

OLTL's DRAFT NFCE CLARIFICATION

Purpose / objectives

- Issue a policy clarification to the AAAs as quickly as possible in order to **limit the number of additional cases that may be incorrectly decided under prior standards that consumers and advocates suggested were confusing.**
- Clarify that Pennsylvania employs only one NFCE standard which closely adheres to federal statutes and regulations. **Supersede previous interpretations** of the NFCE standard that have been perceived by consumers and advocates as **more restrictive than federal law.**
- Clarify that the NFCE **standard must be uniformly applied.** An individual's level of care assessment should not differ because it is conducted by one AAA rather than another. **Neither should an individual's level of care assessment differ because the individual is seeking MA services under a HCB waiver, rather than in an MA nursing facility.** (see page 2)
- Clarify that the NFCE **standard does not limit access to Medicaid long-term care services to individuals requiring skilled or rehabilitative care. Nursing facility clinical eligibility also encompasses what was previously labeled intermediate care:** “. . . health-related care and services that are not as inherently complex as skilled nursing or rehabilitation services but which are needed and provided on a regular basis in the context of a planned program of health care and management. . . .” (see pages 3-4)
- Clarify that **an individual may be eligible for Medicaid long-term care services even though he requires only personal care services.** (see page 4)
- Clarify that, as a general matter, the AAAs **should adhere to the medical improvement standard when conducting annual reassessments of consumers' continuing eligibility for Medicaid long-term care services.** In other words, “once a consumer has been properly determined to be NFCE, the consumer should remain NFCE unless there is some change in circumstance that warrants a different outcome.”

Although application of the medical improvement standard in the context of nursing facility level-of-care determinations is not required by federal law, **OLTL believes that application of an improvement standard makes sense and is consistent with our reading of applicable Pennsylvania law.** The 1984 Disability Amendments enacted by Congress and a stream of well-known federal court decisions, such as *Patti v. Schweiker*, 669 F.2d 582; *Lopez v. Heckler*, 713 F.2d 1432; *Finnegan v. Matthews*, 641 F.2d 1340 instruct that “**termination of benefits . . . must rest on substantial new evidence that the individual's condition has improved**”. The medical improvement standard adopted by Congress sets out **limited, but noteworthy exceptions:**

- Although the consumer has not improved medically, s/he has benefited from advances in medical or vocational therapy or technology; or
- New or improved diagnostic techniques or evaluations now show that the consumer's impairment is not as disabling as it was considered when the consumer's case was previously assessed; or
- Substantial evidence demonstrates that the prior determination was in error. Evidence that the prior determination was erroneous may be found in evidence in the record at the time of a prior assessment or newly-obtained evidence which relates to a prior reassessment.

See generally 42 U.S.C. § 423(f); 42 U.S.C. § 1382c (a) (4). OLTL has modeled the clarifying language regarding medical improvement on this sensible line of federal Circuit Court decisions and Congress' 1984 Disability Amendments that resulted from that litigation.