



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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MEMORANDUM

DATE: February 25, 2010

TO: Ms. Susan Del Pesco, Director
 Division of Long Term Care Residents Protection

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

RE: 13 DE Reg. 1013 [DLTCRP Proposed Skilled & Intermediate Care Facility Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Long Term Care Residents Protection's (DLTCRP's) proposal to amend its regulation covering Skilled and Intermediate Care Facilities published as 13 DE Reg. 1013 in the February 1, 2010 issue of the Register of Regulations. SCPD has the following observations.

First, the notice recites that comments are due by February 28, 2010. At 1013. This violates the APA which requires a minimum 30-day comment period. See Title 29 Del.C. 10118.

Second, the Division proposes to delete many regulations which benefit residents. For example, it proposes to delete the following requirement:

6.1.1. The nursing facility shall provide to all residents the care necessary for their comfort, safety and general well being, and shall meet their medical, nursing, nutritional, and psychosocial needs.

Likewise, it proposes to delete the following:

- standards protecting resident funds (§6.2);
- a requirement that facilities comply with physician orders for specialized services (§6.4);
- a requirement that facilities schedule activities which enhance quality of life and promote choice (§6.6);

- a requirement of 3 meals/day (§6.85);
- a requirement that resident areas be maintained in a range of 71 to 81 degrees (§7.3.2);
- a maximum cap of 4 residents per bedroom (§7.4.2); and
- a requirement that each facility maintain a quality assessment and assurance committee (§9.0).

SCPD infers that some of these deletions may be based on the belief that 42 C.F.R. Part 483, which is incorporated by reference, may provide equivalent standards. See §1.2. Although Council has not been able to analyze 42 CFR Part 483, we prefer that the aforementioned provisions, and other beneficial standards included in the current regulations, remain in the revised regulations since they benefit residents.

Third, the Council submitted a set of 23 comments to the DLTCRP on the same regulations approximately 16 months ago. See attached November 26, 2008 SCPD memo. All recommendations were rejected by the Division. In Par. 10, the Council objected to a standard authorizing facilities to operate with no nurse whatsoever on the third shift. The current proposal weakens patient well-being further by deleting the following standard:

5.4.2.7. At a minimum, in the absence of a nurse on the third shift, at least one certified nursing assistant shall be qualified to assist with self administration of medication (AWSAM) and to provide basic first aid.

Fourth, the Division proposes the following amendment to existing §6.5.9:

6.5.9. The facility shall ensure that each nursing and ancillary staff member providing care to a resident under ~~16~~ 8 years of age meets the standards as defined in regulations for nursing facilities admitting pediatric residents.

This is an ostensibly odd amendment since the pediatric nursing home standards apply to residents under age 18. See 16 DE Admin Code 3210, §2.1. Indeed, §§5.4 and 5.5 of the pediatric nursing home regulations require nursing staff with specialized pediatric expertise to be present with no cap of age 8 or age 16.

Fifth, the Division should consider adding a regulation as required by recently-amended Title 16 Del.C. §1131C(b) which recites as follows:

(b) The Department shall include in its regulations for all facilities licensed under this chapter a requirement of full cooperation with the protection and advocacy agency in fulfilling functions authorized by this chapter. Without limiting the protection and

advocacy agency's pursuit of other legal remedies, the Department shall enforce violations of such regulations consistent with §§1109 and 1113 of this title.

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

cc: The Honorable Rita Landgraf
Mr. Brian Hartman, Esq.
Mr. Brian Posey, NHRQAC
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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Faxed to Scott - 11/26/08
cc. DMR



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MEMORANDUM

DATE: November 26, 2008

TO: Mr. Robert Smith
Division of Long Term Care Residents Protection

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

RE: 12 DE Reg. 592 [Proposed Nursing Facility Regulations]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services, Division of Long-term Care Residents Protection's (DLTCRPs) proposal to repeal separate regulations covering "skilled" and "intermediate" nursing facilities and adopt a single regulation covering both. The proposed regulations were published as 12 DE Reg. 592 in the November 1, 2008 issue of the Register of Regulations. Council has the following observations and recommendations.

1. In Section 2.2, the definition of "Advance Directive" only encompasses "springing" instruments "should the individual become incapacitated". An instrument can be created (e.g. durable POA) which is immediately effective and provides an agent authority to act irrespective of the capacity of the resident. The Division should consider deletion of "should the individual become incapacitated".

2. In Section 2.6, the definition of "extensive remodeling" is limited to modifying the "square footage of any room intended for resident use". This would literally "disqualify" modifications which may be needed to meet accessibility requirements (e.g. bathroom modifications, changing location of fixtures, modifying doorways, etc.). The term is used in Sections 4.9 and 7.1. If changes to an existing facility do not qualify as "extensive remodeling", the requirement to comply with "Guidelines for Design" is literally inapplicable. See Section 7.1. The Division may wish to expand the definition to prompt broader conformity with the "Guidelines".

3. In Section 2.10, insert "of" between "delivery" and "quality".

4. In Section 2.15, delete "their" since it is a plural pronoun with a singular antecedent (resident). Alternatively, substitute "the resident's".

5. In Section 2.17, the DLP has observed several instances in which residential staff have deactivated power wheel chairs to essentially effect a "restraint". The definition in this section would not "capture" such a restraint or "entrapment" under Section 10.8.5. Consider adding the following sentence: "Restraint also includes the deactivation or sequestration of mobility enabling assistive technology."

6. In Section 2.19, the Division may want to reconsider whether a degree in Sociology provides the practical

background that would support the actual duties of a social worker in a nursing home (e.g. case management, discharge planning). A Sociology major does not focus on this type of activity.

7. In Section 2.0, the Division may wish to consider adding a definition of “advance practice nurse” [Title 24 Del.C. §1902(b)]. There are multiple references to advanced practice nurses within the regulations. See, e.g., Sections 6.3.5 and 6.3.6.

8. Section 3.7 should be amended to include the requirement of “posting” of the bill or rights to conform to Title 16 Del.C. §1123.

9. In Section 3.7, the Division should consider substituting “and” for “and/or” since the latter is disjunctive and could be interpreted as authorizing a facility to choose to comply with either federal regulations or the State bill of rights statute.

10. Sections 5.4.2.3 and 5.4.2.7 authorize operation of a nursing home with no on-site nurse during the third shift. This standard does not enhance resident safety and care and SCPD strongly recommends that this be reconsidered. There should at least be an LPN on-site during the third shift.

11. Section 6.2.2 contemplates quarterly statements of resident personal funds. A resident can obtain more frequent statements on request. SCPD strongly recommends that the Division adopt a norm of more frequent statements. Nursing homes typically bill on a monthly basis and could include the statement with the monthly bill. Indeed, Title 16 Del.C. §1121(3) requires nursing facilities to provide monthly statements.

12. There is some “tension” between Sections 6.3.3 and 6.10.2. The former section establishes a norm of a physician review of medications post hospitalization while the latter section contemplates pharmacist review post hospitalization.

13. In Section 6.5.3, SCPD strongly recommends adding “assistive technology needs”. The regulations contemplate a social worker review of adaptive equipment needs (§6.7.11) but the social worker credentials are minimal (as noted in Par. 6 above) and an AT assessment should be included as part of the medical review under Section 6.5.3. Compare §§11.2 and 13.2.10 of the DLTCRP assisted living regulations, 16 DE Admin Code 3225.

14. Section 6.6.2 could be improved by including a reference to civic activities such a voting. This would implement the following directive in the bill of rights: “(29) Every patient and resident shall be encouraged to exercise the patient’s or resident’s own rights as a citizen of the State and the United States of America.” The elderly, in particular, view voting as a “civic duty”. Consider the following amendment: Scheduled activities...shall include...educational opportunities, *civic activities such as voting*, and interaction with community groups.” Alternatively, to encompass participation in candidate forums, etc., consider the following amendment: “Scheduled activities...shall include...educational opportunities, *civic activities such as participation in the electoral process*, and interaction with community groups.” By including voting among “activities”, transportation or assistance with absentee ballots would be “captured” by Section 6.6.4.

15. In Section 6.8, the “meals” section could be improved. For example, the DLTCRP assisted living regulations include an expectation that food be “palatable”. See §12.1.2 of 16 DE Admin Code 3225. DLTCRP neighborhood home regulations are even more descriptive. See Section 7.0 of 16 DE Admin Code 3310. Section 7.0 includes the following provisions:

7.7. Meals shall be served so that they are flavorful, attractive in appearance, at appropriate serving temperature, and have preserved their nutritional value.

7.3. Persons shall be offered opportunities for choices in food selection.

7.8. Meals should be provided in locations which provide the opportunity for socialization, choice, sanitation, and also support the person's preferences.

SCPD recommends that similar language be included in these regulations.

16. Section 6.11.1.6 disallows self-administration of even over-the-counter medications unless approved by both a physician and interdisciplinary team. This may be a bit "overbroad" since a resident could not even use lip balm (chapstick) or lotions without physician and team approval.

17. Sections 7.3.4 and 7.4.1.2 require facilities to be equipped with a resident call system and have handrails on both sides of corridors. However, ICF/MRs serving "developmentally disabled residents" are exempt. Apart from lack of "people-first" language, these exemptions are problematic. On a practical level, residents of the Stockley Center (assuming it includes an ICF/MR unit) would benefit from handrails and a call system. Legally, the exemption ostensibly constitutes discrimination against persons with mental retardation in violation of the ADA, Section 504, and the Equal Accommodations law.

18. Section 7.4.2.5 allows four (4) residents per room. This is not conducive to privacy and suggests a "warehousing" approach.

19. Several sections deal with infection control and sanitary practices. Consistent with the attached articles, the incidence of C.diff, MRSA, and other treatment-resistant pathogens is alarming. It appears that resident laundry should not be commingled, that high temperatures should be used in washing, and that bleach should be routinely used. The Division should consider the following amendments.

a. Temperature is addressed at §7.6.3.1. However, the 160 degree temperature standard only applies to on-site laundry. Section 7.6.4 should be amended to also impose a temperature standard for off-site laundry.

b. There is no prohibition on mass or commingled laundry, even of undergarments. This should be made explicit.

c. At a minimum, Section 7.6.3 could require that bleach be available in the on-site laundry area. Better yet, the Division could consider requiring all laundry susceptible to washing with bleach, including all undergarments, be washed with bleach.

20. Section 7.7.2.5 requires that each resident have "a chair suitable for resident relaxation" Although implied, the text does not indicate whether this chair must be in the resident's room as juxtaposed to a

common area. It is also unclear if a single chair in a room with four residents would suffice or if four chairs would be required in a room with four residents.

21. Section 10.3 requires maintenance of records for 6 years for adults after discharge but only 3 years for minors after attaining the age of majority. The rationale for the shorter period is unclear. Since the statute of limitations for a suit by the minor would generally not begin to run until the minor turned 18, longer record retention would be prudent. For similar reasons, the 3 year maintenance period for retention of incident reports in Section 10.6 may be unduly short.

22. Although facilities are generally required to comply with the bill of rights (Title 16 Del.C. §1121) under Section 3.7, the Division includes some references to specific rights throughout the regulations. See, e.g., Sections 6.5.8. Given the importance of discharge, it would be preferable to include some specific standards in the regulations conforming to Title 16 Del.C. §1121(18).

23. SCPD is concerned that the regulations as proposed may not comport with the Older Americans Act and the CMS Skilled Nursing Home Regulations. Therefore, Council encourages the Division to review the national standards to ensure that the proposed regulations are in compliance with them.

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

cc: Ms. Carol Ellis
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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