

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF LONG TERM CARE RESIDENTS PROTECTION
Statutory Authority: 16 Delaware Code, Section 1101 (16 **Del.C.** §1101)

FINAL

ORDER

3102 Long Term Care Transfer, Discharge and Readmission Procedures

NATURE OF THE PROCEEDINGS:

The Department of Health and Social Services (“Department”) / Division of Long Term Care Residents Protection (DLTCRP) initiated proceedings to establish Regulation 3102 Long Term Care Transfer, Discharge and Readmission Procedures. The Department’s proceedings to establish the regulation was initiated pursuant to 16 **Delaware Code** Section 1124 and its authority as prescribed by 29 **Delaware Code** Section 7971.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the July 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 30, 2012 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSED AMENDMENT

The proposal establishes Regulation 3102 Long Term Care Transfer, Discharge and Readmission Procedures. The proposed change will establish the regulation as required by 16 **Del.C.** §1124.

Statutory Authority

29 **Del.C.** Chap. 79, “Department of Health and Social Services.”
16 **Del.C.** §1124, “Staff training; issuance of regulations.”

Background

DLCTRP is establishing these regulations as prescribed by 16 **Del.C.** §1124.

Summary of Proposed Amendment

The proposal establishes regulations governing transfer, discharge and readmission procedures of residents of long term care facilities that must be *used* by facilities in these situations. It also establishes the method for residents to request a hearing; and establishes procedures for the conduct of the hearing.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

The Governor’s Advisory Council for Exceptional Citizens (“GACEC”) and the State Council for Persons with Disabilities (“SCPD”) offered comments and suggestions. The Delaware Health Care Facilities Association (“DHCFA”) also offered comments and suggestions. DLTCRP has considered each comment and responds as follows:

Comment: 1. In its April 24 commentary, Par. 1, the SCPD noted that 57% of Delaware nursing home patients are funded by Medicaid. These patients have a federal right to contest a discharge or transfer with certain protections that were not included in the April version of the regulation. DHSS regulations specifically apply the hearing procedures codified at 16 DE Admin Code Part 5000 to appeals by Medicaid beneficiaries of proposed nursing home discharges and transfers. The SCPD therefore commented that “the better approach would be to adopt or incorporate the Part 5000 regulations as the standards for discharges and transfers from all licensed long-term care facilities.” Instead of adopting this approach, the July version of the regulation has 2 sets of standards applicable to the following facilities: 1) Section 3.0 applies to nursing facilities which participate in the Medicaid or Medicare programs; and 2) Section 4.0 applies to State-licensed long-term care facilities. There are several problems with this approach:

A. A discharge from an ICF/MR (e.g. Stockley; Mary Campbell) is not covered by Section 3.0 (since exempt from 42 C.F.R. §483.5) and the procedures in Section 4.0 are not co-terminous with those in 42 C.F.R. §§431.210 - 431.246.

Response: *The section has been revised as follows:*

3.0 Transfer, discharge and readmission rights of residents in a certified skilled nursing facility or a certified nursing facility as defined in 42 CFR §483.5. or an Intermediate Care facility (ICF/MR) as defined in 42 CFR §440.150.

B. If the State proposed to discharge a Medicaid beneficiary from a State-run nursing facility (GBHC; Bissell;

DHCI), the beneficiary has a right to a Medicaid hearing under 16 DE Admin Code Part 5000 which conforms to the procedures mandated by Ortiz v. Eichler. Neither Section 3.0 nor Section 4.0 of the DLTCRP regulation complies with Ortiz and the regulation will confuse Medicaid beneficiaries of State-run nursing facilities into believing that only the DLTCRP process applies.

Response: Section 1 was revised as follows:

1.0 Purpose

This regulation applies to decisions by licensed facilities to transfer or discharge a resident. It prescribes the process for providing an impartial hearing to a resident. governs the impartial hearings on contested discharges from long term care facilities. 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 Del.C. Administrative Code §5000. Be aware that the appeal requirements are different from the requirements in this regulation.

C. Section 3.0 applies to nursing homes participating in the Medicare program pursuant to 42 C.F.R. §483.5. Federal law authorizes Medicare beneficiary appeals of proposed nursing home discharges through a QIO. See attached Quality Insights Delaware publication, "How to Appeal if your Services Are Ending". Time periods to contest the discharge are very short. Medicare beneficiaries will likely be confused concerning the overlapping Medicare and DLTCRP appeal systems. At a minimum, the DLTCRP regulation should include an explanatory comment or note highlighting the availability of both appeal systems.

Response: Section 1 was revised by inserting a second paragraph which states:

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 Del. Administrative Code §5000. Be aware that the appeal requirements are different

D. For nursing facilities which are covered by both Section 3.0 (Medicaid/Medicare enrolled) and Section 4.0 (State licensed under 16 Del.C. Ch. 11), it is unclear if only Section 3.0 applies or both Sections 3.0 and 4.0 apply.

Response: *The Division does not consider this unclear. All residents of licensed long term care facilities are covered by Section 4.0 by 16 Del.C. §1118. Medicaid beneficiaries residing in certified facilities are covered by both § 3.0 and § 4.0.*

Comment: 2. In Section 2.0, the definition of "transfer and discharge" is problematic. The definition is as follows:

"Transfer and discharge" includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility.

The April version of the regulation contained a similar definition which limited "transfer and discharge" to removal to another facility. The SCPD objected to the narrow definition which, while based on 42 C.F.R. §483.12(a)(1), categorically presumes that all persons whose residency is terminated go to another facility. To the contrary, involuntarily discharged residents, including those discharged for nonpayment, may go to a relative's home, a homeless shelter, or "the street". Under the proposed definition, the regulation (and its protections) would be inapplicable to terminations of residency if the resident is expected to go to a relative's home, a homeless shelter, or "the street".

Response: *The definition of "transfer and discharge" has been revised as follows: **"Transfer and discharge" is defined separately in Section 3.0 and 4.0. includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility***

Comment: 3. Section 3.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and 1122.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of "legal representative" in Section 2.0 as follows:

"Legal representative" includes a resident's guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

Response: *The suggestion was adopted. Legal Representative is now defined in Section 2 as follows:*

"Legal Representative" or "representative" includes a resident's: guardian; agent pursuant to a power of attorney, advanced health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§ 1121(34) and 1122.

Comment: 4. Section 3.3.2 merits revision. It is loosely based on 42 C.F.R. §483.12(a)(6). First, references to "developmentally disabled individuals" and "mentally ill individuals" are not "people-first" and violate Title 29 Del.C. §608(b)(1)a. Second, unlike the federal regulation, it is ambiguous in defining when notice should be given to the P&A. The facility would, with no guidance, determine if such notice is "applicable" and may have to "guess" at the identity of the P&A. Third, there are other key agencies which should also receive notice, including the DSHP Plus MCO and any DHSS agency (APS; DDDS) involved in the placement. Consider the following substitute:

3.3.2 Provide a copy of the notice to the Division; the State LTC ombudsman; the resident's Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident's placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if

the resident is an individual with a developmental disability or mental illness.

Response: Section 3.3.2. was revised as follows:

3.3.2 Provide a copy of the notice to the Division; the State LTC ombudsman; the resident's Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident's placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.

Comment: 5. In §3.4.2.4, delete the comma after the word "needs".

Response: Comma deleted.

Comment: 6. Sections 3.5.6 and 3.5.7 are based on 42 C.F.R. §§483.12(a)(6). I recommend combining §§3.5.6 and 3.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Delaware's P&A for individuals with developmental disabilities and mental illness is the same agency.

Response: The suggestion was adopted as follows:

~~3.5.6 For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and~~

~~3.5.7 For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.~~

3.5.6 For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Comment: 7. As applied to Medicaid-funded residents, §3.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J, DCIS No. 036864 (Del. DES 1987). Thus, if the discharge is based on nonpayment, the notice must include the calculations. The notice must include the citations to the regulation(s) supporting discharge. The notice must "contain any information needed for the claimant to determine from the notice alone the accuracy of the agency's intended action" and "provide a detailed individualized explanation of the reason(s) for the action being taken". These requirements should be added to §3.5.

Response: The suggestion was adopted as follows:

3.5 Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:

3.5.4 ~~The reason for transfer or discharge;~~

3.5.1 A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:

3.5.1.1 A statement of what action the agency intends to take;

3.5.1.2 The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facilities intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months.

3.5.1.3 The specific policy or regulation supporting such action.

Comment: 8. Section 3.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

Response: The suggestion was adopted as follows:

~~3.5.4 A statement that the resident has the right to appeal the action to the State;~~

3.5.4 A statement of the resident's right to a fair hearing as provided in this section:

3.5.5 The method by which the resident may request a fair hearing;

3.5.6 A statement that the resident may represent him or herself or may be represented by counsel or by another person.

Comment: 9. Section §3.8 could result in violations of State law. The implication is that a facility can change a resident's room within the same building as of right. This is reinforced by §4.8. However, State law requires the facility to honor the room request of a resident unless impossible to accommodate. See Title 16 Del.C. §1121(28) and compare §4.8.3. Moreover, a facility must honor the requests of spouses to share a room if feasible and not medically contraindicated. Section 3.8 should be amended to clarify that a facility's discretion to transfer residents to another room in the same building is limited by Title 16 Del.C. §§1121(13) and 1121(28).

Response: *The suggestion was adopted as follows:*

3.8 Room changes in a composite distinct part. *Room changes in a facility that is a composite distinct part (as defined in 42 CFR §483.5(c)) must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations. A facilities' discretion to transfer residents to another room is limited by Title 16 Del.C. §§121 (13) and (28).*

Comment: 10. If §3.0 is a "stand alone" regulation which excludes application of §4.0, §3.9.3 would violate State statute [Title 16 Del.C. §1121(18)] since readmission is not limited to Medicaid beneficiaries. Every LTC resident who is returning from an acute care facility is entitled to be offered the next available bed.

Response: *The suggestion was adopted as follows:*

3.9.3 Permitting resident to return to facility. *A nursing facility must establish and follow a written policy under which a resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:*

3.9.3.1 *Requires the services provided by the facility; and*

3.9.3.2 *Is eligible for Medicaid nursing facility services.*

3.9.3.3 *Additional protection for readmission is found at 16 Del.C. §1121 (18).*

Comment: 11. Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, if the Division is disinclined to strictly enforce resident readmission rights accorded by §3.9.3 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §3.11 to read as follows:

3.11 *If a facility issues a discharge notice rather than permitting a resident's readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident's readmission or place limitations on the facility's admissions to preserve one bed. In exercising its discretion, the Department will consider the following:*

3.11.1 *Historical bed turnover rates in the facility;*

3.11.2 *Availability of public or private funding for costs of care;*

3.11.3 *Adverse health and quality of life consequences of delaying readmission; and*

3.11.4 *Federal and State public policy preferences for provision of services in the least restrictive setting.*

Response: *The Division has no legal authority to impose bed holds before a decision that a discharge was improper.*

Comment: 12. Consistent with the commentary under Par. 3 above, §4.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and 1122:

Notify the resident and, if known, a family member or legal representative of the resident, including an agent authorized to act on the resident's behalf pursuant to Title 16 Del.C. §1121(34) and 1122, of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of "legal representative" in Section 2.0 as follows:

"Legal representative" includes a resident's guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

Response: *Legal Representative is now defined in the Section 2 as follows:*

"Legal Representative" or "representative" includes a resident's: guardian; agent pursuant to a power of attorney, advanced health care directive, or similar document; or authorized representative pursuant to Title 16 Del C §§ 1121(34) and 1122.

Comment: 13. Consistent with the commentary under Par. 7 above, §4.5 merits revision. As applied to Medicaid-funded residents, §4.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J, DCIS No. 036864 (Del. DES 1987). Thus, if the discharge is based on nonpayment, the notice must include the calculations. The notice must include the citations to the regulation(s) supporting discharge. The notice must "contain any information needed for the claimant to determine from the notice alone the accuracy of the agency's intended action" and "provide a detailed individualized explanation of the reason(s) for the action being taken". These requirements should be added to §4.5.

Response: *The suggestion was adopted as follows:*

4.5 Contents of the notice. *The written notice specified in paragraph 3.3 of this section must include the following:*

4.5.1 *The reason for transfer or discharge;*

4.5.1 *A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:*

4.5.1.1 *A statement of what action the agency intends to take;*

4.5.1.2 *The reasons for the intended action, including any information needed for the resident to determine from the*

notice alone the accuracy of the facilities intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months.

4.5.1.3 The specific policy or regulation supporting such action.

Comment 14: Section 4.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

Response: The suggestion was adopted as follows:

4.5.4 A statement that the resident has the right to appeal the action to the State;

A statement of the resident's right to a fair hearing as provided in this section:

4.5.4.1 The method by which the resident may request a fair hearing;

4.5.4.2 A statement that the resident may represent him or herself or may be represented by counsel or by another person.

Comment 15: As noted under Par. 6 above, §§ 4.5.6 and 4.5.7 are based on 42 C.F.R. §§483.12(a)(6). I recommend combining §§4.5.6 and 4.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Delaware's P&A for individuals with developmental disabilities and mental illness is the same agency.

Response: The suggestion was adopted as follows:

~~4.5.6 For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and~~

~~4.5.7 For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.~~

4.5.6 For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102nd

Comment: 16: Consistent with the comments under Par. 9 above, §4.8 could result in violation of State law. The implication is that a facility can change a resident's room within the same building as of right subject only to §4.8.3. A facility must honor the requests of spouses to share a room if feasible and not medically contraindicated. Section 4.8 should be amended to clarify that a facility's discretion to transfer residents to another room in the same building is limited by both Title 16 Del.C. §§1121(13) and 1121(28).

Response: The suggestion was adopted as follows:

4.8.1 Room changes in a facility must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another location. A facility's' discretion to transfer residents to another room is limited by 16 Del.C. §§121 (13) and (28).

Comment: 17: Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, consistent with Par. 11 above, if the Division is disinclined to strictly enforce resident readmission rights accorded by §4.9.2 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §4.9.3 to read as follows:

4.9.3 If a facility issues a discharge notice rather than permitting a resident's readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident's readmission or place limitations on the facility's admissions to preserve one bed. In exercising its discretion, the Department will consider the following:

4.9.3.1 Historical bed turnover rates in the facility;

4.9.3.2 Availability of public or private funding for costs of care;

4.9.3.3 Adverse health and quality of life consequences of delaying readmission; and

4.9.3.4 Federal and State public policy preferences for provision of services in the least restrictive setting

Response: The Division has no legal authority to impose bed holds before a decision that a discharge was improper.

Comment: 18: In §4.9 there is no definition of "acute care facility" the term used in Title 16 Del.C. §1121(18). The following should be added to §2.0:

"Acute Care Facility " means a health care setting providing intensive services of a type or level not readily available in the current facility, including without limitation, settings licensed or certified pursuant to chapters 10, 11, 22, 50, or 51 of Title 16.

Response: The generally accepted meaning of "Acute Care" is short-term medical treatment, usually in a hospital for patients having an acute illness or injury or recovering from surgery. There is no indication that any broader meaning of

“Acute Care Facility” was intended by the statute.

Comment: 19: There is some “tension” between §§5.1.1.2-5.1.1.3 versus §§3.5.4 and 4.5.4. The hearing request should be submitted to the State not to the provider with a “cc” to the State. Moreover, it is unclear if §5.1.1.3 (contemplating a “cc” to the DLTCRP and Ombudsman) is a “directory” or a sine qua non for perfection of the appeal. In the latter case, a pro se resident who did not send a copy to the Ombudsman could have his/ her appeal dismissed. This would be an unfortunate result.

Response: *The facility and the resident are the parties to a discharge. As such, the facility is aware of the date that the discharge notice was received by the resident, and is aware of when the 30 days for requesting a hearing expires. In addition, it is likely to be easier for resident to provide notice to the facility than to the DLTCRP, or the State LTC Ombudsman. The copies to DLTCRP and the State LTC Ombudsman do not have a time requirement and would not be the basis for a technical dismissal.*

Comment: 20: Sections 5.1.1.2 categorically applies a minimum 30-day appeal timeline. A Medicaid beneficiary requesting a hearing to contest discharge from a State-run facility, an ICF/MR, or other LTC facility would ostensibly have 90 days to request a hearing. Compare to 42 CFR §§431.206(C)(3) and 431.221(d) and 16 Del Admin Code 5000, §§5001, Par. 2V; 5307, Par C.2; and 5401, Par. C.3. This is not addresses anywhere within the DLTCRP regulation.

Response: *A Medicaid beneficiary requesting a hearing to contest a discharge has 30 days to do so. Only after a determination regarding discharge is there a determination as to continued eligibility for Medicaid benefits. If eligibility is modified, then the 90 day time period applies.*

Comment 21: Section 5.4 omits the right to examine case records regardless of their lack of intended use in the proceedings. Compare 42 CFR §431.242(a)(1); 42 USC §483.10(b)(2); Title 16 Del.C. §1121(19); and 16 DE Admin Code, Part 5000, §5403. A reference to this right should be added.

Response: *The suggestion has been adopted. The rights mentioned above have been incorporated by reference at §5.4.6.*

Comment: 22: As a general comment, assisted living facilities (ALF) have expressed concern about the possibility that an ALF could give a notice of discharge because a resident’s care needs exceed the level of care that may be provided under the ALF licensing law and regulations, but then the facility is cited during survey for having a resident whose needs exceed the permitted level of care. ALFs have requested that the Division consider adopting a “safe harbor” provision to the effect that absent other pertinent considerations relating to the discharge, an ALF that has given a notice of discharge based on level of care will not receive a survey deficiency based solely on having a resident who exceeds the permitted level of care, particularly as such circumstance exists during the discharge notice period and while an appeal is pending. I’m not sure how often such a scenario could arise, but it nonetheless has been raised as an issue of concern.

Response: The suggestion has been adopted. Language has been added to § 3.1

§3.1 If the resident appeals a discharge notice that is based on this section the facility will not be cited by the State Survey Agency during the pendency of the appeal for having a resident whose needs exceed the permitted level of care in that facility.

Comment: 23: Also, as a general observation, it is noted that the proposed regulations do not mention the Medicaid managed care organizations (MMCOC) that are now coordinating long term care services for Medicaid beneficiaries in Delaware. As a practical matter, certain discharge decisions – at least for Medicaid beneficiaries - may now be originating with the MMCOCs, rather than the long term care facilities. Thus, it raises the issue of whether the discharge procedures should address the role of the MMCOCs, both in terms of the discharge decision and with respect to any appeal thereof, since in many cases, the MMCOC may be considered an essential party to the proceedings.

Response: *Medicaid MCOs determine and re-determine Medicaid eligibility for levels of care within long term care facilities. They cannot discharge a resident, order a facility to discharge a resident or even close Medicaid for a particular resident.*

Comment: 24: Section 4.8.2 of the proposed regulations requires that a facility give “reasonable notice” before a resident’s room or roommate is changed, except in emergencies. Many facilities address room and roommate changes as terms of their admission agreements. It would be helpful to have a more definitive statement in this regulation as to the Division’s view of “reasonable notice,” so as to avoid an interpretation dispute down the road.

Response: Reasonable has to be determined in the context of the circumstances. While it is not specific, the goal always must be to provide the amount of time necessary to protect the best interests of the residents.

Comment: 25: Sections 4.9.1 and 4.9.2 raise an overarching concern about the Delaware discharge statute (16 Del.C. Sec. 1121(18)), which may not be addressable through the proposed regulations, but which nonetheless warrants comment. The requirement that facilities readmit residents following an acute care stay, while seemingly beneficial on its

face, has a few perhaps unintended consequences. First, the acute care stay is not time-limited in any fashion, so in theory, a resident who has been hospitalized for 6 months has the same standing with respect to facility readmission as a resident who has been out of the facility for a 10-day hospitalization. It is quite possible that during a lengthy hospitalization, a resident's condition will have changed dramatically, and thus, the resident may no longer be appropriate for facility readmission. This may be especially true for an ALF resident. Yet, the discharge statute requires the facility to readmit the resident (regardless of the resident's level of care and regardless of the potential violation of a facility's licensure restrictions), and then initiate a potentially lengthy discharge process that ultimately would result in the resident being placed in the most appropriate care setting (hopefully). Wouldn't it be in the resident's best interest to avoid an interim move and instead, be admitted to the most appropriate care setting immediately following discharge from the acute care setting? That seems obvious, but there is no flexibility under the discharge statute as currently written (unless of course, the resident and/or responsible party voluntarily seeks an alternative placement).

Moreover, an open-ended readmission right is prejudicial to other potential facility residents, as it essentially allows the hospitalized resident to "bump" candidates on a facility's waiting list. The discharge law should include a reasonable temporal element that strikes a balance between the readmission rights of residents and a facility's ability to plan for new admissions and run its business. Particularly in the case of a long-term hospitalization, there should be a definitive point at which the relationship between a facility and a resident who is in an acute care setting is deemed terminated. Of course, that resident can always apply for new admission, and the facility can evaluate the new realities of the resident's medical condition -- as they exist at the time application is made -- to determine whether admission is appropriate. At present, the discharge statute does not afford any flexibility -- it simply states that the facility must readmit the resident following an acute hospitalization, regardless of the how long the resident has been out of the facility and regardless of the realities of the resident's condition. That is not good for the resident or the facility, whose license may be at risk. Facilities would welcome the opportunity to work collaboratively on an amendment that would balance the interests of residents and facilities.

Response: As the commenter states, this is a statutory matter that cannot be resolved by regulation.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 2012 *Register of Regulations*, with the amendments listed herein, should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Title 16 of the Delaware Administrative Code is adopted and shall be final effective September 1, 2012

Rita Landgraf, Secretary, DHSS

3102 Long Term Care Transfer, Discharge and Readmission Procedures

1.0 Purpose

This regulation ~~[governs the impartial hearings on contested discharges from long term care facilities]~~ applies to decisions by licensed facilities to transfer or discharge a resident. It prescribes the process for providing an impartial hearing to a resident].

[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 Del. Administrative Code §5000. Be aware that the appeal requirements are different from the requirements in this regulation.]

2.0 Definitions

"DHSS" means the Department of Health and Social Services

"Division" means the Division of Long Term Care Residents Protection.

["Legal representative" or "representative" includes a resident's: guardian; agent pursuant to a power of attorney, advanced health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.]

"Party" means the resident or resident's representative and the facility.

"Resident" means resident or patient.

"Transfer and discharge" [includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility is defined separately in Section 3.0 and 4.0.]

3.0 Transfer, discharge and readmission rights of residents in a certified skilled nursing facility or a certified nursing facility as defined in 42 CFR §483.5 [or an Intermediate Care facility (ICF/MR) as defined in 42 CFR §440.150. See 42 CFR §483.42]

- 3.1 Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—
- 3.1.1 The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility; [If the resident appeals a notice of discharge based on this section, the facility will not be cited during the pendency of the appeal for housing a resident whose needs exceed the permitted level of care in that facility.]
 - 3.1.2 The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
 - 3.1.3 The safety of individuals in the facility is endangered;
 - 3.1.4 The health of individuals in the facility would otherwise be endangered;
 - 3.1.5 The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
 - 3.1.6 The facility ceases to operate.
- 3.2 Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs 3.1.1 through 3.1.5 of this section, the resident's clinical record must be documented. The documentation must be made by:
- 3.2.1 The resident's physician when transfer or discharge is necessary under paragraph 3.1.1 or paragraph 3.1.2 of this section; and
 - 3.2.2 A physician when transfer or discharge is necessary under paragraph 3.1.4 of this section.
- 3.3 Notice before transfer. Before a facility transfers or discharges a resident, the facility must—
- 3.3.1 Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
 - 3.3.2 **[Provide a copy of the notice to the Division, the State LTC ombudsman, and if applicable, the agency responsible for the protection and advocacy of developmentally disabled individuals and/or the agency responsible for the protection and advocacy of mentally ill individuals. Provide a copy of the notice to the Division; the State LTC ombudsman; the resident's Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident's placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.]**
 - 3.3.3 Record the reasons in the resident's clinical record; and
 - 3.3.4 Include in the notice the items described in paragraph 3.5 of this section.
- 3.4 Timing of the notice.
- 3.4.1 Except as specified in paragraphs 3.4.2 and 3.8 of this section, the notice of transfer or discharge required under paragraph 3.3 of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
 - 3.4.2 Notice may be made as soon as practicable before transfer or discharge when:
 - 3.4.2.1 The safety of individuals in the facility would be endangered under paragraph 3.1.3 of this section;
 - 3.4.2.2 The health of individuals in the facility would be endangered, under paragraph 3.1.4 of this section;
 - 3.4.2.3 The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph 3.1.2 of this section;
 - 3.4.2.4 An immediate transfer or discharge is required by the resident's urgent medical needs under paragraph 3.1.1 of this section.
- 3.5 Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:
- 3.5.1 **[The reason for transfer or discharge: A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:**
 - 3.5.1.1 **A statement of what action the agency intends to take;**
 - 3.5.1.2 **The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facility's intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months.**
 - 3.5.1.3 **The specific policy or regulation supporting such action.]**

- 3.5.2 The effective date of transfer or discharge;
- 3.5.3 The location to which the resident [is will be] transferred or discharged;
- 3.5.4 ~~[A statement that the resident has the right to appeal the action to the State; A statement of the resident's right to a fair hearing as provided in this section;~~
- 3.5.5 The method by which the resident may request a fair hearing;
- 3.5.6 A statement that the resident may represent him or herself or may be represented by counsel or by another person.
- ~~3.5.57] The name, address and telephone number of the State long term care ombudsman;~~
- ~~[3.5.6 For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and~~
- ~~3.5.7 For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.]~~
- 3.6 Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.
- 3.7 Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the Secretary, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents, as required at 42 CFR §483.75(r).
- 3.8 Room changes in a composite distinct part. Room changes in a facility that is a composite distinct part (as defined in 42 CFR §483.5(c)) must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations. [A facility's discretion to transfer residents to another room is limited by Title 16 Del.C. §§121 (13) and (28).]
- 3.9 Notice of bed-hold policy and readmission.
 - 3.9.1 Notice before transfer. Before a nursing facility transfers a resident to a hospital or allows a resident to go on therapeutic leave, the nursing facility must provide written information to the resident and a family member or legal representative that specifies:
 - 3.9.1.1 Notice of State bed-hold. The duration of the bed-hold policy under the State plan, if any during which the resident is permitted to return and resume residence in the nursing facility. See DHSS Long Term Care Institutional Provider Specific Policy Manual at Section 4.5; and
 - 3.9.1.2 Facility policies. The nursing facility's policies regarding bed-hold periods, which must be consistent with paragraph 3.9.3 of this section, permitting a resident to return.
 - 3.9.2 Bed-hold notice upon transfer. At the time of transfer of a resident for hospitalization or therapeutic leave, a nursing facility must provide to the resident and a family member or legal representative written notice which explains the bed-hold policy described in paragraph 3.9.1.1 of this section.
 - 3.9.3 Permitting resident to return to facility. A nursing facility must establish and follow a written policy under which a resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:
 - 3.9.3.1 Requires the services provided by the facility; and
 - 3.9.3.2 Is eligible for Medicaid nursing facility services.
 - [3.9.3.3 Additional protection for readmission is found at 16 Del.C. §1121 (18).]**
- 3.10 Readmission to a composite distinct part. When the nursing facility to which a resident is readmitted is a composite distinct part (as defined in 42 CFR§483.5(c)), the resident must be permitted to return to an available bed in the particular location of the composite distinct part in which he or she resided previously. If a bed is not available in that location at the time of readmission, the resident must be given the option to return to that location upon the first availability of a bed there.

4.0 Transfer, discharge and readmission rights of residents of a Nursing Facility and Similar Facility as defined in 16 Del.C. 1102(4). See 16 Del.C. 1121.

- [4.1 "Transfer and discharge" includes movement of a resident to a location outside of the licensed facility.]

- 4.**[42]** Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility except for:
- 4.**[42].1** Medical needs which cannot be met in the facility;
 - 4.**[42].2** The resident's own welfare;
 - 4.**[42].3** The welfare of the other individuals in the facility;
 - 4.**[42].4** Nonpayment of justified charges, after appropriate notice;
 - 4.**[42].5** Termination of facility operation.
- 4.**[23]** Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs 4.1.1 or 4.1.2 of this section, the resident's clinical record must be documented. The documentation must be made by:
- 4.**[23].1** The resident's physician when transfer or discharge is necessary under paragraph 4.1.1 or paragraph 4.1.2 of this section; and
 - 4.**[23].2** A physician when transfer or discharge is necessary under paragraph 4.1.3 of this section.
- 4.**[34]** Notice before transfer. Before a facility transfers or discharges a resident, the facility must:
- 4.**[34].1** Notify the resident and, if known, a family member or legal representative, of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
 - 4.**[34].2** Record the reasons in the resident's clinical record; and
 - 4.**[34].3** Include in the notice the items described in paragraph 4.5 of this section.
- 4.**[45]** Timing of the notice. (i) Except as specified in paragraphs 4.4.2 and 4.8 of this section, the notice of transfer or discharge required under paragraph 4.3 of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
- 4.**[45].2** Notice may be made as soon as practicable before or after transfer or discharge when:
 - 4.**[45].2.1** The welfare of individuals in the facility would be endangered under paragraph 3.1.3 of this section;
 - 4.**[45].2.2** An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph 3.1.1. of this section; or
- 4.**[56]** Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:
- 4.**[56].1** **[The reason for transfer or discharge; A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:**
 - 4.6.1.1 **A statement of what action the agency intends to take;**
 - 4.6.1.2 **The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facilities intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months; and**
 - 4.6.1.3 **The specific policy or regulation supporting such action.]**
 - 4.**[56].2** The effective date of transfer or discharge;
 - 4.**[56].3** The location to which the resident **[is will be]** transferred or discharged;
 - 4.**[56].4** **[A statement that the resident has the right to appeal the action to the State; A statement of the resident's right to a fair hearing as provided in this section:**
 - 4.6.4.1 **The method by which the resident may request a fair hearing; and**
 - 4.6.4.2 **A statement that the resident may represent him or herself or may be represented by counsel or by another person.]**
 - 4.**[56].5** The name, address and telephone number of the State long term care ombudsman;
 - 4.**[56].6** **[~~For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and~~ For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.**
 - 4.**[56].7** **[~~For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.]~~**
- 4.**[67]** Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

4.~~[78]~~ Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to Division, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents. [The notice shall be provided as far in advance of closure as possible.]

4.~~[89]~~ Room changes.

4.~~[89]~~.1 Room changes in a facility must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another location. [A facility's discretion to transfer residents to another room is limited by Title 16 Del.C. §§1121 (13) and (28).]

4.~~[89]~~.2 The facility must give reasonable notice before the resident's room or roommate is changed, except in emergencies.

4.~~[89]~~.3 The facility shall endeavor to honor roommate requests whenever possible.

4.~~[910]~~ Notice of bed-hold policy and readmission:

4.~~[910]~~.1 Notice before transfer. When a nursing facility transfers a resident out of a facility to an acute care facility it must provide written information to the resident and a family member or legal representative that specifies that the facility must accept the patient or resident back into the facility when the resident no longer needs acute care and there is space available in the facility. If no space is available, the resident shall be accepted into the next available bed.

4.~~[910]~~.2 Permitting resident to return to facility. A nursing facility must establish and follow a written policy for implementing its obligation to immediately offer the first available bed to a resident who is entitled to be readmitted to the facility when acute care is no longer required.

5.0 Fair Hearing Practice and Procedures which pertain to grievances under either Section 3.0 or 4.0 of this regulation.

5.1 Right to hearing. An impartial hearing may be requested by a resident who believes a facility has erroneously determined that he or she must be transferred or discharged.

5.1.1 The hearing request must:

5.1.1.1 Be in writing;

5.1.1.2 Be received by the facility within 30 days from the date that the discharge notice is received by the resident or the resident's legal representative;

5.1.1.3 Be copied to the Division and the State LTC ombudsman.

5.2 DHSS may deny or dismiss a request for a hearing if:

5.2.1 The resident withdraws the request in writing; or

5.2.2 The resident or his or her legal representative fails to appear at a scheduled hearing without good cause.

5.3 Impartial hearing must be conducted:

5.3.1 At a reasonable time, date and place;

5.3.2 After adequate written notice of the hearing;

5.3.3 By an impartial fact-finder who has not been directly involved in the initial determination of the action in question;

[5.3.54] With appropriate translation services available to parties or witnesses as needed to be provided at State expense.

[5.3.4] If the hearing involves medical issues as the basis for the transfer or discharge and if the impartial fact finder considers it necessary to have a medical assessment other than that of the facility involved in making the transfer or discharge decision, such a medical assessment must be obtained at State expense and made part of the record.

5.~~[45]~~ Procedural rights. The parties must be given the opportunity to:

5.~~[45]~~.1 Examine at a reasonable time before the date of the hearing and during the hearing all documents and records to be used by either party at the hearing;

5.~~[45]~~.2 Bring witnesses;

5.~~[45]~~.3 Establish all pertinent facts and circumstances;

5.~~[45]~~.4 Present an argument without undue interference; and

5.~~[45]~~.5 Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

[5.5.6 Residents within the scope of 3.0 have additional rights to as provided in 42 CFR §483.10(b)(2). All residents have additional rights under 16 Del.C. §1121(19).]

- 5.[56] Hearing decisions must be based exclusively on evidence introduced at the hearing.
- 5.[67] The record must consist only of:
- 5.[67].1 The transcript or recording of testimony and exhibits;
 - 5.[67].2 All papers and requests filed in the proceeding; and
 - 5.[67].3 The decision of the hearing officer.
- 5.[78] The parties must have the access to the record at a convenient place and time in order to review or to secure a transcript at the party's expense.
- 5.[89] The impartial decision must:
- 5.[89].1 Summarize the facts; and
 - 5.[89].2 Identify the statutes and/or regulations pertinent to the decision
 - 5.[89].3 Specify the reasons for the decisions; and
 - 5.[89].4 Identify the supporting evidence and apply the relevant legal principles.
- 5.[910] The impartial fact-finder must:
- 5.[910].1 Notify the parties of the decision, in writing.
 - 5.[910].2 Notify the parties that this is the final decision of DHSS with the right to an appeal pursuant to the Administrative Procedures Act, Title 29, Chapter 101.

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