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TO: Regulations Coordinator, Office of Medical Assistance Programs

ORGANIZATION: DPW

FAX NUMBER: (717) 787-4639

FROM: Pam Walz

DIRECT DIAL: (215) 227-2400 x 2431

CASE NAME:

FILE NO.:

MESSAGE: Comments on Proposed Rulemaking for Preadmission Requirements and Civil Rights Compliance

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August 29, 2005

Regulations Coordinator
Office of Medical Assistance Programs
Department of Public Welfare
Room 515 Health and Welfare Building
Harrisburg, PA 17105
By Facsimile (717) 787-4639

Re: Proposed Rulemaking for Preadmission Requirements and Civil Rights Compliance

Dear Sir or Madam:

Thank you for the opportunity to comment on the proposed rulemaking, published in the Pennsylvania Bulletin on July 30, 2005, regarding preadmission requirements and civil rights data collection. We offer the following comments on behalf of our many disabled or frail clients who will benefit from Medical Assistance-funded long term care services, whether they are provided in a home, a community setting, or a nursing facility.

Civil Rights Data

We applaud the Department for taking a closer look at civil rights compliance. Collecting consistent data routinely is essential to assess whether a nursing facility has a pattern of restricting or denying admission based on factors that are illegal to consider. We recall one Community Legal Services client who was informed by nursing home staff that the client's family member could not be admitted because the nursing home had met its "Latino quota."

We offer some specific recommendations regarding the list of data at (18)(i) to be collected. First, we recommend that the Department specify how to categorize race and ethnicity. For consistency, the Department should thoughtfully determine and then inform nursing facilities of the exact categories they are to use in compiling racial and ethnic information. For example, will a dark-skinned person of Latin origin be captured in the data as "Hispanic," "Latino," "Black", or something else? The U.S. Census considers race and Hispanic origin to be distinct concepts that are captured separately. We understand that the categories are likely to be determined after the promulgation of the regulation, and we encourage the Department to look at the best available information and practices when determining the specific categories.

Second, we strongly recommend that the Department add "primary or preferred language" to the list of data to be collected. Discrimination against people because they do not

speak or understand English well is discrimination on the basis of national origin that is prohibited by Title VI of the Civil Rights Act of 1964. Nursing facilities that receive federal funds are subject to the U.S. Department of Health and Human Services' 2003 guidance regarding the prohibition of national origin discrimination and, accordingly, must take reasonable steps to provide people with limited English proficiency with meaningful access to their services. For your reference, the Department's Office of Income Maintenance has already developed a list of languages that is used to track the primary or preferred language of each County Assistance Office client.

Third, we ask that you delete "Social Security number" at 18(i)(G) from the list of data to be collected. We do not understand why a Social Security number would be relevant to monitoring civil rights compliance. The widespread request for and use of Social Security numbers has led to a sharp increase in identity theft with terrible financial and psychological consequences for victims. The Social Security Administration cautions against sharing a Social Security number with anyone who asks for it "even when you are provided with a benefit or service." SSA Publication No. 05-10064 (February 2004). We believe that collecting a nursing home applicant's Social Security number is unnecessary for the proposed regulation's stated purpose of deterring discrimination and rebutting unsubstantiated charges of discrimination.

We are also concerned about the statements at (18)(iii) and question the necessity of including them. These statements explicitly authorize nursing homes to ask anything about a nursing facility applicant as long as the question is not "otherwise prohibited by law." Nursing facilities could view this proposed regulatory language as an endorsement to ask all kinds of screening questions that may not be expressly prohibited by law but nonetheless violate the spirit of the law. For example, 42 C.F.R. 483.12(d) prohibits nursing facilities from requiring oral or written assurances that potential residents are not eligible for, or will not apply for, Medicare or Medicaid benefits. Nursing facilities that want to avoid accepting Medicaid-eligible people ask about the value of an applicant's assets so they can make a determination that the person can pay for care at the higher private pay rate. While neither federal nor state law explicitly prohibits this type of screening, the Department should not promulgate regulations that, in a general and sweeping manner, appear to endorse such practices.

We are pleased that the Department has considered, in its definition of "nursing facility application", the variety of ways that requests for admission may be made. We believe that this definition should be tightened up still further. The Department should give thought to who may be considered a person with apparent authority regarding admissions. CLS had a client, discussed above, who called a nursing facility to inquire about admission for her Spanish-surnamed family member. She called the main facility number, which was answered by the receptionist. When she explained the purpose of her call, the receptionist responded that the facility had met its "Latino quota" and would not be accepting more Latinos at that time. Beyond the blatant illegality of the receptionist's response, our concern is that a receptionist may function as a sort of gate-keeper, dissuading callers from making a more formal application to a the facility's admissions director. To our client, the receptionist appeared to have authority to

tell her that there was no point in applying and perhaps even that she could not apply for her family member's admission. We have frequently heard from low-income clients, many of them members of racial or ethnic minority groups, that they were discouraged from applying to a nursing facility by the person who answered the phone and told them that the facility had no beds available or a long waiting list. It is crucial that these calls not be treated as a "casual inquiry or a request for information".

Finally, at (18)(iv), we recommend that the Department specify the frequency with which the data collected by nursing facilities will be submitted to the Department. Simply requiring the nursing facilities to collect the information is not enough of a deterrent to civil rights violations. The Department must have a systematic plan for receiving and reviewing the data in a routine and timely manner, and the proposed regulation should articulate a regular time frame for submission of the data. Specifying in the proposed regulation the intervals for submission of civil rights reports will also ensure that Department staff in the future maintain the responsibility that the current staff accept for monitoring civil rights compliance.

Preadmission screening

We support the Department's goal avoiding unnecessary institutionalization in nursing facilities by providing access for consumers and their caregivers to information about home and community based services (HCBS). Consumers generally prefer to remain in their homes rather than entering a nursing facility. Currently, if a consumer who has resources in excess of the Medical Assistance limit needs long term care, there is no mechanism to ensure that they receive information about the availability of HCBS prior to their entering a nursing facility. In addition, HCBS is a cost-effective use of Medical Assistance funds since it is less expensive than nursing facility care.

We have a few concerns about the implementation of the expanded pre-admission screening requirements. First, we have questions as to how this policy will operate in the not uncommon situation where a consumer needs long term care but the full extent of her assets is unknown. We have seen numerous cases in which an elderly person who had been admitted to a nursing home was unable, due to dementia or other incapacitating illness, to provide information about the location and extent of her assets. In this situation, it can take months for family members or other representatives to identify all of the person's resources. The custodians of investment accounts and other types of assets are prohibited from releasing any information without a power of attorney, which may or may not have been executed. Even where there is an agent under a power of attorney, delays in obtaining information can be substantial.

We are concerned whether family members of a hospitalized person in need of long term care (and under pressure from the hospital to be discharged before acute care insurance coverage ends) will be told that the placement process cannot be initiated until they can provide resource information which is unavailable to them. To address this, we suggest that the definition of "MA applicant" be clarified to provide that the determination whether an individual is considered

likely to be an MA conversion resident within 12 months should be based on the information which is reasonably available to the individual or person making a nursing facility application on behalf of the individual. The regulations should also provide that if income and/or resource information is not available, the applicant should be referred for a clinical assessment.

We also have a comment concerning the exceptions criteria at 31(2)(ii)(B). The first criteria is that the *nursing facility* have referred the applicant for a clinical evaluation prior to admission. However, it is our understanding that hospitals, not nursing facilities, generally request the clinical evaluations for hospitalized patients who appear likely to need long term care. Often this happens before a particular nursing facility has even been identified as a possible placement. It is also possible that a personal care home or, in fact, any individual may have requested the clinical evaluation. The regulation should be amended to make clear that the exception applies regardless of who referred the applicant for a clinical evaluation.

Again, thank you for the opportunity to offer comments and recommendations.

Sincerely,

Pam Walz
Director
Elderly Law Project

Beth Shapiro
Staff Attorney
Elderly Law Project

cc: Independent Regulatory Review Commission
Honorable Jake Corman
Honorable Vincent J. Hughes
Honorable George Kenney, Jr.
Honorable Frank Oliver