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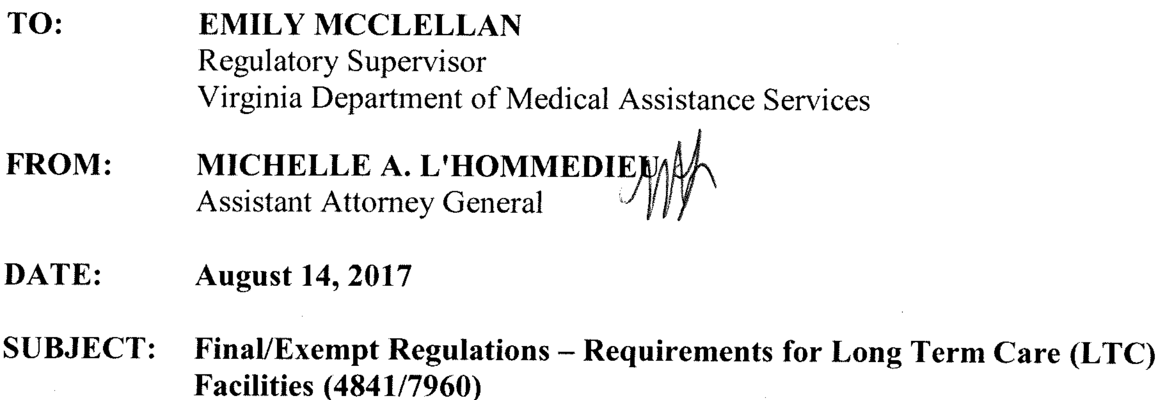

TO:	**EMILY MCCLELLAN** Regulatory Supervisor Virginia Department of Medical Assistance Services
FROM:	**MICHELLE A. L'HOMMEDIEU** Assistant Attorney General
DATE:	**August 14, 2017**
SUBJECT:	**Final/Exempt Regulations – Requirements for Long Term Care (LTC) Facilities (4841/7960)**

I have reviewed the attached exempt final regulations regarding long term care ("LTC") facilities. You have asked the Office of the Attorney General to review and determine if the Department of Medical Assistance Services ("DMAS") has the legal authority to amend the regulations and if the regulations comport with state and federal law.

The changes in these regulations reflect changes in federal law and changes in wording or style. Based on my review, it is my view that the Director of DMAS, acting on behalf of the Board of Medical Assistance Services, under Virginia Code §§ 32.1-324 and 325, has the authority to amend these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act ("APA") and has not exceeded that authority. Based on the foregoing, it is my view that the amendments to these regulations are exempt from the procedures of Article 2 of the APA under Virginia Code §§ 2.2-4006(A)(4)(c) and 2.2-4006(A)(3).

It is my understanding that the proposed changes will amend the State Plan. It is my understanding that any approval necessary from CMS has either been obtained or is not needed because the regulatory changes are necessary to reflect the changes made by CMS in federal regulations. If you have any questions, please contact me at 786-6005.

cc: Kim F. Piner, Esq.

Attachment

Project 5109 - Final

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

CH 0010 Requirements for LTC Facilities

12VAC30-10-240. Amount, duration, and scope of services: Payment for nursing facility services.

The State includes in nursing facility services at least the items and services specified in 42 CFR 483.10~~(c)(8)(i)~~(f)(11).

12VAC30-10-430. Medicaid quality control.

A. A system of quality control is implemented in accordance with 42 CFR 431, Subpart P.

B. The State does not operate a claims processing assessment system that meets the requirements of ~~431.800(e), (g), (h), (j) and (k)~~ 42 CFR 431.808, 42 CFR 431.818, CFR 431.830, 42 CFR 431.832, 42 CFR 431.834, and 42 CFR ~~831~~431.836. The State has an approved Medicaid Management Information System (MMIS).

12VAC30-10-520. Required provider agreement.

With respect to agreements between the Medicaid agency and each provider furnishing services under the plan:

A. For all providers, the requirements of 42 CFR 431.107 and 42 CFR Part 442, Subparts A and B (if applicable) are met.

B. For providers of NF services, the requirements of 42 CFR Part 483, Subpart B, and § 1919 of the Act are also met. (*plus additional requirements described below)

C. For providers of ICF/~~MR~~IID services, the requirements of participation in 42 CFR Part 483, Subpart ~~D~~I are also met.

D. Ambulatory prenatal care is not provided to pregnant women during a presumptive eligibility period.

E. For each provider receiving funds under the plan, all the requirements for advance directives of § 1902(w) are met:

1. Hospitals, nursing facilities, providers of home health care or personal care services, hospice programs, health maintenance organizations and health insuring organizations are required to do the following:

   a. Maintain written policies and procedures with respect to all adult individuals receiving medical care by or through the provider or organization about their rights under state law to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives;

   b. Provide written information to all adult individuals on their policies concerning implementation of such rights;

   c. Document in the individual's medical records whether or not the individual has executed an advance directive;

   d. Not ~~condition the provision of care or otherwise~~ to discriminate against an individual based on whether or not the individual has executed an advance directive including the provision of care;

   e. Ensure compliance with requirements of state law (whether statutory or recognized by the courts) concerning advance directives; and

   f. Provide (individually or with others) for education for staff and the community on issues concerning advance directives.

2. Providers will furnish the written information described in subdivision E 1 a of this section to all adult individuals at the time specified below:

a. Hospitals at the time an individual is admitted as an inpatient;

b. Nursing facilities when the individual is admitted as a resident;

c. Providers of home health ~~care~~ or personal care services before the individual comes under the care of the provider;

d. Hospice program at the time of initial receipt of hospice care by the individual from the program; and

e. Health maintenance organizations at the time of enrollment of the individual with the organization.

3. 12VAC30-20-240 describes law of the state (whether statutory or as recognized by the courts of the state) concerning advance directives.

As a condition of participation in the Virginia Medical Assistance Program all nursing ~~homes~~ facilities must agree that when ~~a patient~~ an individual is discharged to a hospital, the nursing ~~home~~ facility from which the ~~patient~~ individual is discharged shall ensure that the ~~patient~~ individual shall be given an opportunity to be readmitted to the facility at the time of the next available vacancy.

The only acceptable reasons for failure to readmit a specific ~~patient~~ individual who has been discharged to a hospital shall be the ~~patient~~ individual is certified for a level of care not provided by the facility, the ~~patient~~ individual is judged by a physician to be a danger to himself or others, or the ~~patient~~ individual, who at the time of readmission has an outstanding payment to the nursing ~~home~~ facility for which he is responsible in accordance with Medicaid regulations.

F. The Department of Medical Assistance Services (DMAS) shall conduct provider screening according to the requirements of Subpart E of 42 CFR Part 455. DMAS shall terminate or deny enrollment to any provider in accordance with the requirements of 42 CFR 455.416.

12VAC30-10-670. Appeals process.

A. The Medicaid agency has established appeals procedures for NFs as specified in 42 CFR 431.153 and 431.154.

B. The State provides an appeals system that meets the requirements of 42 CFR 431 Subpart E, 42 CFR 483.~~12~~15, ~~and~~ 42 CFR 483 Subpart E, and 12VAC30-110-10 through 12VAC30-110-370 for residents who wish to appeal a notice of intent to transfer or discharge from a NF and for individuals adversely affected by the preadmission screening ~~and~~ or annual resident review requirements of 42 CFR 483 Subpart ~~81~~ C.

12VAC30-10-751. Enforcement of compliance for nursing facilities.

A. The Commonwealth shall comply with the Medicaid Program requirements of ~~42 CFR 488.300 et seq.~~ 42 CFR 488, Subpart E.

B. Notification of enforcement remedies. When taking an enforcement action against a nonstate operated nursing facility, the state provides notification in accordance with 42 CFR 488.402(f).

1. The notice (except for civil money penalties and state monitoring) specifies:

a. The nature of noncompliance;

b. Which remedy is imposed;

c. The effective date of the remedy; and

d. The right to appeal the determination leading to the remedy.

2. The notice for civil money penalties is in writing and contains the information specified in 42 CFR 488.434 and 42 CFR 488.440.

3. Except for civil money penalties and state monitoring, notice is given at least two calendar days before the effective date of the enforcement remedy for immediate jeopardy situations and at least 15 calendar days before the effective date of the enforcement remedy when immediate jeopardy does not exist. The two-day and 15-day notice periods begin when the facility receives the notice, but, in no event will the effective date of the enforcement action be later than 20 calendar days after the notice is sent. (42 CFR 488.402(f)(3),(4), (5))

4. Notification of termination is given to the facility and to the public at least two calendar days before the remedy's effective date if the noncompliance constitutes immediate jeopardy and at least 15 calendar days before the remedy's effective date if the noncompliance does not constitute immediate jeopardy. The state must terminate the provider agreement of a nursing facility in accordance with procedures in 42 CFR Parts 431 and 442. (42 CFR 488.456(c) and (d)).

C. Factors to be considered in selecting remedies. In determining the seriousness of deficiencies, the state considers the factors specified in 42 CFR 488.404(b)(1) and (2).

D. Application of remedies.

1. If there is immediate jeopardy to resident health or safety, the state terminates the nursing facility's provider agreement within 23 calendar days from the date of the last survey or immediately imposes temporary management to remove the threat within 23 days. (42 CFR 488.410)

2. The state imposes the denial of payment (or its approved alternative) with respect to any newly admitted individual ~~admitted to a nursing facility~~ that has not come into

substantial compliance within three months after the last day of the survey. (42 CFR 488.417(b)(1) and § 1919(h)(2)(C) of the Act)

3. The state imposes the denial of payment for new admissions remedy as specified in 42 CFR 488.417 (or its approved alternative) and a state monitor as specified at 42 CFR 488.422, when a facility has been found to have provided substandard quality of care on the last three consecutive standard surveys. (42 CFR 488.414 and § 1919(h)(2)(D) of the Act)

4. The state follows the criteria specified at 42 CFR 488.408(c)(2), (d)(2), and (e)(2) when it imposes remedies in place of or in addition to termination. (42 CFR 488.408(b) and § 1919(h)(2)(A) of the Act)

5. When immediate jeopardy does not exist, the state terminates a nursing facility's provider agreement no later than six months from the finding of noncompliance if the conditions of 42 CFR 488.412(a) are not met.

E. Available remedies. The state has established the remedies defined in 42 CFR 488.406(b).

~~1. Termination;~~

~~2. Temporary management;~~

~~3. Denial of payment for new admissions;~~

~~4. Civil money penalties;~~

~~5. Transfer of residents; transfer of residents with closure of facility; and~~

~~6. State monitoring.~~

12VAC30-20-251 through 12VAC30-20-259 describe the criteria for applying the above remedies, plan of correction, nursing facility appeals, and repeated substandard quality of care.

F. In the event that the Commonwealth and ~~HCFA~~CMS disagree on findings of noncompliance or application of remedies in a nonstate operated nursing facility or a dually participating facility when there is no immediate jeopardy, such disagreement shall be resolved in accordance with the provisions of 42 CFR 488.452~~(1995)~~.

G. The Commonwealth shall have the authority to apply one or more remedies for each deficiency constituting noncompliance or for all deficiencies constituting noncompliance.

H. As set forth by 42 CFR 488.454~~(d)~~, remedies shall terminate on the date that ~~HCFA~~CMS or the Commonwealth can verify as the date that substantial compliance was achieved and the facility has demonstrated that it could maintain substantial compliance once the facility supplies documentation acceptable to ~~HCFA~~CMS or the Commonwealth that it was in substantial compliance and was capable of remaining in compliance.

12VAC30-10-810. Resident assessment for nursing facilities.

A. The state specifies the instrument to be used by nursing facilities for conducting a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity as required in § 1919(b)(3)(A) of the Act.

B. The state is using the resident assessment instrument designated by CMS. ~~the Health Care Financing Administration. See Transmittal #241 of the State Operations Manual (§ 1919(e)(5)(A))~~Appendix R "Resident Assessment Instrument for Long-Term Care Facilities" of the CMS State Operations Manual.