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**In Re: L**  
**Appeal of Involuntary Discharge**  
**from St. Joseph Living Center**  
**Windham, Connecticut 06280**

**Connecticut Department of**  
**Social Services**  
**Office of Administrative**  
**Hearings and Appeals**

**September 17, 1998**

**Memorandum in Opposition to Request for Reconsideration**

Nursing Home has requested reconsideration of the Hearing Officer's June 26, 1998 decision prohibiting that facility from evicting Mrs. L. S, husband and conservator of L, opposes the request for reconsideration and urges that reconsideration be denied, or, if the Department agrees to reconsider, that Hearing Officer's decision be affirmed.

Nursing Home has raised only two objections to the Fair Hearing decision:

1. That the hearing officer "failed to address the legal issue of whether the waiting list law, Corm. Gen. Stat. §19a-533, supersedes federal and state law governing transfer and discharge of nursing home residents, (42 U.S.C. §1396 and Conn. Gen. Stat. §19a-535.)"
2. That the hearing officer was factually and legally erroneous in holding that the the notice issued by Nursing Home was "faulty."

The X contend that the Hearing Officer did squarely answer the question raised by Nursing Home and expressly found that Mrs. X is a nursing home resident entitled to a notice of discharge regardless of the fact that she was initially admitted for respite care. The Hearing Officer was also correct in finding the notice of discharge defective on its face because it failed to provide 10 clear days before the proposed discharge.

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The Hearing Officer addressed the issue raised by St. Joseph Living Center (“Nursing Home”) as to whether a notice of discharge was required for a patient admitted for respite care in the first paragraph of her discussion at page 7 of her opinion. She stated:

*I find that the appellant is a nursing home resident and the discharge rules under State Statute 19a-535 apply in this case as she was admitted to the facility even though the admission was initially for respite care.*  
(Emphasis added)

The Hearing Officer also made a finding of fact #13 in which she expressly found that the appellant is subject to the transfer/discharge requirements set forth in Connecticut General Statutes §19a-535. The Hearing Officer expressly found that the waiting list regulation only governs who can be admitted to a nursing home before others and “does not state respite care can never be extended or what happens when the situation changes during the respite stay.” (Decision, p. 7).

Nursing Home refers in its argument, page 4, to the waiting list statute Connecticut General Statutes §19a-533 and the issue of whether it supersedes federal and state laws. The waiting list statute cited, however, makes no mention of admissions for respite care. The respite care exception to the waiting list law is found only in DSS regulations at Conn. Agencies Regulations §17-311-209 and not in any state law.

With regard to the primacy of state and federal law the Hearing Officer properly noted that state law, Connecticut General Statutes §19a-535, by its plain language applies to all nursing home residents. The state law, like the federal law and regulations which the state statute implements (the Nursing Home Reform Act, 42 U.S.C. §1396r, and 42 C.F.R. Parts 431 and 483) treats all nursing home residents equally as to transfers, regardless of the basis for admission of a resident. As correctly noted by the Hearing Officer, the DSS regulations relating

to respite admissions (1) merely govern the nursing home admission process and have no bearing on the rights that individuals become entitled to when, following the admission process, they become residents and (2) contain no provisions or requirements relating to transfers or discharges. As detailed in the X' Memorandum of Law, April 14, 1998, even if there were irreconcilable conflict between the DSS waiting list regulation and the federal and state law, federal and state law would override the regulations based on, *inter alia*, (1) the supremacy clause of U.S. Constitution, (2) the supremacy of state statute over a state agency's regulations, (3) the amendment of the state transfer and discharge law subsequent to adoption of the DSS regulation, and (4) the deference afforded to state agencies to interpret their own regulations.

With regard to the defects in the mandated transfer notice, the Hearing Officer was factually and legally correct in holding that Nursing Home notice was faulty. As detailed in the X' Memorandum, Mr. X first received the written notice of discharge of his wife at approximately 6 p.m. on March 2, 1998. The notice stated that his wife would be discharged on March 5, 1998, less than three days later. In spite of telling him that his wife would be evicted in less than three days, the notice also stated: "You must appeal this discharge within ten (10) days of receipt of this letter if you wish to stay the proposed discharge." [Exhibit 5]. Thus the notice was faulty in its attempt to deprive Mrs. X of her right to a stay of the transfer for the mandatory ten day period and its attempt to discharge Mrs. X before she could exercise her right to appeal.

The notice was also faulty in that it was not issued "as many days before the transfer or discharge as practicable." C.G.S. §19a-535(c). The record is undisputed that St. Joseph called Mr. X on February 20, 1998 to order him to pick up his wife. St. Joseph certainly could have

completed and issued the required written notice on that day, thirteen days prior to the proposed discharge date. This would have afforded Mrs. X the ten day appeal period required by law.

While Nursing Home contends that some oral notice was provided earlier, the statute mandates a detailed written notice and does not permit the use of verbal notification, which could easily be incomplete, inaccurate or misunderstood, in lieu of the required written notice. In failing to issue written notice on February 20, 1998, Nursing Home consciously chose not to provide the required written notification "as many days before the transfer or discharge as practicable."

Contrary to the position asserted by [Nursing Home], Mrs. X does not forfeit her right to 10 days in which to appeal just because she has legal counsel. Nursing Home knew that Mr. X strenuously contested the discharge of his wife. The discharge notice which reduced the effective time period to appeal from 10 days to 2 days was therefore clearly an attempt to prejudice the right of Mrs. X to exercise her right to appeal.

The discharge statute is written to protect the due process rights of nursing home residents and should be interpreted to ensure those rights. If DSS were to adopt the position advanced by Nursing Home, it would permit nursing homes to evict frail, elderly, sick nursing home residents to the streets without any rights whatsoever. Surely this is not the public policy the State of Connecticut wishes to adopt.

In conclusion, appellants urge the Department to uphold the Hearing Officer's decision and not grant reconsideration.

Respectfully submitted on behalf of  
S X, Conservator for L X,

By \_\_\_\_\_  
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**Certification**

This is to certify that on July 16, 1998, a copy of the foregoing was mailed, first class  
postage prepaid to:

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