

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

Long-Term Care Program – Pre-Admission Screening and Resident Review

NATURE OF THE PROCEEDINGS

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend Long-Term Care program policies in the Division of Social Services Manual (DSSM) regarding *Pre-Admission Screening and Resident Review (PASRR)*. 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 January 2011 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by January 31, 2011 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 proposal amends the Division of Social Services Manual (DSSM) regarding the Long-Term Care Program, specifically, *Pre-Admission Screening and Resident Review*.

Statutory Authority

- The Omnibus Budget Reconciliation Act of 1987
- Social Security Act §1919(e)(7), *State requirements for preadmission screening and resident review*.
- 42 CFR §§483.100 – 483.116, Preadmission Screening and Annual review of Mentally Ill and Mentally Retarded Individuals

Background

The Omnibus Reconciliation Act of 1987 (OBRA) and P.L. 100-203, Section 4211(c)(7), and OBRA 1990 contain provisions with major implications for persons with mental illness or mental retardation who are applying to or residing in a nursing facility. The provisions were designed to eliminate the practice of inappropriately placing persons with mental illness, mental retardation and related conditions in Medicaid-certified nursing facilities.

Specifically, the PASRR program must ensure that the following conditions are met.

- That no person may be admitted to a Medicaid-certified nursing facility without first being screened for mental illness and mental retardation. This provision applies to the source of nursing facility placement.
- That as a result of this preadmission screening, referred to as the Level I, persons who appear to have a mental illness, mental retardation or related condition will undergo additional screening, referred to as the Level II, to determine if their needs can be met safely in a Medicaid certified nursing facility, with or without specialized services.

Public Law 104-315, signed into law on October 19, 1996, amends Title XIX of the Social Security Act to repeal the requirement for an annual resident review. The amendment requires nursing facilities to notify the state mental health or mental retardation authority, as applicable, of a significant change in the physical or mental condition of a resident who has a serious mental illness or mental retardation. The change in condition must affect either the resident's need for continued nursing facility placement or for specialized services. A review and determination under Section 1919(e)(7) of the Act must be done promptly after the nursing facility notifies the state mental health or mental retardation authority of the significant change in condition.

Summary of Proposed Change

The Division of Medicaid and Medical Assistance (DMMA) proposes to amend DSSM 20102 to add language at new **DSSM 20102.3**, *Pre-Admission Screening and Resident Review Overview* and new **DSSM 20102.3.1**, *Pre-Admission Screening and Resident Reviews* to reflect current Medicaid policy regarding preadmission screening and resident review (PASRR) for all persons applying for admission to or residing in a nursing facility. The addition of this new rule is consistent

with current PASRR evaluation policy and procedures that determines whether (1) the person requires nursing facility level of care and, if so, (2) whether the person also requires specialized services (active treatment).

Fiscal Impact Statement

This revision imposes no increase in cost on the General Fund.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

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

GACEC and SCPD

As background, Congress enacted legislation in the 1980s and 1990s to address "dumping" of persons with mental retardation (a/k/a intellectual disability) and mental illness in nursing homes. Federal law requires screening of persons with mental illness, mental retardation, or related conditions prior to admission to a Medicaid-certified nursing facility. The State has implemented this requirement by conducting Pre-admission Screenings and Resident Reviews (PASRR). DMMA is now adopting a regulation which further defines responsibilities and the process. The Councils have the following observations.

First, the regulation is inconsistent. It sometimes mentions "related conditions" (PAS POL 20102.3.1, §3) and sometimes omits the reference (PAS POL 20102.3; and PAS POL 20102.3.1, §§2 and 5). DMMA may wish to insert a reference to "related conditions" in the sections in which the reference is omitted. Alternatively, some states subsume "mental retardation and related conditions" under the rubric of "developmental disability" which is defined. See attached Wisconsin form. Other states (e.g. N.C.) use acronyms of MI, MR, and RC. Delaware's DLTCRP refers to screening of individuals with "mental illness, mental retardation, and developmental disabilities". See 16 DE Admin. Code 3201, §6.3.4.

Agency Response: The regulation is amended and indicated by **[Bracketed Bold Text]**. DMMA will add "related condition" to the following sections of PAS POL 20102.3, 20102.3.1 #2, #5 and #7.

Second, in PAS POL 20102.3.1, §7, it is particularly important to include a reference to "related conditions" to ensure that DDDS is not only reviewing to identify mental retardation to the exclusion of TBI, autism, etc. Section 7 would also benefit from inclusion of a sentence similar to the first sentence in §6. Consider some variation of the following: "DDDS will assess individual and review documentation to verify whether the individual meets diagnostic criteria of mental retardation or related condition."

Agency Response: DMMA agrees and will add the following sentence to PAS POL 20102.3.1 #7: *DDDS will assess individual and review documentation to verify whether or not diagnostic criteria of mental retardation or related conditions are met.* The amended regulation is indicated by **[Bracketed Bold Text]**.

Third, PAS POL 20102.3.1, §10 indicates that DMMA will issue the final determination letter. It would be preferable to include a recital that the letter (a/k/a "notice") will include appeal rights. Parenthetically, there appears to be some inconsistency between the §10 recital that DMMA will issue the final determination and the DSS regulation reproduced below contemplating appeals of the DSAMH and DDDS decisions to DSS with no mention of DMMA decisions. DMMA may wish to review this ostensible inconsistency with DSS.

5304.1 Jurisdiction for PASARR Hearings

1. An individual who has been adversely affected by any determination made by either the Division of Mental Health (DMH) or the Division of Developmental Disabilities Services (DDDS) as a result of a pre-admission screening or an annual resident review (PASARR) of any applicant for or recipient of residential nursing services may appeal the determination decision under these rules. The hearing will be conducted by the Division of Social Services and the hearing decision is binding on the Department of Health and Social Services. For hearings on PASARR determinations which have a specific affect on Medicaid Program eligibility, DSS will appear as a witness for DDDS or DMH if requested by a party to the hearing. For appeals initiated by non-Medicaid claimants or

appellants, the State's case will be presented by DDDS or by DMH as appropriate.

Agency Response: This section of policy refers to a final determination letter that is issued by the DMMA medical unit. This is not an official denial notice. A denial notice is generated as part of the application process and does include information regarding appeal rights. Additionally, DMMA will add the following sentence to PAS POL 20102.3.1, §10: *Final PASRR determinations will be issued by DMMA.*

DHCFA

Overall, we welcome the Regulations which mirror Federal Regulations, specifically, the Omnibus Reconciliation Act of 1987 (OBRA) and P.L. 100-203, Section 4211 (c)(7), and OBRA 1990 that contain provision with major implications for persons with mental illness or mental retardation and related conditions in Medicaid-certified nursing facilities.

In the proposed language it states that the addition of this new rule is consistent with current State PASRR evaluation policy and procedures that determines whether (1) the person requires nursing facility level of care and, if so, (2) whether the person also requires specialized services (active treatment).

We offer comment because over the years many of our providers have experienced difficulties with regard to what was initially declared to have been short term rehabilitation admissions from group homes through DDDS, from psych group homes, short term respite admissions through APS, short term rehabilitation admissions from the community through Diamond State, DPCI and Unison and some that are coming in directly from the community with undiagnosed or under diagnosed psych and behavioral issues which then end up being longer or long term admissions that fall beyond the scope of the Convalescent Care Exemption (30 days).

In many cases, group homes and or families were not willing to accept these individuals back and providers could not discharge them because of our residents' rights and because of lack of services for MI/MR.

Today, many providers do not even consider these types of admits because of this ongoing and unresolved issue which causes facilities in many cases to have to apply for emergency guardianships to be able to apply for long term care Medicaid to be assured payment while at the same time having to pursue a safe discharge plan to a more appropriate setting, which is often nonexistent.

We respectfully request clarification on how Delaware's process will address these concerns in view of the fact that Delaware's Residents Rights is very prescriptive and makes discharge from any LTC facility near impossible.

It is our opinion that Delaware's Residents Rights must be revisited and addressed to avoid the negative impact these practices are having on the quality of care and life of the very individuals they attempt to protect and to balance the scales of fairness with providers who are often stuck for doing the right thing.

When the Residents Rights Statute was drafted, it was claimed that they were needed because LTC Providers were "patient dumping". It appears that now unfortunately others are doing just this without any legal ramification.

Finally, we have concerns with CMS's latest documents regarding PASRR. Both are attached. The first is the critical element pathway for PASRR. The second is the new entrance conference worksheet where providers will list residents who receive level 2 services.

The problems that exist in Delaware is that even when there is a psychologist or assessing professional recommending specialized services for MI/MR, the individual will go on a list to wait for services- because they are scarce if not non-existent. So we have a double issue, we can't discharge because of resident rights, and even if we could discharge there is no place to send them. Meanwhile our facility staff does the best that they can while hoping to receive payment and praying they are not cited.

We respectfully request clarification on how Delaware's process will address these concerns in view of the fact that payment may well be declined as a result of CMS's latest PASRR documentation processes.

In conclusion, DHCFA membership considers itself a partner with the State of Delaware and wants to work with the State and its agencies to do what is best for those requiring services throughout the continuum, however balance and fair processes must be put in place. It is time to address the "elephant in the room"- lack of services for those with M/I and to come up with a workable plan to care for these individuals. They are deserving of no less.

Agency Response: DMMA thanks the DHCFA for expressing these concerns. We respectfully advise that your comments are about subjects that are outside the scope of the proposed regulation, for example, Delaware Resident's Rights, CMS documents, availability of, or lack thereof MI/MR specialized services; and, therefore, will not be addressed in the final regulation. No change to the regulation was made as a result of these comments.

FINDINGS OF FACT

The Department finds that the proposed changes as set forth in the January 2011 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation regarding the Long-Term Care Program, specifically, *Pre-Admission Screening and Resident Review (PASRR)* is adopted and shall be final effective March 10, 2011.

Rita M. Landgraf, Secretary, DHSS

**DMMA FINAL ORDER REGULATION #11-06
REVISION:**

PAS POL 20102.3 PRE-ADMISSION SCREENING AND RESIDENT REVIEWS (PASRR) OVERVIEW

By Federal mandate, all individuals applying for placement in a Medicaid certified nursing facility, regardless of pay source, must have a Level I Pre-Admission Screening and Resident Review (PASRR) for Mental Illness (MI) or Mental Retardation (MR)/[Related Condition (RC)].

Based on results of a Level I PASRR Screening, the PAS RN may determine that further screening, a Level II PASRR, is warranted. A Level II PASRR evaluates clients with MI and MR/[RC] and determines if nursing home placement, either with or without specialized services, is appropriate. In addition to the PAS RN, an Independent Contracted Psychiatrist also makes placement recommendations. However, the final decision on appropriate placement for individuals with MI or MR/[RC] is made by the State Mental Health Authority for MI or the Division of Developmental Disabilities Services for MR/[RC].

PAS POL 20102.3.1 PRE-ADMISSION SCREENING AND RESIDENT REVIEWS (PASRR)

This applies to all nursing home applicants or residents of a Medicaid certified nursing facility (NF) regardless of payment source or diagnoses.

1. DMMA is Responsible for PASRR Oversight

DMMA will assure PASRR program operates in accordance with federal regulations.

2. A Level I PASRR Screening is completed on all residents or potential residents of a Medicaid certified Nursing home.

A Level I screening is the process of identifying individuals who are suspected of having a mental illness or mental retardation or if categorical determinations are met.

The Nursing Facility is responsible for completing the Level I screening for non-Medicaid individuals.

The Division of Medicaid and Medical Assistance is responsible for completing the Level I screening for Medicaid and potential Medicaid individuals when notified.

3. Determination is made regarding the need for a Level II PASRR screening.

Based on the Level I screening, the individual will meet one of three categories:

- No indication of mental illness/mental retardation/related condition – nursing home admission/continued stay is appropriate - No further evaluation is needed.
- There are indicators of mental illness/mental retardation/related condition however individual meets any of the following Physician's Exemption Criteria:
 - Primary Diagnosis of Dementia or related disorder.
 - Convalescent Care not to exceed 30 days - PAS nurses will track this exemption and initiate Level II PASRR evaluation prior to expiration if continued NF stay is warranted.
 - Terminal Illness – a life expectancy of 6 months or less if the illness runs its normal course.
 - Medical dependency with a severe physical illness.

No further evaluation is needed at this time.

- There are indicators of mental illness, mental retardation/related conditions – Needs complete PASRR Assessment (Level II).

4. DMMA will coordinate the Level II screening for all Medicaid and non-Medicaid individuals.

DMMA PAS nurse will gather data for Level II PASRR screening.

Data is reviewed with DMMA Nurse Supervisor for approval to continue with the Level II screening.

5. The individual and/or legal representatives must receive written notice that further evaluation is needed.

The notice must inform them that the individual is being referred for Level II Evaluation to DSAMH due to mental illness indicators or to DDDS due to mental retardation[/related condition].

6. An Independent Psychiatric Consultant (IPC) will complete the Level II Evaluation for those with mental illness/indicators.

The IPC will assess individual and review documentation to verify whether or not there is a serious MI.

[DDDS will assess individual and review documentation to verify whether or not diagnostic criteria of mental retardation or related conditions are met.]

The Level II evaluation may be terminated at any time if the evaluator determines that no Mental Illness is present.

7. DDDS will complete the Level II Evaluation for those with mental retardation/indicators.

[DDDS will assess individual and review documentation to verify whether or not diagnostic criteria of mental retardation or related conditions are met.]

The Level II evaluation may be terminated at any time if the evaluator determines that no Mental Retardation [or related conditions] is present.

8. DSAMH or DDDS Determines Need For Specialized Services and /or NF Services.

DSAMH will review IPC's recommendations and determine need for Specialized Services and/or NF services.

9. DMMA is notified by DSAMH/DDDS of final determination.

10. DMMA will send final determination letter to:

- Individual/applicant;
- Legal Representative;
- Admitting or retaining NF;
- Attending Physician;
- Discharging hospital – if exemption is not applicable.

[Final PASRR determinations will be issued by DMMA.]

14 DE Reg. 616 (01/01/11)

14 DE Reg. 895 (03/01/11) (Final)