



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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November 24, 2015

Mr. Jamie Mack
Division of Public Health
Jesse Cooper Building
417 Federal Street
Dover, DE 19901

RE: 19 DE Reg. 392 [DPH Proposed Personal Assistance Services Agency Regulation]

Dear Mr. Mack:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Public Health's (DPH's) proposed regulation to implement legislation (H.B. No. 107), which was recently enacted to remove a ban on provision of personal assistance services in hospitals and nursing facilities. The proposed regulation was published as 19 DE Reg. 392 in the November 1, 2015 issue of the Register of Regulations. The preamble describes the purpose of the changes as follows:

One purpose of the amendments is to allow for the provision of services by these agencies in nursing facilities and hospitals. This change will allow consumers to receive the services necessary to safely achieve their highest level of independence and optimal quality of life while residing in their own home or during a necessary hospitalization. In addition, amendments were made to update the requirements to ensure patients receive safe and quality care.

SCPD has the following observations.

First, in §1.0, definition of "Personal Assistance Services Agency", first sentence, SCPD recommends correction of grammar. There are singular pronouns (his/her) with a plural antecedent (consumers). This can be easily corrected by substituting "their" for "his/her".

Second, in §1.0, definition of "Personal Assistance Services Agency", the second sentence reads as follows: "The personal assistance services agency shall only provide services in the county in which the agency is located and/or the county(ies) which are immediately adjacent." This new limitation may be ill-conceived. A "Personal Assistance Services Agency" "located" in Kent County could serve the entire State. However, an Agency "located" in NCC could not serve clients in Sussex and an Agency "located" in Sussex could not serve clients in NCC. The rationale for this change is not provided. The term "located" is not defined. It is not based on statute. See 16 Del.C. §122(3)x. Delaware is a small

state and the limitation may unnecessarily circumscribe residents' choice of providers.

Parenthetically, inclusion of this limitation in a definition violates the attached Section 4.3 of the Delaware Administrative Code Style Manual since it creates a substantive standard in a definition.

Third, in §5.4.2.2, simple fingernail care by a direct care worker is authorized. However, toenail care is categorically banned. This is counterintuitive. If someone can trim a fingernail, the same skills would logically apply to trimming toenails. For example, simple "soaking of fingernails" is authorized but soaking of toenails is banned. Moreover, the ban would ostensibly conflict with the statutory authorization that authorizes personal assistance workers to provide "those other services set out in §1921(a)(15) of Title 24", i.e. acts individuals would normally perform themselves but for functional limitations. [16 Del.C. §122(3)x2]. Individuals could normally provide their own toenail care. The Division may wish to consider whether a categorical ban on toenail care is justified.

Fourth, the following new limitation is added:

Section 3.13. The personal assistance services agency must not use the word "healthcare", or any other language that implies or indicates the provision of healthcare services, in its title or in its advertising.

Since personal assistance workers, by statute, can perform acts individuals could normally perform themselves but for functional limitations, the restriction is "overbroad". See 16 Del.C. §122(3)x2 and 24 Del.C. §1921(a)15). Many of the services authorized by statute would amount to "healthcare". Indeed, the above statutes specifically authorize personal care workers to perform "healthcare acts".

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.

Sincerely,



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

cc: Mr. A. Richard Heffron, President, State Chamber of Commerce
Ms. Karyl Rattay, DHSS-DPH
Ms. Debbie Gottschalk, DHSS
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

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DELAWARE ADMINISTRATIVE CODE STYLE MANUAL (EXCERPT)

4.3 Definitions (See Figure 4.1)

It is recommended that definitions of terms be included in each regulation. Definitions provide clarification of terms used within a regulation, save space in the body of the regulation, and allow the regulation writer to control the meaning of a word. Define a term only when the meaning of a word is important and it is used more than once in the regulation. Do not define ordinary words that are used in their dictionary context. Regulatory information should not be included in the definition.

Example of a Definition that is Too Substantive:

"Lockup facility" means a secure adult detention facility used to confine prisoners waiting to appear in court and sentenced prisoners for not more than 90 days. In addition to the cell, a lockup facility must include space for moderate exercise and activity, such as weight lifting, ping-pong, table games, reading, television, and cards.

This definition should end at "90 days."