



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
MARGARET M. O'NEILL BUILDING
410 FEDERAL STREET, SUITE 1
DOVER, DE 19901

VOICE: (302) 739-3620
TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

MEMORANDUM

DATE: July 28, 2011

TO: Ms. Sharon L. Summers, DMMA
Planning & Policy Development Unit

FROM: Daniese McMullin-Powell, ^{DMMA/kit} Chairperson
State Council for Persons with Disabilities

RE: 15 DE Reg. 46 [DMMA Proposed State Residency Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) proposal to amend its residency regulation published as 15 DE Reg. 46 in the July 1, 2011 issue of the Register of Regulations. SCPD has the following concerns and observations.

First, in the general residency section, DMMA proposes to consider a person institutionalized in Delaware a non-resident under the following circumstances:

e. Exception when an institutionalized individual intends to return home to their principal place of residence located in another state, the individual will not be considered a Delaware resident since their intent is not to remain in Delaware.

There are multiple problems with this approach.

A. If the institutionalized individual has a guardian or has an I.Q. of 49 or less, federal regulations render the individual's "intent" immaterial. See 42 C.F.R. §435.403(c).

B. Likewise, the "next of kin" arguably determines place of abode/residency for individuals residing in licensed long-term care facilities who are determined incompetent by the attending physician. See Title 16 Del.C. §§1121(34) and 1122.

C. If the individual intends to return to a former residence on a temporary basis, Delaware residency should be unaffected. See 42 C.F.R. §435.403(j)(3) which recites as follows:

(3) The agency may not deny or terminate a resident's Medicaid eligibility because of that person's temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.

For example, if an individual's elderly parent developed a terminal illness and the individual returns to the out-of-state family home to provide temporary care, the proposed DMMA standard would compel a finding of non-Delaware residency contrary to federal law.

Second, in the context of long-term care, DMMA is narrowing the resource exclusion for a principal place of residence if the individual intends to return home. See proposed §§20310.1.1 and 20320.4.1. The current regulations would exclude the residence even if out-of-state. The proposed regulations would only permit a resource exclusion if the residence is in Delaware. SCPD could not locate any federal law or regulation which requires Delaware to only exclude a Delaware principal place of residence. The analogous SSI resource regulation [20 C.F.R. §416.1212] excludes the value of the principal place of residence regardless of location. Moreover, it is anomalous to exclude an out-of-state principal residence if used by a spouse or dependent relative. See §20310.1.2. Finally, the following illustrations would appear to undermine the validity of the proposed regulation:

A 20 year old with a principal place of residence in Elkton, Maryland suffers a traumatic brain injury in a motorcycle accident. He undergoes rehabilitation in Delaware with expectation of recovery and returning home in 1 year and is appointed a Delaware guardian prior to placement in an institution. The 20 year-old's state of residence is that of the guardian by operation of law pursuant to 42 C.F.R. §435.403(h)(4)(i). The 20 year old is a Delaware resident for Medicaid purposes but his Maryland principal place of residence should be an exempt resource.

An 80 year old living alone in Pennsylvania experiences a stroke, is no longer able to live independently, and is "taken in" by her adult daughter living in Delaware to provide care. After 3 months, the daughter realizes her mother requires more care than the family can provide. The mother applies and is admitted to a Delaware nursing home located near the daughter's residence to facilitate regular visits. The mother has the capacity to declare, and does declare, that she likes the nursing home and intends to remain there indefinitely (e.g. as long as she needs that level of care). This satisfies requirements of Delaware residency for Medicaid purposes [20 C.F.R. §435.403(i)]. The mother also declares that, if she sufficiently recovers from the effects of the stroke, she intends to return to her principal residence in Pennsylvania (with or without part-time caregivers). This satisfies the federal requirements to exclude the Pennsylvania residence.

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

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

15reg46 dmma-residency 7-28-11