DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)
16 **DE Admin. Code** 20101, 20103, and 14100

FINAL

ORDER

Long Term Care Medicaid

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend Delaware Social Services Manual (DSSM) regarding Long Term Care Medicaid, specifically, to add additional application methods. 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 May 2018 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by May 31, 2018 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

Effective for services provided on and after July 12, 2018, Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend sections 20101, 20103, and 20103.1.2 of the Delaware Social Services Manual (DSSM) regarding Long Term Care Medicaid.

Background

Current policy and practice requires a face to face interview when an individual applies for Long Term Care Medicaid. Additionally, current practice requires the application process to be completed by the applicant, their family member or their legal representative. The proposed policy change removes this restriction and allows the applicant the choice of who can apply for Long Term Care Medicaid on their behalf and removes the face-to-face interview requirement for applying for Long Term Care Medicaid. The proposed application process leaves the choice of the type of application method to the individual applying e.g. electronic, face-to-face interview, mail, fax, telephone.

Statutory Authority

- 42 CFR 435.906
- 42 CFR 435.908
- 42 CFR 435.907(a)
- 42 CFR 435.930(a)
- 1902(a)(8)&(19) Social Security Act

Purpose

The purpose of this proposed regulation is to add additional application methods for Long Term Medicaid.

Public Notice

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments were to have been received by 4:30 p.m. on May 31, 2018.

Provider Manuals and Communications Update

A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates. Updates are available on the Delaware Medical Assistance Portal website: https://medicaid.dhss.delaware.gov/provider

Fiscal Impact Statement

There is no anticipated fiscal impact to the agency as a result of this proposed clarification of policy.

Summary of Comments Received with Agency Response and Explanation of Changes

Several commenters offered the following summarized observations:

Summarized Comment: The proposed rule allows "someone acting responsibly" to apply for long term care Medicaid on behalf of an applicant who is either a minor or incapacitated. This term is not defined in the Delaware regulations although it appears in other places in the federal regulations. More than one commenter recommend that this term be defined to exclude individuals or entities who may have a conflict of interests or at least require that any entity or individual acting as "someone acting responsibly" has an obligation to act in the best interest of the applicant.

Agency Response: DMMA appreciates the recommendation to include a definition for the term "someone acting responsibly". Title 42 CFR § 435.907(a) allows for "someone acting responsibly for the applicant" to file on behalf of an individual who is a minor or incapacitated. DMMA also appreciates the concern where an individual is "not acting responsibly for the applicant." However, these are issues that would be a basis for denial later in the application process. Additionally, 42 CFR § 435.907(f) requires that all initial applications be signed under penalty of perjury. So, someone "acting responsibly for the applicant" is also subjecting themselves to potential prosecution if he or she commits perjury. The final regulation will be revised as follows:

20101 Application Process - Long Term Care Services

…If the patient is not competent, the family or ~~legal representative~~ someone acting responsibly **[as defined in 42 CFR 435.907(a))]** will act on behalf of the patient…

Summarized Comment: There was a suggestion to add the full CFR citation for the definition of household.

Agency Response: DMMA agrees with the suggestion. The final regulation will be revised as follows:

20103 Financial Eligibility Determination

… In accordance with section 1413(b)(1)(A) of the Affordable Care Act, the agency must accept an application from the applicant, an adult who is in the applicant's household, as defined in **[42 CFR]** §435.603(f), or family, as defined in section 36B(d)(1) of the **[~~Code~~ United States Code (U.S.C.)]**, an authorized representative, or if the applicant is a minor or incapacitated, someone acting responsibly for the applicant, and any documentation required to establish eligibility -…

DMMA is appreciative of the opportunity to receive public comments and greatly appreciates the thoughtful input given. DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the May 2018 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Social Services Manual (DSSM) regarding Long Term Care Medicaid, specifically, to add additional application methods, is adopted and shall be final effective July 12, 2018.

6/18/18
Kara Odom Walker, MD, MPH, MSHS
Secretary, DHSS

FINAL

20101 Application Process - Long Term Care Services

The application process is twofold. Applicants for Medicaid must be medically and financially eligible to receive coverage. Referrals for Medicaid may come from many sources: the applicant, the family of the applicant, persons in the community, hospital social workers, etc. The potential nursing facility or Home and Community Based Waiver patient may be in an adult foster care home, in his own home, in the hospital or in a nursing facility as a private pay patient.

Rarely does the applicant himself initiate the referral. This means it is extremely important in the case of the mentally competent patient that the **[~~DSS~~ Division of Medicaid and Medical Assistance (DMMA)]** nurse determine initially if the patient is aware that a referral for nursing facility admission or Home and Community Based Waiver has been made. The person must be willing to enter a nursing facility or accept Waiver services, otherwise placement or referral cannot be made. The **[~~DSS~~ DMMA]** nurse and social worker may assist the family or others in helping the patient to accept the need for nursing facility or Waiver care, but the main responsibility belongs to the family or persons acting as family.

If the patient is not competent, the family or ~~legal representative~~ someone acting responsibly **[as defined in 42 CFR 435.907(a)]** will act on behalf of the patient.

It is not the responsibility of **[~~DSS~~ DMMA]** to find a nursing facility placement for a patient although they may give assistance when they have knowledge of available, Medicaid certified beds.

20103 Financial Eligibility Determination

This is the second step in the application process. A referral is passed to the LTC financial eligibility unit within two days of being referred to the Medicaid PAS unit.

~~An application for Medicaid is made only when an interview is held with the applicant or his family member who is applying on the applicant's behalf. Should anyone hold Power of Attorney or Guardianship over the applicant, he also must attend the interview along with the applicant/family member, unless his attendance is waived by the supervisor. In addition, the application form must be signed listing those individuals for whom Medicaid coverage is being sought. The applicant or his representative must sign the Application, Affidavit of Citizenship, and Responsibility Statement. The application date is considered to be the date of the interview unless the interview requirement is waived. The interview can only be waived if the applicant is medically unable to come in for the interview and there is no family member, POA agent or Guardian medically able to come in for the interview or other good cause exists. The unit Supervisor must approve the waiving of the interview requirement.~~

~~For cases in which the interview is waived, the application must be date stamped when it is received in the Division of Medicaid and Medical Assistance office. The stamped date sets the base for the timeliness of determination.~~

In accordance with section 1413(b)(1)(A) of the Affordable Care Act, the agency must accept an application from the applicant, an adult who is in the applicant's household, as defined in **[42 CFR]** §435.603(f), or family, as defined in section 36B(d)(1) of the **[~~Code~~ United States Code (U.S.C.)]**, an authorized representative, or if the applicant is a minor or incapacitated, someone acting responsibly for the applicant, and any documentation required to establish eligibility -

(1) Through commonly available electronic means;

(2) By telephone;

(3) Via mail;

(4) In person

The Application, Affidavit of Citizenship and Responsibility Statement must be signed by the individual or a representative of their choice. For individuals who are minors or incapacitated a signature is required by someone acting responsibly on the applicant's behalf. The date of application is the date the application is received by LTC Medicaid Office.

42 CFR 435.906; 42 CFR 435.907(a) and Social Security Act 1943(b)

9 DE Reg. 997 (12/01/05)

20103.1.2 Timely Documentation

The DMMA Medicaid worker must explain this 90-day time standard to the applicant or representative. ~~during the initial interview.~~ It must be emphasized ~~during the interview~~ to the applicant or their representative, that all documentation needed for the worker to determine Medicaid eligibility must be received by the date indicated on the "Request for Verification" letter (Form 415) or the application will be denied. In cases where verification is incomplete, the worker will give the applicant 15 days to return the information on the initial "Request for Verification" letter (Form 415). The date by which all documentation must be received must be clearly noted on this form.

14100.3 Interview Requirement for Some Eligibility Groups

An in-person interview is not required for any eligibility group subject to the modified adjusted gross income (MAGI)-based methodologies described in Section 16000.

An in-person interview is not required for ~~some~~ Long Term Care eligibility determinations. SEE SECTION 20101 - Application Process - Long-Term Care Services.

17 DE Reg. 503 (11/01/13)

22 DE Reg. 66 (07/01/18) (Final)