

Direct Care Worker Non-Skilled Services in Home and Community Based Services Settings
Joint Policy Clarification – Departments of Human Services, Health, and State
November 14, 2016

Issue

The Administration is issuing a policy that clarifies the types of non-skilled services/activities that can be performed in the consumer’s place of residence or other independent living environment by personal attendants, direct care workers, nursemaids or other household aids of any type (collectively, “DCWs”) in all home and community-based services (“HCBS”) settings. These services/activities fall under the Department of Health’s (“DOH”) Home Care Agency regulations governing home care services as directed by an individual in a home or independent living environment, the Department of Human Services (“DHS”) regulations, and HCBS waiver programs and the state-funded Act 150 program, and are exempt from the licensure requirements under the Professional Nursing Law and the Practical Nurse Law as “home care.” This policy clarification will help the Administration meet one of its key priorities, serving individuals with disabilities in the community, whenever possible.

Background

Many individuals, families, DCWs, advocates, and other members of the stakeholder community have expressed a strong desire for the Commonwealth to adopt a policy that would clarify the types of non-skilled home care services/activities DCWs can perform in HCBS settings to enable individuals with disabilities to live independently.

The Pennsylvania Long-Term Care Commission (“LTCC”) Final Report, recommended the Commonwealth explore “enabl[ing] DCWs to provide additional services for long term services and supports (“LTSS”) consumers.”¹ ADAPT, a national disability rights grassroots organization, has also recognized the need for DCWs to provide individuals with assistance concerning activities that individuals could perform themselves, but for their disability.²

In 2015, Disability Rights Pennsylvania (“DRP”) contacted DHS and DOH to discuss potential litigation concerning a conflict in the agencies’ implementation and interpretation of separate DHS and DOH regulations and policies impacting individuals with disabilities who received funding through DHS’ HCBS program. DRP brought the issue to the attention of DHS and DOH after DOH informed a home care agency that performance of clean intermittent catheterizations by DCWs was not in the scope of practice for a DCW or a home health aide or nurse aide.

DHS and DOH began working together, along with the Department of State (“DOS”) to explore options to clarify the types of non-skilled services/activities that can be performed by DCWs for individuals with disabilities in all HCBS settings to enable those individuals to receive support in their own homes and community.

Current Regulations, Laws, and Policies

Regulation of Home Care Agencies and Registries – Department of Health

¹ Pennsylvania Long-Term Care Commission. (2014). *Pennsylvania Long Term Care Commission Final Report*. http://www.dhs.state.pa.us/cs/groups/webcontent/documents/report/c_134443.pdf

² Wheat, T. ADAPT. (2014) *ADAPT Action Report*. <http://www.adapt.org/freeourpeople/2014dc/report03.php>

Under Act 69 of 2006, (Act of July 7, 2006, P.L. 334, No. 69), which amended the Health Care Facilities Act (HCFA), 35 P.S. § 448.101 et seq., home care services are provided by Home Care Agencies and by contractors listed in Home Care Registries. Home Care Agencies and Home Care Registries are regulated by DOH pursuant to the HCFA, 35 P.S. §§ 448.806(d.1) and 448.809a, and its implementing regulations, 28 Pa. Code §§ 611.1 – 611.57. Home Care Agencies and Home Care Registries are defined as follows:

A Home Care Agency is “[a]n organization ... that supplies, arranges or schedules employees to provide or perform activities of daily living or instrumental activities of daily living or companionship services or specialized care on an hourly, shift or continual basis to a consumer in the consumer's place of residence or other independent living environment ...”for which the organization receives a fee, consideration or compensation of any kind.”

A Home Care Registry is “[a]n organization ... that supplies, arranges or refers independent contractors to provide activities of daily living or instrumental activities of daily living or specialized care in the consumer's place of residence or other independent living environment ...”

35 P.S. § 448.802a.

Home care agencies supply, arrange or schedule employees to provide home care services, as directed by the consumer or the consumer's representative, in the consumer's place of residence or other independent living environment. Home care services include:

- (i) Personal care.
- (ii) Assistance with instrumental activities of daily living, which include home management activities, respite care, companionship services, and personal care, including, but not limited to, self-administered medications, feeding, oral, skin and mouth care, shaving, assistance with ambulation, bathing, hair care and grooming, dressing, toileting, and transfer activities. 35 P.S. § 448.802a
- (iii) Companionship services.
- (iv) Respite care.
- (v) Specialized care, which is defined as nonskilled services unique to the consumer’s care needs that facilitate the consumer’s health, safety and welfare, and ability to live independently.

See 28 Pa. Code § 611.5.

Prior to assigning a DCW employee to provide home care services, the home care agency or registry must evaluate the DCW and show DOH that the DCW has demonstrated competency in any activities that he or she will provide to the individual. 28 Pa. Code § 611.55. This is done by the agency or registry having a set of approved training standards that must be met by the DCW or by passing a competency examination which meets the regulatory requirements. The home care agency or home care registry is required to include documentation in the DCW’s file that the agency or registry has reviewed the individual’s competency to perform assigned duties through direct observation, testing, training, consumer feedback or other method approved by the DOH or through a combination of methods. *Id.*

Regulation of Nurses – Department of State

Anyone seeking to practice professional nursing or practical nursing must obtain a license to do so. The practice of professional nursing is “[d]iagnosing and treating human responses to actual or potential health problems through such services as case findings, health teaching, health counseling, provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed physician or dentist.” (49 Pa. Code § 21.1). The practice of practical nursing is “[t]he performance of selected nursing acts in the care of the ill, injured or infirm under the direction of a licensed professional nurse, a licensed physician or a licensed dentist which do not require the specialized skill, judgment and knowledge required in professional nursing.” (49 Pa. Code § 21.141). The DOS regulates nurses. (63 P. S. §§ 211 through 225.5, and 651 through 667; and 49 Pa. Code Chapter 21).

The Professional Nursing Law does not prohibit “home care of the sick by friends, domestic servants, nursemaids and companions or household aides of any type, so long as such persons do not represent or hold themselves out to be licensed nurses, licensed registered nurses, or registered nurses; or use in connections with their names, any designation tending to imply they are licensed to practice under the provisions of this act...” (63 P.S. § 214(1)). Likewise, the Practical Nurse Law does not prohibit “home care of the sick by friends, domestic servants, nursemaids and companions or household aids of any type so long as such persons do not represent or hold themselves out to be practical nurses or use in connection with their names any designation tending to imply that they are licensed to practice under the provisions of this act.” (63 P.S. § 653(1)).

Home and Community-Based Services –Department of Human Services

DHS delivers HCBS through Medicaid-funded or state-funded programs. HCBS provide support and services that enable a person to remain in a community setting (including, the consumer’s place of residence or other independent living environment) rather than being admitted to an institutional setting.

DCWs assist individuals with activities of daily living, which include the following, which is not an exhaustive list:

- Eating and drinking;
- ambulating;
- transferring and toileting;
- taking medications;
- personal hygiene; and
- bladder and bowel management.

Policy Clarification

The Administration is issuing a policy that clarifies the types of non-skilled activities/services that can be performed by DCWs to assist individuals with disabilities with activities of daily living that could be performed independently but for their disability. These non-skilled, routine activities/services include assistance with bowel and bladder routines, assistance with medication, ostomy care, clean intermittent catheterization, assistance with skin care, and wound care. These non-skilled activities provided in the consumer’s place of residence or other independent living environment are specialized care, a type of home care service unique to the consumer’s care needs that are not prohibited under the Professional

Nursing Law and Practical Nurse Law. DCWs may perform these non-skilled services/activities, with evidence of competency or training, provided they do not represent or hold themselves out as being licensed nurses, licensed registered nurses, or registered nurses; or use in connection with their names, any designation tending to imply they are licensed to practice nursing.

Rationale

- Assistance with bowel and bladder routines, assistance with medication, ostomy care, clean intermittent catheterization, and wound care delivered by DCWs are non-skilled “home care” services.
- Individuals with disabilities will have a greater chance of remaining in their homes and community when they are able to receive non-skilled assistance with long term supports and services from DCWs.
- Individuals with disabilities will be afforded the same opportunity for independence that individuals without disabilities experience when discharged from a hospital or when they require certain care at home or in other independent living environments. Nurses are not required to perform these activities for individuals without disabilities.
- Pennsylvania is moving to Community HealthChoices (CHC), a Medicaid managed care system for individuals with physical LTSS needs and individuals dually eligible for Medicaid and Medicare. This policy aligns with the goals of CHC and will further the Commonwealth’s efforts to encourage LTSS in HCBS settings.