

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF LONG TERM CARE RESIDENTS PROTECTION
Statutory Authority: 31 Delaware Code, Section 1101 (31 **Del.C.** §1101)
16 **DE Admin. Code** 3102

PROPOSED

PUBLIC NOTICE

3102 Long Term Care Transfer, Discharge and Readmission Procedures

The Division of Long Term Care Residents Protection (DLTCRP) is proposing a revision to Regulation 3102 - Long Term Care Transfer, Discharge and Readmission Hearing Procedures.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Tom Murray, Deputy Director, DHSS/DLTCRP, 3 Mill Road, Suite 308, Wilmington, DE 19806 or by fax to (302) 577-6661 by Thursday January 31, 2013.

The action concerning the determination of whether to adopt the revision to the regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

SUMMARY OF PROPOSED CHANGES

Background

DLTCRP is proposing revisions to this regulation after receiving additional comments.

Summary of Proposal

This revision amends the sections regarding the filing of appeals of discharges from the facility to the Division, includes a statement that the resident has the opportunity for other remedies through the Medicare Quality Improvement Organization, re-numbers Section 4 and includes a 30 day time limit during which an appeal must be filed.

Statutory Authority

16 **Del.C.** §1124, "Staff training; issuance of regulations."

29 **Del.C.** §7971(d)(1) "Division of Long Term Care Residents Protection."

3102 Long Term Care Transfer, Discharge and Readmission Procedures

1.0 Purpose

This regulation applies to decisions by licensed facilities to transfer or discharge a resident. It prescribes the process for providing an impartial hearing to a resident.

This regulation does not extend to decisions of DHSS, or any of its Divisions, to deny, suspend, delay, reduce, or terminate benefits. The regulation governing appeals related to benefit eligibility are found at 16 **DE Admin. Code** §5000. Be aware that the appeal requirements are different from the requirements in this regulation.

2.0 Definitions

"**DHSS**" means the Department of Health and Social Services

"**Division**" means the Division of Long Term Care Residents Protection.

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

"**Party**" means the resident or resident's representative and the facility.

"**Resident**" means resident or patient.

"**Transfer and discharge**" ~~is defined separately in Section 3.0 and 4.0~~ includes movement of a resident to a location outside of the licensed facility.

3.0 Transfer, discharge and readmission rights of residents in a certified skilled nursing facility or a certified nursing facility as defined in 42 CFR §483.5 or an Intermediate Care facility (ICF/MR) as defined in 42 CFR §440.150.

- 3.1 Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—
 - 3.1.1 The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility. If the resident appeals a notice of discharge based on this section, the facility will not be cited during the pendency of the appeal for housing a resident whose needs exceed the permitted level of care in that facility.
 - 3.1.2 The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
 - 3.1.3 The safety of individuals in the facility is endangered;
 - 3.1.4 The health of individuals in the facility would otherwise be endangered;
 - 3.1.5 The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
 - 3.1.6 The facility ceases to operate.
- 3.2 Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs 3.1.1 through 3.1.5 of this section, the resident's clinical record must be documented. The documentation must be made by;
 - 3.2.1 The resident's physician when transfer or discharge is necessary under paragraph 3.1.1 or paragraph 3.1.2 of this section; and
 - 3.2.2 A physician when transfer or discharge is necessary under paragraph 3.1.4 of this section.
- 3.3 Notice before transfer. Before a facility transfers or discharges a resident, the facility must:
 - 3.3.1 Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
 - 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.
 - 3.3.3 Record the reasons in the resident's clinical record; and
 - 3.3.4 Include in the notice the items described in paragraph 3.5 of this section.
- 3.4 Timing of the notice.
 - 3.4.1 Except as specified in paragraphs 3.4.2 and 3.8 of this section, the notice of transfer or discharge required under paragraph 3.3 of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
 - 3.4.2 Notice may be made as soon as practicable before transfer or discharge when:
 - 3.4.2.1 The safety of individuals in the facility would be endangered under paragraph 3.1.3 of this section;
 - 3.4.2.2 The health of individuals in the facility would be endangered, under paragraph 3.1.4 of this section;
 - 3.4.2.3 The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph 3.1.2 of this section;
 - 3.4.2.4 An immediate transfer or discharge is required by the resident's urgent medical needs under paragraph 3.1.1 of this section.
- 3.5 Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:
 - 3.5.1 A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:
 - 3.5.1.1 A statement of what action the agency intends to take;
 - 3.5.1.2 The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facility's intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months.
 - 3.5.1.3 The specific policy or regulation supporting such action.
 - 3.5.2 The effective date of transfer or discharge;
 - 3.5.3 The location to which the resident will be transferred or discharged;
 - 3.5.4 A statement of the resident's right to a fair hearing ~~as provided in this section~~; **which includes the following:**
 - 3.5.4.1 Notice that the request for a fair hearing must be sent to the Division by U.S. mail, e-mail, or fax at 3 Mill Rd, Suite 308, Wilmington, DE 19806 or fax (302) 577-6673. Call (302) 577-6661 to secure e-mail address.

3.5.4.2 Notice that the Division must receive the notice within 30 days from the date the notice of discharge is received.

~~3.5.5~~ The method by which the resident may request a fair hearing;

~~3.5.6~~3.5.4.3A statement that the resident may represent him or herself or may be represented by counsel or by another person.

~~3.5.7~~3.5.4.4The name, address and telephone number of the State long term care ombudsman;

3.5.4.5 A fair hearing request does not preclude or limit the resident's pursuit or other remedies or review systems authorized by law, including Medicare beneficiary complaints to a Medicare Quality Improvement Organization (QIO) consistent with 42 C.F.R. §476.71(a)(2).

3.6 Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

3.7 Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the Secretary, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents, as required at 42 CFR §483.75(r).

3.8 Room changes in a composite distinct part. Room changes in a facility that is a composite distinct part (as defined in 42 CFR §483.5(c)) must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations. A facility's discretion to transfer residents to another room is limited by Title 16 **Del.C.** §§121 (13) and (28).

3.9 Notice of bed-hold policy and readmission.

3.9.1 Notice before transfer. Before a nursing facility transfers a resident to a hospital or allows a resident to go on therapeutic leave, the nursing facility must provide written information to the resident and a family member or legal representative that specifies;

3.9.1.1 Notice of State bed-hold. The duration of the bed-hold policy under the State plan, if any during which the resident is permitted to return and resume residence in the nursing facility, See DHSS Long Term Care Institutional Provider Specific Policy Manual at Section 4.5; and

3.9.1.2 Facility policies. The nursing facility's policies regarding bed-hold periods, which must be consistent with paragraph 3.9.3 of this section, permitting a resident to return.

3.9.2 Bed-hold notice upon transfer. At the time of transfer of a resident for hospitalization or therapeutic leave, a nursing facility must provide to the resident and a family member or legal representative written notice which explains the bed-hold policy described in paragraph 3.9.1.1 of this section.

3.9.3 Permitting resident to return to facility. A nursing facility must establish and follow a written policy under which a resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:

3.9.3.1 Requires the services provided by the facility; and

3.9.3.2 Is eligible for Medicaid nursing facility services.

3.9.3.3 Additional protection for readmission is found at 16 **Del.C.** §1121 (18).

3.10 Readmission to a composite distinct part. When the nursing facility to which a resident is readmitted is a composite distinct part (as defined in 42 CFR§483.5(c)), the resident must be permitted to return to an available bed in the particular location of the composite distinct part in which he or she resided previously. If a bed is not available in that location at the time of readmission, the resident must be given the option to return to that location upon the first availability of a bed there.

4.0 Transfer, discharge and readmission rights of residents of a Nursing Facility and Similar Facility as defined in 16 Del.C. 1102(4). See 16 Del.C. 1121.

~~4.1 "Transfer and discharge" includes movement of a resident to a location outside of the licensed facility.~~

4.21 Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility except for:

4.21.1 Medical needs which cannot be met in the facility;

4.21.2 The resident's own welfare;

4.21.3 The welfare of the other individuals in the facility;

4.21.4 Nonpayment of justified charges, after appropriate notice;

4.21.5 Termination of facility operation.

- 4.32 Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs 4.1.1 or 4.1.2 of this section, the resident's clinical record must be documented. The documentation must be made by:
- 4.32.1 The resident's physician when transfer or discharge is necessary under paragraph 4.1.1 or paragraph 4.1.2 of this section; and
 - 4.32.2 A physician when transfer or discharge is necessary under paragraph 4.1.3 of this section.
- 4.43 Notice before transfer. Before a facility transfers or discharges a resident, the facility must:
- 4.43.1 Notify the resident and, if known, a family member or legal representative, of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
 - 4.43.2 Record the reasons in the resident's clinical record; and
 - 4.43.3 Include in the notice the items described in paragraph 4.5 of this section.
- 4.54 Timing of the notice. (i) Except as specified in paragraphs 4.4.2 and 4.8 of this section, the notice of transfer or discharge required under paragraph 4.3 of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
- 4.54.1 Notice may be made as soon as practicable before or after transfer or discharge when:
 - 4.54.1.1 The welfare of individuals in the facility would be endangered under paragraph 3.1.3 of this section;
 - 4.54.1.2 An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph 3.1.1. of this section; or
- 4.65 Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:
- 4.65.1 The reason for transfer or discharge; A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:
 - 4.65.1.1 A statement of what action the agency intends to take;
 - 4.65.1.2 The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facilities intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months; and
 - 4.65.1.3 The specific policy or regulation supporting such action.
 - 4.65.2 The effective date of transfer or discharge;
 - 4.65.3 A description of and the address of ~~t~~The location to which the resident will be transferred or discharged;
 - 4.65.4 A statement of the resident's right to a fair hearing ~~as provided in this section:~~
 - 4.65.4.1 The method by which the resident may request a fair hearing; ~~and which includes the following:~~
 - 4.5.4.1.1 Notice that the request for a fair hearing must be sent to the Division by U.S. mail, e-mail, or fax at 3 Mill Rd, Suite 308, Wilmington, DE 19806 or fax (302) 577-6673. Call (302) 577-6661 to secure e-mail address.
 - 4.5.4.1.2 Notice that the Division must receive the notice within 30 days from the date the notice of discharge is received.
 - 4.6.4.2 ~~4.5.4.1.3~~ A statement that the resident may represent him or herself or may be represented by counsel or by another person.
 - 4.65.5 The name, address and telephone number of the State long term care ombudsman;
 - 4.65.6 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.
- 4.76 Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.
- 4.87 Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to Division, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents. The notice shall be provided as far in advance of closure as possible.
- 4.98 Room changes.
- 4.98.1 Room changes in a facility must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another location. A facility's discretion to transfer residents to another room is limited by Title 16 **Del.C.** §§1121 (13) and (28).
 - 4.98.2 The facility must give reasonable notice before the resident's room or roommate is changed, except in emergencies.
 - 4.98.3 The facility shall endeavor to honor roommate requests whenever possible.

4.409 Notice of bed-hold policy and readmission:

- 4.409.1 Notice before transfer. When a nursing facility transfers a resident out of a facility to an acute care facility it must provide written information to the resident and a family member or legal representative that specifies that the facility must accept the patient or resident back into the facility when the resident no longer needs acute care and there is space available in the facility. If no space is available, the resident shall be accepted into the next available bed.
- 4.409.2 Permitting resident to return to facility. A nursing facility must establish and follow a written policy for implementing its obligation to immediately offer the first available bed to a resident who is entitled to be readmitted to the facility when acute care is no longer required.

5.0 Fair Hearing Practice and Procedures which pertain to grievances under either Section 3.0 or 4.0 of this regulation.

- 5.1 Right to hearing. An impartial hearing may be requested by a resident who believes a facility has erroneously determined that he or she must be transferred or discharged.
 - 5.1.1 The hearing request must:
 - 5.1.1.1 Be in writing;
 - 5.1.1.2 Be received by the facility Division within 30 days from the date that the discharge notice is received by the resident or the resident's legal representative;
 - 5.1.1.3 Be copied to the Division facility and the State LTC ombudsman.
- 5.2 No facility which has received a timely hearing request shall take any steps to discharge or transfer a resident then on site until a fair hearing has been provided or the request, denied or dismissed pursuant to 5.3. The Division has discretion to suspend admissions at a facility as a means of maintaining bed availability and/or to impose civil money penalties for noncompliance with 16 Del.C. ch. 11.
- 5.23 DHSS may deny or dismiss a request for a hearing if:
 - 5.23.1 The resident withdraws the request in writing; or
 - 5.23.2 The resident or his or her legal representative fails to appear at a scheduled hearing without good cause.
- 5.34 Impartial hearing must be conducted:
 - 5.34.1 At a reasonable time, date and place;
 - 5.34.2 After adequate written notice of the hearing;
 - 5.34.3 By an impartial fact-finder who has not been directly involved in the initial determination of the action in question;
 - 5.34.4 With appropriate translation services available to parties or witnesses as needed to be provided at State expense.
- 5.45 If the hearing involves medical issues as the basis for the transfer or discharge and if the impartial fact finder considers it necessary to have a medical assessment other than that of the facility involved in making the transfer or discharge decision, such a medical assessment must be obtained at State expense and made part of the record.
- 5.56 Procedural rights. The parties must be given the opportunity to:
 - 5.56.1 Examine at a reasonable time before the date of the hearing and during the hearing all documents and records to be used by either party at the hearing;
 - 5.56.2 Bring witnesses;
 - 5.56.3 Establish all pertinent facts and circumstances;
 - 5.56.4 Present an argument without undue interference; and
 - 5.56.5 Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.
 - 5.56.6 Residents within the scope of 3.0 have additional rights to as provided in 42 CFR §483.10(b)(2). All residents have additional rights under 16 Del.C. §1121(19).
- 5.67 Hearing decisions must be based exclusively on evidence introduced at the hearing.
- 5.78 The record must consist only of:
 - 5.78.1 The transcript or recording of testimony and exhibits;
 - 5.78.2 All papers and requests filed in the proceeding; and
 - 5.78.3 The decision of the hearing officer.
- 5.89 The parties must have the access to the record at a convenient place and time in order to review or to secure a transcript at the party's expense.

5.910 The impartial decision must:

5.910.1 Summarize the facts; and

5.910.2 Identify the statutes and/or regulations pertinent to the decision

5.910.3 Specify the reasons for the decisions; and

5.910.4 Identify the supporting evidence and apply the relevant legal principles.

5.4011 The impartial fact-finder must:

5.4011.1 Notify the parties of the decision, in writing.

5.4011.2 Notify the parties that this is the final decision of DHSS with the right to an appeal pursuant to the Administrative Procedures Act, Title 29, Chapter 101.

16 DE Reg. 710 (01/01/13) (Prop.)