

DELAWARE NURSING HOME RESIDENTS QUALITY ASSURANCE COMMISSION

Herman M. Holloway, Sr. Campus – Room 198
1901 N. DuPont Highway, New Castle, DE

Meeting of September 12, 2006

Commission Members Present: Patricia C. Engelhardt; Walter E. Ferris; Karen E. Gallagher;; Vicki L. Givens;; Thomas P. McGonigle, Esq. (Chairman); Brian L. Posey; Yrene E. Waldron; Dr. McKinley Wardlaw, Jr.

Commission Members Absent: Joseph M. Letnaunchyn; Rep. Pamela S. Maier; Sen. Robert I. Marshall

Others Present: Steve Autman (Consumer); Michael Dura (Delaware Healthcare Association); Sue Hansen, (Aide to Ms. Gallagher); Victor Orija, State LTC Ombudsman; Pamela Tyranski, Deputy Director (Division of Medicaid & Medical Assistance DHSS); Tom Murray, Deputy Director; Mitzi Murphy and Joan Reynolds, Support Staff (Division of Long Term Care Residents Protection DHSS).

1. Call to Order

The meeting was called to order at 10:05 AM by Chairman McGonigle.

2. Approval of the Minutes of the meeting of July 11, 2006

The Minutes of July 11, 2006 were approved as corrected.

3. Discussion

- Update – Administrative Staff hiring for DNHRQA Commission Chairman

The position for an Administrative Specialist III has been posted by AOC with the possibility of flexibility hours (with further approval), based on an agreement between the Commission and applicant. A possible salary of \$40,000 would require another approval. Chairman McGonigle gave members a copy of the relevant section of the budget bill, the epilogue language, Section 56. After applicants' resumes are read, those qualified will be interviewed as soon as possible. Members interested in participating in the interview process with Chairman McGonigle, Ms. Engelhardt, Ms. Gallagher, Ms. Waldron, and Rep. Maier are asked to contact the Chairman.

- Review Sunset Committee Recommendations

Informal Dispute Resolution (IDR)

As requested by the Sunset Committee, Mr. Murray discussed the Informal Dispute Resolution (IDR) draft prepared by DLTCRP, explaining how the process actually works. Each Commission member was given a copy of this draft. Mr. Murray stated that DLTCRP acts as the agent for CMS. When surveying a facility the Division will cite the violation under a Federal tag or Federal regulation. When the survey team leaves they very often have only Federal violations that are being cited so the report issued will be a list of alleged violations. State violations are usually for staffing for a specific part of the State statute or State regulations or safety code violations. If there are State violations there is a second report, so both a Federal report and a State report could be issued. There are two tracts for dispute resolution The Division is authorized to run the IDR process on behalf of CMS. If there are State violations, the facility can appeal the State violations. Eventually, after this informal process if there is no resolution the facility can ask for an administrative hearing. Any change is documented on separate reports but it is done at one meeting. With the State process the enforcement remedies are not part of the IDR process it's the underlying deficiencies. The purpose of that is to focus the IDR process on the deficient practice and not to make the focus of the IDR on the fine. There is free exchange of follow-up questions and information between the facility and the surveyors. Mr. Murray explained in the Federal IDR process the sanctions/remedies are not stayed pending

the IDR process but they are for the State level. When the report is uploaded to CMS, they initiate the penalty phase at that point. If the facility wants to appeal the penalty phase continues and depending on the outcome of the IDR, the penalties may be rescinded. For the State, as soon as someone elects to go to the IDR process the penalty process stops except for urgent remedies. The reasoning for the State penalty stopping as opposed to the Federal's is that the State is more fair. When the Feds impose a civil money penalty there is a 30-day period when the facility can pay at a reduced rate. Very often the IDR is over before the facility has to pay. The IDR process does not directly cover what the fines are. All of this happens after the QAR team meets and makes their decisions concerning the violations and issues a final report. It was suggested that in the IDR draft under "Introduction" and in the IDR cover letter sent to facilities that this fact be more clearly stated.

Mr. Murray further explained the POC (Plan of Correction) as described in the draft. Before the IDR process a POC is sent back to the Division. Further discussion ensued concerning the Administrative Hearing if requested by a facility following an IDR. However, a hearing is not usually necessary because the facility may decide to drop their appeal for a hearing after discussion and submitting information that satisfies the Division. The way the document is drafted it appears that the IDR is voluntary. The terminology concerning IDR hearings needs clarification of whether it is mandatory or voluntary. If the IDR is an informal hearing it's questionable that an official record on which an appeal can be based can be made. Mr. Murray will discuss these discrepancies with the Director in an effort to clarify this issue. Chairman McGonigle noted that the provider can appeal an IDR decision but the State does not have this option. He feels that in fairness both sides should have this option.

Could the name "IDR" be changed to more clearly reflect its process? The Division would need to consult CMS. Discussion followed about the appeal in respect to the sanction. Chairman McGonigle wants clarification regarding the facility loosing the hearing and choosing to appeal, at this point in time would it need to arrange to make payments? Discussion followed about tags, their purpose and use. In answer to the question of why residents cannot attend the IDR hearing, Mr. Murray said the hearing is closed except for the facility, ombudsman, and Division personnel. In the new proposed system residents, family/guardians attendance is curtailed. This is because the citation against a facility is issued by the State survey team and at that point it becomes their job to prosecute that particular deficiency. The position of the Division is that the citation is issued by and on behalf of the State and not by and on behalf of a particular resident. Chairman McGonigle said that while he understood the State's position of wanting to move the hearings in an orderly fashion, he questions the exclusion of residents or guardians at hearings. He feels a more transparent nature of the hearings would discourage unfounded suspicions. Mr. Murray said this is an administrative licensing process not a criminal investigation.

The Chairman moved that the Commission recommend to the Division that residents or their representatives or guardians who are involved with the underlying sanction are permitted to attend the IDR hearing, not to have standing to testify but to attend the IDR hearing. The motion was not carried, 3 yes, 4 no.

The Commission is in agreement that residents to be notified of the IDR hearing should be persons who have filed complaints with the Division that went thru the survey process that subsequently resulted in an IDR hearing. This is in addition to previously sending the residents letters acknowledging the complaints because the IDR process may result in a change of the sanction. Mr. Posey asked if these proposed rules or regulations are subject to the Administrative Procedures Act. Chairman McGonigle asked if the Division had consulted their Deputy Attorney General. The way this IDR document is presently drafted is that if the State loses at this level, it's over, they don't get an opportunity to appeal, and they lose. The provider does

get the opportunity to appeal. The issue of whether this is an open or close process is more important because of that than it otherwise would be.

Chairman McGonigle will send an e-mail to Mr. Murray outlining the points discussed today about the IDR draft regulations.

3. Old Business/New Business

Ms. Waldron announced that this week is National Assisted Living Week.

Sept. 21, 2006 – Ms. Waldron said a program on Culture Change will be part of part of the trade show. Speaking on communication and human connection will Erin Bonito

October 3, 2006 - Residents Rights Rally; 1-3 PM at the Dover Sheraton Inn. Chairman McGonigle will send further information of the rally to members.

October 18, 2006 - There will be a training session in conjunction with the Division on new CMS items: psycho-social outcomes, activity guidance, quality assurance, bed entrapment, etc. Speaking will be a consultant from American Health Care who has worked with CMS.

4. Public Comment

Mr. Autman said that in this process today, victims, their families and representatives have been stripped of their rights to participate in witnessing a process that has affected them and may in the future affect lives. Damage is done in downgrading, negotiation and collusion. To foreclose the opportunity for openness is immoral. He would promote openness at all meetings, IDR Hearings, the Administrative Appeal level, Federal level, and any other related proceedings

5. Next meeting will be Tuesday, October 10, 2006, at 10 A.M. The location will be DHSS Campus, Main Building., Room 198.

6. Adjournment

The meeting was adjourned at 11:52 AM.

FINAL MINUTES - The September 12, 2006, Minutes were approved as written.