

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

Fair Hearing Practice and Procedures, 5304 Jurisdiction

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to provide information of public interest with respect to Fair Hearing Practice and Procedures, specifically jurisdiction for hearings over Medicaid program waiver services. The Department's proceedings 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 public comment pursuant to 29 **Delaware Code** Section 10115 in the June 2008 Delaware Register of Regulations, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by June 30, 2008 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 purpose of this regulatory action is to amend the Division of Social Services Manual (DSSM) related to Fair Hearing Practice and Procedures, specifically to clarify jurisdiction for hearings over Medicaid program waiver services.

Statutory Authority

- 42 CFR Part 431 Subpart E, *Fair Hearings for Applicants and Recipients*

1) DSSM 5304.2, *Nursing Facility Discharge Notice Hearings*: This rule text is deleted from the Division of Social Services Manual as the Division of Long-Term Care Residents Protection (DLTCRP) now has jurisdiction over these types of hearings. Reference is made to DLTCRP's Patient's Bill of Rights, Appendix A of Regulation No. 3201, *Nursing Home Regulations for Skilled Care* and Regulation No. 3205, *Nursing Home Regulations for Intermediate Care*.

2) DSSM 5304.5, *Jurisdiction for Hearings over Medicaid Program Services*: This new rule clarifies that the Division of Social Services (DSS) has jurisdiction over fair hearings involving Medicaid program waiver services.

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 the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows:

The regulations were published as 11 DE Reg. 1583 in the June 1, 2008 issue of the Register of Regulations and address two (2) matters: 1) nursing home discharge hearings; and 2) Medicaid waiver disputes.

Nursing Home Discharge Hearings

SCPD previously commented on DSS proposed fair hearing regulations published as 11 DE Reg. 1193 (March 1, 2008) and final regulations published as 11 DE Reg. 1482 (May 1, 2008). SCPD noted that, although DSS regulations contemplated DSS processing of nursing home discharge hearings, the DLTCRP processed hearings involving discharges from other LTC facilities. DSS responded that the Attorney General's Office was reviewing jurisdiction in this context. At 1484. DSS now proposes to repeal its regulation based on DLTCRP regulations under which the DLTCRP is arguably responsible for processing nursing home discharge hearing requests:

This rule is deleted from the Division of Social Services Manual as the Division of Long-Term Care Residents Protection (DLTCRP) now has jurisdiction over these types of hearings. Reference is made to DLTCRP's Patient's Bill of Rights, Appendix A of Regulation 3201, Nursing Home Regulation for Skilled Care and Regulation No. 3205, Nursing Home Regulations for Intermediate Care.

At 1584.

SCPD believes there are multiple problems with this approach. First, as the Councils noted in their commentary, the DLTCRP has no hearing regulations akin to the DSS 5000 standards to define its hearing process. For this reason, the Councils recommended clarifying that the DSS 5000 series regulations applied to the hearings. Second, the attached DLTCRP regulations literally delegate the hearing authority to the Division of Public Health. The Division of Public Health was responsible for these hearings before the DLTCRP was established and this reference may no longer be viable. If it is viable, it is unclear if DPH has any regulations to guide hearing participants. It would be preferable for DSS to either apply the 5000 series procedures to these hearings or issue regulations defining procedures for the hearings. Otherwise, it is impossible for participants to know who has the burden of proof, if subpoenas can be requested, if hearsay is admissible, etc. Finally, if a nursing home resident is being funded through Medicaid (i.e. has a "Medicaid bed") and is being discharged, would he/she be categorically precluded from requesting a Medicaid hearing through DSS to contest the discharge?

Agency Response: Thank you for your comments concerning DLTCRP's hearing process. The Division of Medicaid and Medical Assistance (DMMA) will work with DLTCRP to assure that its hearing process for nursing home discharges conforms to federal requirements.

Medicaid Waiver Disputes

DSS adds a regulation clarifying that DSS has jurisdiction over disputes concerning Medicaid waivers. There are two (2) concerns with this standard. First, rather than refer to "waivers for the mentally retarded", DSS should preferably use "people-first" language (e.g. waivers for persons with mental retardation). Second, since DPH is involved with the AIDS waiver, it should be listed with the other divisions in §5304.5. See DSS commentary at 11 DE Reg. 1483 (bottom).

Agency Response: We agree with your recommended wording change to "waivers for persons with mental retardation." Your letter indicates that the Division of Public Health (DPH) is involved with the AIDS waiver. DPH does not administer or manage this waiver. DMMA administers and manages this waiver. DMMA contracts with DPH to provide waiver case management services. That is the extent of DPH's involvement in this waiver.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the June 2008 Register of Regulations should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual regarding Fair Hearing Practice and Procedures, specifically jurisdiction for hearings over Medicaid program waiver services, is adopted and shall be final effective August 10, 2008.

Vincent P. Meconi, Secretary, DHSS, July 15, 2008

DSS FINAL REGULATIONS #08-34

REVISIONS:

~~5304.2 Nursing Facility Discharge Notice Hearings~~

~~Consistent with 42 CFR 438.202 and 438.204 (a)(1), a person who has received a notice of intent to discharge or transfer a person from his/her residential nursing facility may take an appeal of the decision to the Division of Social Services. RESERVED~~

(Break in Continuity of Sections)

5304.5 Jurisdiction for Hearings over Medicaid Program Services

The Delaware Medicaid Program operates Medicaid waiver projects offering home and community-based services (HCBS). These projects include waivers for ~~[the mentally retarded persons with mental retardation]~~, for the elderly and disabled, for persons with acquired immune deficiency syndrome and other HIV-related diseases, for persons with acquired brain injuries, for residential services under an Assisted Living waiver, and for other types of conditions that require special services. (See DSSM 20700 et seq.)

The Division of Social Services ("DSS") has jurisdiction for hearings over disputes involving these services. The delivery of these services is managed by other Divisions within the Department of Health and Social Services ("DHSS") including the Division of Services for Aging and Adults with Physical Disabilities ("DSAAPD"), the Division of Developmental Disabilities Services ("DDDS") and the Division of Medicaid and Medical Assistance ("DMMA"). For these hearings, the Division taking the action in dispute will prepare the §5312 hearing summary and defend the action at the hearing.

12 DE Reg. 242 (08/01/08)