



STATE OF NEW YORK
DEPARTMENT OF HEALTH

161 Delaware Avenue Delmar, NY 12054-1393

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

January 6, 2006

DAL/DQS: #06-01
Subject: Medicare Part D Authorized
Representatives

Dear Administrator,

The Department is writing this letter to help you address some issues regarding residents who are eligible for the new Medicare Part D prescription drug benefit (Part D). Specifically, you may have residents who are Medicaid beneficiaries and are eligible for Part D but are not enrolled in a Part D pharmacy plan, as well as residents who have been automatically enrolled in Part D plans that are not in the residents' best interests.

Residents who have legal capacity to act on their own behalf to make decisions regarding Part D, including the decision to enroll or change enrollment, should exercise their right to do so. Facility personnel may assist residents in making Part D decisions as long as they indicate to the Centers for Medicare and Medicaid Services (CMS) that they have provided assistance and their relationship to the resident.

Residents who have legal capacity to act on their own behalf may also legally authorize (or may have already legally authorized) other individuals (including, at the facility's discretion, individuals working for the facility) to act on their behalf to make decisions regarding Part D, under Title 15 of Article 5 of the General Obligations Law (Power of Attorney); or they may authorize the provider's Administrator, or Administrator's designee, under 10 NYCRR § 415.3(g).

Residents who choose to legally authorize other individuals to act on their behalf to make decisions regarding Part D, must do so in writing, and acknowledge that they are making the authorization of their own will and absent undue influence. Residents should not incur any cost associated with the preparation and execution of the authorization document itself.

For residents who lack legal capacity to act on their own behalf to make decisions regarding Part D, and already have a legally authorized representative, the legally authorized representative can make decisions regarding Part D on the resident's behalf.

For residents who lack legal capacity to act on their own behalf to make decisions regarding Part D, and do not have an existing legally authorized representative, formal legal guardianship could be established. Also, family members and other parties who have an interest in the well-being of the resident can legally authorize a designated representative, including themselves, to make Part D decisions under 10 NYCRR § 415.2(f). The individual or individuals most personally involved in the resident's care should be the designated representative.

The Department recognizes that there may be rare instances when no relative or community member has an interest in the well-being of the resident. The Department would authorize the facility to establish the Administrator or Administrator's designee to act as designated representative in those exceptional instances. The provider should exhaust all efforts to identify individuals with an interest in the well-being of the resident, before establishing the Administrator or Administrator's designee as the designated representative.

In any instance where an authorized representative is acting on behalf of a resident, the representative has both an ethical and legal responsibility to act in the resident's best interests. No nursing home, its officers or its employees may solicit, accept or receive payment, discount, or other remuneration for personal use or benefit, as a result of enrollment of an individual in a particular Part D pharmacy plan.

The Department intends to monitor facilities' policies and procedures in connection with residents eligible for Part D, for compliance with all legal requirements, including compliance with laws that prohibit kickbacks and self-referrals. This will include a review of provider processes with respect to enrollment of individuals without legal capacity to act on their own behalf to make decisions regarding Part D.

Nursing home staff should engage in ongoing efforts to ensure that all residents and their designated representatives receive information and education regarding resident responsibilities and rights with respect to Part D. It is critical that the rights of residents to make their own decisions, or to have designated representatives make those decisions on their behalf and in their best interests, are honored and protected.

For your convenience, the Department has established an e-mail contact specifically for questions regarding authorized representatives. Please submit any questions on this issue to nhinfo@health.state.ny.us with a subject heading of **“Authorized Representative”**. The Department will post questions and responses as appropriate to the Health Provider Network (HPN) and the DOH website.

Thank you for your cooperation in ensuring that our nursing home residents maintain access to appropriate and timely treatment.

Sincerely,

A handwritten signature in cursive script that reads "Keith W. Servis". The signature is written in black ink on a light-colored background.

Keith W. Servis, Director
Division of Quality & Surveillance
For Nursing Homes & ICFs/MR