



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney
Governor

John McNeal
SCPD Director

MEMORANDUM

DATE: April 26, 2017

TO: Ms. Renee Purzycki, DLTCRP
Planning & Policy Development Unit

FROM: Ms. Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

RE: 20 DE Reg. 766 [DLTCRP Proposed Neighborhood Home Regulation (4/1/17)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Long Term Care Residents Protection (DLTCRP's) proposed regulation. DLTCRP proposes a full revision of the standards applicable to DDDS neighborhood homes. The proposed regulation was published as 20 DE Reg. 766 in the April 1, 2017 issue of the Register of Regulations.

SCPD has the following observations.

First, DHSS should consider joint promulgation of regulations by both the DLTCRP and DDDS. By statute, DDDS is authorized to promulgate regulations covering neighborhood homes. See 29 Del.C. §7909A© (1) and (e). In the past, the DLTCRP and DDDS jointly promulgated the neighborhood home regulations. See 15 DE Reg. 968 (January 1, 2012). Sole promulgation by DLTCRP may render the regulations vulnerable to question in any enforcement action.

Second, in §1.0, the definition of "authorized representative" merits revision. On the one hand, it appears to limit an "authorized representative" to someone acting on behalf of a resident lacking decision-making capacity in the first and last sentences. On the other hand, it includes someone appointed under a POA, AHCD, or supportive decision-making agreement - all of which require the resident to have capacity. This is confusing. The section should be revised to encompass anyone authorized by law to act on the resident's behalf.

Third, in §1.0, definition of "person centered plan", the grammar in the second sentence is incorrect. The list inconsistently includes nouns (people; strategies) and verbs (uses; offers). Compare the attached §7.3 from the Delaware Administrative Code Drafting & Style Manual.

Fourth, in §3.2.1, insert “at least” prior to “annually”. Otherwise, a licensee could argue that DHSS can only conduct one inspection annually, i.e., there is a regulatory “cap” of one inspection annually.

Fifth, in §4.2.15, a total ban on firearms on the premises of a neighborhood home could be challenged under the Second Amendment and the Delaware Constitution. See attached March 14, 2014 News Journal article describing Delaware Supreme Court ruling that WHA cannot limit firearms in common areas. See also Title 16 Del.C. §1121(25) and (29). The DLTCRP may wish to seek guidance from the Attorney General’s Office in this context.

Sixth, the Division should consider adding a subsection to §5.4 which currently contemplates submission of plans only to DHSS. Under certain circumstances, the premises would be subject to review by the State Architectural Accessibility Board. See Title 29 Del.C. §7303.

Seventh, the only accessibility references in Section 5.4 are in the context of ramps. See, e.g., §§5.4.6 and 5.4.6.2. This is highly underinclusive. For example, a ramp for ingress and egress is of little use if doorways are narrow or bathrooms are inaccessible. A general reference at §5.6 is rather cryptic. The CMS Rule contemplates that “the setting is physically accessible to the individual” overall. See 42 C.F.R. 441.710(a)(1)(B).

Eighth, Section 5.4.6 only requires a ramp if accommodating individuals who regularly require wheelchairs. One problem with this approach is that providers have no incentive to have accessible sites and individuals using wheelchairs are disproportionately excluded from the neighborhood home network. A second problem with this approach is that visitors using wheelchairs cannot enter the home.

Ninth, there is some “tension” between §5.9.5 (requiring doors to be capable of being opened from either side at all times) and §5.10.7 (requiring lockable doors). The CMS Community Rule promotes resident privacy, including doors “lockable by the individual, with only appropriate staff having keys to doors”. See 42 C.F.R. 441.710(a)(1)(B).

Tenth, Section 5.10.12 limits bedrooms to no more than two (2) individuals. It would be prudent to include a subsection noting that residents have some choice in roommates. See Title 16 Del.C. §1121(28). The CMS Rule is even more affirmative: “Individuals sharing units have a choice of roommates in that setting.” 42 C.F.R. 441.710(a)(1)(B).

Eleventh, Section 6.2 contemplates manual entries in a medication administration record. If electronic entries are permissible in a data base (e.g. in THERAP), then this section may merit revision.

Twelfth, Section 6.8.3.1 merits review. It generally includes elopement as a reportable incident only if an individual’s whereabouts are unknown and the individual suffers harm. Many behavior plans include restrictions (e.g. line of sight or supervision standards). Section 6.8.3.1 does not account for violations of behavioral plans. Thus, an individual restricted to line of sight due to sex offenses could elope and the agency would not have to report the occurrence.

Thirteenth, Section 6.8.4.2 characterizes injuries resulting in transfer to an acute care facility as a reportable incident. At a minimum, we recommend including “urgent care” facilities in this section. Anecdotally, we understand that a provider may have opted to take injured individuals to urgent care facilities to inferentially avoid reporting incidents. By analogy, the DSCY&F requires its providers to report any injury resulting in medical/dental treatment other than first aid provided on-site. See 9 DE Admin Code 103.15.22 and 103.32.0. This is manifestly a more protective standard.

Fourteenth, Section 7.4 could be improved by incorporating the ADA standard that there should be no protrusion from the wall in excess of four inches. See attachments related to fire extinguishers.

Fifteenth, Section 9.1.5 is overly restrictive in requiring all prescribed medications to be kept locked in a cabinet or lock box. An individual with asthma could not keep an emergency inhaler in his personal possession. An individual with dry skin could not keep a prescription skin moisturizer in his personal possession. The standard is also too brittle if staff are trying to train an individual to monitor and self-administer medications in anticipation of developing greater independence. Restricting access to an individually prescribed medication is not “normal” and the blanket policy of locking all prescribed medications may violate the CMS Community Rule. If there are less intrusive methods to achieve safety, they should be considered and restrictions only allowed if included in the person-centered service plan. See 42 C.F.R. 441.530 and 441.710(a).

Sixteenth, we did not notice a “waiver of standards” provision analogous to the current regulation, §12.0. If this is an oversight, the Division may wish to include a comparable provision.

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

cc: Ms. Mary E. Peterson, DLTCRP
Ms. Jill Rogers, DDDS
Mr. Stephen Groff, DMMA
Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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Generally, use the active rather than the passive voice:

EXAMPLE:

Use: The Chairman appoints members of the committee.

Avoid: Members of the committee are appointed by the chairman.

Generally, use the third person:

EXAMPLE:

Use: The applicant shall file the appropriate forms.

Avoid: You shall file the appropriate form.

If an idea can be accurately expressed either positively or negatively, express it positively. The negative form is appropriate where a provision expresses a prohibition. Negative words should not be used where provisions provide only advisory guidance.

7.3 Tabulation and Use of Bullets

Tabulation is used to arrange the structure of subdivisions in a document. All items in the tabulated enumeration must belong to the same class. Each item listed must be parallel to the introductory language. The following tabulation is incorrect because each subdivision is not parallel in substance or form to the introductory language:

EXAMPLE:

1.1 An applicant for licensure shall:

- 1.1.1 Complete the application for examination;
- 1.1.2 Submit in advance the examination fee; and
- 1.1.3 Eligibility for licensure by reciprocity.
(Language not parallel)

Subdivision 1.1.3 should read, "Be eligible for licensure by reciprocity."

The following guidelines apply when using displayed lists:

1. In most cases, the introductory language to a displayed list should end in a colon.
2. All items in a displayed list should begin with a capital letter, whether the entry is a word, a sentence fragment, a full sentence, or numerous sentences.
3. Each item should end with a semicolon or period, and a period should be used after the last item if it is the end of a sentence.
4. Items should end with periods if the items are complete sentences or if it is anticipated that the list will be modified often.
5. If using semicolons and the list consists of alternatives, "or" should be placed after the second to last item.
6. If using semicolons and the list is inclusive, "and" should be placed after the second to last item.
7. Language should not be added after a displayed list that continues the sentence of the introductory language.
8. The automatic numbering feature of word processing programs should not be used. Each number should be typed individually.

If a displayed list is not an exhaustive list and uses "but ... not limited to" in the introductory language or if it is a list of suggestions, the list should be bulleted and not numbered.

EXAMPLE

- 9.4.4 Sources of CE credits include but are not limited to the following:
- Programs sponsored by national funeral service organizations.
 - Programs sponsored by state associations.
 - Program provided by local associations.
 - Programs provided by suppliers.
 - Independent study courses for which there is an assessment of knowledge.
 - College courses.
- 9.4.5 The recommended areas include but are not limited to the following:
- Grief counseling
 - Professional conduct, business ethics or legal aspects relating to practice in the profession.
 - Business management concepts relating to delivery of goods and services.
 - Technical aspects of the profession.
 - Public relations.
 - After care counseling.
- 9.4.6 Application for CE program approval shall include the following:
- 9.4.6.1 Date and location.
- 9.4.6.2 Description of program subject, material, and content.
- 9.4.6.3 Program schedule to time segments in subject content areas for which approval of, and determination of credit is required.
- 9.4.6.4 Name of instructor, background, and expertise.
- 9.4.6.5 Name and position of person making request for program approval.

7.4 Use of "shall", "may", "may not", and "must"

Use "shall" in the imperative sense to express a duty or obligation to act. The term "shall" is generally used in connection with statutory mandates. "May" is permissive and generally expresses a right, privilege, or power. When an individual is authorized but not ordered to act, the term "may" is appropriate. If an obligation to act is intended, "shall" is used.

Use "may not" when a right, privilege, or power is restricted. Using "shall not" negates the obligation but not the permission to act; therefore, "may not" is the stronger prohibition. Wherever possible, the words "shall" or "may" are used in place of other terms such as "is authorized to", "is empowered to", "is directed to", "has the duty to", "must", and similar phrases. However, if certain action is intended to be a condition before accruing a right or privilege, the word "must" is used instead of "shall" or "may" (e.g., "In order to have your regulations published, you must file them by the deadline.")

When the word "shall" is used, the subject of the sentence must be a person, committee, or some other entity that has the power to make a decision or take an action. For this reason, do not use the word "shall" to declare a legal result or state a condition. When writing a sentence that contains the word "shall", check for proper use of the word by reading the sentence to yourself and substituting the phrase "has the duty to" for "shall".

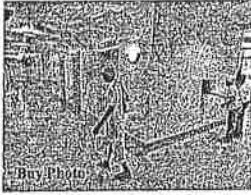
EXAMPLE:

Use: A practitioner shall perform clinical work only in designated areas.

Avoid: Clinical work shall be performed only in designated areas

NRA wins court ruling against WHA

Sean O'Sullivan, The News Journal Published 7:15 p.m. ET March 18, 2014 | Updated 9:01 a.m. ET March 19, 2014



(Photo: ROBERT CRAIG/THE NEWS JOURNAL)

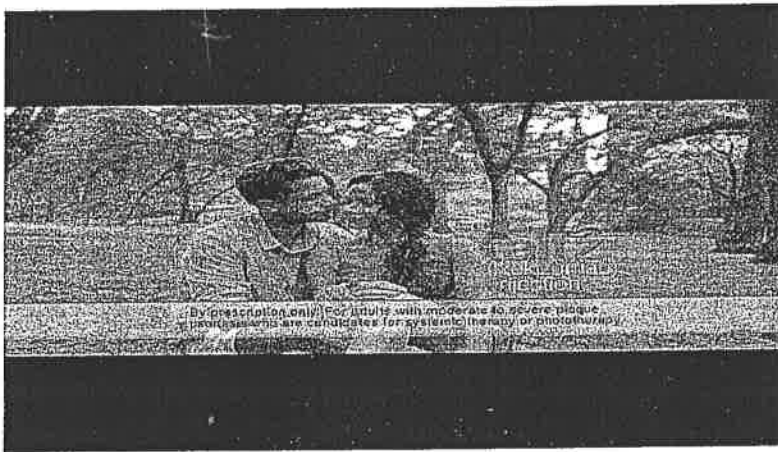
In a surprising blow to public housing officials and a clear win for the [National Rifle Association](http://home.nra.org/) (<http://home.nra.org/>), the [Delaware Supreme Court](http://courts.delaware.gov/Supreme/index.stm) (<http://courts.delaware.gov/Supreme/index.stm>) has ruled that the [Wilmington Housing Authority](http://www.wha.net/) (<http://www.wha.net/>) cannot set limits on residents' rights to carry guns in common areas of public housing.

The unanimous ruling by the state Supreme Court noted that under the Delaware Constitution, which offers broader gun rights protections than the U.S. Constitution, the WHA limitations on possessing a gun were "overbroad and burden the right to bear arms more than is reasonably necessary."

"Public Housing is 'a home as well as a government building,' " Justice Henry DuPont Ridgely wrote for the

panel.

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The ruling directly contradicts a July 2012 ruling by U.S. District Judge Leonard Stark who found that the limits on residents carrying guns in common areas like lounges, halls and laundry rooms was "a reasonable policy."

Because the case turned on questions of state, not federal law, the Delaware Supreme Court ruling prevails.

[Poll: Guns in public housing \(http://archive.delawareonline.com/poll/2014-03-19/7892044\)](http://archive.delawareonline.com/poll/2014-03-19/7892044)

The Delaware justices wrote that in certain circumstances, the WHA could limit the "use" of firearms but it could not limit "possession" of firearms in what amounted to parts of the residents' homes.

The state justices said that more narrow regulations – like barring residents from bringing guns into portions of WHA buildings where state employees work – may be acceptable.

"It is definitely a win," said attorney Francis X. Pilleggi, who represented two WHA residents in the NRA-funded lawsuit. "The result is excellent and exactly what we were looking for."

WHA Executive Director Frederick S. Purnell said he was very disappointed, "Overall I think the ruling sets us back."

Purnell said he thought the restrictions on guns in common areas "struck a good balance between the right to bear arms and the overall mandate we have to provide a safe environment for our residents."

Before the ruling, Purnell and others said that public housing agencies across the nation were watching the case to see what kind of limits could be placed on gun possession.

Purnell said the WHA would comply with Tuesday's ruling and said he does not expect there will be an appeal.



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WHA attorney Barry Willoughby said he was at least pleased that the court adopted a standard of review which may give the WHA some limited authority to regulate weapons in future.

But, he said, "Effectively the case is over."

Before Tuesday's decision, residents of Wilmington public housing were divided. Some strongly opposed any weapons in the buildings while others said they wanted to have a firearm for self defense. And some, like WHA resident Mary Williams, who favored allowing residents to have guns, opposed guns in common areas.

"You don't need that," she said in August. "Just keep it in your room."

The case against the WHA started June 2010 when two WHA residents filed suit to keep guns in their public housing units. At that time, the WHA had a broad ban on all guns in public housing. But weeks later, the U.S. Supreme Court made a landmark ruling that state and local governments could not impose a blanket ban on gun ownership.

So in Sept. 2010, WHA dropped its flat ban on guns and instead adopted a policy that placed restrictions on guns in common areas of public housing like television lounges and laundry rooms. The NRA and the WHA plaintiffs, however, persisted in their legal challenge arguing the new restrictions improperly limited their rights. District Judge Stark disagreed, finding the limits were a reasonable safety measure.

The NRA then appealed to the U.S. Third Circuit Court of Appeals arguing that the issues in the case involved questions related to the Delaware Constitution, not the U.S. Constitution. The federal appeals court agreed in August and sent the matter to the Delaware Supreme Court for clarification.

As a technical matter, the case will now go back to the U.S. Third Circuit Court of Appeals, which will in turn likely send the case back to District Judge Stark. But it appears that will not be needed, as WHA officials said Tuesday they will comply with the Delaware Supreme Court ruling and lift the restriction on guns in common areas.

In court, the WHA had argued it was unsafe to allow guns to be carried in common areas because it could lead to a situation where the person with the largest caliber gun gets control of the television remote. On Tuesday, Pileggi said that was a false argument because other state and federal laws restrict the use of guns and place limits on how people can behave with firearms.

He said if someone used a gun in a threatening manner to gain control of the TV remote, then they could be charged with terroristic threatening.

Also, Pileggi said he did not believe this case would end up limiting other public institutions from putting restrictions on guns in places like courthouses and town halls.

"In this opinion, the court went out of its way to distinguish public residences from government buildings," he said. "There is a huge distinction" he said, because one is a home and the other is not.

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