

Pennsylvania Association of Elder Law Attorneys

A State Chapter of the National Academy of Elder Law Attorneys

P.O. Box 61051

Harrisburg, PA 17106

Officers

Marielle F. Hazen, CELA*, President
Jeffrey A. Marshall, CELA*, President-Elect
Robert Clofine, CELA*, Vice President
Stanley M. Vasiliadis, CELA*, Secretary
Sally L. Schoffstall, Treasurer

Directors

Dana McBride Breslin, CELA*
Prof. Lawrence A. Frolik
Leslie H. Wizelman, CELA*
Julian E. Gray, CELA*
Carol Sikov Gross, CELA*
Linda M. Anderson, CELA*

May 22, 2008

Mr. Brian Lester
Office of Long Term Living
P.O. Box 2675
Harrisburg, PA 17105
Submitted via email to blester@state.pa.us

Re: Proposed Clarification of NFCE Standard

Dear Mr. Lester:

Thank you for this opportunity to comment on the proposed clarification of the NFCE standard.

The Pennsylvania Association of Elder Law Attorneys (PAELA) is a newly formed association of elder law attorneys who represent aging consumers throughout Pennsylvania. PAELA attorneys serve numerous consumers statewide who qualify for Medicaid funded long term care services. Our members help families with the problems they encounter when attempting to access needed services. We support the Office of Long Term Living's efforts to eliminate some of these problems by bringing consistency to the medical eligibility determination process.

PAELA requests that the Office of Long Term Living consider the following recommendations when finalizing the bulletin clarifying the NFCE standard.

- 1.) We recognize that the bulletin is needed to provide immediate clarification to assure that consumers are not wrongly terminated from or denied waiver eligibility, but strongly believe that the NFCE definition should be contained in regulation and adopted through the regulatory process. We believe the new NFCE standard as proposed violates federal law by setting the eligibility standard higher than federal law permits. For a more complete discussion of this issue, please see the attached excerpt on this issue from an article by Jeffrey A. Marshall, CELA*.

A clarification outlined in a bulletin is not sufficient to override conflicting state and federal laws and regulations. Failure to follow the regulatory process violates the most fundamental due process requirements and represents an unlawful usurpation of the legislative and regulatory process. The regulatory process is essential to ensure that interested parties have an opportunity to provide input, and to allow the Independent Regulatory Review Commission (IRRC) to perform its function of determining whether the regulation is consistent with legislative intent.

- 2.) The proposed bulletin should be revised to clarify that the need for an intermediate level of care is sufficient to establish NFCE; skilled care is not required; and a physician need not oversee the day to day service provision. Failure to clarify these issues will result in denials of services which will in turn accelerate the need of some consumers for skilled nursing services. We support the following language proposed by the Health Law project and various other advocacy organizations.

"A consumer should be considered NFCE if:

- 1. The consumer has an illness, injury, disability or medical condition diagnosed by a physician; and*
- 2. As a result of that diagnosed illness, injury, disability or medical condition, the consumer requires care and services above the level of room and board; and*
- 3. The care and services are **either***
 - (a) skilled nursing or rehabilitation services as specified by the Medicare Program in 42 CFR Section 409.31(a), 409.31(b)(1) and (3), and 409.32 through 409.35; **or***
 - (b) health related care and services that are not as inherently complex as skilled nursing or rehabilitation services, but which are needed and provided on a regular basis in the context of a planned program of health-related care and maintenance and were previously available only through institutional facilities; and*
- 4. A physician certifies that the individual is NFCE."*

NFCE Standard Comments
May 22, 2008
Page 3 of 5

We appreciate the opportunity to provide these comments. Please feel free to contact either Marielle Hazen or Jeffrey Marshall at the addresses below if you have any questions or would like additional information from us regarding these comments.

Sincerely,

Marielle F. Hazen, CELA*
President
PA Association of Elder Law Attorneys
2000 Linglestown Road, Suite 202
Harrisburg, PA 17110
(717)540-4332
mhazen@hazenelderlaw.com

Jeffrey A. Marshall, CELA*
President-Elect
PA Association of Elder Law Attorneys
49 East Fourth Street, Suite 200
Williamsport, PA 17701
(570) 321-9008
jmarshall@paelderlaw.com

**Certified Elder Law Attorney by the National Elder Law Foundation*

CC: Honorable Estelle Richman
Secretary
Department of Public Welfare
Email: erichman@state.pa.us

Honorable John Michael Hall
Deputy Secretary
Office of Long Term Living
Email: johnhall@state.pa.us

Honorable Patricia H. Vance
Main Capitol
Senate Box 203031
Harrisburg, PA 17120-3031
Email: vance@pasen.gov

Honorable Phyllis Mundy
36 East Wing
PO Box 202120
Harrisburg, PA 17120-2120
Email: pmundy@pahouse.net

Assessments and Level of Careⁱ

By Jeffrey A. Marshall, Certified Elder Law Attorneyⁱⁱ

In order to qualify for PDA waiver benefits, an applicant must be determined to require the level of care of a nursing facility.ⁱⁱⁱ This determination is based on a medical evaluation conducted by the applicant's physician, and an assessment conducted by the local area agency on aging. The level-of-care (LOC) criteria are complex, involving multiple measures of functional and nursing needs.

In 2006 the Department of Aging revised the assessment process in order to enhance statewide "consistency" in assessments and increase centralized control over the availability and utilization of Waiver. It issued a new standardized tool for assessing clinical eligibility for Medicaid funded nursing facility and waiver services.^{iv} In addition, the Department revised and tightened the criteria for functional qualification for Medicaid. These changes effectively limited eligibility for Waiver benefits, resulted in frequent delays in approvals, and made planning much more difficult.

As discussed below, the Department's new functional need criteria appear to be in contravention of federal Medicaid law.^v In addition, the assessment and level of care changes were implemented without being submitted to CMS for approval.

Prior to the 2006 changes, the Department of Aging Assessment Manual mirrored federal law by specifying that functional eligibility for the Waiver required a medical diagnosis/illness or condition, which created medical needs for care and service, which:

- Are ordered by, and provided under the direction of a physician, **and**;
- Are needed to be given on a regular basis and provided by or under the supervision of a skilled medical professional, **or**
- Because of a mental or physical disability, the individual requires nursing and related health and medical services in the context of a planned program of health care and management. These services are usually only available in an institutional setting. [Emphasis added]

The Department's above stated pre-2006 definition of nursing facility clinical eligible (NFCE) status was consistent with Federal Medicaid requirements that eligibility be granted not only to consumers who need "skilled care" but also to applicants in need of what used to be called "intermediate care."^{vi}

On March 28, 2007 the PDA formally revised the Home and Community Based Services Assessment Manual with the issuance of Aging Program Directive APD # 07-01-01.^{vii} The APD re-defined an NFCE consumer as follows:

A NFCE consumer is an individual who is assessed and determined to be clinically eligible for NF care. This determination is made based on the diagnosis by a physician of a medical illness or condition which creates medical needs that require care and service, which:

- Are ordered by, and provided under the direction of a physician, **and**;
- Are needed to be given on a regular basis and provided by or under the supervision of a skilled medical professional, **and**
- Because of a mental or physical disability, the individual requires nursing and related health and medical services in the context of a planned program of health care and management. These services are usually only available in an institutional setting. [Emphasis added]

The change of the word “or” to “and” imposes a skilled care requirement for NFCE status and effectively deletes coverage for consumers who need only an intermediate level of care. As a result, the Department has set the standard for eligibility higher than federal law permits in violation of Section 42 U.S.C. § 1396r(a).^{viii}

ⁱ This is a portion of an article that appeared in the Spring 2008 issue of the Pennsylvania Bar Association’s Elder Law Section Newsletter.

ⁱⁱ Mr. Marshall is certified as an Elder Law Attorney by the National Elder Law Foundation. He author of Elder Law in Pennsylvania, 2nd Edition.

ⁱⁱⁱ 42 U.S.C. § 1396n(c)(1).

^{iv} The 12 page level of care assessment (LOCA) tool is available online at http://www.aging.state.pa.us/aging/lib/aging/loca_feb_16_2007.pdf.

^v See discussion of federal level of care requirements in *Maryland Department of Health and Mental Hygiene v. Ida Brown*, 935 A.2d 1128 (Md. Ct. Special Appeals, November 27, 2007) available at <http://mdcourts.gov/opinions/cosa/2007/1572s06.pdf>.

^{vi} Prior to The Nursing Home Reform Law of 1987, Medicaid law split nursing homes into skilled care and intermediate care facilities. The Reform Law abolished the distinction effective October 1, 1990.

^{vii} Available online at the Department of Aging website <http://www.aging.state.pa.us/aging/>.

^{viii} See, 42 U.S.C. § 1396r(a)(1)(C); 42 C.F.R. § 440.155 “Plainly, 42 C.F.R. § 440.155 does not require involvement of, or service provided by, skilled or trained medical personnel.’ *Maryland Department of Health and Mental Hygiene v. Ida Brown*, 935 A.2d 1128 (Md. Ct. Special Appeals, November 27, 2007) available at <http://mdcourts.gov/opinions/cosa/2007/1572s06.pdf>.