

CHAPTER 286
FORMERLY
SENATE BILL NO. 227

AN ACT TO AMEND THE DELAWARE CODE BY CREATING A NEW CHAPTER 65 OF TITLE 30 OF THE DELAWARE CODE TO IMPOSE QUALITY ASSESSMENT FEES ON NURSING FACILITIES AND BY CREATING A NEW CHAPTER 105 OF TITLE 16 ESTABLISHING THE NURSING FACILITY QUALITY ASSESSMENT FUND.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend Title 30 of the Delaware Code by adding a new Chapter 65 to that Title as follows:

Chapter 65. Nursing Facility Quality Assessments.

§ 6501. Definitions.

As used in this chapter:

(1) 'CMS' means the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services.

(2) 'DHSS' means the Delaware Department of Health and Social Services.

(3) 'A managed care company under contract to the Medicaid agency' means an entity that meets the definition of an MCO under 42 C.F.R. § 438.2 and has a contract with the Delaware Medicaid program.

(4) 'Nursing facility' means a nursing facility as defined and licensed pursuant to Chapter 11 of Title 16 of the Delaware Code. As used in this Chapter, the term 'Nursing Facility' shall include for-profit and non-profit entities but shall exclude the Delaware Veterans Home and any state, federal or other public government-owned facilities and any facilities that exclusively serve children.

(5) 'Nursing facility services' has the meaning given that term in 42 C.F.R. § 433.56, or any successor regulation or superseding statute.

(6) 'Continuing Care Retirement Community' and 'CCRC' means an entity providing nursing facility services together with assisted living or independent living on a contiguous campus with the number of assisted living and independent living beds in the aggregate being at least twice the number of nursing facility beds. For purposes of this definition contiguous means land adjoining or touching other property held by the same or related organization. Land divided by a public road shall be considered contiguous.

(7) 'Resident day' means a calendar day of care provided to a nursing facility resident, including the day of admission and excluding the day of discharge, provided that one resident day shall be deemed to exist when admission and discharge occur on the same day. A resident day includes a day on which a bed is held for a patient and for which the facility receives compensation for holding the bed.

(8) 'Medicaid resident day' means a resident day paid for by the Delaware medical assistance program including a managed care company under contract to the Medicaid agency.

(9) 'Medicare resident day' means a resident day paid for by the Medicare program, a Medicare Advantage or special needs plan, or by a Medicare hospice program.

(10) 'Non-Medicare resident day' means a resident day not paid for by the Medicare program, a Medicare Advantage or special needs plan, or by a Medicare hospice program.

(11) 'Fiscal year' shall mean the time period from July 1 to June 30.

(12) The terms 'Medicaid' and 'Medical Assistance' mean the Medicaid program operated in Delaware by the Department of Health and Social Services under Title XIX of the federal Social Security Act.

§ 6502. Quality Assessment.

(a) Effective for assessment periods beginning on or after June 1, 2012 any nursing facility engaged in this State in providing nursing facility services with the exception of those exempted under § 6502 (d), shall be charged a quarterly quality assessment as prescribed in subsection § 6502(b) on nursing facility services provided by nursing facilities for the purpose of obtaining federal Medicaid matching funds under the State's Medicaid program. If an entity conducts, operates or maintains more than one nursing facility, the entity shall pay the quality assessment for each separately licensed nursing facility. The quality assessment shall be charged on a per non-Medicare resident day basis as set forth in § 6502(b)

(b) The quality assessment for each non-Medicare resident day:

(1) Shall for assessment periods ending prior to June 1, 2013 not exceed:

(i) \$14.00 per non-Medicare resident day for each nursing facility that is described in subsection § 6502(d)(2) and,

(ii) \$16.00 per non-Medicare resident day for all other nursing facilities subject to the quality assessment; and

(2) Shall for assessment periods beginning on and after June 1, 2013 equal:

- (i) \$9.35 per non-Medicare resident day for each nursing facility that is described in subsection § 6502 (d) (2) and;
- (ii) \$12.00 per non-Medicare resident day for all other nursing facilities subject to the quality assessment.

(c) The quality assessment imposed by this section shall be payable on a calendar quarter basis using returns prescribed by the Department of Finance. The assessment for each calendar quarter will be based upon non-Medicare resident days for the three month period ending prior to the start of the last month in the calendar quarter. Payments shall be due as follows:

- (1) for calendar quarters that end prior to the date of notification by CMS of the approval of the waiver, and if required a state plan amendment, no later than 45 days after the date of the CMS approval letter;
- (2) for calendar quarters that end after the date of notification by CMS of the approval of the waiver and any required state plan amendment:
 - (i) for the calendar quarter ending June 30th; no later than the 15th day of the last month of that quarter;
 - (ii) for all other quarters; no later than 30 days after the end of the quarter.

(d) In accordance with the redistribution method set forth in 42 C.F.R. § 433.68(e)(1) and (2), DHSS shall seek a waiver from CMS of the broad-based and uniform provider assessment requirements of federal law to exclude certain nursing facilities from the quality assessment and to permit certain nursing facilities with a high volume of Medicaid resident days or facilities with a high number of total annual resident days to pay the quality assessment at a lesser amount per non-Medicare resident day. Such waiver shall seek authority from CMS for DHSS to:

- (1) exempt the following nursing facilities from the quality assessment:
 - (i) Continuing Care Retirement Communities as defined in §6501; and,
 - (ii) Nursing facilities with 46 or fewer beds.
- (2) lower the quality assessment for nursing facilities with greater than or equal to 45,000 annual Medicaid resident days based upon the most recent cost report ending in the calendar year prior to the state fiscal year in which the assessment is applied.

(e) The Department of Finance shall, within thirty days after the return due date for each quarter, deposit the quality assessments collected as follows:

- (1) 90% of the quality assessments shall be deposited to the Nursing Facility Quality Assessment Fund established pursuant to §10501 of Title 16, and
- (2) 10% of the quality assessments collected shall be deposited to the State's general fund.

(f) The quality assessment fee imposed by this § 6502 shall be subject to and shall have available all provisions of Chapter 5 of this Title regarding procedures, administration, and enforcement.

(g) Within seven (7) days of receiving notification from CMS of the approval of the waiver and if required a state plan amendment, DHSS shall notify the nursing facilities and the Department of Finance of:

- (1) the CMS approval date, and
- (2) the facilities that are subject to the quality assessment and those that are exempt and the reasons for the exemption, and
- (3) the specific dollar amounts of the per non-Medicare resident day quality assessment to be charged in accordance with section 6502 (b), and
- (4) identify which facilities are subject to the differing assessment amounts specified in section 6502 (b), and
- (5) the date the quality assessments are due to be paid by nursing facilities to the department of Finance.

§ 6503. Penalties.

In addition to the penalties prescribed in Chapter 5 of this Title, if any quality assessment is not paid when due, or a facility fails to timely prepare the prescribed return form, DHSS may:

- (a) Withhold any Medicaid payments to the delinquent nursing facility, including any payments due to the nursing facility for Medicaid patients from a managed care company under contract to the Medicaid agency, until such time as the quality assessment amount is paid in full; and/or
- (b) Suspend or revoke the nursing facility license; and/or
- (c) Develop a plan that requires the nursing facility to pay any delinquent quality assessment and penalty amounts in installments.

Section 2. Amend Title 16 of the Delaware Code by adding a new Chapter 105 to that Title as follows:

Chapter 105. Nursing Facility Quality Assessment Fund

§10501. Definitions.

As used in this chapter:

(1) the terms 'nursing facility', 'Medicaid', 'DHSS', 'CMS', 'Medicaid resident day', 'nursing facility services', 'managed care company under contract to the Medicaid agency' have the meaning given these terms in Title 30, Chapter 65.

(2) 'Medicaid enrolled nursing facility' means a nursing facility enrolled in the Medicaid program and/or enrolled with a managed care company under contract to the Medicaid agency for the purpose of providing nursing

facility services to Medicaid eligible patients, but shall exclude the Delaware Veterans Home and any state, federal or other public government-owned facilities and any facilities that exclusively serve children.

(3) 'Medicaid share of the quality assessment' means for each nursing facility, the assessment cost applicable to Medicaid residents

§10502. Nursing Facility Quality Assessment Fund; Establishment; Funding.

(a) There shall be established in the State Treasury and in the accounting system of the State a special fund to be known as the Nursing Facility Quality Assessment Fund (the "Fund")

(b) The following revenue shall be deposited into the Fund:

(1) As specified in 30 Del. C. §6502 (e)(1), 90% of the quality assessment collected;

(2) On the last day of each month, the State Treasurer shall credit the Fund with interest on the average balance in the Fund for the preceding month. The interest to be paid to the Fund shall be that proportionate share, during such preceding month, of interest to the State as the Fund's and the State's average balance is to the total State's average balance.

§10503. Use of Nursing Facility Quality Assessment Fund; Payments.

(a) Funds deposited into the Nursing Facility Quality Assessment Fund shall be used by DHSS exclusively to secure federal matching funds available through the state Medicaid plan and any applicable waivers, and together with the Federal funds shall be used exclusively by DHSS including any managed care companies under contract to the Medicaid agency to:

(1) Provide for per diem rate adjustments in accordance with §10504 to Medicaid enrolled nursing facilities,

(2) To reimburse the Medicaid share of the quality assessment in accordance with §10504.

(3) To reimburse any funds advanced from the DHSS Medicaid budget appropriation that were used to make the payments referred to under §10503, (a) (1) and (2).

(b) If the quality assessment imposed by §6502 of Title 30 and the payments referred to by §10503, (a) (1) and (2) are repealed, any funds remaining in the Nursing Facility Quality Assessment Fund shall:

(1) first reimburse DHSS if the total of all quality assessment payments received from nursing facilities are equal to or less than the state share of all of the payments referred to by §10503, (a) (1) and (2) made by DHSS including managed care companies under contract to the Medicaid agency to nursing facilities; and

(2) if the total of all quality assessments received is greater than the state share of the payments issued referred to by §10503, (a) (1) and (2), the remaining funds will be distributed back to the nursing facilities generally and proportionately on the same basis as the assessments were collected in the last calendar quarter

§10504. Nursing facility rate adjustments.

(a) Medicaid enrolled nursing facilities that are not subject to penalties under §6503 of Title 30 shall be eligible for per diem rate adjustments referred to by §10503, (a) (1) and (2). Nursing facilities subject to penalties under §6503 of Title 30 shall be eligible for per diem rate adjustments only after all penalties and past due quality assessments are paid in full.

(b) Effective April 01, 2012, nursing facilities are paid for services rendered to Medicaid patients directly by DHSS as well as by managed care companies under contract to the Medicaid agency. The per diem rate adjustments referred to by §10503, (a) (1) and (2) will be incorporated into the DHSS nursing facility level of reimbursement rate schedules. Unless a facility is subject to penalties as described in §10504 (a), DHSS and the managed care companies will pay no lower than the adjusted per diem rates in these schedules.

(c) The rate adjustments referred to by §10503, (a) (1) and (2) shall be a rate paid on a per Medicaid resident day basis. The rate paid will be the same per diem amount for each facility other than the per diem to reimburse the Medicaid share of the assessment.

(d) The rate adjustments referred to by §10503, (a) (1) and (2) will be retroactive for dates of service on or after June 01, 2012. Upon CMS notification to DHSS of waiver approval and, if required, state plan amendment approval, the per diem rates in effect as of June 01, 2012 will be increased by the rate adjustments referred to by §10503, (a) (1) and (2). The retroactive rate adjustments for Medicaid paid claims for service dates between June 01, 2012 and the date of CMS notification of waiver and, if required, plan amendment approval, must be paid within 30 days of CMS approval.

Section 3. Repeal in certain circumstances; sunset date.

(a) Except as provided in subsection (c), the quality assessment imposed by §6502 of Title 30 and the payments referred to by §10503, (a) (1) and (2) of Title 16 shall be repealed and no further obligation to pay the quality assessment or issue adjusted Medicaid payments shall exist if:

(1) CMS determines that the quality assessment imposed by §6502 of Title 30 is impermissible and can not be used as the non-Federal share of the payments referred to by §10503, (a) (1) and (2) of Title 16 made to nursing facilities or for purposes of claiming federal Medicaid matching funds under Title XIX of the federal Social Security Act; or

(2) Either the quality assessment waiver or the state plan amendment reflecting the nursing facility payments referred to by §10503, (a) (1) and (2) of Title 16 are not approved by CMS; or

(3) Federal Medicaid funds being matched with the State quality assessment funds become unavailable due to a change in federal law or the interpretation of federal law by a body of competent jurisdiction. In this case, the quality assessments and the payments referred to by §10503, (a) (1) and (2) will terminate beginning on the date the federal statutory, regulatory, or interpretive change takes effect; or

(4) The DHSS reduces rates, in the aggregate, for nursing facility services, exclusive of the rate adjustments in §10503, (a) (1) and (2), below those in effect as of the effective date of this legislation.

(b) If not earlier repealed under section (a) of this section, the quality assessment imposed by §6502 of Title 30 and the payments referred to by §10503, (a) (1) and (2) of Title 16 shall be repealed and no further obligation to pay the quality assessment shall continue for the calendar quarters beginning after December 31, 2015.

(c) For any calendar quarter for which the payments referred to by §10503, (a) (1) and (2) of Title 16 have been made, the quality assessment provisions of §6502 of Title 30 will remain in effect for that quarter and not be repealed until the following quarter.

Section 4. Administration: Implementation Regulations.

(a) DHSS and the Department of Finance shall enter into a memorandum of understanding under which DHSS shall reimburse the reasonable costs of the Department of Finance in administering Chapter 65 of Title 30.

(b) DHSS and the Department of Finance are authorized to promulgate rules and regulations and take such other actions as are necessary to implement the provisions of Title 30, Chapter 65 and Title 16, Chapter 105

Approved June 28, 2012