

March 1, 2011

**REVIEW OF THE MINISTRY OF HEALTH AND LONG-TERM CARE
MEMO RE CRISIS DESIGNATION AND FIRST AVAILABLE BED POLICY
DATED FEBRUARY 23, 2011**

Over the last 10 years, the Advocacy Centre for the Elderly (ACE) has had many requests for legal information and assistance in the area of discharge from hospital. In 2010, the ACE had over 160 calls requesting information in this regard.

While the facts of each case may have been different, there were certain recurrent themes. In general, hospitals were attempting to enforce “policies” regarding long-term care choices. Hospital patients and their families or substitute decisions makers (SDMs) were told that they must comply with such policies, or be charged the “daily rate”: that is, the uninsured rate, which could run anywhere as high as \$1800 per day. Such policies also included the patient being required to move to the first available long-term care home bed in the area whether it was one of their “choices” or not; to choose specific numbers of homes from a “short list”, or to go to specific homes. Some hospitals went so far as to “complete” the choice sheets for the applicants.

It was our opinion that both the hospital policies and charging the uninsured rate to those awaiting placement in long-term care were illegal. In order to assist our clients, we prepared an information paper, outlining our position regarding discharge. The most recent, *Discharge from Hospital to Long-Term Care: Issues in Ontario*,¹ reflected the following:

1. Hospitals cannot create “discharge policies” that do not comply with or attempt to override the relevant legislation, including the *Long-Term Care Homes Act, 2007* and the *Health Care Consent Act*;
2. Applicants cannot be required to “choose” homes that they do not want because the home is on a short list or has an available bed;
3. Hospitals can only charge patients awaiting long-term care (often referred to as Alternate Level of Care or ALC patients) the maximum allowed by s. 10 of the regulations to the *Health Insurance Act* (presently \$53.23) and may not charge

¹Meadus, Jane E. December 20, 2010, available at www.ancelaw.ca. This document will be updated shortly to reflect the Ministry of Health and Long-Term Care position referred to herein.

the uninsured daily rate; and

4. Crisis designations mean that applicants go to the top of the waiting list for the homes they have chosen and they may choose more than five: it does not mean they have to go to the “first available bed” in the system.

Nevertheless, ACE is aware of the realities of the health care system, and staff advise patients or their SDMs that they should consider all discharge options available to them, including considering homes that they had not initially included in their choice list. Patients and their SDMs must be aware of all of the relevant information so that they can make fully informed choices. These realities include lengthy long-term care home waiting lists, plus the risks to elderly patients caused by lengthy hospital stays, such as acquiring hospital-borne infections, becoming incontinent and losing mobility. However, it is the fully informed choice of the patient or their SDM that is required by law, not simply a signature on a piece of paper. “Agreements” to go to homes that do not meet the person’s needs and to which they would not otherwise consent, and which are only made because of threats of illegal charges or policies, are not valid consents and cannot be relied upon in the placement process.

On February 15, 2011, the Erie St. Clair Local Health Integration Network (LHIN) issued a press release indicating that, as a result of severe pressure on the hospitals in their area, they were authorizing that ALC patients be designated as crisis until patient flow in the hospital stabilized and the risk to patient quality care was alleviated. The release went on to state that as a result, the three Essex county hospitals would reinstate their “First Available Bed” policies, requiring patients to either accept the first available long-term care home bed that could [in the opinion of the hospital] meet their needs, or be charged the uninsured rate, which was reported to be \$600 per day.

As we believed that the implementation of these policies was contrary to law, we wrote to Gary Switzer, CEO of Erie St. Clair LHIN, and to the Minister of Health and Long-Term Care, Deb Matthews, requesting that the existing legislation be complied with.

On February 22, 2011, the Honourable Deb Matthews, Minister of Health and Long-Term Care, stated the following in the legislature: “I want to start by saying that it is completely unacceptable that anyone be charged more than the copay rate—that’s \$53.23—if they are in a hospital waiting for long-term care”. She reiterated this statement the following day.

On February 23, 2011, Ruth Hawkins, Assistant Deputy Minister (A), Health System Accountability and Performance Division of the Ministry of Health and Long-Term Care issued a memo to all LHIN CEOs, and copied it to the Ontario Hospital’s Association and all Community Care Access Centre (CCAC) CEOs, in which she clarified the Ministry’s position regarding Crisis Designation and First Available Bed Policy. A copy of that memo is attached. Among the general statements made in that document, are the following:

1. Hospital policies and practices must comply with the legislation, including the *Long-Term Care Homes Act, 2007*;

2. Such policies and practices must not be made at the expense of patient consent and choice;
3. Hospitals do not have the authority to require applicants waiting for a bed in a long-term care home to take the first available bed because this practice is not consistent with the *Long-Term Care Homes Act, 2007*;
4. The fee charged to patients who require chronic care or who are more or less a permanent resident of a hospital or other institution, including ALC patients, cannot exceed that found in section 10, Regulation 552 under the *Health Insurance Act* of \$53.23 per day;
5. Pursuant to the *Long-Term Care Homes Act, 2007*, it is the CCAC that is responsible for determining eligibility for admission, priority for admission, monitoring waiting lists, and authorizing admissions to long-term care homes. Hospitals have no such authority.
6. A hospital cannot choose a long-term care home for a person.
7. Before an admission can be authorized the CCAC, the person or their substitute decision-maker must provide valid consent to the admission.

Ms Hawkins went on to state the following regarding the February 15, 2011 news release by the Erie St. Clair LHIN:

1. It was not consistent with the provisions set out in the memo.
2. The LHIN could not implement the policies and procedures set out in the news release.
3. Neither the hospital nor the LHIN had authority to override the legislative and regulatory provisions.
4. Patients, including those designated ALC , could only be charged allowed under the law.
5. The admission process for homes must be conducted in accordance with the *Long-Term Care Homes Act, 2007* and its regulations.

These statements by the Ministry of Health and Long-Term Care are consistent with the position that the Advocacy Centre for the Elderly has taken for many years. While we are glad that the Ministry has finally made public their position, we wish it had come sooner to prevent so many families from having to deal with this unnecessary pressure over the years.

Unfortunately, we continue to be concerned as to how hospitals and LHINs will respond. We have already heard of hospitals who have directed their staff that it is “business as usual” and to continue to apply their [illegal] hospital discharge policies. This is disheartening, and a complete disregard for both the patients and the law. We hope that the Ministry of Health and Long-Term Care will make it clear to hospitals and LHINs that such actions will not be tolerated.

Jane E. Meadus
Barrister & Solicitor
Institutional Advocate
meadusj@lao.on.ca