

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**  
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

**FINAL**

**ORDER**

**State Survey Agency State Long-Term Care Ombudsman Program**

**NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Delaware Title XIX Medicaid State Plan regarding *State Survey Agency* specifically, *a change in the administrative authority of the State Long-Term Care Ombudsman Program*. The Department’s proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

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 31, 2012 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

**SUMMARY OF PROPOSAL**

The proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX Medicaid State Plan regarding State Survey Agency, specifically, *a change in the administrative authority of the State Long-Term Care Ombudsman Program*.

**Statutory Authority**

- Social Security Act §1919(g)(1)(C), *Survey and Certification Process*
- Older Americans Act, Title VII
- 146<sup>th</sup> General Assembly, Senate Bill 102, *An Act to Amend Title 16 of the Delaware Code Relating to the Long-Term Care Ombudsman*

**Background**

The State Long-Term Care Ombudsman program was established by Title III of the Older Americans Act (OAA) in 1978 as a demonstration program and was transferred to a new Title VII of the OAA (which also includes other programs) in 1992. With enactment States are required to establish and operate an Office of the State Long-Term Care Ombudsman, headed by the State Long-Term Care Ombudsman. The Ombudsman Program identifies, investigates and resolves complaints made by or on behalf of residents of nursing, board and care and similar adult care homes; addresses major issues which affect residents; works to educate residents, nursing home personnel and the public about residents rights and other matters affecting residents; and performs other functions specified in the Act to protect the health, safety, welfare and rights of residents.

Today, the Ombudsman Program exists in all states, the District of Columbia, Puerto Rico and Guam, under the authorization of the Older Americans Act. Each state has an Office of the State Long-Term Care Ombudsman, headed by a full-time state ombudsman assisting residents and their families and providing a voice for those unable to speak for themselves.

Delaware’s Ombudsman Program has received Medicaid funding since 1990 and was previously administered through the Delaware Division of Services for Aging and Adults with Physical Disabilities (DSAAPD).

**Summary of Proposal**

*What Prompted the Change?*

Delaware Health and Social Services (DHSS) received authorization in State Fiscal Year 2011 Budget Bill to consolidate the three (3) long-term care facilities, Delaware Hospital for the Chronically Ill (DHCI), Emily P. Bissell Hospital (EPBH), and Governor Bacon Health Center (GBHC) into the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). The consolidation was implemented to improve access to services as the needs of the residents of the three facilities are similar to the needs of DSAAPD’s overall target population. The perception of a conflict of interest would have been created if the same Division Director supervised the three facilities and supervised the Long Term Care Ombudsman Program (LTCOP), which is charged with monitoring clients’ rights of the residents who live there. Federal

regulations require the Ombudsman program be in a Division separate from long-term care facilities.

Authorized by Senate Bill 102 (146th General Assembly) and signed into law by the Governor on July 13, 2011, this change was not only to enhance crucial constituent services consistent with the Secretary's focus on client advocacy and protections and to elevate their visibility across the Department and State Government, but also to address the possible perception of a conflict of interest which would exist if the program remained within the DSAAPD, which now houses the long term care facilities. The effective date of the transition was January 1, 2011.

#### *Summary of Proposed Amendment*

As referenced above, the Medicaid State plan will be amended at General Program Administration, 4.40(d), *Survey & Certification Process* to identify a change in the administrative authority over the State Long-Term Care Ombudsman Program from the DSAAPD to the Office of the Secretary, Delaware Health and Social Services (DHSS). DHSS is the designated single State agency responsible for the administration of Delaware Medicaid.

The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

#### **Fiscal Impact Statement**

This plan amendment imposes no increase in cost on the General Fund.

### **SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE**

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

GACEC and SCPD have the following observations.

As the "Summary of Proposal" section (p. 43) indicates, transfer of three (3) State long-term care facilities (DHCI, EPBH, and GBHC) to the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) in the FY11 budget bill created a conflict of interest. The conflict resulted from the DSAAPD Division Director supervising both the State LTC facilities and the Ombudsman since the Ombudsman is expected to be an independent monitor of LTC facilities. To resolve the conflict, legislation (S.B. 102) was enacted to place the Ombudsman under the Office of the Secretary. The proposed regulation merely revises the Medicaid State Plan to reflect this change. GACEC and SCPD endorse the proposed regulation.

**Agency Response:** DMMA thanks the Councils for their endorsement.

GACEC further comments as follows:

However, consistent with the June 17, 2011 GACEC letter on Senate Bill No. 102, the GACEC requested a DHSS commitment to address the following: 1) conflicts between DHSS Administration and the Ombudsman; and 2) the need to ensure the availability of independent legal counsel to the Ombudsman. Council would like to request additional information to assess whether the Department ever implemented its commitment.

**Agency Response:** DMMA appreciates the comment. However, issues around DHSS and Ombudsman conflict resolution and the availability of independent counsel are processes outside the scope and authority of this Medicaid regulation. The proposed Medicaid state plan amendment simply identifies a change in the administrative authority over the State Long-Term Care Ombudsman Program. DMMA will forward your request for additional information to the Office of the Secretary. No change was made to the regulation as a result of this comment.

#### **FINDINGS OF FACT:**

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

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Delaware Title XIX Medicaid State Plan regarding *State Survey Agency, specifically, a change in the administrative authority of the State Long-Term Care Ombudsman Program* is adopted and shall be final effective September 10, 2012.

Rita M. Landgraf, Secretary, DHSS

#### **DMMA FINAL ORDER REGULATION #12-40 REVISION:**

79u

Revision: HCFA-PM-92-3  
APRIL 1992

(HSQB)

OMB No.:

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory/ **DELAWARE**

<u>Citation</u>	4.40	<u>Survey &amp; Certification Process</u>
Sections 1919(g)(1) thru (2) and 1919(g)(4) thru (5) of the Act; P.L. 100-203 (Sec. 4212(a))	(a)	The State assures that the requirement of 1919(g)(1)(A) through (C) and section 1919(g)(2) (A) through (E)(iii) of the Act which relate to the survey and certification on non-State owned facilities based on the requirements of section 1919(b), (c) and (d) of this Act are met.
1919(g)(1)(B) of the Act	(b)	The State conducts periodic education programs for staff and residents (and their representative). <u>Attachment 4.40-A</u> describes the survey and certification education program.
1919(g)(1)(C) of the Act	(c)	The State provides for a process for the receipt and timely review and investigation of allegations of neglect and abuse and misappropriation of resident property by a nurse aid of a resident in a nursing facility or by another individual used by the facility. <u>Attachment 4.40-B</u> describes the State's process.
1919(g)(1)(C) of the Act	(d)	The State agency responsible for surveys and certification of nursing facilities or an agency delegated by the State survey agency conduct the process for the receipt and timely review and investigation, of allegations of neglect and abuse and misappropriation of resident property. If not the State survey agency, what agency? <b><u>Ombudsman - Division of Aging State Long Term Care Ombudsman - Delaware Health and Social Services.</u></b>
1919(g)(1)(C) of the Act	(e)	The State assures that a nurse aide, found to have neglected or abused a resident of Act misappropriated resident property in a facility, is notified of the finding. the name and finding is placed on the nurse aide registry.**
1919(g)(1)(C) of the Act	(f)	The State notifies the appropriate licensure authority of any licensed individual found to have neglected or abused a resident or misappropriated resident property in a facility. <u>Allegations are investigated by the Delaware Attorney General's Office. Results are reported to the Delaware Board of Licensure and Discipline.</u> **The Delaware Attorney General's Office sends reports of all adjudicated Nurses Aides to the Delaware Office of Health Facilities Licensing and Certification who notifies the Delaware Nurse Aide Registry.