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A SHORT HISTORY OF DPW PROJECTIONS FOR NURSING FACILITY UTILIZATION IN PENNSYLVANIA

By: *Robert G. Sobanski, Senior Reimbursement Analyst*

According to U.S. Census and Pennsylvania Department of Aging data, by 2020, 25% of Pennsylvania's population will be over 60. By 2030, 70 Million Americans (20% of the total population) will be over 65. See also: "A Profile of Older Americans -2002", Administration on Aging, U.S. Department of Health & Human Services, available at: http://research.aarp.org/general/profile_2002.pdf. While public policy favors increased use of home- and community-based alternatives to nursing facility care and the availability of such programs is expanding in Pennsylvania, there is a continuing need for nursing facility services for the "Baby Boom Generation" as well as a simultaneous need to project how that need will affect nursing home utilization.

The Governor proposed a supplemental budget for FYE June 30, 2006 to deal with greater than expected Medical Assistance nursing facility utilization. In the 2003-2004 Budget, projected utilization for FYE June 30, 2006 was 74,800 average residents per day. In the 2004-2005 Budget that projection was changed to 68,600, which was increased to 82,220 in the 2005-2006 Budget. The 2006-2007 Executive Budget puts the number at 81,441. The actual number will not be available until after the close of this fiscal year.

Projected utilization for 2006-2007 has undergone similar shifts. In the 2004-2005 Budget, the projection was for only 68,600, increased

in the 2006 Budget to 83,090, and decreased in the pending 2006-2007 Executive Budget to 81,806.

The 2001-2002 Budget projected 76,910 days for 2003-2004, while the actual number ended up being 78,817 according to later Budget data. The 2002-2003 Budget projected 75,080 days for 2004-2005, while the actual number ended up being 81,051. In the 2001-2002 Budget, actual utilization for 1999-2000 was 78,487. In the 2006-2007 Executive Budget, actual utilization for 2004-2005 was 81,051. Pennsylvania's population increased from 2000 to 2005 by about 144,000 (1.17%), while its nursing facility utilization increased by 3.3%, during a period of major expansion of home- and community-based programs.

The Governor's Office of Health Care Reform presented testimony on the Governor's "Long Term Living Reform Agenda" on February 16, 2006, which includes ensuring that "the supply of nursing home beds properly matches the need for such care while providing opportunities for nursing facilities to expand their continuum of care." There appears to be a need for the Commonwealth and all involved in this process to get a better handle on projecting the need for care in order to deal with the budget realities before us this year as well as the expansion of Pennsylvanians needs for care in the future.

DPW IS SERIOUS ABOUT ENFORCEMENT OF THE NEW MA PROVIDER APPEAL RULES

By: *Daniel K. Natirboff, Esquire*

In 2003, the Pennsylvania Department of Public Welfare's Bureau of Hearings and Appeals (BHA) adopted new rules of practice and procedure for Medical Assistance Provider Appeals. These new rules, known as the Final Standing Practice Order (FSPO), 33 Pennsylvania Bulletin 3053 (June 28, 2003), affect all Medical Assistance Provider Appeals brought since December 3, 2002, when the General Assembly consolidated original jurisdiction over all Medical Assistance provider appeals in BHA (Act 142-2002).

The FSPO includes a number of rules that expressly authorize BHA to dismiss the provider's appeal when and if the provider fails to comply with deadlines established by the FSPO, even though similar penalties are not imposed against the program office in the Department of Public Welfare whose actions are disputed in the appeal. These deadlines are similar to those established for Medicare's

Provider Reimbursement Review Board (PRRB); and, federal courts have upheld the PRRB's dismissals of Medicare provider appeals for failure to meet the similar PRRB position paper deadlines. See: *Michael Reese Hospital & Medical Center v. Thompson*, 427 F.3d 436 (7th Cir. 2005); *High Country Home Health, Inc. v. Thompson*, 359 F.3d 1307 (10th Cir. 2004); *UHI, Inc. v. Thompson*, 250 F.3d 993 (6th Cir. 2001); *Inova Alexandria Hospital v. Shalala*, 244 F.3d 342 (4th Cir. 2001); *Novacare, Inc. v. Thompson*, 357 F.Supp.2d 268 (D.D.C. 2005).

One of the BHA deadlines, established by FSPO Rule 35(c)(1), involves the filing of Position Papers and reads as follows: "If the provider fails to meet the position paper due date or fails to supply the Bureau with the required documentation, the Bureau will dismiss the provider's appeal."

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BHA has dismissed a provider's appeal for failure to comply with these Rule 35(c)(1) requirements, citing PRRB precedents, Appeal of Snyder Memorial Health Center, Order of January 24, 2005 at Docket No. 94-03-291; and, that dismissal is currently on appeal before the Commonwealth Court of Pennsylvania, at No. 1547 C.D. 2005, and a decision is pending. Oral Argument was held before the Court on Tuesday, April 4, 2006. While the provider submitted a timely position paper, BHA found that the position paper did not include "required documentation" and granted the Program Office's Motion to Dismiss on that basis, without permitting the provider any opportunity to cure the deficiencies. The "required documentation" that was found lacking included signatures of the experts expected to be called for hearing on their statements of expert opinions and copies of each of the documents regarding what information each expert would testify to, requirements expressly listed in FSPO Rule 35(c)(3)(iii).

When the FSPO was adopted, Capozzi & Associates, P.C., which served on BHA's Advisory Committee for these new rules (and still does), advised that the FSPO required significant changes in how and when providers needed to prepare to litigate disputes with the Medical Assistance Program, especially with respect to the accelerated requirements to file and complete pre-hearing disclosures and discovery, including the new position paper requirements. BHA's decision in Appeal of Snyder Memorial Health Center demonstrates that BHA and Program Office counsel are serious about enforcing the new requirements to eliminate provider rights to relief and that providers must be equally serious about the preparation of their appeals for hearing under the FSPO if their rights to relief are to be preserved.

PENNSYLVANIA SUPREME COURT BROADENS AVAILABLE TAX EXEMPTION UNDER PENNSYLVANIA CONSTITUTION:

By: Donald R. Reavey, Esquire

Stating that times have changed since 1959, the Supreme Court of Pennsylvania held (5-1) that the provision of the Pennsylvania Constitution permitting tax exemptions for "actual places of regularly stated religious worship" could now include church parking lots. (Wesley United Methodist Church v. Dauphin County Board of Assessment Appeals, No. 105 MAP 2004, decided December 30, 2005.) The Court had held in 1959, under a prior but similar constitutional clause, that such tax exemptions were precluded.

The Court noted that taxing authorities had acknowledged that, when zoning codes require a new church to provide parking, they extended the exemption for the church building to the parking lot because the church had to comply with the zoning requirement in order to be built. The Court found that where an existing church can show that a parking lot is necessary to its maintenance of a congregation the same extension of the exemption could be permitted under the current Pennsylvania Constitution. The Court recognized that, since 1959, congregations have moved away from old neighborhoods and now must commute back to their original churches for worship and rely on church parking lots because of limited street parking. While the Court noted that not all church parking lots would be able to meet this burden of proof, the Court held that "if a church proves its parking lots are a reasonable necessity to the existence of the church itself, those lots are entitled to such status."

Still awaiting decision, since September 2005, is a tax exemption case of first impression under the current Pennsylvania Constitution provision permitting tax exemption for portions of the real estate owned by an institution of purely public charity that are used "for the purposes of the institution" that raises similar questions about the impact of changing times on tax exemptions. In Alliance Home of Carlisle, Pa. (Chapel Pointe) v. Board of Assessment Appeals et al, No. 208 MAP 2004, Capozzi & Associates, P.C. represents a continuing care retirement community providing subsidized programs for seniors' retirement pursuant to a Pennsylvania law encouraging and regulating these retirement planning alternatives. Chapel Pointe seeks recognition that the tax exemption already granted to the facility as a whole for sales tax purposes should also include, for real estate tax purposes not only their nursing facility, but also their assisted and independent living housing, as reasonably necessary to the existence of the overall continuing care program because they are required as part of the statutory definition of "continuing care." Such tax exemption has been granted in some states, while denied in others. The reasoning in Wesley United Methodist Church provides support for the Court's ability to recognize the public service provided by such continuing care programs in this changing "baby boomer" time.

PERSONAL CARE HOME ENFORCEMENT: A Cautionary Case History

By: Joseph F. Murphy, Esquire

The recent voluntary closure of a Personal Care Home (PCH) in Delaware County, Pennsylvania, serving residents with mental illness, after years of economic losses and a recent spate of enforcement expenses demonstrates, as argued in the pending PCH litigation before the Supreme Court of Pennsylvania, just how economically fragile these facilities are, the range of enforcement tools available to the Department of Public Welfare, and the difficulty of providing services to residents with complex conditions within the current regulatory, case-management, and enforcement systems. Here, a look at the statutory and regulatory arsenal involved in that loss of more than 160 PCH beds to an underserved area and population provides a cautionary case history challenging the compliance resources of providers and case-management support services for residents alike. The enforcement time frame involved is just 6 months, starting with inspection and enforcement actions in November 2005 through to the PCH's voluntary closure notice issued on March 1, 2006 and the closure of the facility within 60 days thereafter.

The current PCH regulations include a series under the heading of "Enforcement" at 55 Pa. Code §§ 2600.261 (Classification of violations), 2600.262 (Penalties), 2600.263 (Appeals of penalty), 2600.264 (Use of fines), 2600.265 (Review of classifications), 2600.266 (Revocation or nonrenewal of licenses), 2600.267 (Relocation of residents), 2600.268 (Notice of violations), 2600.269 (Ban on admission), and 2600.270 (Correction of violations). These regulations, however, only supplement the additional and expansive enforcement authority provided to the Department of Public Welfare (DPW) by statutory provisions in the Public Welfare Code at 62 P.S. Article X (Departmental Powers and Duties as to Licensing), including 62 P.S. §§ 1008 (Provisional license), 1026 (Refusal to issue license; revocation; notice), 1053 (Actions against violations of law and rules and regulations), 1055 (Injunction or restraining order when appeal is pending), 1056 (Injunction or restraining order when no appeal is pending), 1057.1(a) (Appeals do not act as automatic supersedeas), 1057.1(b) (Authority to petition the court to appoint a master at facility's expense), 1057.2 (Relocation), 1086 (Penalties), and 1087 (Revocation or nonrenewal of license).

In the recent Delaware County case, DPW used its statutory and regulatory arsenal as follows:

1. DPW issued a revocation notice (62 P.S. § 1026) that provided an effective supersedeas if the notice was timely appealed, which it was; the appeal was stayed pending settlement and later the closure of the facility.
2. DPW sought an injunction pursuant to 62 P.S. §§ 1053-1054 in the local Court of Common Pleas to require the PCH to comply with DPW regulations pending the completion of the appeal and thereby give DPW the right to seek contempt citations from the Court for any violations in addition to any penalties that DPW could impose administratively; no injunction was issued. DPW did not seek the imposition of a master or the immediate relocation of residents.
3. DPW referred the deficiencies involved for further review to determine whether a grand jury should investigate possible criminal violations for neglect of a care-dependent person (18 Pa. C.S. § 2713) arising from disputes about the care provided to and refusal of care by a resident involved in the deficiencies; an investigation was initiated.
4. DPW sought to require the PCH to discharge some mentally ill residents and to downsize as part of the resolution of the revocation dispute; the PCH determined to voluntarily close after first trying to sell.
5. DPW sought to require a potential buyer of the PCH to dis-

charge some mentally ill residents, to downsize the facility, and to defer any transfer of ownership for up to 90 days as a condition for approval of transfer of the license to the buyer 55 Pa. Code § 20.27; the buyer abandoned the deal after such demands were made and the facility determined to voluntarily close.

The facility provided 60-days advance notice of its voluntary closure to DPW pursuant to 55 Pa. Code § 2600.228(c) and more than 30-days advance written notice to residents, county and local agencies and Pennsylvania Protection & Advocacy pursuant to 55 Pa. Code § 2600.228(b). The facility requested relocation assistance for the residents from DPW pursuant to 55 Pa. Code § 2600.228(f) and 62 P.S. § 1057.2, which was provided by county and local agencies and other facilities (including both PCH's and LTC facilities), as well as by DPW staff. Some residents were screened for and transferred to higher levels of care pending alternative placements in other community-based settings. About half of the residents were relocated within two weeks of the closure notice to DPW.

Personal care home providers facing enforcement disputes with DPW need to be aware of the enforcement arsenal available to DPW in such disputes in order to assess alternatives for the resolution of such disputes, including negotiation and closure. Capozzi and Associates, P.C. stands ready to assist you.

PENNSYLVANIA'S SUPPORT FOR THE INDIGENT LAW (ACT 43-2005): RESIDENT'S SPOUSE AND CHILD CAN BE LIABLE FOR PAYMENT

By: Michael B. Volk, Esquire

The Pennsylvania Legislature recently consolidated the Pennsylvania support laws into one volume, including the law that permits nursing facilities to sue a financially capable spouse or child of a resident for payment. Act 43-2005 moves these relative support provisions to 23 Pennsylvania Consolidated Statutes Chapter 46 (Support of the Indigent). The newly codified 23 Pa. C.S. § 4602 (relating to relatives' liability; procedure) replaces 62 P.S. § 1973 (which was published in a volume with public welfare laws), but without any substantial changes to support rights. Section 4 of Act 43-2005 provides that the new Support of the Indigent law is a continuation of the prior Support Law. Under the new law, relatives are still only liable if they have sufficient financial ability to support the indigent person and a person can be deemed indigent whether or not they are receiving public benefits, just based on their inability to cover their basic living expenses.

The Superior Court of Pennsylvania applied the prior Support Law to permit actions by nursing facilities and residents to collect unpaid bills for facility services to the resident from the resident's financially able children, whether or not the children were parties to the admission agreement between the nursing facility and the resident. Nothing in the legislative history of Act 43-2005 indicates legislative intent to change prior caselaw.

The new law, like prior law, permits a petition for support to be brought by any person having an interest in the indigent person's care, which would include a nursing facility providing care and services to the indigent person.

While some relatives may not have sufficient resources to be liable for unpaid resident bills under these support provisions, nursing facilities should still obtain as much information as possible during the admission process and thereafter about such potential sources of payment for unpaid bills. Any litigation for support may be brought in the court of common pleas in the area where the resident is receiving care, rather than where the potentially responsible relative lives. While these support law matters have many of the same problems in collecting payment as any debt litigation, the new law continues the authority of the Court in a support action to have anyone who fails to comply with a court order for support arrested for a contempt hearing and even imprisoned for up to six months (23 Pa. C.S. § 4602(D)). The Support of the Indigent Law provides a means to obtain an alternative source of payment not only for services already rendered, but also for on-going bills that will not be covered by other payment sources, for example in cases where the resident is disqualified because of a prior transfer of assets under the "look back period" for Medicaid benefits, which was recently increased by the Deficit Reduction Act of 2005.

DPW'S BUREAU OF HEARINGS & APPEALS RULES THAT EMPLOYEE MEALS PROVIDED AS FRINGE BENEFIT ARE ALLOWABLE COSTS FOR NURSING FACILITIES

By Order of March 27, 2006, the Bureau of Hearings & Appeals, in FY 2001 nursing facility provider audit appeals brought by four (4) County Homes pursuant to the new Medicaid Provider Appeal Law (67 Pa. C.S. Chapter 11), ruled that employee meals provided as a bona fide fringe benefit were allowable costs under 55 Pa. Code Chapter 1187.

While the Program Office has requested further review of the Bureau's decision by the Secretary, the Program Office conceded in these appeals that employee meals provided as a bona fide benefit qualify as allowable costs under the Chapter 1187 regulations, but argued that the fringe

benefits in these appeals failed to qualify as "a standard benefit in the nursing home industry". The Bureau's decision found that the County Homes proved that "the cost of free meals is applied uniformly and without discrimination within [Appellants'] facilities and within the industry locally" and were provided "in other similarly situated facilities, which reveals that the benefit herein is standard within the local industry." The Bureau also ruled that federal guidelines in HIM-15 (CMS Pub. 15-1) were not applicable because DPW regulations dealt with the issue.

PROVIDERS FILE CONSTITUTIONAL CHALLENGES TO 0.95122 ADJUSTMENT TO 2005-2006 NURSING FACILITY RATES

Capozzi & Associates, P.C., in cooperation with another Harrisburg law firm, filed a Petition for Review in the Commonwealth Court of Pennsylvania challenging the validity of the "nursing home rate limitation" (55 Pa. Code § 1187.96(e)(2)) that DPW implemented retroactively for Medicaid payments for FYE June 30, 2006 ("11"). The limitation was implemented without going through regular rulemaking procedures under special retroactive statutory authority granted to DPW by Act 42-2005, which the Petition for Review argues was adopted in violation of procedures required by the Pennsylvania Constitution. Similar constitutional procedure concerns are currently pending before the Supreme Court of Pennsylvania with respect to now repealed legislation that increased salaries for Pennsylvania judges, legislators, and public officials, as well as in violation of other statutory requirements. We also filed for a

preliminary injunction to prevent DPW from applying the limitation in making payments to nursing facility providers. The Commonwealth Court has granted the providers' motion for expedited discovery procedures in advance of the hearing on the preliminary injunction and scheduled the hearing for May 25, 2006. Our Firm also filed protective individual provider appeals with DPW's Bureau of Hearings & Appeals challenging the Peer Group Prices used to set the Year 11 payment rates, as well as additional appeals challenging the validity of the Final Rate notices issued by DPW in March 2006. If you would like more information on this litigation, you may contact Louis J. Capozzi, Jr., Esquire or Daniel K. Natirboff, Esquire at our Firm.

UPCOMING EVENTS:

August 19, 2006 – Presentation at Slippery Rock University