



STATE OF DELAWARE
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MEMORANDUM

DATE: May 30, 2013

TO: Ms. Mary Peterson, Director
Division of Long Term Care Residents Protection

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

RE: 16 DE Reg. 1130 [DLTCRP Proposed LTC Transfer, Discharge & Readmission 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) proposal to adopt a "complete revision" of its regulations covering transfers and discharges from long-term care facilities. The proposed regulation was published as 16 DE Reg. 1130 in the May 1, 2013 issue of the Register of Regulations. SCPD has the following observations.

First, Section 1.2 contains the following exclusion:

This regulation does not extend to decisions of DHSS or any of its Divisions, to deny, suspend, delay, reduce or terminate benefits. The regulation governing appeals related to benefit eligibility are found at 16 DE Admin Code §5000.

This exclusion is highly problematic.

The "5000" series regulation recites that it only applies to DMMA and DSS. See 16 DE Admin Code 5000, §5001. Thus, if a non-Medicaid resident of a DHSS-run nursing facility, (GBHC; Bissell; DHCI) were being discharged, the resident would have no right to an impartial hearing under Title 16 Del.C. §1121(18) or the "5000" series. Likewise, a resident of a DSAMH-sponsored group home would have no right to an impartial hearing under §1121(18) or the "5000" series. A non-waiver DDDS resident of a group home or shared living/adult foster home would have no right to an impartial hearing under §1121(18) or the "5000" series. The purported exclusion is

inconsistent with the §1121(18). Conversely, a Medicaid-funded nursing facility resident is not limited to the DLTCRP 3102 regulation to contest a discharge/transfer. Under federal law and DHSS regulation, such an individual is entitled to a hearing from the Medicaid agency to contest a nursing facility discharge/transfer. See 42 C.F.R. §431.206(b)(3) and §431.201(a) and 16 DE Admin Code 5000, §5001, Par. 2.C. Section 1.1 of the proposed regulation suggests that the DLTCRP 3102 regulation is the exclusive hearing system for appeals of LTC facility discharges/transfers. There is no analog to §4.6.2 (covering Medicare-funded residents) for Medicaid-funded residents of nursing facilities.

Second, in §2.0, definition of “facility”, SCPD recommends simply cross referencing Title 16 Del.C. §1102(4). If the full text is retained, the Division should substitute “Title 16” for “this title”.

Third, §3.1.1.5 could be improved to better address episodic conditions or those subject to remission and flare-ups. If someone’s condition has temporarily improved, this should not be the basis for discharge. Consider amending the reference to “...services provided by the facility on a long-term basis”.

Fourth, in §3.2.1.3, the reference to “treatment team” is problematic. There is no definition of “treatment team” and some facilities (e.g. shared living/foster home) may lack a “treatment team”.

Fifth, in §3.3.1, consider the following revision: “(b)efore a facility ~~transfers or discharges~~ proposes to transfer or discharge a resident...” This would be more consistent with the 30-day advance notice requirement in §3.3.2.1.

Sixth, there is some “tension” between the definition of “transfer and discharge” in §2.0 (limiting “transfer” to movement outside the facility) and use of the word “transfer” in §§3.3.2.2.2 and 3.6.1.1 in the context of intra-facility changes of roommates.

Seventh, in §3.3.3.1.3.1, substitute “facility’s” for “facilities”.

Eighth, in §3.3.3.1.7.6, consider deletion of “nursing”. Compare §3.3.1.2.

Ninth, in both §§3.7.2.1 and 3.7.2.2, delete the term “nursing”.

Tenth, there is some “tension” between §3.3.3.1.7 and 4.1.2.3. A facility’s attorney could argue that a resident who submits a timely hearing request to the DLTCRP, but does not “copy” the facility or Ombudsman, has not “perfected” an appeal. Indeed, §3.3.3.1.7 does not specifically include the requirement to “copy” the facility and Ombudsman in the facility notice so a resident may not be aware of the requirement. The DLTCRP has previously shared its view that “copying” the Ombudsman and facility is “directory” and not a basis for dismissal of an appeal. However, the regulation should be revised for clarity. Consider the following revision: “Copied to the facility and the State LTC ombudsman provided that delay in providing a copy shall not result in denial or dismissal of a hearing request.”

Eleventh, §4.6.1.1 contains an “unusual” right for the facility to inspect the resident’s records. This is not the general DHSS approach. Compare 16 DE Admin Code 5000, §5311E and F and §5403. SCPD recommends substitution of the following in §4.6.1.1: “Complete any inspection and duplication of records pursuant to a request under Title 16 Del.C. §1121(19).”

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
Mr. Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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