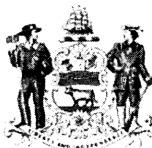

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MEMORANDUM

DATE: January 26, 2011

TO: Ms. Sharon L. Summers, DSS
Policy, Program & Development Unit

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

RE: 14 DE Reg. 618 [DSS Proposed Fair Hearing Practices and Procedures Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Social Services' (DSS) proposal to amend its *Fair Hearing Practices and Procedures* regulation. The proposed regulation was published as 14 DE Reg. 618 in the January 1, 2011 issue of the Register of Regulations. SCPD has the following observations.

First, DSS is deleting parenthetical language in existing §5001 which clarifies that a hearing may be requested based on suspension, reduction, overpayment, sanctions, delays, and terminations. This was a useful clarification and SCPD recommends that it be inserted in new §5001, Par. 1.

Second, in §5300, DSS should consider adding a reference to disclosure of agencies providing free legal representation as a feature of an "adequate" notice. Cf. 7 C.F.R. 273.15(f).

Third, §5300, Par. 2.A.6 is not literally accurate. It categorically recites "(i)f the agency action is upheld, that such assistance must be repaid." Repayment is discretionary and the State or MCO can decide to not pursue recovery. The analogous federal regulation [42 C.F.R. 431.230(b)] states that the agency "may institute recovery". Moreover, a beneficiary can elect to not continue benefits during the pendency of appeal. See §5308, Par. 2.A and §5300, Par. 2.C. Finally, this section would literally impose a mandatory repayment duty for benefits received prior to issuance of the notice and during the minimum 10-day notice period.

Fourth, in §5300, Par. 2.C., SCPD recommends inserting "potential" prior to "liability". As noted in

the preceding paragraph, pursuing repayment is discretionary with the State or MCO. "Benefits are subject to recovery" [§5308, Par. 1] but the agency has discretion to not impose retroactive liability.

Fifth, §§5304, Par. 2 and 5305, Par. 1 categorically require hearing requests to be in writing. Food Supplement Program hearing requests can be submitted orally. See 7 C.F.R. 273.15(h). The Division may wish to revise this regulation to include that exception.

Sixth, §5304.1 contemplates PASARR decisions being issued by DDDS and DSAMH. Proposed DMMA regulations would change the decision-making to DMMA. See 14 DE Reg. at 615, 618 (1/1/11).

Seventh, in §5304.1, substitute "effect" for "affect".

Eighth, in §5305, Par. D.1, the description of "timely notice period" is inaccurate since it categorically states it is a 10-day period. A notice can be provided which gives more than a 10-day notice. The 10 days is a "minimum" which an agency or MCO may exceed. See, e.g., 42 C.F.R. 431.211 and §5300, Par. B. If an MCO mailed out a notice with an effective date of 15 days from notice date, the "timely notice period" would be 15 days, not 10 days. Reduction or termination of benefits would be barred within that 15 day period, not a 10 day period.

Ninth, §5305, Par. 3, literally gives the hearing officer no authority to accept a fair hearing request beyond the 90-day period beginning with the effective date of action regardless of cause. Thus, even if a beneficiary does not receive a notice of action based on the MCO mailing it to a wrong address or wrong person, the beneficiary is without a remedy. In contrast, a hearing officer has authority to extend hearing timelines for "good cause". See §5311, Par. 3, Subsection 3 and §5308, Par. 2.C.1. The hearing officer should be authorized to allow an untimely fair hearing request based on "good cause".

Tenth, the interplay between §5311, Par. 2 (contemplating mailing of hearing notice 12 days prior to hearing) and §5403, Par. 2 (giving staff 5 working days to respond to a beneficiary's request for documents) is problematic. By the time the beneficiary receives the notice of hearing disclosing the right to access "the record", there is no time to arrange for copies prior to hearing. Hearing notices should be issued more than 12 days prior to hearing.

Eleventh, §5311 should be amended to specifically require that notices be sent to both the appellant and his/her attorney or representative. For example, Par. 3., Subsection 1, literally authorizes mailing of the notice to the appellant with no notice to the attorney. This ultimately results in delayed receipt by counsel. When coupled with only a 12 day advance notice period, the regulation promotes last-minute requests for continuances and undermines effective representation.

Twelfth, in §5311, Par. 3, it would be preferable to include a disclosure of right to access "case records" apart from the documents the agency or MCO has submitted as part of the Fair Hearing summary (the "record"). For example, an agency or MCO may not submit documents which undermine its position to the hearing officer but they may be in its case records. Access is a beneficiary's right and should be disclosed in the hearing notice. See §5403, Par. 2.

Thirteenth, in §5312, the introduction recites that the policy applies to decisions made by DSS or DMMA. There is no comparable provision covering MCOs which also issue appealable decisions. The regulation covers "Medicaid Managed Care Cases" [§5304, Par. 1.B; §5401, Par. C.6]. SCPD believes the superseded version of §5312 contained references such as "if completed by DSS" because it contemplated MCOs responding to hearing requests in addition to the State. The new version solely contemplates "State Agency" preparation of the hearing summary, etc. which has not been the historical practice for appeals from MCO decisions. MCOs have traditionally been required to prepare their own Fair Hearing summaries.

Fourteenth, §5312, Par. 2.E, is inadequate since it only requires citation to "State rules". The agency is required to disclose "(t)he specific regulations that support, or change in Federal or State law that requires, the action" [42 C.F.R. 431.210]. The hearing decision is based on "State and federal laws and regulations." See §5500, Par. 3.

Fifteenth, superseded §5312, Par 4, contained the following consumer-oriented guidance: "The document must be easily read and understood (abbreviations should be avoided)." It would be preferable to retain this guidance in the new version.

Sixteenth, §5401 contains the following limitation for Food Supplement Program appeals:

> DSS is not required to hold fair hearings unless the request for a fair hearing is based on a household's belief that:
>
> A. Its benefit level was computed incorrectly
> B. The rules were misapplied or misinterpreted

This is not accurate. For example, failure to timely process an application is appealable. Parenthetically, it is unfortunate that the recitation in the superseded regulation [clarifying that "failure to act with reasonable promptness" is appealable] is being deleted. The recital should preferably be retained. It is retained in the Medicaid context. See §5401, Par. C.1. It is retained in the cash assistance context. See §5401, Par. B.1. Moreover, the USDA discourages such categorical limitations on appeals:

> If it is unclear from the household's request what action it wishes to appeal the State agency may request that the household clarify its grievance. The freedom to make a request for a hearing shall not be limited or interfered with in any way.

7 C.F.R. 273.15(h). [emphasis supplied]

Seventeenth, the grammar in §5401, Par. C could be improved. Subparts 1-4 are sentences while Subparts 5-7 are not sentences and literally state that a "hearing is received". It reads, in pertinent part, as follows:

The State agency must grant an opportunity for a hearing when:

> ...5. Received from prepaid ambulatory plan...
> 6. Received from any managed care organization...
> 7. Received from any enrollee...

The comparable federal regulation [42 C.F.R. 431.220] does not reflect the same deficiency and should be reviewed.

Eighteenth, in §5402, Par. 1.F, the grammar merits correction. It reads as follows:

> The Hearing Officer will conduct hearings regarding decisions on:
>
> ...F. Food Supplement Program households may appeal decisions concerning expedited service.

Nineteenth, in §5404, Par. G, the word "handicaps" is disfavored. Consider substituting "limitations" or "impairments".

Twentieth, §5405 is being deleted with no substitute. It should be retained. It is important to have standardized hearing procedures and to clarify the burden of proof. The "Summary of Proposed Changes" section of the regulation does not indicate that this is a section which will be revised in the future. It is simply being deleted.

Twenty-first, <u>the DHSS approach to resident hearings to contest a discharge or transfer from a nursing home remains extremely problematic</u>. CMS regulations require <u>DMMA</u>, as the State's "Medicaid agency" to provide a compliant hearing for residents who contest nursing home discharges and transfers:

> (a) The Medicaid agency must be responsible for maintaining a hearing system that meets the requirements of this subpart.
> (b) The State's hearing system must provide for -
> (1) A hearing before the agency;...

42 C.F.R. §431.205.

> The State agency must grant an opportunity for hearing to the following:
>
> (3) Any resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged.

42 C.F.R. 431.220. See also 42 C.F.R. §206(c)(3).

Despite the above regulations, and Council objection, DSS discontinued offering such hearings in August, 2008:

> The rule is deleted from the Division of Social Services Manual as the Division of Long-Term Care Residents Protection (DLTCRP) now has jurisdiction over these types of hearings. Reference is made to DLTCRP's Patient's Bill of Rights, Appendix A of Regulation 3201, Nursing Home Regulation for Skilled Care and Regulation No. 3205, Nursing Home Regulations for Intermediate Care.

12 DE Reg. 243 (August 1, 2008)

The current proposed regulation still contains multiple sections contemplating application of the DSS regulation to nursing home discharge/transfer disputes:

> Section 5001. Providing an Opportunity for a Fair Hearing
>
> This policy applies to all applicants and recipients of DSS and DMMA services.
>
> ...2. Staff Inform Clients in Writing of Their Hearing Rights
>
> ...C. At the time a skilled nursing facility or a nursing facility notifies a resident that he or she is to be transferred or discharged.
>
> Section 5401. Conducting Hearings on State Actions
>
> This policy applies to DSS hearing officers any time an appellant/claimant requests a hearing due to an agency action.
>
> C. Medical Assistance Hearings
>
> The State agency must grant an opportunity for a hearing when:
>
> ...3. A resident believes a nursing facility has erroneously determined that he or she must be transferred or discharged.

At the same time, attempting to locate DLTCRP regulations defining procedures to receive and process resident challenges to nursing home discharge/transfer is, at best, a daunting endeavor. DSS cited to "DLTCRP's Patient's Bill of Rights, Appendix A of Regulation No. 3201" at 12 DE Reg. 243 (August 1, 2008). However, Appendix A has ostensibly never been published as a regulation. It does not appear in the Delaware Administrative Code. It does not even appear on the DLTCRP's Website. The DLTCRP incorporated some federal standards by reference into its regulations last year [13 DE Reg. 1322, 1323 (April 1, 2010)]. However, those regulations contain no hearing procedures and only require facilities to notify residents facing discharge/transfer of the general " right to appeal the action

to the State". 42 C.F.R. §483.12(a)(6)].

Since the State Medicaid agency is required to maintain a hearing system with specific standards conforming to 42 C.F.R. Part 431, Subpart E, SCPD recommends that DSS maintain regulations for processing challenges to nursing home discharges/transfers, at least for "recipients of DSS and DMMA services" to whom the regulations apply [§5001]. Literally, the CMS regulations do not permit delegation of the hearing system by the Medicaid agency to another State agency. See above excerpts from 42 C.F.R. §§431.205- 431.206.

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
Ms. Deborah Gottschalk
Ms. Rosanne Mahaney
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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