

Involuntary Transfer/Discharge: A Growing Problem We Can Do Something About!



The National **Long-Term Care**
Ombudsman Resource Center

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Providing Legal Support to the
Aging Advocacy Network

- <http://www.nlrc.aoa.gov/>
- Collaboration developed by the Administration for Community Living/ Administration on Aging between the National Consumer Law Center, National Senior Citizens Law Center, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
- Request a training
- Request consulting
- Request technical assistance
- Access articles and resources



Presenter – Lori Smetanka

- First joined the National Consumer Voice for Quality Long-Term Care (formerly NCCNHR) in 1994 as Law and Policy Specialist focusing on the long-term care survey and enforcement system, issues important to long-term care residents, including rights, prevention of abuse and neglect, and providing support to state and local long-term care ombudsman programs.
- In 2004 she became Director of the National Long-Term Care Ombudsman Resource Center, funded by AOA and housed at the Consumer Voice, which provides support, technical assistance, and training for state and local long-term care ombudsman programs on issues related to long-term services and supports, including prevention of abuse and neglect, and ombudsman program management.
- Lori is a member of the Board of Directors of the Assisted Living Consumer Alliance, and numerous other workgroups and committees.



Presenter – Eric Carlson

- Directing Attorney at the National Senior Citizens Law Center.
- Mr. Carlson has broad experience in many forms of long-term services and supports (LTSS), including home and community-based services, nursing facility care, and assisted living facilities.
- He led NSCLC's extensive research (funded through The Commonwealth Fund) on Medicaid-funded assisted living and currently is leading a project to assist consumer advocacy on Medicaid managed LTSS in Florida and New Jersey. He counsels attorneys from across the country and co-counsels litigation on consumers' behalf.

Presenter – Mary Ann Parker

- The attorney for the D.C. Long-Term Care Ombudsman Program/Legal Counsel for the Elderly.
- Ms. Parker began her legal career approximately 25 years ago in private practice in Maryland. However, she has been involved with legal concerns facing DC's seniors for approximately 20 years.
- For over seven years, Ms. Parker has provided legal representation to residents of DC's Long Term Care Facilities.
- Ms. Parker has conducted legal trainings and presentations throughout D.C. on a variety of legal issues including advance directives, long-term care planning, public benefits and residents' rights.
- Ms. Parker was the recipient of the 2009 Toby S. Edleman Legal Justice Award for extraordinary efforts to achieve justice for long-term care consumers.



The National **Long-Term Care**
Ombudsman Resource Center

INVOLUNTARY TRANSFER/DISCHARGE: A GROWING PROBLEM WE CAN DO SOMETHING ABOUT

Lori Smetanka, J.D.

National LTC Ombudsman Resource Center

July 17, 2013

National LTC Ombudsman Resource Center

- Housed at the National Consumer Voice for Quality Long-Term Care
- Funded by the Administration on Aging/Administration for Community Living
- Provide
 - Training
 - Technical Assistance
 - Support



to State & Local
LTC Ombudsman Programs



Why Hold Today's Webinar?

- Transfer/Discharge of individuals from nursing homes, assisted living, and board & care facilities is a growing problem
- There are things we can do about it!

Complaints to Ombudsmen About Transfer/Discharge

	Rank (NH)	Rank (B&C)
2012	1	2
2011	1	3
2010	2	3
2009	2	3
2008	2	3
2007	2	3
2006	2	3

National Ombudsman Reporting System (NORS)

Transfer/Discharge Complaints Encompass:

- Discharge/eviction
 - planning
 - notice
 - procedure
 - implementation
 - includes abandonment
- Appeal process –
 - absent
 - not followed

National Ombudsman Reporting System (NORS)

What Can We DO?

- Better **EQUIP** long-term care ombudsmen, legal counsel and others to handle these cases
- **ENCOURAGE** increased partnerships, collaborations between ombudsmen and attorneys; as well as advocacy at the systems level
- **EDUCATE** ombudsmen, legal services attorneys, private attorneys, administrative law judges, licensing and certification agencies, guardians, facilities, families, residents, and more

Resources



www.ltcombudsman.org

Federal law and regulatory language

State Resources/Guidance:

- Illinois – Transfer/Discharge Toolkit
- Oregon – Guidance for Successful Transitions in Oregon Assisted Living and Residential Care Communities

Fact Sheets

Sample Notices

more coming.....



National Senior Citizens Law Center

Protecting the Rights of Low-Income Older Adults

July 17, 2013

Involuntary Transfer/Discharge:

A Growing Problem We Can Do Something About

Eric Carlson, National Senior Citizens Law Center



NSCLC



National Senior Citizens Law Center

Protecting the Rights of Low-Income Older Adults



NSCLC



National Senior Citizens Law Center

Protecting the Rights of Low-Income Older Adults

The National Senior Citizens Law Center
advocates nationwide to promote the
independence and well-being of
low-income elderly and disabled Americans.

Nursing Home Reform Law

- Applies to every facility certified for Medicare and/or Medicaid.
- Applies regardless of resident's payment source.
 - Transfer/discharge law found at 42 USC 1395i-3(c)(2), 1396r(c)(2); 42 CFR 483.12.



Six Allowable Reasons

- Necessary to meet resident's welfare.
- Resident's health has improved; no longer needs facility services.
- Safety of others endangered.
- Health of others endangered.
- Nonpayment after reasonable notice.
- Facility ceases to operate.



A Poll!

- Which justification do you see most frequently?
 - Meet resident's welfare.
 - Resident's improved health.
 - Endangering safety or health.
 - Nonpayment.
 - Facility ceases to operate.



Notice Requirements

- Notification of resident and, “if known, an immediate family member of the resident or legal representative.”
- Written notice in a language that resident and/or representative will understand.



Contents of Notice

- Reason.
- Date of proposed transfer/discharge.
- Location to where resident is to be moved.
- Right to appeal.
- LTC Ombudsman program: name, address, & telephone #.



Timing

- Generally 30 days in advance of proposed transfer/discharge.
- “Practicable” notice of less than 30 days allowed in certain circumstances.
 - No interpretation of “practicable” in law.
 - “Practicable” should be long enough to accommodate appeal.



Non-Payment Not Exception

- “Congress specifically intended a 30 day notice because [in the Reform Law] it exempted a 30 day notice for a number of reasons ... but not for nonpayment of services.”
 - 56 Federal Register at 48,840 (1991).



Documentation in Clinical Record

- Basis must be documented in resident's clinical record.
 - By **resident's MD** if transfer/discharge based on resident's welfare, or improved condition.
 - By **any MD** if transfer/discharge based on endangerment of other's health.



Preparation

- “[F]acility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge.”
 - Orientation may include (according to CMS Surveyor’s Guidelines) “trial visits, if possible, by the resident to a new location.”
 - Guidelines located in Appendix PP to CMS’s State Operations Manual.



General Preparation Obligations

- Facility must have “[a] post-discharge plan of care that is developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment.”



Appeal Hearings

- Hearing officer.
- Hearing generally held at nursing facility.
- Relatively informal.
- Right to introduce evidence and cross-examine witnesses.
- Resident usually outnumbered, so strong advocacy needed.



Another Poll!

- In your experience, how frequently do residents prevail in hearings?
 - 0 to 20%
 - 21% to 40%
 - 41% to 60%
 - 61% to 80%
 - 81% to 100%



Improper Justifications

- Resident is disruptive, argumentative, and/or obnoxious.
- Resident does not follow facility policies or care plan; is “non-compliant.”
- Caring for resident is too burdensome or expensive.
- Facility is exposed to potential legal liability for injuries suffered or caused by resident.



More Improper Justifications

- Resident refuses treatment.
- Resident does not need facility's specialized services.
- Resident's Medicare eligibility has ended.
 - *See also Jimmo v. Sebelius* on continued Medicare reimbursement.
- Facility is part of hospital complex.



And more ...

- Resident has exhausted savings; now is Medicaid eligible.
 - Depends on whether state allows partial Medicaid certification.
- Resident's Medicaid application is in process; facility has not been paid.
- Facility has voluntarily withdrawn from Medicaid program.



Defenses

- Facility hasn't met burden.
 - *e.g.*, facility can meet needs, resident isn't danger.
 - Facility would be violating law “if it refused to provide a statutorily defined service in order to eliminate certain residents under one of the transfer reasons.”
 - 56 Federal Register at 48,839 (1991).
- Facility has made procedural mistake.
 - *e.g.*, no MD documentation, no listed destination.



More Defenses

- Facility proposed transfer to another location and that location:
 - Can't provide appropriate level of care (assisted living facility, homeless shelter, daughter's house, etc.)
 - Provides the same level of care as the current nursing facility.



- Mary Ann Parker will describe her representation of residents with the Ombudsman Program in Washington, D.C.





Advocating for Long-Term Care Residents:

Challenging Involuntary Discharges, Transfers and Relocations in the District of Columbia

Presented by:

Mary Ann B. Parker, staff attorney, The DC Long-Term Care Ombudsman
Program, Legal Counsel for the Elderly,
DCOA Network Provider



DC Long-Term Care Ombudsman Program

- DC Office of Aging(DCOA) established the Office of the DC Long-Term Care Ombudsman Program(DCLTCOP) in 1975.
- DCOA awarded a grant to Legal Counsel for the Elderly(LCE) to operate the Ombudsman Program in 1985.
- Included within DCLTCOP's staff is an assigned attorney.
- DCLTCOP has placed a high priority on monitoring and challenging involuntary discharge, transfers and relocations.



Applicable Discharge and Transfers Laws and Policy:

- D.C. 6-108 Law (Nursing Homes and Community Residence Facilities Protection Act of 1985, D.C. Code § 44-1003.01-13, et al.
- D.C. Model Discharge Plan for Nursing Homes and Community Residence Facilities adopted and implemented by Department of Health.
- Federal Law-OBRA '87 42 CFR § 483.12



Similarities between DC law and federal law:

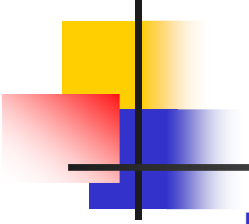
- Specific rights given to all residents facing an involuntary discharge or transfer.
- Similar list of reasons for discharge.
- Thirty day advance notice for nursing home residents in most circumstances.
- Resource information must be provided including how to contact the long-term care ombudsman.
- Written notification must be given to the resident and his/her legal representative.
- The Resident is given the right to challenge the discharge.

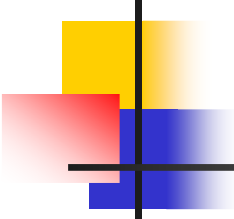


Differences in DC Law:

- Law includes relocations and covers nursing homes, assisted living residences and community residence facilities.
- Requires that the notice be on a form prescribed by the Mayor and must, at a minimum, contain specific information about appeal rights, etc.
- Advance notice must be given to the resident, his or her representative, appropriate governmental agency and DCLTCOP.
- Advance notice can be limited according to documented medical necessity or if DCLTCOP determines it is an emergency.

DC Law continued:

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- Resident is given 7 days to appeal a discharge/transfer or 5 days to appeal a relocation.
 - A hearing has to be scheduled within 5 days.
 - The appeal stays the discharge.
 - DCLTCOP can challenge the discharge with a resident's consent or on behalf of the Ombudsman Program.
 - LTC providers are required to implement a model discharge plan.



Challenging individual DC Discharges, Transfer and Relocations:

- DCLTCOP worked with the regulatory agency to develop uniform Notices of Discharge, Transfer and Relocation which contains spaces for all required information.
- All copies are required to be sent/faxed to DCLTCOP.
- DCLTCOP Receives about 5,000 a year.
- DC has one administrative staff person who logs in the notices and distributes via email to appropriate Ombudsman for review.



Legal Representation in Involuntary Discharge Transfers and Relocations:

- After reviewing a questionable notice, the Ombudsman will reach out to resident and to facility for investigative purposes.
- If issues are still unresolved, the Ombudsman will refer to the DCLTCOP attorney.
- If appropriate, the attorney will enter the initial hearing request which may include a Motion to Dismiss based on procedural defects of the notice.
- All challenges are heard before the Administrative Court and can be appealed after Reconsideration to the D.C. Court of Appeals.



Hearings in DC Discharge, Transfer and Relocation Cases:

- Several cases brought by DCLTCOP to Office of Administrative hearings have resulted in rulings that the notice must contain all required language or the case can be dismissed without addressing substantive claims.
- DCLTCOP appealed a discharge case in 2004 which resulted in the court finding that the administrative law judge had the authority to readmit a nursing home resident who was discharged with an invalid notice. *See, Paschall v. D.C. Dep't of Health*, 871 A.2d 463(DC 2005)
- DCLTCOP brought a Mandamus lawsuit in 2003 to require that the Model Discharge Plan required by law be implemented for all discharges in DC. *See, DC Long-Term Care Ombudsman Program v. District of Columbia, et al.*, Case No. 03ca7660 Sup. Court (DC 2004)



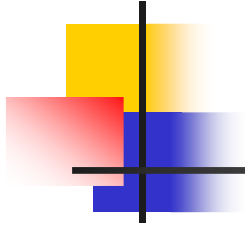
Impact of Contesting Individual Discharges and Transfers on Quality of Care for Residents:

- Sets up a structure for notices to be issued and challenged.
- Eliminates the discharge process as an easy way for a facility to unilaterally remove residents.
- Emphasizes discharge planning for all residents.
- Requires facility to focus on the rights of residents and their treatment plans.
- Requires facility to follow both the spirit and the letter of the law when it comes to discharges and transfers.
- Keeps resident in charge of his/her life!



Systemic Impact of Challenging Discharges, Transfers and Relocations:

- Educates Facilities, Residents and Courts of residents' discharge rights and laws.
- Improves collaboration with regulatory agencies.
- Creates supportive laws, protocols and policies.
- Creates a clear and uniform structure.
- Increases awareness of larger issues such as homelessness.



QUESTIONS???
