739-6126

July 27, 2012

Sharon L. Summers
Planning and Policy Development Unit
Division of Medicaid and Medical Assistance
1901 North DuPont Highway
P.O. Box 906
New Castle, DE 19720-0906

RE: DMMA Proposed Medicaid Telemedicine Regulation [16 DE Reg. 44 (July 1, 2012)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Medicaid and Medical Assistance proposal to adopt a regulation allowing the use of a telemedicine delivery system for providers enrolled under the Delaware Medicaid program. The Council would like to share the following observations.

First, authorizing telemedicine offers many advantages to individuals with disabilities, including less transportation time and expense in reaching providers and improved access to subspecialties not widely available in a local area. The concept therefore merits endorsement.

Second, the standards omit any requirement that the use of telemedicine be considered only when it is consistent with effective communication. The Americans with Disabilities Act (ADA) generally contemplates accommodations to ensure effective communication between medical providers and patients; therefore, it would be preferable to "highlight" this consideration in the regulation since it could otherwise be inadvertently overlooked. See attachments. The following sentence could be added:

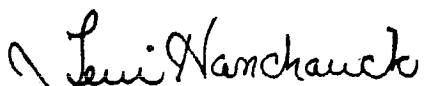
The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modifications, if necessary to ensure effective communication.

Third, in Section 27, "Provider Qualifications", second paragraph, first bullet, the verb/predicate has been omitted and the word "within" is misspelled. Consider the following amendment: "Act within their scope of practice".

Fourth, in the "Covered Services" section, the reference to "illness or injury" is "underinclusive" since it would exclude diagnoses and treatment of "conditions" such as cerebral palsy or epilepsy. Medicaid covers more than illnesses and injuries. Compare attached DHSS definition of "medical necessity".

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

Sincerely,

A handwritten signature in cursive script that reads "Terri Hancharick".

Terri A. Hancharick
Chairperson

TAH:kpc

Enclosures

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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July 27, 2012

Sharon L. Summers
Planning and Policy Development Unit
Division of Medicaid and Medical Assistance
1901 North DuPont Highway
P.O. Box 906
New Castle, DE 19720-0906

RE: DMMA Proposed LTC Ombudsman Program Regulation [16 DE Reg. 42 (July 1, 2012)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Medicaid & Medical Assistance (DMMA) proposal to adopt an amendment to the Medicaid State Plan.

As the "Summary of Proposal" section (p. 43) indicates, transfer of three State long-term care facilities (DHCI, EPBH, and GBHC) to DSAAPD in the FY11 budget bill created a conflict of interest. The conflict resulted from the DSAAPD Division Director supervising both the State Long Term Care (LTC) facilities and the Ombudsman since the Ombudsman is expected to be an independent monitor of LTC facilities. To resolve the conflict, legislation (S.B. No. 102) was enacted to place the Ombudsman under the Office of the Secretary. The proposed regulation revises the Medicaid State Plan to reflect this change. Council endorses the revision. However, consistent with the attached June 17, 2011 GACEC letter on Senate Bill No. 102, the GACEC requested a DHSS commitment to address the following: 1) conflicts between DHSS Administration and the Ombudsman; and 2) the need to ensure the availability of independent legal counsel to the Ombudsman. Council would like to request additional information to assess whether the Department ever implemented its commitment.

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

Sincerely,

A handwritten signature in cursive script that reads "Terri Hancharick".

Terri A. Hancharick
Chairperson

TAH:kpc

Enclosures



Governor's Advisory Council for Exceptional Citizens (GACEC) 516 West Loockerman St., Dover, DE 19904
302-739-4553 (voice) 302-739-6126 (fax) <http://www.gacec.delaware.gov>

MEMORANDUM

DATE: June 17, 2011

TO: The Honorable Members of the Delaware General Assembly

FROM: Terri A. Hancharick, Chairperson
GACEC

RE: Senate Bill No. 102 (Long-term Care Ombudsman)

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed Senate Bill 102 which would establish a long-term care ombudsman program within the Department of Health and Social Services (DHSS). As background, the federal Older Americans Act provides funding to states to establish a long-term care ombudsman program either through a public or private agency. Many years ago, Delaware's long-term care ombudsman program was operated as a non-profit, rather than a State agency. The current enabling statute establishes the program within the Division of Aging and Services for Persons with Physical Disabilities (DSAAPD). See Title 16 Del.C. §1150. Senate Bill 102 would establish the program within DHSS rather than any particular division. According to the synopsis, the rationale is as follows: "This change is required by the Federal Administration on Aging to keep the Ombudsman program in a separate Division from the long term care facilities."

This change is ostensibly prompted by the placement of State long-term care facilities under DSAAPD rather than the Division of Public Health (DPH). Consistent with the March 3, 2011 DSAAPD presentation to the JFC, the DSAAPD assumed responsibility for State long-term care facilities effective January 1, 2011. Eighty-nine percent (89%) of DSAAPD staff are now employed in the State nursing homes. It is understandable that the federal Administration on Aging would identify a conflict of interest for the Ombudsman who is expected to independently monitor such facilities. The relevant federal statute (attached) prohibits or discourages conflicts of interest. See also the attached NCCNHR resource paper entitled "Conflict of Interest and the Long-term Care Ombudsman Program (July, 2009). According to the attached DSAAPD JFC presentation, the

Department plans to place the Ombudsman within the Office of the Secretary, reporting to Kathi Weiss, the DHSS Director of Constituent Relations.

Council considers the transfer of the Ombudsman from DSAAPD to the Office of the Secretary to be an improvement; however, obvious potential for conflict still remains with placement in any part of DHSS. Moreover, the attached federal law requires the provision of "adequate legal counsel...without conflict of interest." At a minimum, it would be preferable for DHSS to prepare a Memorandum of Understanding (MOU) or other document assuring the independence of the Ombudsman. A better alternative would be to amend the enabling statute by adding the following sentences to §1150:

The Department shall serve as the administering agency for the Office while ensuring its independence and freedom from conflicts of interest through regulation, interagency agreement, or other written assurances which shall include, without limitation, the availability of legal counsel without conflict of interest.

The latter provision could be addressed through an interagency agreement with the Attorney General's Office. Council would request that copies of any agreements that may be developed be shared with the GACEC and other disability advocacy groups in Delaware.

The Legislature could also consider placement of the Ombudsman with a different State agency. For example, to obviate conflicts of interest, the Developmental Disabilities Council and State Council for Persons with Disabilities are placed administratively with the Department of Homeland Security. Cf. Title 29 Del.C. §8210.

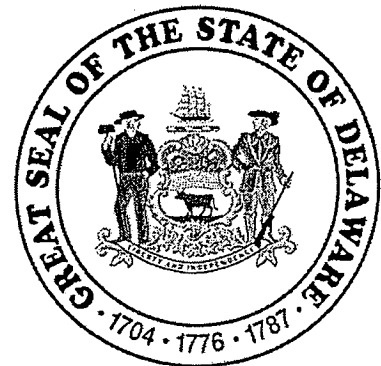
Thank you for your consideration of our observations. Please contact the GACEC office if you have any questions on our comments.

CC: The Honorable Rita Landgraf, DHSS
Deborah Gottschalk, DHSS
Lisa Bond, DHSS
Joanne Finnigan, DHSS
Kathleen Weiss, DHSS
William Love, DHSS

Attachments

DELAWARE ADMINISTRATIVE CODE

Drafting and Style Manual



September 2009 Edition

PREFACE

The Division of Research was created by the Delaware General Assembly to act as a reference bureau for information relating or pertaining to legislative matters and subjects of interest to the Senate and House of Representatives.

Among the services provided is the publication of regulations submitted by executive branch agencies to the **Registrar of Regulations**. This document enables interested citizens to find all of the regulations proposed by any state agency in one convenient location. The monthly *Delaware Register of Regulations* is available in hardcopy and can also be found on-line at:

<http://regulations.delaware.gov/>

The composition and style guidelines in this manual are intended to provide editorial assistance in drafting documents to be published in the monthly *Delaware Register of Regulations* and the *Delaware Administrative Code*. These guidelines are not intended to be inflexible rules, nor are they complete in scope. The staff of the Registrar's office hopes that use of these suggestions, together with attention to proper English usage, will produce greater clarity and accuracy in the texts of official documents.

INTRODUCTION

Statutory Authority provides a condensed summary of administrative law and is commonly referred to as the *Administrative Procedures Act*, located in Title 29, Chapter 101 of the Delaware Code. The key principle is that a state agency must have the legal authority to adopt a regulation.

Customary Language and Usage covers the basic style and format in which executive agency regulations traditionally appear in Delaware. Regulations should be uniform in style and language conventions and be drafted in a clear and concise manner, since they impose certain requirements or restrictions on individuals' rights. The guidelines contained herein are similar to those used by the Division of Research when drafting legislation.

Questions regarding regulatory drafting or this manual should be directed to the Registrar's Office by phone at 302-744-4327, by E-mail at Jeffrey.Hague@state.de.us or via the Internet at:

<http://regulations.delaware.gov/>

1.0 Statutory Authority**1.1 General Information**

Generally, the principle of separation of powers states that under our federal and state constitutions, the legislative branch, enacts laws while the executive branch carries out the laws. In accordance with this principle, an administrative agency does not have authority to enact law. The Delaware Code contains the following broad delegation of rulemaking power to Delaware executive agencies:

"The General Assembly has conferred on Boards, Commissions, Departments and other agencies of the Executive Branch of State Government the authority to adopt regulations..." (29 Del.C. §1131).

Pursuant to this provision, the Delaware General Assembly enacts laws that direct a specific state agency to adopt regulations that include details of, implementing, executing, embellishing upon, or clarifying a specific statutory scheme. If an agency adopts a regulation that falls outside of the rulemaking powers delegated by statute to that agency, then the regulation does not fall within statutory authority and is theoretically deemed invalid.

1.2 Citing the Proper Statute as Authority for Adopting Regulations

Agencies should not, in general, cite any of the provisions in chapter 101 of Title 29 of the Delaware Code as statutory authority. Although this chapter contains the provisions governing the rulemaking process all agencies must follow, agencies should refer to the language in the statutes that detail the adoption of regulations into their particular agency.

1.3 Failure to Implement the Law as Directed by Statutory Authority

Repeating existing statutory information should be avoided when drafting regulations. Redundant text is unnecessary because a statute may be amended, thereby requiring an amendment to the regulation. Instead, regulations should reflect what is set forth in a statutory scheme. For example, suppose a statute states:

"Any other provision of this chapter notwithstanding, the Court or the Department in making a determination as to what damages shall be paid by the Department shall consider only 2 factors..."

Any corresponding regulations should actually list those factors the department feels necessary for a person to comply with in order to be granted a license. To only state in the regulations that the Department shall only consider "2 factors" is insufficient information.

1.4 Exceeding Statutory Authority

When drafting regulations, each agency must scrutinize the authorizing statute to determine the extent to which the General Assembly has assigned rulemaking authority.

Similarly, a statute that authorizes regulations to govern the issuance of a building permit does not, on its own, authorize the regulations to provide for the suspension, renewal or revocation of such permit.

In addition, regardless of whether the authorizing statute is general or confining, certain types of provisions - such as penalties, the right to appeal to the courts etc. - require specific statutory authority.

1.5 Regulation Validity

In order for a regulation to be valid, an agency must comply with the rulemaking process set forth in the Delaware Code. Title 29, Chapter 101, §10102 (7) defines a regulation as follows:

(7) "**Regulation**" means any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court. Such statements do not include locally operative highway signs or markers, or an agency's

explanation of or reasons for its decision of a case, advisory ruling or opinion given upon a hypothetical or other stated fact situation or terms of an injunctive order or license."

According to the definition, if an agency drafts any directive that includes law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court, that statement is considered a regulation.

1.6 Conclusion:

- Avoid redundancy or paraphrasing the provisions of the Delaware Code in a regulation. Make sure the regulations actually implement the program or statutory outline.
- All directives affecting individuals regardless of the terminology the agency uses, should be adopted as regulations pursuant to the rulemaking process set forth in Title 29, chapter 101.

2.0 Standard Document Format

2.1 Submission Guidelines:

2.1.1 Documents must be submitted to the Registrar's office no later than the 15th of the month for publication on the first of the following month issue of the Register.

2.1.2 Documents should be submitted to the Registrar in electronic format.

2.1.3 Proposed Regulations filed electronically should include:

2.1.3.1 Text of the proposed regulation formatted to the specifications of the Registrar as outlined in section 2.4.3.

2.1.3.2 Notice of Public Hearing and/or Notice of Public Comment Period, including agency contact information and the method of submitting comments.

2.1.3.3 A summary of the regulatory action when available.

2.1.3.4 The entire text of a regulation should be submitted if the regulation has not been through the APA process.

2.1.4 Final Regulations filed electronically should include:

2.1.4.1 Order adopting the Final Regulation.

2.1.4.2 A summary of the regulatory action when available.

2.1.4.3 Text of the Final Regulation formatted to the specifications of the Registrar as outlined in section 2.4.4.

2.1.4.4 A non-marked up version of the regulation as amended.

2.1.4.5 Any other supporting documents such as a Hearing Officers report, etc. as deemed appropriate by the submitting agency.

2.1.4.6 The entire text of a regulation should be submitted where possible.

2.2 Header (See Figure 2.1)

2.2.1 The beginning page of each document submitted should contain an identifying heading including:

2.2.2 The complete name of the promulgating agency including division and subdivision if applicable, typed in the upper left corner of each page, flush with the left margin; and

2.2.3 The Delaware Administrative Code citation, if assigned.

2.2.4 The statutory authority to promulgate the regulation, flush with the left margin.

Figure 2.1
Header Example

Agency Name
Division Name
Subdivision Name
Delaware Administrative Code citation (if assigned)
Statutory Authority: Title Delaware Code, Section (Title Del.C. Section)

2.3 **Numbering**

- 2.3.1 Regulatory text should be numbered with numerals only.
- 2.3.2 Start out with a 1.0 as the first section and number down tabbing in one level for additional subsection. See Figure 2.2 for an example.

Figure 2.2
Numbering a regulation

Example:

3.0 **Use of Designations**

3.1 Designation "Certified Public Accountant" and the Abbreviation "CPA" in the Practice of Certified or Public Accountancy:

3.1.1 Only the following individuals and entities may use the designation "certified public accountant", the abbreviation "CPA", and other designations which suggest that the user is a certified public accountant, in the practice of certified or public accountancy:

3.1.1.1 An individual who is registered with the Board and holds a certificate of certified public accountant and a current permit to practice.

3.1.1.2 A sole proprietorship, partnership, corporation, or any other entity authorized under Delaware law or a similar statute of another state which is registered with the Board and holds a current firm permit to practice.

3.2 Designation "Certified Public Accountant" and the abbreviation "CPA" by certificate holders who do not maintain a permit to practice:

3.2.1 An individual who holds a certificate of certified public accountant but does not maintain a permit to practice may use the designation "certified public accountant" or the abbreviation "CPA" on business cards and stationery if:

3.2.1.1 The certificate of certified public accountant has not been suspended or revoked and is in good standing.

3.2.1.2 The individual does not engage in the practice of certified or public accountancy and does not offer to perform certified or public accountancy services.

2.4 **Body of text.**

- 2.4.1 All documents should be typed in conventional uppercase and lowercase format.
- 2.4.2 Documents should be typed in *Arial* font face and **10 point** font size. Automatic numbering and bullets function of the software should not be used.
- 2.4.3 Proposed Regulations:
 - 2.4.3.1 Proposed changes to an existing regulation must be indicated as follows:
 - 2.4.3.1.1 Arial type shall indicate the text existing prior to the regulation being promulgated
 - 2.4.3.1.2 Underlined text must be used to indicate new text.

2.4.3.1.3 Language which is ~~stricken~~ shall indicate text being deleted.

2.4.3.2 If a new regulation is being proposed, all language must be underlined.

2.4.4 Final Regulations:

2.4.3.2 Final Regulations must be formatted as follows:

2.4.3.2.1 Arial type must be used indicate the text existing prior to the regulation being promulgated.

2.4.3.2.2 Underlined text must be used to indicate new text added at the time of the proposed action.

2.4.3.2.3 Language which is ~~stricken~~ shall indicate text being deleted at the time of the proposed action.

2.4.3.2.4 **[Bracketed bold language]** must be used to indicate text added between when the regulation was proposed and the time the final order is issued.

2.4.3.2.5 ~~**[Bracketed bold stricken]**~~ must be used to indicate language deleted between when the regulation was proposed and the time the final order is issued.

2.5 Footnotes.

2.5.1 Footnotes, if used, should be referenced at the end of the regulation. The use of footnotes should be kept to a minimum.

2.6 Appendices.

2.6.1 Avoid using appendices as part of a regulation. Material important enough to be set out should be made part of the regulation itself and numbered accordingly. Appendices are not considered to be part of the regulation proper and may not be published in the *Delaware Register of Regulations*.

3.0 Structure Of Regulations

3.1 Definitions (See Figure 3.1)

3.1.1 It is recommended that definitions of terms be included in each regulation. Definitions provide clarification to terms used within a regulation and allow the regulation writer to control the meaning of a word. Define a term only when the meaning of a word is important and it is used more than once in the regulation. Regulatory information should not be included in the definition.

3.1.2 Definitions should be formatted as provided in this section.

- Place definitions at the beginning of the regulation as one of the first numbered sections.
- The first paragraph should read, "The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:"
- Arrange the words or specific terms in alphabetical order.
- Do not number individual definitions.
- Uppercase the first letter of the first word in each definition. All subsequent words in each definition should be lowercase, unless words are proper nouns. The word or term being defined should be placed within quotation marks and bold.
- Immediately after the defined word or term, insert the word "means"

Figure 3.1

EXAMPLE:

1.0 Definitions.

1.1 The following words and terms, when used in this regulation, should have the following meaning unless the context clearly indicates otherwise:

“**Adoptive parent**” means a provider who gives parental care and establishes permanent family relationships for children in the providers home for purposes of adoption. Standards apply to adoptive parents until the final order of adoption is issued.

“**Adult**” means any individual 18 years of age or older.

“**Agency**” means the local welfare or social services agency.

3.2 Arrangement or organization.

3.2.1 Concise drafting of a regulation, as well as the general design and logical arrangement of its sections, subsections and subdivisions, better communicates the meaning of the regulation. The major objective in arranging text within a regulation is to make the document as clear and understandable as possible.

3.3 Sequence.

3.3.1 The sequence of elements of a regulation as provided in this section should be observed:

- Place general provisions before special provisions;
- Place more important provisions before less important provisions;
- Place frequently used provisions before less frequently used provisions; and
- Place permanent provisions before temporary provisions.

3.3.2 Gender.

3.3.2.1 Avoid using pronouns that indicate gender. Use the noun which the pronoun would replace. However, if pronoun gender must be indicated, use “his” instead of “his/her” and “he” instead of “he/she” or “(s)he.” The use of the masculine gender is addressed in 1 Del.C. §304 of the Delaware Code.

4.0 Citations

4.1 Citations to the Delaware Code.

4.1.1 When citing chapters, articles or sections of the Delaware Code, refer to the following relevant examples:

- Citing an entire chapter: 29 Del.C. Ch. 100 or 29 Delaware Code, Ch 100
- Citing a specific section: 29 Delaware Code, Section 10101 or 29 Del.C. §10101
- Citing multiple sections: 29 Delaware Code, Sections 500-520 or 29 Del.C. §§500-520
- Citing a subsection: 29 Delaware Code, Section 300(a) or 29 Del.C. §300(a)

4.2 Citations to the *Delaware Register of Regulations*.

4.2.1 The *Delaware Register of Regulations* is cited by volume, issue, page number and date. For example, to refer to Volume 13, Page 349 of the *Delaware Register of Regulations* issued on September 1, 2009 write:

13 DE Reg. 349 (09/01/09)

4.2.2 The Delaware Administrative Code is cited by title and regulation number: For example, to refer to Natural Resources and Environmental Control, Division of Air and Waste Management, Air Quality Management Section, Regulations for Requirements for Preconstruction Review use:

7 DE Admin Code 1125 Requirements for Preconstruction Review (name optional)

4.3 Federal statutory and federal regulatory citations.

- 4.3.1 When citing federal statutes, the official name, together with a reference to the United States Code, should be used as follows:

The Atomic Energy Act of 1954 (42 USC §§2011-2284)

- 4.3.2 The Federal Register should be cited by volume and page number. The approved short form of citation is "FR." Thus, 12 FR 1234 refers to text at page 1234 of Volume 12.
- 4.3.3 The Code of Federal Regulations should be cited by title and section numbers. "CFR" is the approved short form. Thus, 7 CFR 1.1 refers to text at 1.1 of Title 7.

5.0 Incorporation By Reference

- 5.1 Incorporation by reference is a device by which a document is made part of the regulation simply by referring to it. While the text of an incorporated document does not appear in their regulation, the provisions of the incorporated document are as fully enforceable as any other regulation.
- 5.2 When incorporating by reference it is necessary to cite the specific publication including year and volume that is being incorporated into the regulation. The text incorporating a document should be included in the text of the regulation.
- 5.3 A copy of the incorporated document shall be made available to the Registrar for public inspection purposes.
- 5.4 Each regulation that proposes to incorporate a document is identified in the *Delaware Register of Regulations* by an Editor's Note.

6.0 Composition And Style Guidelines For Document Drafting

6.1 Application of guidelines.

- 6.1.1 The composition and style guidelines in this manual are intended to provide editorial assistance in drafting documents to be published in the *Delaware Register of Regulations*.
- 6.1.2 Specific questions may arise which are not covered within this article, due to the general nature of these guidelines. These guidelines are primarily based on the following reference books:

A Manual of Style, University of Chicago Press (1982); and

Drafting Legislation and Rules in Plain English, by Robert J. Martineau, West Publishing Company (1991).

Each of these books provides extensive guidance in most areas of document drafting.

- 6.1.3 Matters of spelling, usage, and word division should be referred to *Webster's Ninth New Collegiate Dictionary*, Miriam-Webster, Inc., or *The American Heritage Dictionary of the English Language*, New College Edition

6.2 General guidelines.

- 6.2.1 In general, keep the language of the text as clear and simple as possible. When drafting, remember that documents should be written so that the general public can understand them. Avoid using language that only individuals with specialized knowledge can understand. Consistency of expression, logical arrangement, and adherence to accepted usage aid readability.
- 6.2.2 Strive for consistency of terminology, expression and arrangement. Avoid using the same word or term in more than one sense. Conversely, avoid using different words to denote the same idea. Apply the principles of consistency to phrases, sentences, paragraphs, arrangement and format. For example, in the text of a regulation, two or more subdivisions which are similar in substance should be parallel in form.
- 6.2.3 Tabulation is used to arrange the structure of subdivisions in a document. All items in the tabulated enumeration must belong to the same class. Each item listed must be parallel to the introductory

language. The following tabulation is incorrect because subdivision is not parallel in substance or form to the introductory language:

EXAMPLE:

- 1.1 An applicant for licensure shall:
 - 1.1.1 Complete the application for examination;
 - 1.1.2 Submit in advance the examination fee; and
 - 1.1.3 Eligibility for licensure by reciprocity.
(Language not parallel)

Subdivision 1.1.3 should read, "Be eligible for licensure by reciprocity."

- 6.2.4 Absolute conciseness does not ensure clarity but, in general, keeping a document simple and short avoids confusion and misunderstanding. In the case of regulatory drafting, divide a lengthy text into more than one regulation in order to avoid the complexities entailed in multiple sections and to make the text easier to read. Avoid long sentences where short ones will suffice.
- 6.2.5 Ordinarily, use the present tense of verbs. However, the future tense is appropriate when using the imperative "shall." Section 6.3 provides additional information on the use of "shall".
- 6.2.6 Generally, use the active rather than the passive voice:

EXAMPLE:

Use: The Chairman appoints members of the committee.

Avoid: Members of the committee are appointed by the chairman.

- 6.2.7 Generally, use the third person:

EXAMPLE:

Use: The applicant shall file the appropriate forms.

Avoid: You shall file the appropriate form.

- 6.2.8 If an idea can be accurately expressed either positively or negatively, express it positively. The negative form is appropriate where a provision expresses a prohibition. Negative words should not be used where provisions provide only advisory guidance.
- 6.3 Use of "shall," "may" and "must."
 - 6.3.1 Use "shall" in the imperative sense to express a duty or obligation to act. The term "shall" is generally used in connection with statutory mandates. "May" is permissive and generally expresses a right, privilege or power. When an individual is authorized but not ordered to act, the term "may" is appropriate. If an obligation to act is intended, "shall" is used.
 - 6.3.2 Use "may not" when a right, privilege or power is restricted. Using "shall not" negates the obligation but not the permission to act; therefore, "may not" is the stronger prohibition. Wherever possible, the words "shall" or "may" are used in place of other terms such as "is authorized to," "is empowered to," "is directed to," "has the duty to," "must," and similar phrases. However, if certain action is intended to be a condition before accruing a right or privilege, the word "must" is used instead of "shall" or "may" (e.g., "In order to have your regulations published you must file them by the deadline.")
 - 6.4 Use of "any," "each" and "every."
 - 6.4.1 Do not use "any," "each," "every," "all," or "some," if "a," "an," or "the" can be used with the same result. If the subject of the sentence is plural, it is seldom necessary to use these adjectives. For

example, it should be stated, "Qualified employees shall..." rather than, "Any qualified employee shall..." If the subject of the sentence is singular, the indefinite pronoun is used only when the article "a" or "the" is inadequate, as when the use of "a" would allow the unintended interpretation that the obligation is to be discharged by applying it to a single member of the class instead of to all of them. If it is necessary to use an indefinite pronoun, follow these rules:

- 6.4.1.1 If a right, privilege or power is conferred, use "any," as in "Any qualified employee may..."
- 6.4.1.2 If an obligation to act is imposed, use "each," as in "Each employee shall..."
- 6.5 Use of "such" and "said."
 - 6.5.1 Avoid the use of "such" and "said." Instead, use "the," "that" or a pronoun. In many instances "such" and "said" mean nothing at all and can be omitted without any other words being substituted.
- 6.6 Use of "and/or."
 - 6.6.1 The term "and/or" should never be used. In general the term "and" means to add something to what has already been said. "Or" means in the alternative. The word "and" is a conjunctive and the word "or" is a disjunctive. In most cases the word "or" is proper to convey the thought of "one, or the other, or any of them." If emphasis is needed, the use of terms such as "any of the following," "all of the following," "either of the following," "or both," and similar modes of expression are sufficient.
- 6.7 Use of words both singular and plural.
 - 6.7.1 Avoid modifying singular words to be both singular and plural (e.g., parent(s)). Instead, indicate one or the other, or both (e.g., parent or parents).
- 6.8 Commas.
 - 6.8.1 Use commas to set off a nonrestrictive clause. A nonrestrictive clause gives added information about the word it modifies, but is not needed to complete the meaning of a sentence.

EXAMPLE:

New rules concerning the licensing of teachers, which I have not read, have been adopted.

"Which I have not read" does not significantly affect the primary meaning, which is that rules concerning the licensing of teachers have been adopted, therefore, commas are used around this nonrestrictive clause.

- 6.8.2 Do not use commas to set off a restrictive clause. A restrictive clause cannot be omitted without altering the meaning of the main clause, therefore, it should not be set off by commas.

EXAMPLE:

The requirements which an applicant must meet for certification are listed in the regulation.

Without the clause "which an applicant must meet for certification," the meaning of the sentence would be significantly altered.

- 6.8.3 Use a comma in a compound sentence to separate independent clauses joined by one of the coordinate conjunctions "and," "but," "for," "or," "nor."

EXAMPLE:

The board is responsible for collecting the revenue from all permits and fees, but the legislature sets the rates.

- 6.8.4 The use of a comma without a coordinate conjunction between two independent clauses is known as a comma fault and should be avoided.

EXAMPLE:

1. The board collects the fees and issues permits, the legislature sets the rates.

The sentence may be corrected by:

Using a coordinate conjunction after the comma.

2. The board collects the fees and issues permits, but the legislature sets the rates.

Using a semicolon between the two independent clauses.

3. The board collects the fees and issues permits; the legislature sets the rates.

Dividing the two independent clauses into two simple sentences.

4. The board collects the fees and issues permits. The legislature sets the rates.

- 6.8.5 Use commas to separate a series of three or more words, phrases or clauses.

EXAMPLE:

The board is responsible for collecting the revenue from all fees, permits, license certifications, and renewals.

- 6.8.6 If the elements within the sentence contain internal commas or other punctuation, separate the elements with semicolons.

EXAMPLE:

The board is responsible for collecting the revenue from fees for examinations; permits for shops, salons and schools; and license certifications.

- 6.9 Hyphens and compound words.

- 6.9.1 Many compounds are formed with the hyphen as a connector, but as these words become established the hyphen is often dropped in favor of the solid form.

- 6.9.2 Words that function as a compound adjective that are placed before the word they modify should be hyphenated.

EXAMPLES:

1. One weekend each month, Mr. and Mrs. Jones go on a 10-mile hike.
2. Our opponent resorted to low-level tactics.

However when these same word groups are placed after the nouns or pronouns they modify, they are not hyphenated.

EXAMPLES:

1. Mr. and Mrs. Jones hike 10 miles one weekend each month.
 2. Our opponent's tactics were low level.
- The hyphen is also used to avoid confusion in words like "re-form" (meaning to form again).

- 6.9.3 Hyphens should not be used in constructions like the following if the meaning is clear without them (e.g., "sales tax bill," "foreign aid plan"). The hyphen is not needed in these forms "navy blue skirt" or "dark green paint."
- 6.9.4 Compound words are listed separately within the dictionary. To avoid confusion, and sometimes absurdities, compound nouns that are usually solid words should be separated when the first part of the compound is modified by an adjective: "businessman, small-business man"; "sailmaker," "racing-sail maker."
- 6.9.5 Do not use the hyphen to connect an adverb ending in "ly" with a participle in such phrases as "newly married couple," or "elegantly furnished house." Adjectives ending in "ly" are another matter; hyphens should, for example, be used in "a gravely-voiced, grizzly-maned statesman of the old school."
- 6.9.6 Hyphens are not used in titles such as "commander in chief," "director general," "editor in chief," or "secretary general." Do use the hyphen in titles like "secretary-treasurer" or "law-enforcement officer."
- 6.9.7 In a series of hyphenated phrases, use the complete phrase in each instance.

EXAMPLES:

USE: On successive days there were three-inch, five-inch, and nine-inch snowfalls.

AVOID: On successive days there were three-, five- and nine-inch snowfalls.

6.10 Quotation marks.

- 6.10.1 Typographical usage dictates that the comma and the period always be placed inside the closing quotation mark, even though they sometimes logically do not seem to belong there.

EXAMPLE:

One package was marked "fragile," and the other package was marked "do not open until Christmas."

- 6.10.2 Semicolons and colons belong outside the closing quotation mark unless they are a part of the quoted material.

EXAMPLE:

One package was marked "fragile"; the other package was marked "do not open until Christmas."

6.11 Capitalization.

- 6.11.1 Capitalize civil, military, religious and professional titles when they immediately precede a personal name, as part of the name.

EXAMPLES:

Governor Markell;
Secretary Clinton; and
Chairman Jones

- 6.11.2 Capitalize full names of legislative, deliberative, administrative and judicial bodies, departments, bureaus, and offices. Lowercase common noun substitutes or incomplete designations, except abbreviations.

EXAMPLES:**Uppercase**

General Assembly of Delaware
Department of Transportation

Lowercase

state legislature
the department

- 6.11.3 Do not capitalize the following words unless they are part of a proper name:

EXAMPLES:

administration;
board;
commission;
executive branch, legislative branch, or judicial branch;
federal;
government; or
state.

- 6.11.4 Capitalize common nouns and adjectives that form an essential part of a place.

EXAMPLES:

Sussex County
City of Dover
Northern Delaware

- 6.11.5 Capitalize "State of Delaware" and "State."

6.11.6 Capitalize names of buildings and monuments.

EXAMPLES:

Washington Monument
Legislative Hall
Townsend Building

6.11.7 Capitalize only the official names of documents.

EXAMPLES:

Uppercase

Lowercase

Constitution of Delaware

state constitution

6.11.8 Capitalize the names of an specific act (e.g., Administrative Procedures Act).

6.11.9 Capitalize the word "Act" when it has previously been referred to or defined, and subsequent references are to the specific act.

6.11.10 Capitalize a word describing a part of a document only if it is followed by a specific number or letter designation.

EXAMPLES:

Uppercase

Lowercase

Chapter 4
Part IV

this chapter
this part

6.11.11 Lowercase "page" and "line" (e.g., page 10, line 22).

6.12 Writing numbers.

6.12.1 Arabic numerals are used for numbers greater than nine (e.g., 10, 11, 12...), except for proper names such as "Chapter 1," not "Chapter One." Numbers from one to nine are spelled out. Zero is written "0."

6.13 Percentages.

6.13.1 Numerals are used followed by a percentage symbol (%) for all percentages. All percentages consist of at least two digits.

6.13.2 Percentages greater than or equal to 10 are written in the following manner:

10%;
12%;
3.4%; or
15.63%.

6.13.3 Percentages less than 10 are written in the following manner:

9.6%;
8.64%; or
8.0%.

6.13.4 Percentages less than one are written in the following manner:

- 0.5%;
- 0.002%; or
- 0.621%.

6.14 Monetary figures.

6.14.1 Numerals are preceded by a dollar symbol (\$) for most monetary listings.

6.14.2 Amounts less than \$1.00 are written with a dollar symbol followed by a space, a decimal, and the cent value, to conform with the following:

- \$.04;
- \$.50; or
- \$.99.

6.14.3 Amounts greater than \$.99 but less than \$10 are written with a dollar symbol followed by the dollar value followed by a decimal point followed by the cent value, even if the cent value is ".00," to conform with the following:

- \$2.00;
- \$3.40; or
- \$9.99.

6.14.4 Amounts greater than \$9.99 are written with a dollar symbol followed by the dollar value followed by a decimal point followed by the cent value, unless the cent value is ".00," in which case no decimal point or cent value will be included, to conform with the following:

- \$10;
- \$10.06; or
- \$100.

6.14.5 Monetary listings incorporating seven or more digits are written to conform to the following:

EXAMPLES:

USE: \$1 million

AVOID: \$1,000,000

6.15 Dates.

6.15.1 In the text of documents, spell out the month of the year. Do not use the number of the month to signify the month. Do not abbreviate the name of the month.

EXAMPLES:

USE: December 2, 1994

AVOID: 12/2/94

Dec. 1, 1994

6.16 Temperature.

Forms of temperatures (i.e., Fahrenheit, Celsius and Kelvin) are written using numerals only. The temperature value is followed by a degree symbol (°) followed by a "F", "C" or "K" as the case may be.

EXAMPLES:

75° F,

30° C,

-4° F,

0° K

6.17 Fractions.

Fractions are written in numeric form (e.g., $\frac{1}{2}$, $\frac{3}{4}$, $\frac{1}{4}$). Mixed numerals (whole numbers and fractions) are also written in their numeric form (e.g., $1\frac{1}{2}$, $2\frac{3}{4}$, $13\frac{1}{4}$).

6.18 Units of measure.

Generally, abbreviations are not used in the *Delaware Register of Regulations*; however, there are a few exceptions when referring to units of measure. The following table serves as a guide to writing units of measure:

<u>USE</u>	<u>AVOID</u>	<u>USE</u>	<u>AVOID</u>
inches	in.	°F	Fahrenheit
feet	ft.	°C	Celsius
square feet	sq. ft.	°K	Kelvin
pounds	lbs.	centimeter	cm
barrel	bbl.	millimeter	mm
by	X	Watts	W.
Btu	British thermal unit	No.	#

6.19 Time.

Time should be written in Arabic numerals, with the exception of 12 p.m. which is written as "noon."

EXAMPLES:

USE: 10 a.m.	AVOID: 10:00 a.m.
10:30 a.m.	
noon	12 p.m.

6.20 Quotations.

6.20.1 Quotations should be used as follows:

- 6.20.1.1 Words within text which require emphasis are set off in quotation marks.
- 6.20.1.2 Brief quotes are enclosed in quotation marks; lengthy quotes are set off in the text but are not enclosed in quotation marks.
- 6.20.1.3 Quotation marks are used to enclose certain material following the terms "marked," "designated," "classified," "named," "endorsed" or "signed."

EXAMPLES:

1. Such sheep shall be accompanied by a waybill or owner-shipper certificate marked "for immediate slaughter."
 2. The term "meat" and the names of particular kinds of meat, such as beef, veal, mutton.
- 6.20.1.4 Quotation marks are used to enclose titles of articles, editorials, essays, papers, reports, subjects and themes.

EXAMPLE:

The procedures are described in "Methods of Analytical Chemists." In evaluating replicate data, table 19, page 935, "Journal of the Association of Official Analytical Chemists" (Volume 49, Number 5, October 1960), shall be followed.

- 6.21 Commonly used words with their plain language translations. The use of the words in the right column is preferred.

AVOID

USE

and/or	"A" or "B," or both
appear	seem
ascertain	find out
at this point in time	now
commence	begin
complete	fill out
comply	follow
constitute	be
disclose	show
elect	choose
endeavor	try
ensue	follow
execute	sign
experience	have, feel
facilitate	make easy
presently	now, soon
prior to	before, earlier
prohibit	forbid
purchaser	buyer
pursuant to	in response to
subsequent to	after, later
such, same, said	the, this, that, them, those, it
terminate	end
or the duration of	during
forthwith	immediately
forward	send
hereby	by this
herein	to this
hereinabove*	
hereafter*	
herinbelow*	
hereof	of this
hereto	to this
thereat, there,	at that level
thereby	by that

therein	in that
thereof	of that
thereto	to that
therewith	with that
thus	so, that way
transpire	happen
upon	on
vehicle	car, truck, way
vendor	seller
whereas	avoid using this term
wherein	where, in which

- * The use of the words "hereinabove," "hereinafter," and "hereinbelow" should not be used when referring to the position of a section or other provision. If a reference is necessary, specify the part, article, section, subsection or subdivision of the regulation by number.

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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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,


Tom 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

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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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.

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.

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".
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

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)
 (Cite as: 2007 WL 4181670 (Del.Super.))

C

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Superior Court of Delaware,
 New Castle County.
 PIONEER HOUSE, CARELINK, Appellants, De-
 fendants Below

v.

DIVISION OF LONG TERM CARE RESIDENT'S
 PROTECTION, Appellee, Plaintiffs Below.

C.A. No. 07A-01-003 JRS.

Submitted: Aug. 13, 2007.

Decided: Nov. 5, 2007.

Upon Appeal from a decision of the Division of
 Long-Term Care. **AFFIRMED.**

JOSEPH R. SLIGHTS, III, Judge.

*1 This 5th day of November 2007, upon con-
 sideration of the appeal of Carelink Community
 Support Services ("Carelink"), from the decision of
 the Division of Long Term Care Resident's Protec-
 tion (the "Division") imposing a \$1,250 per day
 monetary penalty upon Carelink,^{FN1} it appears to
 the Court that:

FN1. See Docket Item ("D.I.") 3, Division
 of Long-Term Care Resident's Protection
 decision (the "Division"), at 1 (Dec. 18,
 2006).

1. Debra Rice ("Ms.Rice") is a 34 year-old
 woman with cerebral palsy. She was a resident at
 Pioneer House, a state-licensed assisted living facil-
 ity operated by Carelink, when the events giving
 rise to the regulatory investigation at issue here first
 arose.

2. On May 30, 2006, Ms. Rice received a letter
 from Carelink informing her that she was being dis-

charged from Pioneer House due to repeated hospi-
 talizations that resulted from a reoccurring unstable
 medical problem. According to Carelink's letter,
 Ms. Rice was hospitalized five times in 2004,
 twelve times in 2005, and eight times from January
 to April in 2006. Carelink justified its discharge de-
 cision by citing to § 63.409C of the Delaware Reg-
 ulations for Assisted Living Facilities, which states:
 "An assisted living facility shall not admit, provide
 services to, or permit the provision of services to
 individuals who, as established by the resident as-
 sessment: Require monitoring of a chronic medical
 condition that is not essentially stabilized through
 available medications and treatments."^{FN2} The
 letter went on to explain that Ms. Rice would have
 sixty days to make other living arrangements, but
 could stay as long as necessary until such arrange-
 ments were made.

FN2. D.I. 9, at Ex. 1.

3. Ms. Rice was admitted to Christiana Hospit-
 al on June 20, 2006 and was discharged later that
 day back into the care of Pioneer House. The fol-
 lowing day, June 21st, Ms. Rice was admitted to St.
 Francis Hospital. On June 26, 2006, St. Francis
 Hospital attempted to discharge Ms. Rice and re-
 turn her to Pioneer House. St. Francis discovered,
 however, that Pioneer House had officially dis-
 charged Ms. Rice on June 22, 2006 and was refus-
 ing to allow her to return. With nowhere else to go,
 Ms. Rice was placed in The Arbors, a skilled nurs-
 ing home facility.^{FN3}

FN3. Appellant's brief states that St. Fran-
 cis Hospital unilaterally made the decision
 to send Ms. Rice to a nursing home facil-
 ity. The letter from Carelink dated June 26,
 2006, however, indicates that Ms. Rice
 was discharged from Pioneer House on
 June 22, 2006, and was not allowed to re-
 turn to Pioneer House upon her release
 from St. Francis.

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4. After learning of Ms. Rice's discharge, Carol Ellis ("Ms.Ellis"), director of the Division sent a compliance nurse, Pat Alt ("Ms.Alt"), to determine whether a medical basis existed for the discharge. Ms. Alt performed a nursing assessment on Ms. Rice and concluded that there were no medical grounds for the discharge. Specifically, she determined that Ms. Rice's medical condition was the same at the time of her assessment as it had been throughout Ms. Rice's long residency at Pioneer House. Ms. Alt also concluded that Pioneer House continued to be an appropriate placement for Ms. Rice.

5. After Ms. Alt's assessment, Ms. Ellis began a series of communications with Eileen Joseph ("Ms.Joseph"), President and CEO of Carelink, meant to secure Ms. Rice's return to Pioneer House. On August 17, 2006, Ms. Joseph sent a letter to Ms. Ellis reiterating Carelink's position that Ms. Rice was discharged for medical reasons. Ms. Joseph also explained in the letter that the facility would need a review of Ms. Rice's current medical condition and an independent medical evaluation to determine Ms. Rice's eligibility for return to Pioneer House.

*2 6. Ms. Ellis responded in a letter dated August 18, 2006, informing Ms. Joseph that the Division was imposing civil money penalties on Carelink, in the amount of \$1,250 per day, for its failure to allow Ms. Rice to return to Pioneer House. As support, Ms. Ellis cited to 16 *Del. C.* § 1109(e), which states "Each day of a continuing violation constitutes a separate violation ... No penalty for a nonhealth and safety violation shall exceed \$1,250 per day beyond the initial day." The letter also explained that an assessment conducted by the compliance nurse revealed that Pioneer House was still an appropriate living arrangement for Ms. Rice because her medical condition was unchanged. Ms. Ellis concluded the letter by informing Ms. Joseph of her opportunity to request an informal dispute resolution process regarding the imposition of the penalty.

7. Ms. Joseph and Ms. Ellis eventually spoke about Ms. Rice's return to Pioneer House and the additional measures that would be needed to address her health issues. Ms. Ellis explained that the Division did not believe Ms. Rice needed a new care plan, but Ms. Joseph disagreed. Ms. Joseph stated that because Ms. Rice had not resided at Pioneer House since June 22, 2006, she felt it was unethical for the facility to re-admit a resident who had received treatment for a serious medical condition without having a revised care plan. In response, Ms. Ellis reiterated that Ms. Rice did not need a new care plan to return to Pioneer House.

8. In the meantime, Ms. Rice had appealed her discharge from Pioneer House. A hearing on the appeal was held on September 8, 2006. The issues addressed at that hearing were: (1) whether, according to the requirements of 16 *Del. C.* § 1121(18), the facility's discharge was necessary for Ms. Rice's welfare, or the welfare of other residents; (2) whether the facility's refusal to allow Ms. Rice to return to Pioneer House on June 26, 2006 violated 16 *Del. C.* § 1121(18) because the facility's discharge was not necessary due to medical reasons and because the facility did not inform Ms. Rice about her right to request a hearing to contest the discharge; and (3) whether 16 *Del. C.* § 3225 provides a basis for discharge under Delaware law and, if so, whether Pioneer House met the statutory requirements for discharge.^{FN4}

FN4. D.I 3, Division's Sept. 20, 2006 decision, at 1.

9. The hearing officer released his 17 page (single spaced) decision on September 20, 2006. With respect to the first issue, the hearing officer concluded that 16 *Del. C.* § 1121(18) did not support Carelink's decision to discharge Ms. Rice. The hearing officer explained that while Ms. Rice's condition did require periodic hospitalizations, that did not change the way in which the facility and her treating doctors cared for her. Regarding the second issue, the hearing officer determined that Carelink violated 16 *Del. C.* § 1121(18) because the statute

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requires that residents be given thirty days notice prior to discharge. The hearing officer also pointed out that although the May 30, 2006 letter from Carelink stated Ms. Rice would have sixty days to vacate, she was discharged on June 22, 2006, eight days shy of the required thirty days. Finally, as to the third issue, the hearing officer stated that 16 *Del. C.* § 3225 did not provide a basis for Pioneer House to discharge Ms. Rice because the statute was not intended by the General Assembly to serve as a basis for discharging residents from long term care facilities. That statute alone did not establish grounds for Ms. Rice's discharge.^{FN5}

FN5. D.I 3, Division's Sept. 20, 2006 decision, 14-16.

*3 10. By letter dated September 22, 2006, Ms. Joseph exercised the facility's right to challenge the imposition of the penalty at an informal dispute resolution proceeding. She argued that Pioneer House's discharge of Ms. Rice was supported by 16 *Del. C.* § 1121(18), which gives a facility authority to discharge a resident for medical reasons. Thereafter, representatives from Carelink, including Ms. Joseph, met with the Division to discuss Ms. Rice's discharge and her stay at The Arbors. After the discussion concluded, Ms. Joseph asked the division to rescind the penalties, but the Division declined the request.

11. At some point after Carelink made the request to rescind the penalties, Carelink filed a license renewal application with the Division. Ms. Ellis informed Ms. Joseph in a letter dated October 6, 2006 that before a license renewal would issue, Carelink would have to pay whatever penalty had accrued as a result of the violation in addition to the annual licensing fee. The letter also addressed Ms. Joseph's request for an informal dispute resolution on the amount of the penalties. Ms. Ellis emphasized that there would be no further discussion regarding the merits of Ms. Rice's discharge at the informal resolution proceedings on the penalties. Ms. Ellis also pointed out that the September 20, 2006 decision of the hearing officer was binding, not ad-

visory. The record does not reflect any further response from Ms. Joseph regarding Ms. Ellis' October 6th letter.

12. An administrative hearing regarding the Division's imposition of civil money penalties on Carelink occurred on November 22, 2006 before the same hearing officer that issued the September 20, 2006 decision on Ms. Rice's discharge.^{FN6} During the course of the hearing, the Division sought to introduce as evidence the September 20, 2006 decision regarding Ms. Rice's discharge. Carelink objected to the introduction of the decision on the ground that the Division was attempting unfairly to exploit the discharge issue.^{FN7} The Division responded that it was not attempting to reargue the merits of Ms. Rice's discharge, but instead was offering the September 20, 2006 decision as a basis to justify the imposition and amount of the civil monetary penalty.^{FN8} The Division also pointed out that collateral estoppel prevented a reargument of the discharge issue. Carelink disagreed that collateral estoppel applied and argued that the imposition of the penalties was a separate matter from Ms. Rice's discharge.^{FN9} The hearing officer took the matter under advisement and asked for additional briefing from both parties by December 15, 2006.^{FN10} The Division submitted its brief on December 12, 2006, but Carelink never submitted any supplemental briefing on the matter.^{FN11}

FN6. The Court gathers that this administrative hearing was the "informal dispute resolution process" to which Ms. Ellis referred in her August 18, 2006 letter.

FN7. D.I. 3, Hr'g Tr. at 51.

FN8. D.I. 3, Hr'g Tr. at 52.

FN9. D.I. 3, Hr'g Tr. at 52-53.

FN10. D.I. 3, Hr'g Tr. at 56.

FN11. D.I 3, Division's Dec. 18, 2006 decision, at 8.

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13. The evidence presented at the hearing consisted mainly of testimony from Ms. Ellis and Ms. Joseph. The Division also submitted letters into evidence that memorialized the communications between Carelink and the Division. Ms. Ellis testified about the factors used in determining whether to impose a penalty and how the Division calculated the amount of \$1250 a day for the violation. Specifically, in response to questioning about how the Division came up with the figure of \$1,250 per day, Ms. Ellis responded that in circumstances where a facility refuses to comply with the law, the Division will impose the maximum penalty allowed by the statute in hopes the facility will promptly comply to prevent accumulation of the penalties.

*4 14. Ms. Joseph also testified at the hearing and again maintained that Carelink's discharge of Ms. Rice was proper given her reoccurring medical condition. She maintained that Carelink's requests for a new care plan and medical releases were intended as safeguards to ensure Ms. Rice received the proper level of care. Ms. Joseph did admit on cross-examination that she had read the September 20, 2006 decision requiring that Ms. Rice be readmitted to Pioneer House, but stated that she did not agree with the hearing officer's interpretation of 16 *Del. C.* § 1121(18).^{FN12}

FN12. D.I. 3, Hr'g Tr. at 37.

15. The hearing officer issued his decision regarding the imposition of the penalty on December 18, 2006. The hearing officer applied the four part test set out in *Higgins v. Walls* to determine whether collateral estoppel applied to the underlying discharge issues.^{FN13} Specifically, *Walls* held that collateral estoppel will apply when:

FN13. 901 A.2d 122 (Del.Super.Ct.2005).

(1) the issue previously decided is identical to the issue at bar; (2) the prior issue was finally adjudicated on the merits; (3) the party against whom the doctrine was invoked was a party or in privity with a party to the prior adjudication; and (4) the

party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in a prior action.^{FN14}

FN14. 901 A.2d 122, 137-138
(Del.Super.Ct.2005).

After an analysis of the first factor, the hearing officer found that Carelink's violation of 16 *Del. C.* § 1121(18) for improperly discharging Ms. Rice and the resulting civil money penalties implicated the same factual issues. With regard to the second factor, the hearing officer determined that Ms. Rice's discharge was finally adjudicated on the merits because he had issued a final, binding decision on the matter. Additionally, the hearing officer stated that the party against whom the doctrine is being invoked, Carelink, was a party in the previous matter. Finally, the hearing officer relied on his own observations of the previous hearing to determine that Carelink had a full and fair opportunity to litigate the matter. After considering these elements, the hearing officer found that the September 20, 2006 decision on the discharge issue was admissible under the doctrine of collateral estoppel as evidence that the discharge was improper.

16. The hearing officer then turned to the propriety of the penalty and found that the penalties were proper under the six factor test set forth in 16 *Del. C.* § 1109(b)(1)-(6). The pertinent provisions of § 1109 provide:

(b) In determining the amount of the penalty to be assessed under subsection (a) of this section, the Department shall consider:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard or potential hazards created by the violation to the health or safety of a resident or residents;

(2) the history of violations committed by the person or the person's affiliate(s), employee(s), or controlling person(s);

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*5 (3) the efforts made by the facility to correct the violation(s);

(4) the culpability of the person or persons who committed the violation(s);

(5) A misrepresentation made by the Department or to another person regarding:

a.) the quality of services provided by the facility;

b.) the compliance history of the facility; or

c.) the identity of an owner or controlling person of the facility;

(6) Any other matter that affects the health, safety, or welfare of a resident or residents.

The hearing officer found that Carelink's actions amounted to a serious violation because "anytime an assisted living resident's patients [sic] rights are violated, it constitutes a serious matter because the effect is to erode the dignity and life-style of a vulnerable member of our community."
FN15

FN15. D.I 3, Division's Dec. 18, 2006 decision, at 9.

17. A large section of the decision focused specifically on the fifth and final factor, the extent to which the facility misrepresented facts relating to the facility or the care rendered to the resident.
FN16

In this regard, Ms. Ellis testified that throughout her interactions with the facility she believed that Carelink never intended to allow Ms. Rice to return to Pioneer House. She further testified that Carelink's continued insistence on a new care plan and medical releases were only roadblocks to prevent Ms. Rice's return. The hearing officer agreed. He concluded that Carelink's ongoing statements that Ms. Rice might be permitted in the future to return to Pioneer House were false, material and relied upon by Ms. Rice and the Division.

FN16. 16 *Del. C.* § 1109(b)(5)

18. On appeal to this Court, Carelink challenges the sufficiency of the evidence supporting the hearing officer's decision to uphold the civil money penalty.
FN17 Specifically, Carelink argues that: (1) the hearing officer committed legal error when he determined that Carelink made misrepresentations; (2) the charge that Carelink violated 16 *Del. C.* § 1109(b)(4) is without merit; (3) the hearing officer improperly failed to consider Carelink's efforts to correct the deficiency in accordance with 16 *Del. C.* 1109(b)(4); and (4) the penalty upheld by the hearing officer was arbitrary, vindictive and without factual basis.
FN18 The Division responds that the hearing officer's decision is grounded in sound legal analysis and supported by substantial factual evidence.

FN17. Carelink has not appealed the hearing officer's September 20, 2006 decision with respect to the propriety of Carelink's decision to discharge Ms. Rice.

FN18. Carelink asserted a fifth argument in the summary of the argument section of the brief, that "the hearing officer, by virtue of being employed by the agency for whom he is hearing the Administrative Hearing, has a conflict of interest." This argument, however, was not developed in the brief and will therefore not be addressed by the Court. Appellant's Br. at 1.

19. This Court repeatedly has emphasized the limited extent of its appellate review of administrative determinations. The Court's review is confined to ensuring that the hearing officer made no errors of law and determining whether "substantial evidence" supports the hearing officer's factual findings.
FN19 Questions of law that arise from the hearing officer's decision are subject to *de novo* review, pursuant to Superior Court Civil Rule 3(c), which requires that the Court must determine whether the hearing officer erred in formulating or applying legal precepts.
FN20 Substantial evidence

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means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."^{FN21} It is "more than a scintilla but less than a preponderance of the evidence."^{FN22} The "substantial evidence" standard of review contemplates a significant degree of deference to the hearing officer's factual conclusions and its application of those conclusions to the appropriate legal standards.^{FN23} In its review, the Court will consider the record in the light most favorable to the prevailing party below.^{FN24}

FN19. *Canyon Const. v. Williams*, 2003 WL 1387137, at * 1 (Del.Super.Ct. Mar. 5, 2003); *Hall v. Rollins Leasing*, 1996 WL 659476, at *2-3 (Del.Super.Ct. Oct. 4, 1996).

FN20. See *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del.1998); *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del.1990).

FN21. *Breeding v. Contractors-One, Inc.*, 549 A.2d 1102, 1104 (Del.1998).

FN22. *Id.*

FN23. *Hall*, 1996 WL 659476, at *2 (citing DEL.CODE ANN. tit. 29, § 10142(d)).

FN24. *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del.Super.Ct. Aug. 16, 1991).

A. The Hearing Officer Correctly Applied The Applicable Statute.

*6 20. In reviewing the hearing officer's decision for any errors of law, the Court is bound by the language of 16 *Del. C.* § 1109(b)(1-6), which gives the Division authority to impose a civil monetary penalty in the event of a violation. Delaware courts will not engage in statutory construction if the statute is not ambiguous and the meaning of the statute is clearly ascertainable.^{FN25} When applying a statute that is clear on its face, "the Court's

role is [] limited to an application of the literal meaning of the words."^{FN26} A statute is deemed ambiguous only if it could reasonably be interpreted in more than one way or if the literal interpretation would lead to an unreasonable result not intended by the legislature.^{FN27}

FN25. *Newtowne Village Service Corp. v. Newtowne Road Development Co.*, 772 A.2d 172, 175 (Del.Super.Ct.2001).

FN26. *Coastal Barge Corp. v. Coastal Zone Industrial Control Bd.*, 492 A.2d 1242, 1246 (Del.1985).

FN27. *Id.*

21. The statute governing the Division's imposition of civil monetary penalties is clear on its face and neither side has challenged the statute or highlighted any ambiguities.^{FN28} Given this determination, the hearing officer's decision contained no errors of law because he applied the statute in accordance with its plain meaning. The statute gives the Division substantial discretion in assessing penalties upon a finding of violation and in determining the amount of such penalties. The statute simply requires that the Division "consider" the six factors enumerated therein and that the penalty not exceed \$1,250 per day beyond the initial day.^{FN29} The statute prescribes no further analysis. In his decision, the hearing officer clearly "considered" these six factors and, in doing so, followed the plain meaning of the statutory provisions. Accordingly, the Court will not disturb the legal grounds upon which the hearing officer based his decision.

FN28. The Court was unable to uncover any case law interpreting the statute in the course of its research, and the parties have cited none.

FN29. 16 *Del. C.* § 1109.

B. The Hearing Officer's Decision Is Supported By Substantial Evidence.

22. Moving on to the second step of the analysis

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is, whether the hearing officer's findings were supported by substantial evidence, it is important to note that direct testimony from Ms. Ellis and Ms. Joseph comprised the majority of the evidence presented at the hearing. Testimonial evidence necessarily implicates an inquiry by the factfinder into the credibility of the witnesses testifying before him. The hearing officer is in the best position to make that inquiry. Credibility determinations made by a hearing officer will not be disturbed on appeal unless the Court determines that the hearing officer abused his discretion.^{FN30} On appeal, the Court will not independently "weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."^{FN31}

FN30. *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del.1994)

FN31. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.Super.1965).

23. To support its claim that Carelink misrepresented material facts under section 1109, the Division was obliged to prove that: (1) Carelink stated a fact that was material to the transaction; (2) that fact was state falsely; (3) with knowledge of its falsity or recklessness as to whether it is true or false; and (4) with the intent to mislead another who justifiably relies on the misrepresentation.^{FN32} Misrepresentations do not necessarily result from overt acts, but may also arise out of "deliberate concealment of material facts, or by silence in the face of a duty to speak."^{FN33}

FN32. *Antamian v. Nemours Health Clinic*, 2001 WL 1474819 *1 (Del . Super.Ct. Nov. 14, 2001).

FN33. *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del.Super.Ct.1983).

*7 24. Ms. Ellis' testimony, in addition to the correspondence between Carelink and the Division, provided the hearing officer with substantial evi-

ence upon which to conclude that Carelink made misrepresentations.^{FN34} During direct examination, Ms. Ellis testified that Carelink repeatedly implied that Ms. Rice could return to Pioneer House when either a new care plan was drafted or a medical release was signed.^{FN35} She further testified that Carelink, through its ongoing delay tactics, demonstrated its true intention of obstructing Ms. Rice's return to the facility (notwithstanding her medical eligibility to return) at all costs. The fact that Carelink continued to refuse to take Ms. Rice back even after the hearing officer's September 20, 2006 decision ordering it to do so, and after declining to seek further review of this decision (by appeal or otherwise) further supports the conclusion that Carelink's promises to work toward Ms. Rice's return were hollow and misleading.^{FN36} The hearing officer determined that Ms. Ellis' testimony in this regard was credible, and Carelink has offered no persuasive basis upon which the Court could conclude that the hearing officer abused his discretion. Because the original violation that sparked the imposition of the penalty resulted from Ms. Rice's unlawful discharge from Pioneer House, and Carelink's misrepresentations pertained to Ms. Rice's return to Pioneer House, the hearing officer correctly found that the misrepresentations were material to the underlying issue before him.

FN34. To reiterate, the Court need not find that the hearing officer's decision in this regard is supported by a preponderance of the evidence; it is sufficient to discern that more than a scintilla of evidence exists in order to justify a finding that the hearing officer's decision on the misrepresentation claim is supported by substantial evidence. *See Breeding*, 549 A.2d at 1104.

FN35. Hearing Transcript at 10-11

FN36. D.I. 3, S-6, Letter from Eileen Joseph, President and CEO, Carelink, to Carol Ellis, Director, Division of Long Term Care Residents Protection (September 22, 2006). Here again, the

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Court notes that Carelink never took an appeal of the September 20 decision.

B. Substantial Evidence Supports The Finding That Carelink Is The Culpable Party.

25. The Court is also satisfied that the hearing officer had an adequate factual foundation upon which to consider the appropriate amount of the penalty assessed by the Division. Ms. Ellis testified at length regarding the degree of Carelink's culpability in committing the violation. During cross examination, Ms. Ellis testified that throughout her involvement in the case, Carelink possessed the means and opportunity to return Ms. Rice to Pioneer House and to come into compliance with the law.^{FN37} It simply chose not to allow her to return. Contrary to Carelink's argument, the hearing officer's September 20, 2006 decision requiring Carelink to accept Ms. Rice in no way limited or qualified Carelink's culpability. Indeed, Carelink's failure to comply with the decision, or properly appeal it, framed the legal basis for the imposition of the penalty in the first instance. The ongoing accrual of the penalty was a direct result of Carelink's ongoing recalcitrance.^{FN38} Carelink cannot blame Ms. Rice's failure to return to Pioneer House on the lack of a new care plan or not having medical approval because these were self-imposed restrictions that the Division had previously determined were unnecessary.

FN37. Hearing Transcript at 22.

FN38. *Id.*; D.I. 3. Hearing Officer's Dec. 18, 2006 Decision, at 10.

26. The hearing officer also properly considered Carelink's efforts to correct the deficiency and accurately determined that Carelink had not made any serious effort to return Ms. Rice to Pioneer House. In this regard, Carelink misses the mark when it argues that the Division could not point to anything the facility could have undertaken to correct the deficiency. The Division made one suggestion that was repeatedly ignored by Carelink: allow Ms. Rice to return to Pioneer House. Carelink's in-

sistence on a new care plan and medical releases were not genuine efforts to facilitate Ms. Rice's return and remedy the violation because the Division repeatedly told Carelink that such steps were unnecessary. The efforts Carelink did make only hindered Ms. Rice's return to Pioneer House.

C. The Penalty Upheld by the Hearing Officer was not Arbitrary or Vindictive.

*8 27. There was sufficient evidence in the record to support the penalty imposed by the Division. To reiterate, the statute only requires that the Division "consider" the six factors in determining the amount of penalty, and specifies that the penalty may not exceed the \$1,250 per day ceiling.^{FN39} In this case, the Division considered all of the factors and found that Carelink's conduct specifically implicated three of them. The hearing officer's decision was not arbitrary because he relied upon and specifically referenced the evidence presented at the hearing, mainly the testimony of Ms. Ellis and Ms. Joseph, and found Ms. Ellis's testimony to be more credible. When asked how she calculated the amount of \$1,250 per day for the penalty, Ms. Ellis responded that the Division will impose the maximum amount when a facility improperly denies care to a resident in order to coerce prompt compliance. Ms. Ellis' testimony was supported by the exhibits submitted into evidence by the Division that documented the correspondence between Carelink and the Division. Carelink did not submit any evidence other than Ms. Joseph's testimony.

FN39. 16 *Del. C.* § 1109(e).

28. Based on the foregoing, the decision of the hearing officer upholding the imposition of the \$1,250 per day civil monetary penalty upon Carelink is **AFFIRMED**.

IT IS SO ORDERED.

Del.Super.,2007.

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(Del.Super.)

END OF DOCUMENT

DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801

Wilmington, Delaware 19801

(302) 575-0690 (TTY) (302) 575-0696 Fax (302) 575-0840

July 31, 2006

By Fax ((302) 577-6672) and Mail

John Thomas Murray, Deputy Director
Division of Long Term Care Residents Protection
3 Mill Road, Suite 308
Wilmington, DE 19806

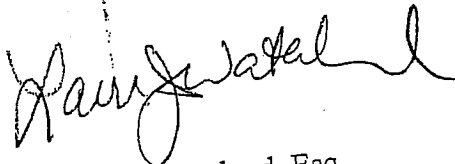
RE: D. R.

Dear Mr. Murray:

Thank you for your action regarding V. D. which will allow her to remain at Pioneer House pending the outcome of the hearing regarding her proposed discharge. I am writing to ask for the same consideration for Ms. R. Pioneer House did not inform her of her right to challenge the discharge, did not forward my request for a hearing to you when they received it, and took advantage of her hospitalization at St Francis in early July to bypass the 60 days notice of discharge that it had given her. (This action, if it had occurred a few days later, would have violated SB 318). If a bed is still available at Pioneer House, it would seem entirely appropriate to allow Ms. R. to return to her home pending the outcome of the hearing. This request is all the more compelling because the hearing, it seems, will not take place until at least the end of August, if not later. Ms. R. is extremely unhappy where she is.

Please consider this request and let me know your decision on the matter.

Sincerely,



Laura J. Waterland, Esq.

Senior Staff Attorney

302-575-0660 ext 231

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

GEORGE V. MASSEY STATION
516 WEST LOOCKERMAN STREET
DOVER, DELAWARE 19904
TELEPHONE: (302) 739-4553
FAX: (302) 739-6126

June 20, 2012

Charlie Michels, Executive Director
Delaware Professionals Standard Board
Townsend Building
401 Federal Street, Suite 2
Dover, DE 19901

RE: DOE Proposed Early Childhood Teacher Regulation [15 DE Reg. 1665 (June 1, 2012)]

Dear Mr. Michels:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Professional Standards Board proposed regulation to adopt revised certification standards for early childhood teachers. The changes are intended to be predominantly non-substantive. The GACEC **endorses** the proposed regulation subject to the Board adopting the grammatical and formatting revisions listed below. Council only identified the following grammatical and formatting concerns.

First, in §4.1.1, a comma should be inserted after "3.1.5.1". A comma is required after a lengthy introductory adverb clause. The comma was properly inserted in §4.1.2 but omitted in §4.1.1.

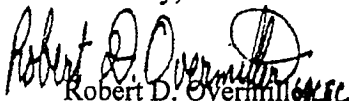
Second, §§4.1 and 4.2 contain plural pronouns ("their") with singular antecedents ("the educator"). The error is easily corrected by substituting "a" for "their" with no loss of meaning.

Third, there is a lack of punctuation in §§4.1.1.1- 4.1.1.5 and 4.2.1.1 - 4.2.1.5. Consider adding the following:

- A. semicolon after §§4.1.1.1, 4.1.1.2, 4.1.1.3, 4.2.1.1, 4.2.1.2, and 4.2.1.3;
- B. "; and" after §§4.1.1.4 and 4.2.1.4; and
- C. period after §§4.1.1.5 and 4.2.1.5.

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

Sincerely,


Robert D. Overmiller
Past Chairperson

RDO:kpc



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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July 23, 2012

Ms. Susan K. Haberstroh
Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 16 DE Reg. 20 [DOE Proposed Health Exams & Screening Regulation]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its health examinations and screening regulations published as 16 DE Reg. 20 in the July 1, 2012 issue of the Register of Regulations.

As background, in 2011, the DOE proposed a regulation to require a second health examination for students entering 9th grade. SCPD endorsed the proposed regulation subject to changing terminology from "physical examination" to "health examination". The DOE adopted a final regulation which incorporated that change. See 15 DE Reg. 432 (October 1, 2011) (proposed); 15 DE Reg. 838 (December 1, 2011) (final). The DOE is now delaying mandatory implementation of the regulation by one (1) school year, i.e., the regulation would be effective with the 2013-2014 school year rather than the 2012-2013 school year. The regulation would "strongly recommend" the second health exam but not "require" it for the 2012-2013 school year. The rationale is as follows: "The delay for required implementation is to provide additional time for parents and guardians to be advised and to prepare for the new requirement."

SCPD would have preferred full implementation with the 2012-13 school year but understands DOE's rationale for allowing additional time to "roll out" the new requirement.

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

Sincerely,

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

cc: The Honorable Mark Murphy
Dr. Teri Quinn Gray
Ms. Mary Ann Mieczkowski
Ms. Paula Fontello, Esq.
Ms. Terry Hickey, Esq.
Mr. John Hindman, Esq.
Mr. Charlie Michels
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

16reg20 doe-health exams 7-23-12.doc

Office of Civil Rights

Investigating External Complaints of Discrimination

The FHWA has jurisdiction to investigate complaints of discrimination filed under Title VI of the Civil Rights Act of 1964 (Title VI) and related statutes, and Title II of the Americans with Disabilities Act of 1990 (ADA).

FHWA and State Highway Agency (SHA) investigators gather relevant evidence in order to make an accurate finding of compliance or non-compliance with the law. At the completion of the investigation, the investigator prepares an Investigative Report and file which includes all the relevant facts and documents obtained during the investigation. The Investigative Report also includes a finding for each issue and recommendations for corrective action, if appropriate. The investigative file is forwarded to the FHWA Headquarters Office of Civil Rights for review and issuance of a Final Agency Decision.

All Final Agency Decisions and dismissals are issued by the FHWA Headquarters Office of Civil Rights, including all ADA decisions that are processed by the FHWA. Decisions issued by the FHWA are final.

NOTE:

- Complaints filed under Title VI and related statutes against a SHA are investigated by the FHWA Headquarters Office of Civil Rights.
- Complaints filed under Title VI and related statutes against a SHA's sub-recipient or contractor are investigated by the SHA.
- Complaints filed under the ADA are investigated by the FHWA Division Offices and SHAs.

Contacts/phone numbers/email addresses

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Authorities

Title II of the Americans with Disabilities Act of 1990 (<http://www.access-board.gov/about/laws/ada.htm>)

Title VI of the Civil Rights Act of 1964, as amended
(<http://www.usdoj.gov/crt/cor/coord/titlevstatat.htm>)

Section 504 of the Rehabilitation Act of 1973, as amended
(<http://www.dotcr.ost.dot.gov/Documents/ycr/REHABACT.HTM>)

The Age Discrimination Act of 1975, as amended
(http://www.dol.gov/oasam/regs/statutes/Age_act.htm)

The Federal-aid Highway Act of 1973, as amended
(<http://www.usdoj.gov/crt/cor/byagency/dot324.htm>)

The Civil Rights Restoration Act of 1987
(http://www.fhwa.dot.gov/environment/ejustice/facts/restoration_act.htm)

Executive Order 12250 – "Leadership and Coordination of Nondiscrimination Laws" (<http://www.usdoj.gov/crt/cor/byagency/eo12250.htm>)

Title 28, Code of Federal Regulations, Part 35 – "Nondiscrimination on the Basis of Disability in State and Local Government Services" (<http://www.ada.gov/reg2.html>)

Title 49, Code of Federal Regulations, Part 21 – "Nondiscrimination in Federally-Assisted Programs of the DOT – Effectuation of Title VI of the Civil Rights Act of 1964" (http://www.access.gpo.gov/nara/cfr/waisidx_07/49cfr21_07.html)

– Refer to 49 CFR 21.11 (Conduct of investigations)

Title 49, Code of Federal Regulations, Part 27 – "Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance"

http://www.access.gpo.gov/nara/cfr/waisidx_03/49cfr27_03.html

– Refer to 49 CFR 27.123 (Conduct of investigations)

Title 23, Code of Federal Regulations, Part 200 – "Title VI Program and Related Statues – Implementation and Review Procedures" (http://www.access.gpo.gov/nara/cfr/waisidx_02/23cfr200_02.html)

– Refer to 23 CFR 200.9(b)(3) (State Highway Agencies responsibilities)

Guidance

Memorandum: [Processing Complaints Filed Under Title VI and the ADA](#)

[FHWA External Complaint Processing Procedures Manual](#)

[DOT Order 1000.12 – "Implementation of the DOT Title VI Program"](#)

– Provides guidance and procedural instructions for all modal administrations on processing Title VI complaints

U.S. DOJ's Title VI Legal Manual (<http://www.usdoj.gov/crt/cor/Pubs/manuals/legalman.html>)

U.S. DOJ's Investigation Procedures Manual for Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes (<http://www.usdoj.gov/crt/cor/Pubs/manuals/complain.html>)

ADA Title II Technical Assistance Manual (<http://www.usdoj.gov/crt/ada/taman3.html>)

ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) (<http://www.access-board.gov/adaag/html/adaag.htm>)

Useful Links

U.S. Department of Justice (<http://www.usdoj.gov>)

U.S. Access Board (<http://www.access-board.gov/>)

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Office of Civil Rights

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United States Department of Transportation - **Federal Highway Administration**

Office of Civil Rights

Americans with Disabilities Act (ADA)/Section 504 of the Rehabilitation Act of 1973 (504)

The primary purpose of the Federal Highway Administration's (FHWA) Americans with Disabilities Act (ADA) program is to ensure that pedestrians with disabilities have opportunity to use the transportation system in an accessible and safe manner. As part of FHWA's regulatory responsibility under Title II of the ADA and Section 504 of the Rehabilitation Act of 1973 (504), the FHWA ensures that recipients of Federal aid and State and local entities that are responsible for roadways and pedestrian facilities do not discriminate on the basis of disability in any highway transportation program, activity, service or benefit they provide to the general public; and to ensure that people with disabilities have equitable opportunities to use the public rights-of-way system.

Laws and regulations require accessible planning, design, and construction to integrate people with disabilities into mainstream society. Further, these laws require that the actions of government highway entities do not discriminate in their programs and activities against persons with disabilities.

Section 504 of the 1973 Rehabilitation Act (*Public Law 93-112*) prohibits discrimination on the basis of disability in Federally assisted programs. Section 504 requirements for USDOT administrations are covered under *49 CFR Part 27* (USDOT), Nondiscrimination on the Basis of Disability in Programs and Activities Receiving or Benefiting from Financial Assistance. The Americans with Disabilities Act (ADA, 1990, *Public Law 101-336*) is a broader civil rights statute that prohibits discrimination against people with disabilities in all areas of public life.

The ADA addresses State and local government services, activities and policy making under the Department of Justice's ADA Title II implementing regulations. The ADA, under Title II, Subpart A, covers public rights-of-way. The Department of Justice (DOJ) has rulemaking authority and enforcement responsibility for Title II, while USDOT is legally obligated to implement compliance procedures relating to transportation, including those for highways, streets, and traffic management. The FHWA Office of Civil Rights oversees the DOT requirements in these areas.

Section 504 responsibilities not detailed specifically in Title II of the ADA are: Rest areas on Interstate highways must be accessible; and pedestrian overpasses, underpasses, and ramps constructed with Federal financial assistance must be accessible.

Key FHWA Stewardship/Oversight Responsibilities

- Ensure that FHWA recipients and subrecipients are informed of their responsibilities to provide accessibility in their programs, activities, and facilities (i.e., public rights-of-way).

- Ensure that recipients and subrecipients are applying appropriate accessibility standards to all transportation facilities.
- Ensure that all complaints filed under Section 504 or the ADA are processed in accordance with established complaint procedures.

Contacts/phone numbers/email addresses

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Authorities

The Americans with Disabilities Act (42 USC 126)

Title II of the Americans with Disabilities Act Implementing Regulation (28 CFR 35)

Section 504 of the Rehabilitation Act of 1973 (29 USC 794, et seq).

Section 504 of the Rehabilitation Act of 1973 Implementing Regulation 49 CFR 27

Americans with Disabilities Act Accessibility Guidelines (ADAAG)

Public Rights-Of-Way Accessibility Guidelines (PROWAG)

Uniform Federal Accessibility Standards (UFAS)

Guidance

- FHWA's Oversight Role in Accessibility, September 12, 2006
 - Memorandum from the Administrator
 - Memorandum: Clarification of FHWA's Oversight Role in Accessibility

- Announcement of USDOT Accessibility Regulations: 49 CFR Part 37—Transportation Services for Individuals with Disabilities: Federal Register / Vol. 71, No. 209 / Monday, October 30, 2006 / Rules and Regulations / Page 63263. [HTML](#) / [PDF](#)
- Notice of availability of the Access Board's November 2005 Draft Public Rights-of-Way Accessibility Guidelines (PROWAG) [Public Rights-of-Way Access Advisory, January 23, 2006](#)
- [FHWA/FTA Memorandum](#) (September 25, 2000)
[FHWA Program Administration Policy on Pedestrians and Accessible Design](#)
- **Designing Sidewalks and Trails for Access**
FHWA's two-part report on pedestrian and trail accessibility.
 - [Part 1, Review of Existing Guidelines and Practices](#), lays out the history and the practices of applying accessibility concepts to sidewalks and pedestrian trails. (Out of print, available online only)
 - [Part 2, Best Practices Design Guide](#), provides recommendations on how to design sidewalks, street crossings, intersections, shared use paths, and recreational pedestrian trails. See also [Transmittal Memorandum](#), [Detectable Warnings Memorandum \(July 2004\)](#), [Detectable Warnings Memorandum \(May 2002\)](#), and [Errata Sheet](#).
- [Detectable Warnings Memorandum \(July 30, 2004\)](#)
[Detectable Warnings Memorandum \(May 6, 2002\)](#)
FHWA and the US Access Board encourage the use of the latest recommended design for truncated domes.
- Accessible Pedestrian Signals
- [Synthesis and Guide to Best Practices Website](#) – this website provides overall information on installation criteria and design considerations.
- [Synthesis and Guide to Best Practices Article](#) – this article provides the latest recommended technical specifications for installing accessible pedestrian signals.
- [Special Report: Accessible Public Rights-of-Way Planning and Design for Alterations \(US Access Board – July 2007\)](#)
- [ADA Best Practices Tool Kit for State and Local Governments \(US Department of Justice – 2007\)](#)

Useful Links

[U.S. Department of Justice's ADA website](#)

[U.S. Access Board](#)

[U.S. Department of Transportation, Office of Civil Rights](#)

[Disability*Gov](#)

[The Disability and Business Technical Assistance Center \(DBTAC\)](#)

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United States Department of Transportation - **Federal Highway Administration**

Office of Civil Rights

Procedures Manual For Processing External Complaints of Discrimination

Procedures Manual For Processing External Complaints of Discrimination

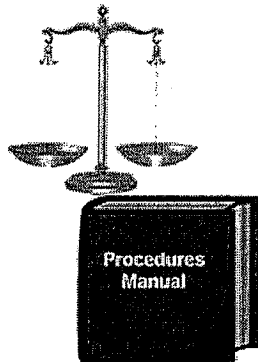


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ACRONYMS

ADA

Americans with Disabilities Act of 1990

ADAAG

Americans with Disabilities Act Accessibility Guidelines

ADR

Alternative Dispute Resolution

CFR

Code of Federal Regulations

DOCR

Departmental Office of Civil Rights

FHWA

Federal Highway Administration

FOIA

Freedom of Information Act

HCR

Headquarters Office of Civil Rights

IP

Investigative Plan

IR

Investigative Report

LOF

Letter of Finding

LEP

Limited English Proficiency

OA

Operating Administration

ROI

Report of Investigation

ROW

Right-of-Way

STA

State Transportation Agency

U.S.C.

United States Code

USDOJ

U.S. Department of Justice

USDOT

U.S. Department of Transportation

CHAPTER 1: INTRODUCTION

1-1 Purpose and Applicability

This manual outlines the Federal Highway Administration's (FHWA) procedures for processing external complaints of discrimination filed under Title VI of the Civil Rights Act of 1964 (and related statutes as identified in Section 1-2) and Title II of the Americans with Disabilities Act of 1990 and/or Section 504 of the Rehabilitation Act of 1973. The procedures are designed to provide due process for complainants and respondents.

The procedures apply to the FHWA, and may be used by the, State Transportation Agencies (STA) and other primary recipients and sub-recipients for the investigation of external complaints of discrimination. The procedures do not preclude the responsible staff of any agency from attempting to informally and independently resolve complaints.

1-2 Selected Authorities

A. Nondiscrimination Statutes

- **Title VI of the Civil Rights Act of 1964**, 42 U.S.C. 2000d, provides: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
- **Section 504 of the Rehabilitation Act of 1973**, 42 U.S.C. 794, et seq., provides: No qualified handicapped person shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance.
- **Age Discrimination Act of 1975**, 42 U.S.C. 6101, provides: No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
- **Federal Aid Highway Act of 1973**, 23 U.S.C. 324, provides: No person shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving Federal assistance under this Title or carried on under this Title.

- **The Civil Rights Restoration Act of 1987**, P.L. 100-209, provides: Clarification of the original intent of Congress in Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973. The Act restores the broad, institution-wide scope and coverage of the nondiscrimination statutes to include all programs and activities of Federal-aid recipients, sub-recipients, and contractors, whether such programs and activities are federally assisted or not.
- **Title II of the Americans with Disabilities Act of 1990**, 42 U.S.C. 12131, et seq., provides: No qualified individual with a disability shall, by reason of such disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a State or local government.

B. Regulations

- 23 Code of Federal Regulations (CFR) 1.36, Compliance with Federal Laws and Regulations
- 23 CFR 200, Title VI Program and Related Statutes-Implementation and Review Procedures
- 28 CFR 35, Nondiscrimination on the Basis of Disability in State and Local Government Services
- 28 CFR 36, Nondiscrimination on the Basis of Disability in Public Accommodations and in Commercial Facilities
- 28 CFR 42, Subpart C, Implementing Title VI of the Civil Rights Act of 1964
- 28 CFR 50.3, USDOJ's Guidelines Enforcement of Title VI of the Civil Rights Act of 1964
- 49 CFR 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964
- 49 CFR 27, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance
- 49 CFR 28, Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Transportation (DOT)

C. Executive Orders (E.O.)

- E.O. 12250, Leadership and Coordination of Nondiscrimination Laws
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
- E.O. 13166, Improving Access to Services for Persons with Limited English Proficiency

D. Directives

- DOT Order 1000.18, Implementation of the DOT Title VI Program
- DOT Order 1050.2, Standard Title VI Assurances
- FHWA Notice 4720.6, Impacts of the Civil Rights Restoration Act (CRRA) on FHWA Programs

E. Other References

- USDOJ's Title VI Legal Manual

- USDOJ's Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes
- Americans with Disabilities Act Accessibility Guidelines (ADA Handbook Appendix B)
- Revised Draft Public Rights-of-Way Accessibility Guidelines (PROWAG) (2005)
- FHWA's Memorandum Clarification of FHWA's Oversight Role in Accessibility, Dated September 12, 2006 (http://www.fhwa.dot.gov/civilrights/memo/ada_memo_clarificationa.htm)

CHAPTER 2: PROCESSING COMPLAINTS

2-1 Complaint Intake

A. Agencies Authorized to Receive Complaints

Complaints may be submitted to the Federal Highway Administration (FHWA), the State Transportation Agency (STA), the United States Department of Transportation (USDOT), and the United States Department of Justice (USDOJ).

B. Persons Eligible to File

Any person or any specific class of persons, by themselves or by a representative, that believe they have been subjected to discrimination or retaliation prohibited by Title VI of the Civil Rights Act of 1964 (Title VI) and related statutes, Section 504 of the Rehabilitation Act of 1973 (Section 504), or Title II of the Americans with Disabilities Act of 1990 (ADA) may file a complaint.

C. What is a Complaint?

1. A complaint is a written or electronic statement concerning an allegation of discrimination that contains a request for the receiving office to take action. Complaints should be in writing and signed and may be filed by mail, fax, in person, or e-mail. A complaint should contain at least the following information:
 - a. A written explanation of what has happened;
 - b. A way to contact the complainant;
 - c. The basis of the complaint, e.g., age, sex, race, color, national origin, or disability;
 - d. The identification of the respondent, e.g., agency/organization alleged to have discriminated;
 - e. Sufficient information to understand the facts that led the complainant to believe that discrimination occurred; and,
 - f. The date(s) of the alleged discriminatory act(s).
2. While the above indicates a complaint should be in writing and signed, the receiving agency must accept complaints in alternate formats from persons with disabilities, upon request.
 - a. The complaint may be filed on a computer disk, by audio tape, or in Braille.
 - b. The complainant may call the agency and provide the allegations by telephone. The agency will transcribe the allegations of the complaint as provided over the telephone and send a written complaint to the complainant for signature.

D. Timeframe for Filing Complaints

Complaints must be filed within 180 days of the last date of the alleged discrimination, unless the time for filing is extended (49 CFR 21.11 and 27.123). The filing date of the complaint is the earlier of: (1) the postmark of the complaint, or (2) the date the complaint is received by any office authorized to receive complaints. An extension may be granted under any of the following circumstances:

- a. The complainant could not reasonably be expected to know the act was discriminatory within the 180-day period, and the complaint was filed within 60 days after the complainant became aware of the alleged discrimination;
- b. The complainant was unable to file a complaint because of incapacitating illness or other incapacitating circumstances during the 180-day period, and the complaint was filed within 60 days after the period of incapacitation ended;
- c. The complainant filed a complaint alleging the same discriminatory conduct within the 180-day period with another Federal, State or local civil rights enforcement agency, and filed a complaint with DOT within 60 days after the other agency had completed its investigation or notified the complainant that it would take no further action;
- d. The complainant filed, within the 180-day period, an internal grievance alleging the same discriminatory conduct that is the subject of the DOT complaint, and the complaint is filed no later than 60 days after the internal grievance is concluded;
- e. Unique circumstances generated by DOT action have adversely affected the complainant;
- f. The discriminatory act is of a continuing nature; or
- g. Some complaints will be referred to DOT by other agencies. In the event the referring agency has possessed the complaint for an inordinately long period of time and the complainant filed his or her complaint with that agency within the 180-day timeframe DOT will automatically grant an informal extension. In these cases, staff does not need to notify the complainant of the extension.

E. Agency Responsibilities

A. Federal Highway Administration

1. All complaints received by the Resource Center or Division Offices will be forwarded to the Director, Investigations and Adjudications in the Headquarters Office of Civil Rights (HCR).
2. The HCR will acknowledge receipt of all complaints filed. The HCR will analyze the allegation (s) and notify the complainant and respondent of the issues accepted for investigation. **(SEE APPENDICES: D-3, D-4, D-5 and E)**
3. Complaints filed under Title VI against an STA will be investigated by HCR or a team comprised of Division Office and Resource Center personnel.
 - a. The Division Office personnel will not investigate Title VI complaints filed against the State for which they are responsible. The Division Office personnel may be assigned as a team member or team leader for the investigation of complaints in other States.
 - b. The HCR will provide the appropriate Division Office with a memorandum advising that a complaint has been filed and accepted for investigation. **(SEE APPENDIX D-6)**

- c. The HCR will also provide the appropriate Division Office with a copy of the Letter of Finding (LOF) after completion of the investigation.
4. Complaints filed under Section 504/ADA with the US DOT/FHWA will be referred to the Division Office for investigation. Upon completion of the investigation, the Division Office will forward the complaint and investigative report to HCR-40 for issuance of the LOF.
5. HCR will consult the Office of Chief Counsel (HCC), the Departmental Office of Civil Rights (S-33), and the Department's Office of the General Counsel whenever (1) a complaint or investigation presents a novel issue, (2) a complaint or investigation presents a issue with which the investigating office is unfamiliar, (3) there is media interest in the case or political sensitivity, or (4) there is a recommendation to terminate or refuse financial assistance. Novel issues are those which raise substantive legal or policy questions that are not addressed in Departmental or FHWA regulations or guidelines.

B. State Transportation Agencies

1. Complaints filed under Title VI with STAs in which the STA is named as the respondent should be forwarded to HCR for investigation.
2. Title VI complaints filed directly with the STAs against its sub-recipients should be processed by the STA in accordance with the FHWA approved complaint procedures as required under 23 CFR 200.9(b)(3). However, the HCR has delegated authority for making all final decisions which include dismissing complaints and issuing LOFs.
3. Complaints filed under the Section 504/ADA with the STA can be investigated by the STA in accordance with 49 CFR 27.13(b).
4. The STAs may use contract investigators to conduct investigations of complaints of discrimination, if the use of contract investigators will assist in preventing or eliminating a backlog of complaints. All complaints are to be investigated in accordance with approved complaint processing procedures.

2-2 Processing Complaints

A. Recording Complaints

Upon initial receipt, a complaint should always be date stamped by the receiving office. The date of receipt by the receiving office is crucial for determining jurisdiction and timeliness.

B. Items Not Considered a Complaint

The following are examples of items that should not be considered a complaint, unless the item contains a signed cover letter specifically asking that the agency take action concerning the allegations:

1. An anonymous complaint;
2. Inquiries seeking advice or information;
3. Courtesy copies of court pleadings;

4. Courtesy copies of complaints addressed to other local, State, or Federal agencies;
5. Newspaper articles; and,
6. Courtesy copies of internal grievances.

C. Accepting Complaints in Alternative Formats and Languages

1. Recipients must ensure that persons with Limited English Proficiency (LEP) have meaningful access to their programs and activities, including their complaint procedures in accordance with E.O. 13166, "Improving Access to Services for Persons with Limited English Proficiency."
2. Complaints in languages other than English should be translated and a responded to in the language in which they were sent.
3. It is important to recognize the need to modify practices to serve LEP complainants and those with disabilities may extend beyond the complaint intake stage. Throughout the complaint resolution process, staff should ensure these individuals understand their rights and responsibilities, as well as the status of their complaint.

D. Reviewing Complaints

1. The complaint will be reviewed within 10 calendars days of receipt to determine whether it contains all the necessary information required for acceptance.
2. If the complaint is complete and no additional information is needed, the complainant will be sent a letter of acceptance along with the Complainant Consent/Release form and the Notice About Investigatory Uses of Personal Information form. **(SEE APPENDIX D)**
3. If the complaint is incomplete, the complainant will be contacted in writing or by telephone to obtain the additional information. The complainant will be given 15 calendars days to respond to the request for additional information.

E. FHWA Complaint Jurisdiction

1. The HCR has delegated authority for referring complaints to other agencies for lack of jurisdiction.
2. If it becomes clear that FHWA lacks jurisdiction over a complaint, the complaint should be referred to the appropriate agency. A referral letter will be sent to the agency along with the complaint and other documents. A letter will also be sent to the complainant stating that the complaint has been referred to another agency and that FHWA has closed the complaint. **(SEE APPENDICES: D-1, D-2, E-2, E-3, E-4 and E-5)**

F. Notification of Acceptance of Complaints

After determining the complaint will be accepted for investigation, a notification letter will be sent to the complainant and the respondent. **(SEE APPENDICES: D, D-3, D-4, D-5 and E)**

G. If the Complainant is Represented by an Attorney

Complainants represented by an attorney should provide a letter of representation.

H. Timeframes for Investigations

1. Although the regulations do not specify a timeframe for the investigation of Title VI complaints the HCR attempts to complete investigations within 180 days.
2. Title VI complaints received directly by the STA are bound by the timeframes outlined in 23 CFR 200.9(b)(3).
3. Although the regulations do not specify a timeframe for the investigation of Section 504/ADA complaints the HCR requests that the Division Office and STA investigate complaints within 90 days of receipts of the complaint from HCR.

I. Dismissals

The HCR has delegated authority for dismissing Title VI complaints. The HCR has delegated authority for dismissing Section 504/ADA complaints processed by the FHWA. A complaint may be dismissed for the following reasons:

1. The complaint is untimely filed;
2. The complainant fails to respond to repeated requests for additional information needed to process the complaint;
3. The complainant cannot be located after reasonable attempts;
4. There is no statutory or alleged basis for the complaint, FHWA lacks jurisdiction in the matter, or the complainant does not allege any harm with regard to current programs or statutes;
5. The complaint has been investigated by another agency and the resolution of the complaint meets USDOT/FHWA regulatory standards; e.g., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet USDOT's standards;
6. The FHWA obtains credible information at any time indicating that the allegations raised by the complainant have been resolved, or are moot and there are no class-wide allegations or implications. In such a case, FHWA will attempt to ascertain the apparent resolution. If FHWA determines that there are no current allegations appropriate for further complaint resolution, the complaint will be closed;
7. The complainant decides to withdraw the complaint. If the complaint included class allegations, the FHWA may close out the entire complaint, pursue resolution of the class allegations, or use the information to target future compliance review activity;
8. The same complaint allegations have been filed with another Federal, State, or local agency, or through a respondent's internal grievance procedures, including due process proceedings, and FHWA anticipates that the respondent will provide the complainant with a comparable resolution process under comparable legal standards; e.g., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet USDOT's standards;
9. The FHWA refers a complaint over which USDOT has jurisdiction to another agency that also has jurisdiction but may be better suited to conduct the investigation;
10. A complaint, because of its scope, may require extraordinary resources. In such instances, FHWA may consider treating such a complaint as a compliance review. Similarly, a compliance review may

be the most effective means of addressing multiple individual complaints against the same respondent; or,

1. If FHWA selects this option, it should discuss the decision with the complainant(s), close the complaint, and initiate the review as soon as possible. The FHWA should provide the complainant(s) with a copy of the resolution documents upon completion of the compliance review.

J. Letters of Finding (LOFs)

1. The HCR has delegated authority for issuing LOFs for all complaints processed by the FHWA.
2. A Title VI finding of violation, no violation, or dismissal is a Federal decision that cannot be delegated. Although an STA can conduct a Title VI investigation of its sub-recipients or contractors and make a recommended finding to the Federal decision-making authority, the FHWA has delegated authority for all final decisions, dismissals, and LOFs.

K. Appeals

LOFs issued by the FHWA are administratively final.

CHAPTER 3: INVESTIGATIVE PROCESS

3-1 Scope of the Investigation

An investigation should be confined to the issues and facts relevant to the allegations in the complaint, unless evidence shows the need to extend the issues. A future compliance review of the respondent may be appropriate when issues identified during the investigation cannot be covered within the scope of the investigation.

3-2 Developing an Investigative Plan

The investigator shall prepare an Investigative Plan (IP) which is a working document intended to define the issues and lay out the blueprint to complete the investigation. The IP is an internal document for use by the investigator to keep the investigation on track and focused on the issues and likely sources of evidence or corroboration. The IP should follow the outline below.

- I. COMPLAINANT(S) NAME AND ADDRESS
ATTORNEY FOR THE COMPLAINANT(S)–(NAME AND ADDRESS), if applicable
- II. RESPONDENT(S) NAME AND ADDRESS
ATTORNEY FOR THE RESPONDENT(S)–(NAME AND ADDRESS), if applicable
- III. APPLICABLE LAW(S)
- IV. BASIS/(ES)
- V. ALLEGATION(S)/ISSUE(S)
- VI. THEORY(IES) OF DISCRIMINATION (for Title VI only)
- VII. BACKGROUND
- VIII. NAME OF PERSONS TO BE INTERVIEWED

- a. QUESTIONS FOR THE COMPLAINANT(S)
- b. QUESTIONS FOR THE RESPONDENT(S)
- c. QUESTIONS FOR WITNESS(ES)

IX. EVIDENCE TO BE OBTAINED DURING THE INVESTIGATION

3-3 Investigative Log

An investigative log should be maintained which documents all activity related to the complaint.
(SEE APPENDIX: C-1)

3-4 Request for Information and Cover Letter

The investigator should prepare a Request for Information (RFI) and cover letter for the respondent. The RFI is taken directly from the evidence section of the IP.

The investigator should make contact with the respondent to advise of the complaint and to determine the appropriate official(s) to interview and receive the RFI. A cover letter should be sent with the RFI explaining the complaint under investigation, and including the investigator's name and information regarding any scheduled meetings. **(SEE APPENDICES: D-3 and E-6)**

The respondent should be given 30 calendar days from the date of the agency's request to submit the required information. The agency may modify the timeframe depending on the extent of the data requested or other special circumstances.

3-5 Interviews

Interviews should be conducted with the complainant, respondent, and appropriate witnesses during the investigative process.

A. Conducting the Interviews

The main objective during the interview is to obtain information from witnesses who can provide information that will either support or refute the allegations. A list of major questions should be prepared to address the issues involved in the complaint. During the interview, the investigator will generally do the following:

1. Introduce themselves, provide identification, state the purpose of the interview, and outline the interview process. Indicate that notes will be taken. Make it clear that the investigator will not use a tape recorder. Take clear and precise notes.
2. Put the individual being interviewed at ease;
3. Ask open ended questions that will get the witness's perception – who, what, where, when, and how;
4. Listen actively and effectively during the interview;
5. Distinguish factual information from opinions; and,

6. Review the statement with the interviewee and allow time for changes or corrections.

B. Persons to be Interviewed

1. Complainant(s)

Complainants are interviewed to gain a better understanding of the situation outlined in the complaint of discrimination. Usually, complaints are received through the mail from complainants. The investigator should contact the complainant to ensure they understand the complainant's concerns. Sometimes the complainant's concerns may be totally different from what was written in the complaint.

It is best to interview the complainant before completing the IP. However, if this cannot be done, the investigator must be ready to make any changes as appropriate to the IP based on any new information provided by the complainant.

The investigator should also question the complainant regarding resolution opportunities.

2. Respondent(s)

Respondents have the right to know the allegations raised in the complaint. Respondents are interviewed to provide an opportunity to respond to the issues raised by the complainant. The interview should include obtaining an understanding of the respondent's operation and policies relative to the allegations cited in the complaint.

Respondents should always be advised that they will be asked to submit a formal position statement addressing the complainant's allegations.

The investigator should also question the respondent regarding resolution opportunities.

3. Witness(es)

The complainant or respondent may have persons they wish the investigator to contact. Individuals who have information relevant to the allegations raised in the complaint of discrimination should be interviewed. The investigator will determine whether the testimony provided by a witness is relevant.

The investigator will also determine when enough interviews have been conducted.

C. Right to Representation

The complainant, respondent, and witnesses have the right to a representative present during interviews.

D. Record of Interview

A written record of both telephone and in-person interviews must be created and kept in the investigative case file.

3-6 Failure by the Respondent to Provide Access to Information

Respondents should provide investigative access to all books, records, accounts, electronic media, audiotapes, and other sources of information or facilities necessary to determine compliance. Failure by a respondent to cooperate fully can be grounds for a determination of noncompliance on the part of the respondent.

A. A Respondent Denies Access When It:

1. Refuses to permit access to its employees and facilities during normal business hours to conduct interviews or obtain written or unwritten information, such as electronic storage media, microfilm, retrieval systems, and photocopies; or
2. Fails to provide information by virtue of the refusal of one of its employees to do so or to provide access to information maintained exclusively by an employee in his or her official capacity.

B. If Access is Denied, the Investigator Should do the Following:

1. If the refusal is stated verbally, either in person or over the telephone, the investigator should ascertain the basis for the respondent's refusal and explain DOT's authority under 49 CFR 21.13, 49 CFR 27.11, and 23 CFR 1.36.
2. Where attempts to persuade a respondent to provide information have failed, a letter should be prepared setting forth DOT's authority to obtain access to the information and addressing any particular concerns expressed by the respondent.
3. Whenever HCR determines that compliance cannot be achieved, it will initiate compliance actions under 49 CFR 21.13, 49 CFR 27.11, or 23 CFR 1.36.

The investigator should indicate in the IR that the respondent refused to provide pertinent information and describe efforts made to obtain the information, including the identity of persons not cooperating in the investigation.

There may be instances where another agency, institution, or person, has exclusive possession of information and refuses to furnish this information to the respondent.

The respondent should certify that this has occurred in its response or report to FHWA and describe what efforts it has made to obtain the information.

3-7 On-Site Visits

A. Determining if an On-Site Visit is Needed for Title VI Investigations

NOTE: All ADA complaints involving the public right-of-way will require an on-site review.

A thorough investigation can often be conducted without an on-site visit to the respondent's facility. If all the following conditions are present, an on-site visit is usually unnecessary:

1. Individuals are not the primary source of information needed (e.g., interviews are unnecessary or can be done by telephone);
2. All needed information can be specified precisely in the RFI and can be easily provided by the respondent;
3. The respondent can provide written documentation to verify its position in its response to the RFI; and,
4. There is good reason to conclude that the complainant is the only person affected by the alleged discrimination.

After analyzing the respondent's response to the RFI, the investigator may decide that a visit to the respondent's facility is necessary. The investigator should consider the possibility of conducting a portion of the investigation on-site if any of the following apply:

1. Personal contact with the complainant and the respondent may yield information and clarification that might not otherwise be discovered by just reviewing written documents or speaking over the telephone;
2. A more accurate impression of the physical environment and general atmosphere of the respondent and the surrounding community can be obtained, which may help in making a determination on the complaint;
3. Some documentation can only be examined on-site for reasons of convenience, cost, format, or bulk.

B. Notifying the Respondent of an On-Site Visit

After the investigator has received and reviewed the documents contained in the RFI from the respondent, a determination should be made as to whether an on-site visit is needed. An on-site notification letter should be sent to the respondent advising it of the planned visit.

At this point of the investigative process, the respondent is already aware of the existence of the complaint, FHWA's jurisdiction, and the basis of the complaint. However, the letter notifying the respondent of the scheduled on-site visit may:

1. Restate the allegations made by the complainant, the basis, and the legal authority under which the complaint is being investigated;
2. State the section of the appropriate regulation that prohibits the discrimination;
3. Request additional information or data needed before the on-site visit, including a deadline for submission;
4. Identify any additional data that should be made available during the on-site visit; and,
5. Request that the respondent's staff to be interviewed and those responsible for the release of additional records be available during the on-site visit.

C. Impartiality of the Investigator

The investigator should conduct an unbiased investigation. In addition, the investigator should not express opinions or conclusions to the public/complainant/respondent concerning matters under investigation unless specifically authorized to do so.

D. Exit Conference During On-Site Visit

Upon completion of the on-site visit, but before returning to the home office, the investigator should review the information and cross-check it with the IP and RFI to ensure that all needed information has been collected. Missing information should be gathered during an exit conference, which provides an opportunity for the investigator to clarify any questions that may have arisen and request any additional information.

3-8 Analyzing Evidence – Title VI Only

A. Standard of Proof

"The standard of proof applied in making a determination of noncompliance should be one of preponderance of evidence. The preponderance of evidence as a standard of proof in civil cases is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it"(*Black's Law Dictionary*)

A formal noncompliance finding may be challenged at an administrative hearing. The evidentiary standard that will be applied by the hearing examiner will be a preponderance of the evidence. Thus, formal findings of noncompliance should not be issued unless the preponderance standard is met.

B. Evidence Collected

The information and data collected depend upon the issues involved in the case. Properly collected and analyzed information is central to compliance investigations. The importance of developing a thorough and complete IP of the information you need in order to determine compliance cannot be overemphasized.

Evidence standing alone does not prove a violation. It must be related to the policies and procedures of the respondent and issues under investigation. To ensure the value of the collected and analyzed evidence, the investigator should:

- Note when the document was received and from whom;
- Keep the original copy of the document clean and free from marks, tears, etc;
- Photocopies of the documents should be made for work sheets;
- Keep the documents filed in a safe place so that they will not get lost or inadvertently removed by co-workers; and,
- Document the circumstances under which the evidence was collected. Remember why the evidence was collected; what questions elicited the evidence; whether any statistical techniques were applied to the evidence, and if so, what they were.

C. Reviewing Evidence

Determining compliance can be done by the analysis of non-numerical evidence as well as numerical evidence, or both. When reviewing non-numerical data the investigator should remember to do the following:

1. Read and Interpret

- Be sure to have a clear and thorough understanding of what the document says.
- Seek clarification where needed to understand the written language, e.g., obtain definitions for abbreviations; identify words and phrases that are key to proper interpretation of the message; where words used within a given context do not take on an obvious meaning, ask interpretive questions; do not make assumptions about the author's thinking.
- Never read meanings into the evidence. Accept the evidence at face value.

2. Determine Relevance

- Read with a purpose.
- Know what information or answers you are looking for.
- Recognize the presence or absence of needed information.
- Where the evidence: (1) does not provide the answers needed, (2) does not provide any direction to a source for the answers needed, or (3) does not raise additional questions (issue-related), the evidence, at least for the moment, is not relevant. However, the fact that evidence is not relevant at this time does not mean that it could not become relevant at a later stage of the investigation.
- Categorize the evidence by issue allegation. This is another test of the relevance of evidence.

3. Verify the Evidence

- Develop a system for cross-checking.
- Identify conflicting information and resolve the conflict to the extent possible. Conflicts should be resolved in order to establish validity of the evidence.

4. Assemble the Evidence

- Develop an information flow pattern. Put the evidence together so that it illustrates a logical continuity of dependent or related independent occurrences leading to a conclusion.
- Be sure to "plug up the gaps" in any information you have gathered.

5. Draw Conclusions

- Allow the evidence to speak for itself.
- Test conclusions by considering all possible rebuttal arguments from the respondent and the complainant.
- Both the respondent and the complainant should be given an opportunity to confirm or rebut the assertions of the other party.

3-9 Exit Interview

The exit interview is conducted separately for the complainant and the respondent. The exit interview provides an opportunity for the investigator, as well as the respondent and the complainant, to clarify any questions that may have arisen and to provide any additional information. The investigator should explain that this exit interview may not be an end to the investigation. The investigator should also explain the process HCR will follow, if a violation is found.

The investigator may have already reached a conclusion as to whether the respondent is in compliance or noncompliance with the FHWA's requirements. Should this happen, it is important that the investigator do not communicate that opinion during the exit interview.

3-10 Preparing the Investigative Report (IR)/Report of Investigation (ROI)

The investigator should prepare an IR/ROI setting forth all the relevant facts obtained during the investigation. The IR/ROI should include a finding for each issue and recommendations where necessary. A copy of the IR/ROI should never be given to the respondent or complainant. **(SEE APPENDICES: D-21, D-22, E-22 and E-23)**

References should be used throughout the IR/ROI to direct the reader to the appropriate supporting documentation in the investigative case file. For large case files, it is suggested that the IR/ROI include an index of documents and a key referencing by tab the evidence in the file relied upon in making any determination.

Upon HCR's review of the IR/ROI, a determination may be made that additional evidence is necessary prior to issuing the LOF.

CHAPTER 4: INVESTIGATIVE CASE FILE

4-1 Creating the Investigative Case File

The investigative case file is a structured compilation of all documents and information, within your agency's possession, pertaining to the case. An investigative case file should be established for each complaint which your agency accepts for investigation.

Complaints that are administratively closed for lack of jurisdiction, because they are untimely filed or, for failure to exhaust local remedies, or for failure to state a claim over which the agency has jurisdiction do not require an investigative case file.

The purpose of the investigative case file is to establish a methodology for the systematic compilation and structured storage of all documents, records, and information associated with the case. This is done in such a manner that the investigative case file: (a) provides the basis and supporting documentation for the IR/ROI, and (b) allows a reader of the IR/ROI to easily verify the facts upon which they are based. **(SEE APPENDIX: C)**

4-2 Distribution of the Investigative Case Files

HCR is responsible for all investigative case files regardless of the agency possessing the physical documents. HCR will provide copies of investigative case files in accordance with the FOIA. Closed investigative case files will be maintained for 4 years, after which they will be archived or destroyed in accordance with the FHWA document retention policy.

LIST OF APPENDICES

Appendix

A HCR's Memorandum Processing Complaints Filed Under Title VI of the Civil Rights Act of 1964 (Title VI) and the Americans with Disabilities Act of 1990 (ADA) Dated January 18, 2008 to Division Administrators/Assistant Division Administrators with Attached Letter Dated March 22, 2006 Processing Complaints Filed Under Title VI and ADA

B Complaint Form

Appendix C – Samples for Title VI and Section 504/ADA Complaints

C Investigative Case File

C-1 Sample Investigator's Log

C-2 Informal Settlement Agreement

Appendix D – Sample Letters for Title VI Complaints

D Acknowledgement Letter to Complainant with Attachments

D-1 No Jurisdiction – Referral to Federal Agency

D-2 No Jurisdiction - Referral to Complainant

D-3 Acceptance Letter and RFI to the Respondent

D-4 Acceptance Letter to Complainant/Multiple Allegations (If an Acknowledgement of Receipt Letter was Provided)

D-5 Acknowledgement of Receipt and Acceptance Letter to the Complainant

D-6 Notification of Complaint Memorandum to Division Office

D-7 Referral Letter to STA for Investigation

D-8 Acknowledgement Letter to Complainant For STA Investigation Referral

D-9 Letter of Finding (LOF) based on STA Investigation - No Violation (Letter to the Complainant)

D-10 LOF based on a STA Investigation - No Violation (Letter to the Respondent)

- D-11 LOF based on a STA Investigation - No Violation w/Recommendation (Letter to the Respondent)
- D-12 FHWA Investigation - Violation LOF (Letter to the Complainant)
- D-13 FHWA Investigation - Violation LOF (Letter to the Respondent)
- D-14 FHWA Investigation - Violation LOF/Compliance Achieved (Letter to the Respondent)
- D-15 FHWA Investigation - No Violation LOF (Letter to the Respondent)
- D-16 FHWA Investigation - No Violation LOF (Letter to the Complainant)
- D-17 Letter Confirming On-Site Visit
- D-18 Closure Letter to Complainant (Withdrawal of Complaint and/or Issues Resolved)
- D-19 FHWA Investigation (Failure to Provide Documents)
- D-20 Sample Investigative Plan
- D-21 Writing the Investigative Report (IR)
- D-22 Sample IR

Appendix E – Sample Letters for Section 504/ADA Complaints

- E Acknowledgment Letter to Complainant
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- E-2 No Jurisdiction – Referral to USDOJ (Letter to Complainant)
- E-3 No Jurisdiction – Referral to USDOJ (Letter to USDOJ)
- E-4 No Jurisdiction – Referral to Federal Agency (Letter to Complainant)
- E-5 No Jurisdiction – Referral to Federal Agency (Memorandum to the Federal Agency)
- E-6 Request For Information (RFI) to Respondent and On-Site Visit Schedule (Sample RFI)
- E-7 Transmittal Memorandum to Division Office LOF Violations
- E-8 LOF to Complainant – Violations
- E-9 LOF to Respondent – Violations
- E-10 Transmittal Memorandum to Division Office – No Violations
- E-11 LOF to Complainant – No Violations
- E-12 LOF to Respondent – No Violations
- E-13 Transmittal Memorandum to Division Office – Violations/Compliance Achieved
- E-14 Updated Letter to Complainant Violations/Compliance Achieved
- E-15 Updated Letter to Respondent Violations/Compliance Achieved
- E-16

Transmittal Memorandum to Division Office – Closure Letter to Complainant Attached (Withdrawal of Complaint and/or Allegations Resolved)

- E-17 Closure Letter to Complainant (Withdrawal of Complaint and/or Allegations Resolved)
- E-18 Transmittal Memorandum to Division Office – Respondent's Failure to Cooperate and Provide Requested Information (Complaint Referred to USDOJ for Enforcement)
- E-19 Letter to Complainant – Respondent's Failure to Cooperate and Provide Requested Information (Complaint Referred to USDOJ for Enforcement)
- E-20 Letter to DOJ – Respondent's Failure to Cooperate and Provide Requested Information (Complaint Referred to USDOJ for Enforcement)
- E-21 Sample Investigative Plan
- E-22 Writing the Report of Investigation (ROI)
- E-23 Sample ROI

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