



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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**MEMORANDUM**

DATE: December 4, 2012

TO: The Honorable Rita Landgraf  
Ms. Deborah Gottschalk  
Ms. Kevin Huckshorn  
Mr. William Love  
Mr. Stephen Groff

FROM: Don Moore, Vice-Chairperson  
State Council for Persons with Disabilities

RE: 16 DE Reg. 532 [DMMA Final PACE 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) final regulation regarding the Program for All Inclusive Care for the Elderly (PACE). The final regulation was published as 16 DE Reg. 532 in the November 1, 2012 issue of the Register of Regulations. SCPD commented on the proposed version of this regulation in August 2012. A copy of SCPD's August 23, 2012 memo is attached for facilitated reference. The Division of Medicaid & Medical Assistance has now adopted a final regulation incorporating three (3) amendments prompted by the commentary. SCPD truly appreciates that the Division considered the August commentary and effected some amendments conforming to the commentary. However, the Council has the following observations and is respectfully requesting regulatory amendments based on Paragraphs "Second" and "Third" below.

First, SCPD identified some "tension" between CMS guidance (indicating that 7% of PACE participants nationwide are nursing home residents) and the proposed DMMA eligibility standard (requiring the participant to be living in the community). The Councils inferred that DMMA intended to require an initial applicant for PACE to be living in the community while allowing continued participation if the applicant subsequently became a nursing home resident. DMMA responded that the Councils' inference was accurate. It added two (2) clarifying amendments. At 534.

Second, SCPD objected to an authorization to terminate eligibility based on even inadvertent and

minor non-compliance with a plan of care. DMMA declined to effect an amendment based on the attached federal regulation, 42 C.F.R. §460.164. The State standard (§10.b) is “similar” to 42 C.F.R. §460.164(b)(2). However, the federal regulation is more “protective” of participants in at least two (2) ways:

A. The federal regulation adopts the term “consistently refuses to comply” while DMMA adopts the term “is consistently non-compliant”. The DMMA term would cover inadvertent non-compliance (e.g. person consistently forgets to take medications) while the federal regulation (requiring “refusal) would not. A person may have decision-making capacity but still be forgetful or have limitations rendering the non-compliance inadvertent.

B. The federal regulation includes the following additional standard requiring the PACE organization to document efforts to resolve the non-compliance prior to discharge:

(c) **Documentation of disruptive or threatening behavior.** If a Pace organization proposes to disenroll a participant who is disruptive or threatening, the organization must document the following information in the participant’s medical record:

- (1) The reasons for proposing to disenroll the participant.
- (2) All efforts to remedy the situation.

[emphasis supplied] The DMMA regulation completely omits this safeguard!

Third, SCPD objected to the following basis for involuntary termination from the program: “engages in disruptive, threatening or non-compliant behavior which jeopardizes his or her safety or the safety of others.” The Council cited CMS and HHS OCR guidance requiring programs to accommodate disabilities rather than simply terminating eligibility. For example, OCR held that the following Delaware regulation violated federal law: “Patients who are, or become mentally ill and who may be harmful to themselves or others, shall not be admitted or retained in a nursing home.” DMMA once again declined to effect an amendment based on its belief that its standard conforms to the attached federal regulation, 42 C.F.R. §460.164. At 535. This is inaccurate. The federal regulation includes the following caveat that the PACE provider assess whether the non-compliance is related to disability:

(d) **Noncompliant behavior.**

(1) A PACE organization may not disenroll a PACE participant on the grounds that the participant has engaged in noncompliant behavior if the behavior is related to a mental or physical condition of the participant, unless the participant’s behavior jeopardizes his or her health or safety, or the safety of others.

42 C.F.R. §460.164(d)

The DMMA regulation omits this safeguard, i.e., it does not require consideration of the

relationship between the behavior and the individual's disability!

Fourth, SCPD requested clarification of whether assisted living services are part of the PACE benefit package. DMMA clarified that they are part of the PACE benefit package.

Fifth, SCPD recommended that the regulation identify the application of the DMMA hearing process to appeals under the PACE program. DMMA agreed and inserted a conforming reference.

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

cc: Ms. Sharon L. Summers  
Mr. Brian Posey  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

16reg532 dmma-pace final 12-4-12



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MEMORANDUM

DATE: August 23, 2012

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

FROM: Daniese McMullin-Powell, *DMP/KIT* Chairperson  
State Council for Persons with Disabilities

RE: 16 DE Reg. 170 [DMMA Proposed PACE 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 establish enrollment standards for the Program for All Inclusive Care for the Elderly (PACE) in Delaware. The proposed regulation was published as 16 DE Reg. 170 in the August 1, 2012 issue of the Register of Regulations. SCPD has the following observations.

First, the key eligibility standards are compiled in §5. There is some "tension" between §5 and §9 in the context of nursing home residency. The CMS document indicates that 7% of PACE enrollees live in nursing homes. Section 9 recites as follows:

9. Nursing facility services are part of the PACE benefit package.

The PACE Organization must notify the Division of Medicaid and Medical Assistance (DMMA) eligibility worker of the individual's placement in a nursing facility.

The PACE individual is not required to contribute to the cost of their care while in a nursing facility.

Thus, the CMS guidance and §9.0 suggest that residents of nursing homes may be eligible for the program. However, §5 requires, as a matter of eligibility for enrollment, that the applicant "(b) living in the community." SCPD infers that an individual must be in the community upon initial enrollment but that "continued eligibility" is not affected by post-enrollment nursing home residency. It would be helpful if DMMA clarified this aspect of eligibility.

Second, §10 b. contains the following justification for involuntary termination from the program:

Has decision making capacity and is consistently non-compliant with the individual plan of care and enrollment agreement, which may impact the participant's health and welfare in the community;...;

This section would literally authorize termination for recurrent "minor/inconsequential" non-compliance with "minor/inconsequential" impact on health and welfare. Providers have a financial incentive to terminate eligibility of "expensive" individuals and it would be preferable to deter involuntary termination in the absence of significant non-compliance. There is also no requirement that the non-compliance be "wilful" rather than inadvertent. For example, an elderly individual's plan may contemplate self-administration of medications. Due to memory deficits, the individual may periodically forget to take medications which affect the individual's welfare. Under a literal reading of the regulatory standard, the individual could be terminated from the program based on consistent non-compliance impacting health. Consider the following substitute:

Has decision making capacity and is wilfully and consistently non-compliant with material components of the individual's plan of care and enrollment agreement which may significantly impact the participant's health and welfare in the community;...

Third, §10.b. contains the following additional justification for involuntary termination from the program:

Engages in disruptive, threatening or non-compliant behavior which jeopardizes his or her safety or the safety of others;...

Individuals with Alzheimer's, dementia, Tourette's or TBI may exhibit such behavior as a symptom of disability. Terminating their eligibility for symptoms of disability would violate §504 and the ADA. CMS requires programs to provide accommodations to participants with disabilities, not "dump" them. Cf. attached CMS Medicaid Director Guidance (July 29, 1998) and CMS Medicaid Director Guidance (May 10, 2010). See also attached October 11, 1985 HHS OCR LOF to Delaware DHSS which held the following regulation violated §504:

57.809 Mental Illness

A. Patients who are, or become, mentally ill and who may be harmful to themselves or others, shall not be admitted or retained in a nursing home.

OCR commented as follows:

Conditions such as Alzheimers Disease may be considered a mental impairment under the definition of handicapping condition; however the presence of this condition and its manifestations may in no way render one ineligible for the receipt of services normally

provided. ...It is our preliminary determination, based on the preceding discussion, that Section 57.809 as written violates Section 504 of the Rehabilitation Act and its implementing regulation 45 CFR Section 84.4 and Section 84.52(a)(1).

Rather than authorizing termination from the program, enrollees manifesting such behavior due to disability should be considered for specialized treatment. See, e.g., 16 DE Admin Code 3225, §§5.5, 5.12 and 7.0; and 16 DE Admin Code 3201, §5.6. Consider the following substitute:

Has decision making capacity and wilfully engages in disruptive, threatening or non-compliant behavior which is not symptomatic of disability and which jeopardizes his or her safety or the safety of others;...

Fourth, it is unclear if “assisted living” services are part of the PACE benefit package. Compare §9.0. This could be clarified. Assisted living settings are required to be “homelike” (16 DE Reg. 3225, §3.0 (definition of “homelike”) and may be less restrictive settings than nursing facilities.

Fifth, the CMS document recites as follows: “If you disagree with the interdisciplinary team about your care plan, you have the right to file an appeal.” The DMMA regulation omits any reference to the right to a hearing to contest denial of program eligibility (§5.0); involuntary termination from the program (§10.0); and disagreements about the plan of care. It would be preferable to clarify that 16 DE Admin Code 5000 applies.

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

cc: Ms. Rita Landgraf  
Ms. Rosanne Mahaney  
Mr. Brian Posey  
Mr. Brian Hartman, Esq.  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

16reg170 dmma-pace 8-23-12

42 CFR 460.164 - Involuntary disenrollment.

CFR

§ 460.164

Involuntary disenrollment.

(a) **Reasons for involuntary disenrollment.** A participant may be involuntarily disenrolled for any of the following reasons:

- (1) The participant fails to pay, or to make satisfactory arrangements to pay, any premium due the PACE organization after a 30-day grace period.
- (2) The participant engages in disruptive or threatening behavior, as described in paragraph (b) of this section.
- (3) The participant moves out of the PACE program service area or is out of the service area for more than 30 consecutive days, unless the PACE organization agrees to a longer absence due to extenuating circumstances.
- (4) The participant is determined to no longer meet the State Medicaid nursing facility level of care requirements and is not deemed eligible.
- (5) The PACE program agreement with CMS and the State administering agency is not renewed or is terminated.
- (6) The PACE organization is unable to offer health care services due to the loss of State licenses or contracts with outside providers.

(b) **Disruptive or threatening behavior.** For purposes of this section, a participant who engages in disruptive or threatening behavior refers to a participant who exhibits either of the following:

- (1) A participant whose behavior jeopardizes his or her health or safety, or the safety of others; or
- (2) A participant with decision-making capacity who consistently refuses to comply with his or her individual plan of care or the terms of the PACE enrollment agreement.

(c) **Documentation of disruptive or threatening behavior.** If a PACE organization proposes to disenroll a participant who is disruptive or threatening, the organization must document the following information in the participant's medical record:

- (1) The reasons for proposing to disenroll the participant.
- (2) All efforts to remedy the situation.

(d) **Noncompliant behavior.** (1) A PACE organization may not disenroll a PACE participant on the grounds that the participant has engaged in noncompliant behavior if the behavior is related to a mental or physical condition of the participant, unless the participant's behavior jeopardizes his or her health or safety, or the safety of others.

- (2) For purposes of this section, noncompliant behavior includes repeated noncompliance with medical advice and repeated failure to keep appointments.

(e) **State administering agency review and final determination.** Before an involuntary disenrollment is effective, the State administering agency must review it and determine in a timely manner that the PACE organization has adequately documented acceptable grounds for disenrollment.