



STATE OF DELAWARE  
STATE COUNCIL FOR PERSONS WITH DISABILITIES  
MARGARET M. O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 1  
DOVER, DE 19901

VOICE: (302) 739-3620  
TTY/TDD: (302) 739-3699  
FAX: (302) 739-6704

**MEMORANDUM**

DATE: September 28, 2012

TO: The Honorable Susan Del Pesco, Director  
Division of Long Term Care Residents Protection

FROM: Daniese McMullin-Powell  Chairperson  
State Council for Persons with Disabilities

RE: 16 DE Reg. 296 [DLTCRP Final LTC Discharge and Impartial Hearing Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Long Term Care Residents Protection's (DLTCRP) final regulations regarding *Long Term Care Transfer, Discharge and Readmission Hearing Procedures* which were published as 16 DE Reg. 296 in the September 1, 2012 issue of the Register of Regulations.

SCPD submitted a lengthy set of comments on the proposed version of this regulation in July. A copy of the July 23 letter is attached for facilitated reference. The Division of Long Term Care Residents Protection has now adopted a final regulation incorporating some amendments prompted by the commentary. SCPD appreciates that the Division considered our comments; however, there are still some concerns and SCPD respectfully requests a meeting with DHSS representatives to discuss specific issues (e.g. pars. 1.C, 11, 17, and 18).

SCPD has the following observations on the final regulations.

1. A. The Council observed that ICF/MRs were not covered by Section 3.0. The Division amended the section to add coverage of ICF/MRs.

1. B. The Council observed that Sections 3.0 and 4.0 were not consistent with Medicaid law in the context of Medicaid-funded residents of State-run nursing facilities. The Division added language excluding application of the DLTCRP regulation to DHSS decisions to terminate benefits (e.g. discharge beneficiary from LTC facility). The citation to the DMMA fair hearing system is provided.

1.C. The Council observed that Medicare beneficiaries have a right to appeal a proposed nursing home discharge through a Quality Improvement Organization. The Councils recommended inclusion of an explanatory comment or note highlighting the availability of both appeal systems. In response, the Division merely “parrots” its response under §1.C and it does not make sense. The comment addressed the right to a Medicare appeal, not a Medicaid appeal.

1.D. The Council recommended clarification of whether facilities covered by Section 3.0 (Medicaid/Medicare enrolled) were also covered by Section 4.0 (State licensed under 16 Del.C. Ch. 11). The Division clarified that such facilities would be covered by both Sections 3.0 and 4.0:

2. The Council objected to a narrow definition of “transfer and discharge” that categorically presumed that all persons whose residency was terminated go to another facility. The Division amended Section 2 to recite as follows: “‘Transfer and discharge’ is defined separately in Section 3.0 and 4.0.” Section 4.1 is then amended to read as follows: “‘Transfer and discharge’ includes movement of a resident to a location outside the licensed facility.” This is acceptable. However, the Division ostensibly forgot to include any definition of “transfer and discharge” in Section 3.0.

3. SCPD recommended addition of a definition of “legal representative”. The Division adopted a slight variation of the definition proffered by the Council.

4. The Council recommended an amendment to expand the scope of agencies to whom a copy of the notice of discharge should be given, including the DSHP Plus MCO and DHSS agency involved in the resident’s placement. The Division agreed and adopted the Council’s amendment verbatim.

5. The Council recommended deletion of a comma. The Division deleted the comma.

6. The Council recommended combining two sections into a single section. The Division agreed and adopted the Councils’ proposed amendment verbatim.

7. The Council observed that the “notice” provisions in §3.5 did not comport with Medicaid regulations and case law. In response, the Division added 4 subsections to the “content of notice” section.

8. The Council recommended incorporating a requirement that the notice include the procedure for requesting a hearing. The Division added a requirement that the notice include the “method by which the resident may request a hearing”.

9. The Council recommended an amendment to clarify that a facility’s discretion to transfer residents to another room is limited by Title 16 Del.C. §§1121(13) and 1121(28). The Division agreed and inserted a conforming sentence.

10. The Council noted that Section 3.0 omitted the right to readmission after a stay in an acute care facility. The Division added a reference to the applicable statute covering readmission.

11. SCPD recommended strict enforcement of the readmission statute [Title 16 Del.C. §1121(18)]. However, in the absence of strict enforcement, the Council recommended adding a regulation memorializing the Division's discretionary authority to direct readmission or preserve one bed during the pendency of a hearing. The Division declined to honor the recommendation, commenting as follows: "The Division has no legal authority to impose bed holds before a decision that a discharge was improper." [emphasis supplied] This is problematic for multiple reasons.

A. First, a resident who requests a hearing to contest a proposed discharge could be involuntarily evicted from a facility during the pendency of proceedings 30 days after the issuance of the discharge notice. The Division's interpretation means it would have no authority to direct maintenance of the status quo, i.e., preserving the resident's bed. For example, if the resident requested a hearing on the 30<sup>th</sup> day after receiving a discharge notice, the regulations would not prevent the facility from physically evicting the resident the next day. The April version of the proposed regulation contained the following protection:

1.1.2. Within 5 days of the receipt of the notice of appeal the Division shall notify the facility that an appeal has been filed and that the patient or resident is not to be discharged during the time the appeal is underway.

15 DE Reg. 1405, 1406 (April 1, 2012)

The final regulation omits any such safeguard to deter discharge during the pendency of proceedings. This is a major omission.

B. The Division's interpretation of its authority represents an unfortunate abdication of responsibility and a reversal of DLTCRP practice. The attached decision in Pioneer House, Carelink v. DLTCRP, 2007 WL 4181670 (Del. Super. November 5, 2007) is illustrative. In this case, the facility attempted to discharge a resident who was returning from acute care treatment. The Division did not defer action until issuance of a hearing officer's decision. The Division directed the facility to readmit the resident during the pendency of proceedings. When the facility refused to comply, the Division imposed civil money penalties which were upheld by the Court.

C. The Division's interpretation is contrary to the recent DHSS administrative hearing decision in In re: Proposed Discharge - J. H., resident of PTA (DHSS August 14, 2012). In that case a facility filled the only available bed after a hearing but prior to disposition. The hearing officer noted that Title 16 Del.C. §1113 authorizes DHSS to suspend admission to a long-term care facility if the facility is violating Chapter 11. At 26. If the facility wishes to contest a DHSS notice suspending admission, it must request a hearing to contest the merits. See Title 16 Del.C. §1114. DHSS is not "impotent" when faced with facial violations of Chapter 11.

12. The Council reiterated its recommendation to include a definition of “legal representative” in connection with §4.3.1. See Par. 3 above. The Division added the definition to the final regulation.

13. Consistent with Par. 7 above, the Council recommended embellishment of the “content of notice” provisions in §4.5. The Division added four subsections..

14. Consistent with Par. 8 above, the Council recommended incorporating a requirement in §4.5.4 that the notice include the procedure for requesting a hearing. The Division added a requirement that the notice include the “method by which the resident may request a hearing”

15. Consistent with Par. 6 above, the Council recommended combining two sections into a single section. The Division agreed and adopted the Councils’ proposed amendment verbatim.

16. Consistent with Par. 9 above, the Council recommended an amendment to clarify that a facility’s discretion to transfer residents to another room is limited by Title 16 Del.C. §§1121(13) and 1121(28). The Division agreed and inserted a conforming sentence.

17. Consistent with Par. 11 above, SCPD recommended strict enforcement of the readmission statute [Title 16 Del.C. §1121(18)]. However, in the absence of strict enforcement, the Council recommended adding a regulation directing readmission or preserving one bed during the pendency of a hearing. The Division declined to honor the recommendation, commenting as follows: “The Division has no legal authority to impose bed holds before a decision that a discharge was improper.” This is problematic for the reasons compiled in Par. 11.

18. The Council recommended adding a definition of “acute care facility” as follows:

“Acute care facility” means a health care setting providing intensive services of a type or level not readily available in the current facility, including, without limitation, settings licensed or certified pursuant to chapters 10, 11, 22, 50 or 51 of Title 16.

The Division declined to adopt the recommendation, responding as follows:

The generally accepted meaning of “Acute Care” is short-term medical treatment, usually in a hospital for patients having an acute illness or injury or recovering from surgery. There is no indication that any broader meaning of “Acute Care Facility” was intended by the statute.

19. SCPD recommended that the appeal request be submitted to the State, not the facility. The Councils also expressed concern that the requirement of sending a copy to various agencies could be construed as necessary to “perfect” an appeal. The Division rejected the recommendation based on the following:

The facility and the resident are the parties to a discharge. As such, the facility is aware of the date that the discharge notice was received by the resident, and is aware of when the 30 days for requesting a hearing expires. In addition, it is likely to be easier for resident to provide notice to the facility than to the DLTCRP, or the State LTC Ombudsman. The copies to the DLTCRP and the State LTC Ombudsman do not have a time requirement and would not be the basis for a technical dismissal.

This makes little sense. Medicaid beneficiaries do not submit an administrative hearing request to an MCO or facility. They submit it to the State. The DLTCRP's commentary suggests that the facility will assess the timeliness and content of the appeal rather than the State. This is a dangerous approach since the facility is not impartial. Indeed, it could simply assert that it never received the request for appeal and then argue that the time period to appeal has lapsed! For example, in the Pioneer House/Carelink case described in Par. 11 above, the facility declined to forward the resident's request for hearing to the Division. See attached July 31, 2006 DLP letter to DLTCRP.

20. The Council noted that §5.1.1.2 categorically applied a 30-day appeal timeline while a Medicaid beneficiary could have 90 days to appeal under both federal and State regulations. The Division responded that "a Medicaid beneficiary requesting a hearing to contest a discharge has 30 days to do so." This is arguable. The federal Medicaid regulation generally identifies a 90-day notice period [42 C.F.R. §§431.206( c)(3) and 431.221] but elsewhere establishes a minimum 30-day notice period. See 42 C.F.R. §483.12. DHSS can have standards which exceed the minimum and the DHSS regulations suggest that a 90-day period would apply. See 16 DE Admin Code Part 5000, §§5001, Par. 2.C; §5307, Par. C.2; and §5401, Par. 1.C.

21. The Council recommended an amendment to clarify a resident's right to examine case records regardless of their lack of intended use in the proceedings. In response, the Division added a general reference to additional rights. See new §5.5.6.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the final regulation.

cc: The Honorable Rita Landgraf  
Ms. Deborah Gottschalk  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

16reg296 dlterp-ltc discharge final 9-28-12



STATE OF DELAWARE  
STATE COUNCIL FOR PERSONS WITH DISABILITIES  
MARGARET M. O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 1  
DOVER, DE 19901

VOICE: (302) 739-3620  
TTY/TDD: (302) 739-3699  
FAX: (302) 739-6704

MEMORANDUM

DATE: July 23, 2012

TO: The Honorable Susan Del Pesco, Director  
Division of Long Term Care Residents Protection

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: 16 DE Reg. 24 [DLTCRP Proposed LTC Discharge and Impartial Hearing Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Long Term Care Residents Protection's (DLTCRP) proposal to adopt *Long Term Care Transfer, Discharge and Readmission Hearing Procedures* which were published as 16 DE Reg. 24 in the July 1, 2012 issue of the Register of Regulations.

As background, DLTCRP issued an earlier version of this regulation in April, 2012. See 14 DE Reg. 1405 (April 1, 2012). SCPD submitted an extensive critique of that initiative which identified many concerns (attached). The Division has now issued a completely revised proposed regulation. Unfortunately, there are still many concerns and SCPD has the following observations and recommendations.

1. In its April 24 commentary, Par. 1, the SCPD noted that 57% of Delaware nursing home patients are funded by Medicaid. These patients have a federal right to contest a discharge or transfer with certain protections that were not included in the April version of the regulation. DHSS regulations specifically apply the hearing procedures codified at 16 DE Admin Code Part 5000 to appeals by Medicaid beneficiaries of proposed nursing home discharges and transfers. The SCPD therefore commented that "the better approach would be to adopt or incorporate the Part 5000 regulations as the standards for discharges and transfers from all licensed long-term care facilities." Instead of adopting this approach, the July version of the regulation has 2 sets of standards applicable to the following facilities: 1) Section 3.0 applies to nursing facilities which participate in the Medicaid or Medicare programs; and 2) Section 4.0 applies to State-licensed

long-term care facilities. There are several problems with this approach:

A. A discharge from an ICF/MR (e.g. Stockley; Mary Campbell) is not covered by Section 3.0 (since exempt from 42 C.F.R. §483.5) and the procedures in Section 4.0 are not co-terminous with those in 42 C.F.R. §§431.210 - 431.246.

B. If the State proposed to discharge a Medicaid beneficiary from a State-run nursing facility (GBHC; Bissell; DHCI), the beneficiary has a right to a Medicaid hearing under 16 DE Admin Code Part 5000 which conforms to the procedures mandated by Ortiz v. Eichler. Neither Section 3.0 nor Section 4.0 of the DLTCRP regulation complies with Ortiz and the regulation will confuse Medicaid beneficiaries of State-run nursing facilities into believing that only the DLTCRP process applies.

C. Section 3.0 applies to nursing homes participating in the Medicare program pursuant to 42 C.F.R. §483.5. Federal law authorizes Medicare beneficiary appeals of proposed nursing home discharges through a QIO. See attached Quality Insights Delaware publication, "How to Appeal if Your Services Are Ending". Time periods to contest the discharge are very short. Medicare beneficiaries will likely be confused concerning the overlapping Medicare and DLTCRP appeal systems. At a minimum, the DLTCRP regulation should include an explanatory comment or note highlighting the availability of both appeal systems.

D. For nursing facilities which are covered by both Section 3.0 (Medicaid/Medicare enrolled) and Section 4.0 (State licensed under 16 Del.C. Ch. 11), it is unclear if only Section 3.0 applies or both Sections 3.0 and 4.0 apply.

2. In Section 2.0, the definition of "transfer and discharge" is problematic. The definition is as follows:

"Transfer and discharge" includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility.

The April version of the regulation contained a similar definition which limited "transfer and discharge" to removal to another facility. The SCPD objected to the narrow definition which, while based on 42 C.F.R. §483.12(a)(1), categorically presumes that all persons whose residency is terminated go to another facility. To the contrary, involuntarily discharged residents, including those discharged for nonpayment, may go to a relative's home, a homeless shelter, or "the street". Under the proposed definition, the regulation (and its protections) would be inapplicable to terminations of residency if the resident is expected to go to a relative's home, a homeless shelter, or "the street".

3. Section 3.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and

1122.

Notify the resident and, if known, a family member or legal representative of the resident, including an agent authorized to act on the resident's behalf pursuant to Title 16 Del.C. §1121(34) and 1122, of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of "legal representative" in Section 2.0 as follows:

"Legal representative" includes a resident's guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

4. Section 3.3.2 merits revision. It is loosely based on 42 C.F.R. §483.12(a)(6). First, references to "developmentally disabled individuals" and "mentally ill individuals" are not "people-first" and violate Title 29 Del.C. §608(b)(1)a. Second, unlike the federal regulation, it is ambiguous in defining when notice should be given to the P&A. The facility would, with no guidance, determine if such notice is "applicable" and may have to "guess" at the identity of the P&A. Third, there are other key agencies which should also receive notice, including the DSHP Plus MCO and any DHSS agency (APS; DDDS) involved in the placement. Consider the following substitute:

3.3.2. Provide a copy of the notice to the Division; the State LTC ombudsman; the resident's Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident's placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.

5. In §3.4.2.4, delete the comma after the word "needs".

6. Sections 3.5.6 and 3.5.7 are based on 42 C.F.R. §§483.12(a)(6). SCPD recommends combining §§3.5.6 and 3.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Delaware's P&A for individuals with developmental disabilities and mental illness is the same agency.

7. As applied to Medicaid-funded residents, §3.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J, DCIS No. 036864 (Del. DES 1987). Thus,

if the discharge is based on nonpayment, the notice must include the calculations. The notice must include the citations to the regulation(s) supporting discharge. The notice must “contain any information needed for the claimant to determine from the notice alone the accuracy of the agency’s intended action” and “provide a detailed individualized explanation of the reason(s) for the action being taken”. These requirements should be added to §3.5.

8. Section 3.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

9. Section §3.8 could result in violations of State law. The implication is that a facility can change a resident’s room within the same building as of right. This is reinforced by §4.8. However, State law requires the facility to honor the room request of a resident unless impossible to accommodate. See Title 16 Del.C. §1121(28) and compare §4.8.3. Moreover, a facility must honor the requests of spouses to share a room if feasible and not medically contraindicated. Section 3.8 should be amended to clarify that a facility’s discretion to transfer residents to another room in the same building is limited by Title 16 Del.C. §§1121(13) and 1121(28).

10. If §3.0 is a “stand alone” regulation which excludes application of §4.0, §3.9.3 would violate State statute [Title 16 Del.C. §1121(18)] since readmission is not limited to Medicaid beneficiaries. Every LTC resident who is returning from an acute care facility is entitled to be offered the next available bed.

11. Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, if the Division is disinclined to strictly enforce resident readmission rights accorded by §3.9.3 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §3.11 to read as follows:

3.11 If a facility issues a discharge notice rather than permitting a resident’s readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident’s readmission or place limitations on the facility’s admissions to preserve one bed. In exercising its discretion, the Department will consider the following:

3.11.1 Historical bed turnover rates in the facility;

3.11.2 Availability of public or private funding for costs of care;

3.11.3 Adverse health and quality of life consequences of delaying readmission;  
and

3.11.4 Federal and State public policy preferences for provision of services in the least restrictive setting.

12. Consistent with the commentary under Par. 3 above, §4.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and 1122:

Notify the resident and, if known, a family member or legal representative of the resident, including an agent authorized to act on the resident's behalf pursuant to Title 16 Del.C. §1121(34) and 1122, of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of "legal representative" in Section 2.0 as follows:

"Legal representative" includes a resident's guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

13. Consistent with the commentary under Par. 7 above, §4.5 merits revision. As applied to Medicaid-funded residents, §4.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J., DCIS No. 036864 (Del. DES 1987). Thus, if the discharge is based on nonpayment, the notice must include the calculations. The notice must include the citations to the regulation(s) supporting discharge. The notice must "contain any information needed for the claimant to determine from the notice alone the accuracy of the agency's intended action" and "provide a detailed individualized explanation of the reason(s) for the action being taken". These requirements should be added to §4.5.

14. Section 4.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

15. As noted under Par. 6 above, §§ 4.5.6 and 4.5.7 are based on 42 C.F.R. §§483.12(a)(6). SCPD recommends combining §§4.5.6 and 4.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Delaware's P&A for individuals with developmental disabilities and mental illness is the same agency.

16. Consistent with the comments under Par. 9 above, §4.8 could result in violation of State law. The implication is that a facility can change a resident's room within the same building as of right subject only to §4.8.3. A facility must honor the requests of spouses to share a room if feasible

and not medically contraindicated. Section 4.8 should be amended to clarify that a facility's discretion to transfer residents to another room in the same building is limited by both Title 16 Del.C. §§1121(13) and 1121(28).

17. Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, consistent with Par. 11 above, if the Division is disinclined to strictly enforce resident readmission rights accorded by §4.9.2 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §4.9.3 to read as follows:

4.9.3 If a facility issues a discharge notice rather than permitting a resident's readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident's readmission or place limitations on the facility's admissions to preserve one bed. In exercising its discretion, the Department will consider the following:

4.9.3.1 Historical bed turnover rates in the facility;

4.9.3.2 Availability of public or private funding for costs of care;

4.9.3.3 Adverse health and quality of life consequences of delaying readmission;  
and

4.9.3.4 Federal and State public policy preferences for provision of services in the least restrictive setting.

18. In §4.9, there is no definition of "acute care facility", the term used in Title 16 Del.C. §1121(18). The following definition should be added to §2.0:

"Acute care facility" means a health care setting providing intensive services of a type or level not readily available in the current facility, including, without limitation, settings licensed or certified pursuant to chapters 10, 11, 22, 50, or 51 of Title 16.

19. There is some "tension" between §§5.1.1.2-5.1.1.3 versus §§3.5.4 and 4.5.4. The hearing request should be submitted to the State, not to the provider with a "cc" to the State. Moreover, it is unclear if §5.1.1.3 (contemplating a "cc" to the DLTCRP and Ombudsman) is "directory" or a sine qua non for perfection of the appeal. In the latter case, a pro se resident who did not send a copy to the Ombudsman could have his/her appeal dismissed. This would be an unfortunate result.

20. Section 5.1.1.2 categorically applies a minimum 30-day appeal timeline. A Medicaid beneficiary requesting a hearing to contest discharge from a State-run nursing facility, an ICF/MR, or other LTC facility would ostensibly have 90 days to request a hearing. Compare 42 C.F.R. §§431.206(c)(3) and 431.221(d); and 16 DE Admin Code Part 5000, §§5001, Par. 2 C;

5307, Par. C.2; and 5401, Par. C.3. This is not addressed anywhere within the DLTCRP regulation.

21. Section 5.4 omits the right to examine case records regardless of their lack of intended use in the proceedings. Compare 42 C.F.R. §431.242(a)(1); 42 U.S.C. §483.10(b)(2); Title 16 Del.C. §1121(19); and 16 DE Admin Code, Part 5000, §5403. A reference to this right should be added.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

cc: The Honorable Rita Landgraf  
Ms. Deborah Gottschalk  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

16reg24 dlterp-ltc discharge 7-23-12

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
(Cite as: 2007 WL 4181670 (Del.Super.))

**C**  
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Superior Court of Delaware,  
New Castle County.  
PIONEER HOUSE, CARELINK, Appellants, De-  
fendants Below  
v.  
DIVISION OF LONG TERM CARE RESIDENT'S  
PROTECTION, Appellee, Plaintiffs Below.

C.A. No. 07A-01-003 JRS.  
Submitted: Aug. 13, 2007.  
Decided: Nov. 5, 2007.

Upon Appeal from a decision of the Division of  
Long-Term Care. **AFFIRMED.**

JOSEPH R. SLIGHTS, III, Judge.

\*1 This 5th day of November 2007, upon con-  
sideration of the appeal of Carelink Community  
Support Services ("Carelink"), from the decision of  
the Division of Long Term Care Resident's Protec-  
tion (the "Division") imposing a \$1,250 per day  
monetary penalty upon Carelink,<sup>FN1</sup> it appears to  
the Court that:

FN1. See Docket Item ("D.I.") 3, Division  
of Long-Term Care Resident's Protection  
decision (the "Division"), at 1 (Dec. 18,  
2006).

1. Debra Rice ("Ms.Rice") is a 34 year-old  
woman with cerebral palsy. She was a resident at  
Pioneer House, a state-licensed assisted living facil-  
ity operated by Carelink, when the events giving  
rise to the regulatory investigation at issue here first  
arose.

2. On May 30, 2006, Ms. Rice received a letter  
from Carelink informing her that she was being dis-

charged from Pioneer House due to repeated hospi-  
talizations that resulted from a reoccurring unstable  
medical problem. According to Carelink's letter,  
Ms. Rice was hospitalized five times in 2004,  
twelve times in 2005, and eight times from January  
to April in 2006. Carelink justified its discharge de-  
cision by citing to § 63.409C of the Delaware Reg-  
ulations for Assisted Living Facilities, which states:  
"An assisted living facility shall not admit, provide  
services to, or permit the provision of services to  
individuals who, as established by the resident as-  
sessment: Require monitoring of a chronic medical  
condition that is not essentially stabilized through  
available medications and treatments."<sup>FN2</sup> The  
letter went on to explain that Ms. Rice would have  
sixty days to make other living arrangements, but  
could stay as long as necessary until such arrange-  
ments were made.

FN2. D.I. 9, at Ex. 1.

3. Ms. Rice was admitted to Christiana Hospit-  
al on June 20, 2006 and was discharged later that  
day back into the care of Pioneer House. The fol-  
lowing day, June 21st, Ms. Rice was admitted to St.  
Francis Hospital. On June 26, 2006, St. Francis  
Hospital attempted to discharge Ms. Rice and re-  
turn her to Pioneer House. St. Francis discovered,  
however, that Pioneer House had officially dis-  
charged Ms. Rice on June 22, 2006 and was refus-  
ing to allow her to return. With nowhere else to go,  
Ms. Rice was placed in The Arbors, a skilled nurs-  
ing home facility.<sup>FN3</sup>

FN3. Appellant's brief states that St. Fran-  
cis Hospital unilaterally made the decision  
to send Ms. Rice to a nursing home facil-  
ity. The letter from Carelink dated June 26,  
2006, however, indicates that Ms. Rice  
was discharged from Pioneer House on  
June 22, 2006, and was not allowed to re-  
turn to Pioneer House upon her release  
from St. Francis.

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
 (Cite as: 2007 WL 4181670 (Del.Super.))

4. After learning of Ms. Rice's discharge, Carol Ellis ("Ms.Ellis"), director of the Division sent a compliance nurse, Pat Alt ("Ms.Alt"), to determine whether a medical basis existed for the discharge. Ms. Alt performed a nursing assessment on Ms. Rice and concluded that there were no medical grounds for the discharge. Specifically, she determined that Ms. Rice's medical condition was the same at the time of her assessment as it had been throughout Ms. Rice's long residency at Pioneer House. Ms. Alt also concluded that Pioneer House continued to be an appropriate placement for Ms. Rice.

5. After Ms. Alt's assessment, Ms. Ellis began a series of communications with Eileen Joseph ("Ms.Joseph"), President and CEO of Carelink, meant to secure Ms. Rice's return to Pioneer House. On August 17, 2006, Ms. Joseph sent a letter to Ms. Ellis reiterating Carelink's position that Ms. Rice was discharged for medical reasons. Ms. Joseph also explained in the letter that the facility would need a review of Ms. Rice's current medical condition and an independent medical evaluation to determine Ms. Rice's eligibility for return to Pioneer House.

\*2 6. Ms. Ellis responded in a letter dated August 18, 2006, informing Ms. Joseph that the Division was imposing civil money penalties on Carelink, in the amount of \$1,250 per day, for its failure to allow Ms. Rice to return to Pioneer House. As support, Ms. Ellis cited to 16 *Del. C.* § 1109(e), which states "Each day of a continuing violation constitutes a separate violation ... No penalty for a nonhealth and safety violation shall exceed \$1,250 per day beyond the initial day." The letter also explained that an assessment conducted by the compliance nurse revealed that Pioneer House was still an appropriate living arrangement for Ms. Rice because her medical condition was unchanged. Ms. Ellis concluded the letter by informing Ms. Joseph of her opportunity to request an informal dispute resolution process regarding the imposition of the penalty.

7. Ms. Joseph and Ms. Ellis eventually spoke about Ms. Rice's return to Pioneer House and the additional measures that would be needed to address her health issues. Ms. Ellis explained that the Division did not believe Ms. Rice needed a new care plan, but Ms. Joseph disagreed. Ms. Joseph stated that because Ms. Rice had not resided at Pioneer House since June 22, 2006, she felt it was unethical for the facility to re-admit a resident who had received treatment for a serious medical condition without having a revised care plan. In response, Ms. Ellis reiterated that Ms. Rice did not need a new care plan to return to Pioneer House.

8. In the meantime, Ms. Rice had appealed her discharge from Pioneer House. A hearing on the appeal was held on September 8, 2006. The issues addressed at that hearing were: (1) whether, according to the requirements of 16 *Del. C.* § 1121(18), the facility's discharge was necessary for Ms. Rice's welfare, or the welfare of other residents; (2) whether the facility's refusal to allow Ms. Rice to return to Pioneer House on June 26, 2006 violated 16 *Del. C.* § 1121(18) because the facility's discharge was not necessary due to medical reasons and because the facility did not inform Ms. Rice about her right to request a hearing to contest the discharge; and (3) whether 16 *Del. C.* § 3225 provides a basis for discharge under Delaware law and, if so, whether Pioneer House met the statutory requirements for discharge.<sup>FN4</sup>

FN4. D.I 3, Division's Sept. 20, 2006 decision, at 1.

9. The hearing officer released his 17 page (single spaced) decision on September 20, 2006. With respect to the first issue, the hearing officer concluded that 16 *Del. C.* § 1121(18) did not support Carelink's decision to discharge Ms. Rice. The hearing officer explained that while Ms. Rice's condition did require periodic hospitalizations, that did not change the way in which the facility and her treating doctors cared for her. Regarding the second issue, the hearing officer determined that Carelink violated 16 *Del. C.* § 1121(18) because the statute

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
(Cite as: 2007 WL 4181670 (Del.Super.))

requires that residents be given thirty days notice prior to discharge. The hearing officer also pointed out that although the May 30, 2006 letter from Carelink stated Ms. Rice would have sixty days to vacate, she was discharged on June 22, 2006, eight days shy of the required thirty days. Finally, as to the third issue, the hearing officer stated that 16 *Del. C. § 3225* did not provide a basis for Pioneer House to discharge Ms. Rice because the statute was not intended by the General Assembly to serve as a basis for discharging residents from long term care facilities. That statute alone did not establish grounds for Ms. Rice's discharge.<sup>FN5</sup>

FN5. D.I 3, Division's Sept. 20, 2006 decision, 14-16.

\*3 10. By letter dated September 22, 2006, Ms. Joseph exercised the facility's right to challenge the imposition of the penalty at an informal dispute resolution proceeding. She argued that Pioneer House's discharge of Ms. Rice was supported by 16 *Del. C. § 1121(18)*, which gives a facility authority to discharge a resident for medical reasons. Thereafter, representatives from Carelink, including Ms. Joseph, met with the Division to discuss Ms. Rice's discharge and her stay at The Arbors. After the discussion concluded, Ms. Joseph asked the division to rescind the penalties, but the Division declined the request.

11. At some point after Carelink made the request to rescind the penalties, Carelink filed a license renewal application with the Division. Ms. Ellis informed Ms. Joseph in a letter dated October 6, 2006 that before a license renewal would issue, Carelink would have to pay whatever penalty had accrued as a result of the violation in addition to the annual licensing fee. The letter also addressed Ms. Joseph's request for an informal dispute resolution on the amount of the penalties. Ms. Ellis emphasized that there would be no further discussion regarding the merits of Ms. Rice's discharge at the informal resolution proceedings on the penalties. Ms. Ellis also pointed out that the September 20, 2006 decision of the hearing officer was binding, not ad-

visory. The record does not reflect any further response from Ms. Joseph regarding Ms. Ellis' October 6th letter.

12. An administrative hearing regarding the Division's imposition of civil money penalties on Carelink occurred on November 22, 2006 before the same hearing officer that issued the September 20, 2006 decision on Ms. Rice's discharge.<sup>FN6</sup> During the course of the hearing, the Division sought to introduce as evidence the September 20, 2006 decision regarding Ms. Rice's discharge. Carelink objected to the introduction of the decision on the ground that the Division was attempting unfairly to exploit the discharge issue.<sup>FN7</sup> The Division responded that it was not attempting to reargue the merits of Ms. Rice's discharge, but instead was offering the September 20, 2006 decision as a basis to justify the imposition and amount of the civil monetary penalty.<sup>FN8</sup> The Division also pointed out that collateral estoppel prevented a reargument of the discharge issue. Carelink disagreed that collateral estoppel applied and argued that the imposition of the penalties was a separate matter from Ms. Rice's discharge.<sup>FN9</sup> The hearing officer took the matter under advisement and asked for additional briefing from both parties by December 15, 2006.<sup>FN10</sup> The Division submitted its brief on December 12, 2006, but Carelink never submitted any supplemental briefing on the matter.<sup>FN11</sup>

FN6. The Court gathers that this administrative hearing was the "informal dispute resolution process" to which Ms. Ellis referred in her August 18, 2006 letter.

FN7. D.I. 3, Hr'g Tr. at 51.

FN8. D.I. 3, Hr'g Tr. at 52.

FN9. D.I. 3, Hr'g Tr. at 52-53.

FN10. D.I. 3, Hr'g Tr. at 56.

FN11. D.I. 3, Division's Dec. 18, 2006 decision, at 8.

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
(Cite as: 2007 WL 4181670 (Del.Super.))

13. The evidence presented at the hearing consisted mainly of testimony from Ms. Ellis and Ms. Joseph. The Division also submitted letters into evidence that memorialized the communications between Carelink and the Division. Ms. Ellis testified about the factors used in determining whether to impose a penalty and how the Division calculated the amount of \$1250 a day for the violation. Specifically, in response to questioning about how the Division came up with the figure of \$1,250 per day, Ms. Ellis responded that in circumstances where a facility refuses to comply with the law, the Division will impose the maximum penalty allowed by the statute in hopes the facility will promptly comply to prevent accumulation of the penalties.

\*4 14. Ms. Joseph also testified at the hearing and again maintained that Carelink's discharge of Ms. Rice was proper given her reoccurring medical condition. She maintained that Carelink's requests for a new care plan and medical releases were intended as safeguards to ensure Ms. Rice received the proper level of care. Ms. Joseph did admit on cross-examination that she had read the September 20, 2006 decision requiring that Ms. Rice be readmitted to Pioneer House, but stated that she did not agree with the hearing officer's interpretation of 16 Del. C. § 1121(18).<sup>FN12</sup>

FN12. D.I. 3, Hr'g Tr. at 37.

15. The hearing officer issued his decision regarding the imposition of the penalty on December 18, 2006. The hearing officer applied the four part test set out in *Higgins v. Walls* to determine whether collateral estoppel applied to the underlying discharge issues.<sup>FN13</sup> Specifically, *Walls* held that collateral estoppel will apply when:

FN13. 901 A.2d 122 (Del.Super.Ct.2005).

(1) the issue previously decided is identical to the issue at bar; (2) the prior issue was finally adjudicated on the merits; (3) the party against whom the doctrine was invoked was a party or in privity with a party to the prior adjudication; and (4) the

party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in a prior action.<sup>FN14</sup>

FN14. 901 A.2d 122, 137-138  
(Del.Super.Ct.2005).

After an analysis of the first factor, the hearing officer found that Carelink's violation of 16 Del. C. § 1121(18) for improperly discharging Ms. Rice and the resulting civil money penalties implicated the same factual issues. With regard to the second factor, the hearing officer determined that Ms. Rice's discharge was finally adjudicated on the merits because he had issued a final, binding decision on the matter. Additionally, the hearing officer stated that the party against whom the doctrine is being invoked, Carelink, was a party in the previous matter. Finally, the hearing officer relied on his own observations of the previous hearing to determine that Carelink had a full and fair opportunity to litigate the matter. After considering these elements, the hearing officer found that the September 20, 2006 decision on the discharge issue was admissible under the doctrine of collateral estoppel as evidence that the discharge was improper.

16. The hearing officer then turned to the propriety of the penalty and found that the penalties were proper under the six factor test set forth in 16 Del. C. § 1109(b)(1)-(6). The pertinent provisions of § 1109 provide:

(b) In determining the amount of the penalty to be assessed under subsection (a) of this section, the Department shall consider:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard or potential hazards created by the violation to the health or safety of a resident or residents;

(2) the history of violations committed by the person or the person's affiliate(s), employee(s), or controlling person(s);

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
 (Cite as: 2007 WL 4181670 (Del.Super.))

\*5 (3) the efforts made by the facility to correct the violation(s);

(4) the culpability of the person or persons who committed the violation(s);

(5) A misrepresentation made by the Department or to another person regarding:

a.) the quality of services provided by the facility;

b.) the compliance history of the facility; or

c.) the identity of an owner or controlling person of the facility;

(6) Any other matter that affects the health, safety, or welfare of a resident or residents.

The hearing officer found that Carelink's actions amounted to a serious violation because "anytime an assisted living resident's patients [sic] rights are violated, it constitutes a serious matter because the effect is to erode the dignity and lifestyle of a vulnerable member of our community."  
 FN15

FN15. D.I 3, Division's Dec. 18, 2006 decision, at 9.

17. A large section of the decision focused specifically on the fifth and final factor, the extent to which the facility misrepresented facts relating to the facility or the care rendered to the resident.  
 FN16

In this regard, Ms. Ellis testified that throughout her interactions with the facility she believed that Carelink never intended to allow Ms. Rice to return to Pioneer House. She further testified that Carelink's continued insistence on a new care plan and medical releases were only roadblocks to prevent Ms. Rice's return. The hearing officer agreed. He concluded that Carelink's ongoing statements that Ms. Rice might be permitted in the future to return to Pioneer House were false, material and relied upon by Ms. Rice and the Division.

FN16. 16 Del. C. § 1109(b)(5)

18. On appeal to this Court, Carelink challenges the sufficiency of the evidence supporting the hearing officer's decision to uphold the civil money penalty.  
 FN17 Specifically, Carelink argues that: (1) the hearing officer committed legal error when he determined that Carelink made misrepresentations; (2) the charge that Carelink violated 16 Del. C. § 1109(b)(4) is without merit; (3) the hearing officer improperly failed to consider Carelink's efforts to correct the deficiency in accordance with 16 Del. C. 1109(b)(4); and (4) the penalty upheld by the hearing officer was arbitrary, vindictive and without factual basis.  
 FN18 The Division responds that the hearing officer's decision is grounded in sound legal analysis and supported by substantial factual evidence.

FN17. Carelink has not appealed the hearing officer's September 20, 2006 decision with respect to the propriety of Carelink's decision to discharge Ms. Rice.

FN18. Carelink asserted a fifth argument in the summary of the argument section of the brief, that "the hearing officer, by virtue of being employed by the agency for whom he is hearing the Administrative Hearing, has a conflict of interest." This argument, however, was not developed in the brief and will therefore not be addressed by the Court. Appellant's Br. at 1.

19. This Court repeatedly has emphasized the limited extent of its appellate review of administrative determinations. The Court's review is confined to ensuring that the hearing officer made no errors of law and determining whether "substantial evidence" supports the hearing officer's factual findings.  
 FN19 Questions of law that arise from the hearing officer's decision are subject to *de novo* review, pursuant to Superior Court Civil Rule 3(c), which requires that the Court must determine whether the hearing officer erred in formulating or applying legal precepts.  
 FN20 Substantial evidence

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
(Cite as: 2007 WL 4181670 (Del.Super.))

means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>FN21</sup> It is "more than a scintilla but less than a preponderance of the evidence."<sup>FN22</sup> The "substantial evidence" standard of review contemplates a significant degree of deference to the hearing officer's factual conclusions and its application of those conclusions to the appropriate legal standards.<sup>FN23</sup> In its review, the Court will consider the record in the light most favorable to the prevailing party below.<sup>FN24</sup>

FN19. *Canyon Const. v. Williams*, 2003 WL 1387137, at \* 1 (Del.Super.Ct. Mar. 5, 2003); *Hall v. Rollins Leasing*, 1996 WL 659476, at \*2-3 (Del.Super.Ct. Oct. 4, 1996).

FN20. See *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del.1998); *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del.1990).

FN21. *Breeding v. Contractors-One, Inc.*, 549 A.2d 1102, 1104 (Del.1998).

FN22. *Id.*

FN23. *Hall*, 1996 WL 659476, at \*2 (citing DEL.CODE ANN. tit. 29, § 10142(d)).

FN24. *General Motors Corp. v. Guy*, 1991 WL 190491, at \*3 (Del.Super.Ct. Aug. 16, 1991).

#### A. The Hearing Officer Correctly Applied The Applicable Statute.

\*6 20. In reviewing the hearing officer's decision for any errors of law, the Court is bound by the language of 16 *Del. C.* § 1109(b)(1-6), which gives the Division authority to impose a civil monetary penalty in the event of a violation. Delaware courts will not engage in statutory construction if the statute is not ambiguous and the meaning of the statute is clearly ascertainable.<sup>FN25</sup> When applying a statute that is clear on its face, "the Court's

role is [ ] limited to an application of the literal meaning of the words."<sup>FN26</sup> A statute is deemed ambiguous only if it could reasonably be interpreted in more than one way or if the literal interpretation would lead to an unreasonable result not intended by the legislature.<sup>FN27</sup>

FN25. *Newtowne Village Service Corp. v. Newtowne Road Development Co.*, 772 A.2d 172, 175 (Del.Super.Ct.2001).

FN26. *Coastal Barge Corp. v. Coastal Zone Industrial Control Bd.*, 492 A.2d 1242, 1246 (Del.1985).

FN27. *Id.*

21. The statute governing the Division's imposition of civil monetary penalties is clear on its face and neither side has challenged the statute or highlighted any ambiguities.<sup>FN28</sup> Given this determination, the hearing officer's decision contained no errors of law because he applied the statute in accordance with its plain meaning. The statute gives the Division substantial discretion in assessing penalties upon a finding of violation and in determining the amount of such penalties. The statute simply requires that the Division "consider" the six factors enumerated therein and that the penalty not exceed \$1,250 per day beyond the initial day.<sup>FN29</sup> The statute prescribes no further analysis. In his decision, the hearing officer clearly "considered" these six factors and, in doing so, followed the plain meaning of the statutory provisions. Accordingly, the Court will not disturb the legal grounds upon which the hearing officer based his decision.

FN28. The Court was unable to uncover any case law interpreting the statute in the course of its research, and the parties have cited none.

FN29. 16 *Del. C.* § 1109.

#### B. The Hearing Officer's Decision Is Supported By Substantial Evidence.

22. Moving on to the second step of the analysis-

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
(Cite as: 2007 WL 4181670 (Del.Super.))

is, whether the hearing officer's findings were supported by substantial evidence, it is important to note that direct testimony from Ms. Ellis and Ms. Joseph comprised the majority of the evidence presented at the hearing. Testimonial evidence necessarily implicates an inquiry by the factfinder into the credibility of the witnesses testifying before him. The hearing officer is in the best position to make that inquiry. Credibility determinations made by a hearing officer will not be disturbed on appeal unless the Court determines that the hearing officer abused his discretion.<sup>FN30</sup> On appeal, the Court will not independently "weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."<sup>FN31</sup>

FN30. *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del.1994)

FN31. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.Super.1965).

23. To support its claim that Carelink misrepresented material facts under section 1109, the Division was obliged to prove that: (1) Carelink stated a fact that was material to the transaction; (2) that fact was state falsely; (3) with knowledge of its falsity or recklessness as to whether it is true or false; and (4) with the intent to mislead another who justifiably relies on the misrepresentation.<sup>FN32</sup> Misrepresentations do not necessarily result from overt acts, but may also arise out of "deliberate concealment of material facts, or by silence in the face of a duty to speak."<sup>FN33</sup>

FN32. *Antamian v. Nemours Health Clinic*, 2001 WL 1474819 \*1 (Del. Super.Ct. Nov. 14, 2001).

FN33. *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del.Super.Ct.1983).

\*7 24. Ms. Ellis' testimony, in addition to the correspondence between Carelink and the Division, provided the hearing officer with substantial evi-

ence upon which to conclude that Carelink made misrepresentations.<sup>FN34</sup> During direct examination, Ms. Ellis testified that Carelink repeatedly implied that Ms. Rice could return to Pioneer House when either a new care plan was drafted or a medical release was signed.<sup>FN35</sup> She further testified that Carelink, through its ongoing delay tactics, demonstrated its true intention of obstructing Ms. Rice's return to the facility (notwithstanding her medical eligibility to return) at all costs. The fact that Carelink continued to refuse to take Ms. Rice back even after the hearing officer's September 20, 2006 decision ordering it to do so, and after declining to seek further review of this decision (by appeal or otherwise) further supports the conclusion that Carelink's promises to work toward Ms. Rice's return were hollow and misleading.<sup>FN36</sup> The hearing officer determined that Ms. Ellis' testimony in this regard was credible, and Carelink has offered no persuasive basis upon which the Court could conclude that the hearing officer abused his discretion. Because the original violation that sparked the imposition of the penalty resulted from Ms. Rice's unlawful discharge from Pioneer House, and Carelink's misrepresentations pertained to Ms. Rice's return to Pioneer House, the hearing officer correctly found that the misrepresentations were material to the underlying issue before him.

FN34. To reiterate, the Court need not find that the hearing officer's decision in this regard is supported by a preponderance of the evidence; it is sufficient to discern that more than a scintilla of evidence exists in order to justify a finding that the hearing officer's decision on the misrepresentation claim is supported by substantial evidence. See *Breeding*, 549 A.2d at 1104.

FN35. Hearing Transcript at 10-11

FN36. D.I. 3, S-6, Letter from Eileen Joseph, President and CEO, Carelink, to Carol Ellis, Director, Division of Long Term Care Residents Protection (September 22, 2006). Here again, the

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
(Cite as: 2007 WL 4181670 (Del.Super.))

Court notes that Carelink never took an appeal of the September 20 decision.

**B. Substantial Evidence Supports The Finding That Carelink Is The Culpable Party.**

25. The Court is also satisfied that the hearing officer had an adequate factual foundation upon which to consider the appropriate amount of the penalty assessed by the Division. Ms. Ellis testified at length regarding the degree of Carelink's culpability in committing the violation. During cross examination, Ms. Ellis testified that throughout her involvement in the case, Carelink possessed the means and opportunity to return Ms. Rice to Pioneer House and to come into compliance with the law.<sup>FN37</sup> It simply chose not to allow her to return. Contrary to Carelink's argument, the hearing officer's September 20, 2006 decision requiring Carelink to accept Ms. Rice in no way limited or qualified Carelink's culpability. Indeed, Carelink's failure to comply with the decision, or properly appeal it, framed the legal basis for the imposition of the penalty in the first instance. The ongoing accrual of the penalty was a direct result of Carelink's ongoing recalcitrance.<sup>FN38</sup> Carelink cannot blame Ms. Rice's failure to return to Pioneer House on the lack of a new care plan or not having medical approval because these were self-imposed restrictions that the Division had previously determined were unnecessary.

FN37. Hearing Transcript at 22.

FN38. *Id.*; D.I. 3. Hearing Officer's Dec. 18, 2006 Decision, at 10.

26. The hearing officer also properly considered Carelink's efforts to correct the deficiency and accurately determined that Carelink had not made any serious effort to return Ms. Rice to Pioneer House. In this regard, Carelink misses the mark when it argues that the Division could not point to anything the facility could have undertaken to correct the deficiency. The Division made one suggestion that was repeatedly ignored by Carelink: allow Ms. Rice to return to Pioneer House. Carelink's in-

sistence on a new care plan and medical releases were not genuine efforts to facilitate Ms. Rice's return and remedy the violation because the Division repeatedly told Carelink that such steps were unnecessary. The efforts Carelink did make only hindered Ms. Rice's return to Pioneer House.

**C. The Penalty Upheld by the Hearing Officer was not Arbitrary or Vindictive.**

\*8 27. There was sufficient evidence in the record to support the penalty imposed by the Division. To reiterate, the statute only requires that the Division "consider" the six factors in determining the amount of penalty, and specifies that the penalty may not exceed the \$1,250 per day ceiling.<sup>FN39</sup>

In this case, the Division considered all of the factors and found that Carelink's conduct specifically implicated three of them. The hearing officer's decision was not arbitrary because he relied upon and specifically referenced the evidence presented at the hearing, mainly the testimony of Ms. Ellis and Ms. Joseph, and found Ms. Ellis's testimony to be more credible. When asked how she calculated the amount of \$1,250 per day for the penalty, Ms. Ellis responded that the Division will impose the maximum amount when a facility improperly denies care to a resident in order to coerce prompt compliance. Ms. Ellis' testimony was supported by the exhibits submitted into evidence by the Division that documented the correspondence between Carelink and the Division. Carelink did not submit any evidence other than Ms. Joseph's testimony.

FN39. 16 *Del. C.* § 1109(e).

28. Based on the foregoing, the decision of the hearing officer upholding the imposition of the \$1,250 per day civil monetary penalty upon Carelink is **AFFIRMED**.

**IT IS SO ORDERED.**

Del.Super.,2007.

Pioneer House Carelink v. Division of Long Term Care Resident's Protection

Not Reported in A.2d, 2007 WL 4181670

Not Reported in A.2d, 2007 WL 4181670 (Del.Super.)  
(Cite as: 2007 WL 4181670 (Del.Super.))

(Del.Super.)

END OF DOCUMENT



**DISABILITIES LAW PROGRAM**  
 COMMUNITY LEGAL AID SOCIETY, INC.  
 100 W. 10th Street, Suite 801  
 Wilmington, Delaware 19801  
 (302) 575-0690 (TTY) (302) 575-0696 Fax (302) 575-0840

July 31, 2006

By Fax ((302) 577-6672) and Mail

John Thomas Murray, Deputy Director  
 Division of Long Term Care Residents Protection  
 3 Mill Road, Suite 308  
 Wilmington, DE 19806

RE: D. R.

Dear Mr. Murray:

Thank you for your action regarding V. D. which will allow her to remain at Pioneer House pending the outcome of the hearing regarding her proposed discharge. I am writing to ask for the same consideration for Ms. R. Pioneer House did not inform her of her right to challenge the discharge, did not forward my request for a hearing to you when they received it, and took advantage of her hospitalization at St Francis in early July to bypass the 60 days notice of discharge that it had given her. (This action, if it had occurred a few days later, would have violated SB 318). If a bed is still available at Pioneer House, it would seem entirely appropriate to allow Ms. R. to return to her home pending the outcome of the hearing. This request is all the more compelling because the hearing, it seems, will not take place until at least the end of August, if not later. Ms. R. is extremely unhappy where she is.

Please consider this request and let me know your decision on the matter.

Sincerely,

Laura J. Waterland, Esq.  
 Senior Staff Attorney  
 302-575-0660 ext 231