



Empowering people with all disabilities by providing: Resources, Options, And Disability related Services needed To obtain individual Freedom in their lives.

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April 4, 2022

Margaret Barajas,
Pennsylvania State Long-Term Care Ombudsman
555 Walnut St. 5th Floor
Harrisburg, PA 17101

Dear Ms. Barajas,

Thank you for your letter dated, March 29th, 2022; which describes itself as a “formal notice and request” to Roads to Freedom Center for Independent Living to “cease and desist efforts to contact Mr. David Italiano.”

I. Lack of Complaint, Investigation or Effort to Resolve Any Issues

We recognize your role under the federal regulation you cite, 45 CFR 1324.13(a)(1)(i), to “identify, investigate and resolve complaints that --- (i) are made by, or on behalf of, residents.” In Pennsylvania, as you know, the Ombudsman’s role is one of advocacy: “to provide an “advocacy force to protect and enhance the health, safety, welfare and rights of older individuals receiving long-term care.”¹

We note that you do not identify any “complaint” you have received regarding RTF (your authority is to investigate and resolve complaints). To the extent that you mention “examples” (without documentation) of matters which cause you concern, it is unclear what investigation you have undertaken or the results of any investigation. Indeed, your letter does not state that you conducted an “investigation.” Rather, you refer to “what has been shared with me, and made known to me by documentation and conversations with involved parties.” You also do not refer to any efforts by you to “resolve” any complaint, if such a complaint was made.

It is of great concern to RTF that you did not speak with RTF before sending your letter, or advise RTF of a complaint against RTF, if any, which you received, or that you were investigating RTF (if there was an investigation), or of the documentation and conversations which you describe.

You did not provide us with any opportunity to comment on, explain, or refute anything which you believe justifies your “cease and desist” notice and request.

¹ <https://www.aging.pa.gov/publications/policy-procedure-manual/Documents/Chapter%20I%20-%20Administration.pdf>

This situation is of particular concern because your request that we “cease and desist” efforts to contact Mr. Italiano interferes with RTF’s mandate and responsibilities under federal law to advocate for him, and to assist him. We discuss our long relationship with him below.

We are not aware of any authority in the Ombudsman to issue “cease and desist” demands, especially where such demands are issued with no prior notice, and with no effort on your part to obtain relevant information from the recipient.

II. RTF Reported Allegations of Abuse to the Ombudsman and Others

RTF is a mandated reporter of possible abuse. On September 28, 2020, RTF reported that Mr. Italiano was the victim of abuse, denial of rights and exploitation. RTF requested your assistance facilitating a meeting with David, his guardian and RTF. RTF reported that David’s rights were being violated. David was not permitted access to federally mandated advocacy and transitional services. He was not allowed access to private communication and the Facility Staff confiscated and refused to return 2 cell phones to him, while he resided in a dangerous congregate setting during COVID. David has also not been given an opportunity to provide input or assist in creating a person-centered plan for his future.

Mr. Italiano also reported to the Lycoming County Ombudsman on September 28, 2020 to request assistance with denied visitation at the Long-Term Care Facility (LTCF) where he was held and monitored with an ankle monitor, and denied visitors, despite others being permitted to have visitors.³

On January 20, 2021, RTF staff requested the local ombudsman, Traci Foster to share information on a program through the Institute on Disabilities at Temple University known as, “MyATprogram” with Mr. Italiano’s Social Worker at the LTCF. RTF did this, in its capacity outlined above and as a contracted Assistive Technology Resource Center (ATRC) with Pennsylvania’s PA’s Initiative on Assistive Technology-TechOwl. This program is a part of the State’s initiative to provide assistive technology to persons with disabilities. Accordingly a cell phone was provided to Mr. Italiano to facilitate communication about his services and supports. The facility confiscated the phone.

RTF met with you on February 18, 2021 to discuss David’s phone being confiscated as well as David desire to live in the community. That day, and again on February 23, 2021, RTF emailed you to ask that you facilitate a meeting with Mr. Italiano, his guardian, and RTF. We received no response.

These reports and complaints by RTF on behalf of Mr. Italiano went to you personally in your official role, to the local ombudsman, to the Department of Health, and to Disability Rights Pennsylvania. You informed RTF in a virtual meeting on February 18, 2021, that you would not discuss Mr. Italiano. Secretary of the Department of Aging was also informed in a meeting that the Guardian/AAA was abusive, and we were informed that he had met with the AAA and he declined to schedule the requested meeting.

So far as we have been informed, these complaint(s) were not investigated by your office.

³ The Local Ombudsman emailed RTF on October 2, 2020 that Mr. Italiano is now permitted to have visitors.

We find it significant that all the concerning allegations you cite as examples in your letter occurred after RTF submitted the complaints on Mr. Italiano's behalf to your office and others, and after AAA was appointed replacement guardian.

III. RTF's Federal Mandate for Advocacy and Other Services

Just as you have responsibilities under federal law, so does RTF as a Center for Independent Living. As we discuss below, Mr. Italiano has repeatedly and personally sought our assistance, including but not limited to with the support of his guardian.

Because you do not acknowledge the above (either the law or Mr. Italiano's requests to RTF), we discuss the former here and the latter in the next section of this letter.

- Individuals CILs serve are at serious risk of segregation and institutionalization in violation of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act as interpreted by the Supreme Court's decision in *Olmstead v. L.C.*, [527 U.S. 581](#) (1999), and the Social Security Act, [42 U.S.C. § 1396n\(c\)\(2\)\(B\) & \(C\)](#) (evaluation of need, right to choose).
- CILs have a responsibility and obligation under federal law to provide certain core services to eligible individuals.⁷ *See* Workforce Innovation and Opportunity Act (WIOA), and the final rule adopted by ACL.⁸ In addition to "individual and systems advocacy," the core services in the final rule most relevant here are:
 - Facilitate the transition of individuals with significant disabilities from nursing homes and other institutions to home and community-based settings. This includes providing consumer-controlled supports and services and the advocacy⁹ needed to move from an institutional setting to community-based setting;

⁷ On eligibility, my understanding is that any individual with a significant disability, as defined in 34 CFR 364.4(b), is eligible for IL services under the SILS and CIL programs authorized under chapter 1 of title VII of the Act. Any individual may seek information about IL services under these programs and request referral to other services and programs for individuals with significant disabilities, as appropriate. The determination of an individual's eligibility for IL services under the SILS and CIL programs meets the requirements of 34 CFR 364.51.

⁸ The Final Rule (published October 27, 2016) is at <https://www.federalregister.gov/documents/2016/10/27/2016-25918/independent-living-services-and-centers-for-independent-living> 81 FR 74682. The Center for Independent Living Program is at Subpart C at 45 CFR 1329. The regulation was issued under the authority of [29 U.S.C. 709](#); [42 U.S.C. 3515e](#).

⁹ Advocacy:

Advocacy means pleading an individual's cause or speaking or writing in support of an individual. To the extent permitted by State law or the rules of the agency before which an individual is appearing, a non-lawyer may engage in advocacy on behalf of another individual. Advocacy may -

- Provide assistance, services and supports to individuals with significant disabilities who self- identify as being at risk of entering institutions so that the individuals may remain in the community.¹⁰

(1) Involve representing an individual -

(i) Before private entities or organizations, government agencies (whether State, local, or Federal), or in a court of law (whether State or Federal); or

(ii) In negotiations or mediation, in formal or informal administrative proceedings before government agencies (whether State, local, or Federal), or in legal proceedings in a court of law; and

(2) Be on behalf of -

(i) A single individual, in which case it is individual advocacy;

(ii) A group or class of individuals, in which case it is *systems advocacy*; or

(iii) Oneself, in which case it is *self advocacy*.

45 CFR 1329.4.

¹⁰ This is the full list of mandated core services:

Independent living core services mean, for purposes of services that are supported under the ILS or CIL programs -

(1) Information and referral services;

(2) Independent Living skills training;

(3) Peer counseling, including cross-disability peer counseling;

(4) Individual and systems advocacy;

(5) Services that:

(i) Facilitate the transition of individuals with significant disabilities from nursing homes and other institutions to home and community-based residences, with the requisite supports and services. This process may include providing services and supports that a consumer identifies are needed to move that person from an institutional setting to community based setting, including systems advocacy required for the individual to move to a home of his or her choosing;

(ii) Provide assistance to individuals with significant disabilities who are at risk of entering institutions so that the individuals may remain in the community. A determination of who is at risk of entering an institution should include self-identification by the individual as part of the intake or goal-setting process; and

(iii) Facilitate the transition of youth who are individuals with significant

Should you receive any complaint regarding RTF and subsequently conduct an investigation, it is imperative that you consider RTF's legal obligations and mandate, and that you also consider the ongoing and long-standing work RTF has done with and for Mr. Italiano personally

IV. Mr. Italiano's Requests for RTF's Services, the Initial Cooperation and the Subsequent Obstruction

When Mr. Italiano first contacted RTF, January 21, 2020, he had a guardian. This guardian, Jim Malee, was happy to hear that RTF would assist David to enroll in Community Health Choices as the first step to returning to the community. Mr. Malee had questioned David's need for the level of care he was receiving as well as the need for a guardian. Mr. Malee supported RTF. Mr. Italiano chose RTF as his Nursing Home Transition Coordination Agency after through discussion with RTF; he confirmed that choice in writing October 15, 2020 on the Office of Long-Term Living "Freedom of Choice Form" pursuant to an October 15, 2020 referral.

On August 19, 2020, Mr. Italiano' specifically authorized RTF to share "All information necessary for a safe and successful transition" his information with his guardian share" for Mr. Italiano in order "To participate in the NHT program." During 2020, there was abundant activity to further Mr. Italiano's transition to the community. RTF, as the relevant federally mandated organization and under contract in this regard by the Managed Care Organization, coordinated and facilitated this effort, with other entities and with explicit support, consent, involvement and encouragement from Mr. Italiano. He was referred to, and he considered and visited, community placements. He was in touch with multiple advocacy and other agencies.

Thus, Mr. Italiano had a voice. He repeatedly expressed his desire to receive advocacy and assistance from RTF, individually and with his guardian. For example, he had visits in the facility with RTF, as confirmed by the ombudsman.¹¹ Disability Rights Pennsylvania spoke with Mr. Italiano who confirmed he wants RTF to continue advocating for him.

Prior to its appointment as guardian the Huntingdon-Bedford-Fulton Area Agency on Aging ("AAA") informed the Orphans Court of evidence supporting the community transition for which Mr. Italiano with RTF had been advocating. AAA called as a witness the nursing home's physician

disabilities, who were eligible for individualized education programs under section 614(d) of the Individuals with Disabilities Education Act ([20 U.S.C. 1414\(d\)](#)), and who have completed their secondary education or otherwise left school, to postsecondary life. Individuals who have reached the age of 18 and are still receiving services in accordance with an Individualized Education Program (IEP) under IDEA have not "completed their secondary education."

45 CFR 1329.4.

¹¹ For example, on October 2, 2020, RTF was informed by the LTC Ombudsman STEP, Office of Aging, that Mr. Italiano was clear to receive visitors, that there would be "no issues" with meeting with him. October 8, 2020, RTF met with Mr. Italiano and he said he would inform the social worker that he wants to transition, and to ask her to assist.

and medical director¹² who testified that Mr. Italiano is "totally functional with taking care of activities of daily living" and that a "personal care or [an] assisted living home would be more appropriate for" him. AAA also presented a psychiatrist's report, which agreed with the physician/medical director; the psychiatrist wrote, "I agree with [Dr. Rosemary Wiegand] that [Appellant] could function with more independence at something like a personal care home or assisted living. Perhaps he could go onto completely independent living eventually but it would be good to see he can function adequately and safely with more liberty than what is available to him here."¹³ The AAA's protective services worker testified that Mr. Italiano could live "in a less restrictive setting."

On January 19, 2021, the Orphans Court adjudicated Mr. Italiano an incapacitated person and appointed the Huntingdon-Bedford-Fulton Area Agency on Aging ("AAA") as the guardian of Appellant's person and estate.

It is only since the guardian Mr. Malee was replaced by AAA that tension and resistance to the prior cooperation with RTF changed. AAA ceased to cooperate and instead actively (and in violation of Mr. Italiano's rights and RTF's federal mandate) obstructed RTF's advocacy for its client.

On February 5, 2021, in speaking with an RTF staff member regarding the confiscation of the cell phone, the facility director, Bobbijo Thompson, stated that the reason the phone was taken away was that it belongs to RTF and "they are court-ordered to not speak with David and it is Roads to Freedom's sneaky way of talking to him." Three days later, on February 8, 2021, the facility director, Bobbijo Thompson, stated in a phone call with RTF that she had a court order that prohibits David from speaking with an Advocate. (RTF has never been informed of such an order and believes that there is no such order).

This obstruction caused Mr. Italiano to fear "repercussions" if he "pursued [his] rights" after on February 5, 2021 – the same day the facility claimed that a court order prohibited Mr. Italiano's contact with RTF -- the facility in which he was confined confiscated his cell phone with which he intended to communicate with RTF. ¹⁴ This abusive pressure on Mr. Italiano began just a few days before a Civil Rights complaint for him was filed with the United States Department of Human Services, Office of Civil Rights ("OCR"), which OCR received February 12, 2021. Mr. Italiano consented in writing to OCR's investigation. That complaint is pending. On February 22,

¹² The nursing home was the prior placement of Mr. Italiano.

¹³ We quote here from the Superior Court decision finding Mr. Italiano incapacitated and appointing the Agency his guardian. Note that an petition for leave to appeal from that decision is pending before the Supreme Court of Pennsylvania; the petition was filed by Mr. Italiano's court-appointed attorney.

¹⁴ On February 15, 2021, Mr. Italiano handwrote a letter to RTF specifically expressing his fear of "repercussions" from the facility "if I pursued my Rights." He wrote that he had called RTF and left a message asking for help after a social worker whom he named confiscated his cell phone with no explanation, he wrote. He also said that he wants to live in Huntingdon County "with a different guardian if need be" (emphasis in original), and that he wants a "community based service there or Lycoming County here by my arrangement."

2022, RTF received a telephone call from a U.S. Department of Justice attorney regarding the OCR complaint.

You have been personally involved in RTF's efforts to resolve AAA's resistance and to facilitate dialog to that end. After the OCR Complaint was filed, and having previously spoken with you, as the Ombudsman, RTF emailed you on February 23, 2021, requesting your follow-up on assistance you said you would provide. We were requesting to meet with Mr. Italiano, the Ombudsman, guardian, and those involved with his care "to facilitate an open dialog" on "plans for his future." As of March 3, 2021, RTF had not received feedback from you. On March 11, 2021, RTF received an email from Secretary Torres stating that he cannot get involved that there is a process underway for Mr. Italiano and that RTF needs to allow the process to occur. On March 11, 2021, RTF wrote to you expressing the hope that you were making progress on scheduling a collaborative person-centered planning meeting with the Guardian, Consumer and Consumer's supports.

V. The Cease and Desist Request Must be Retracted, and Replaced with a Fair Collaborative Process Between Your Office and RTF

RTF finds your "cease and desist" request to be at odds with the facts stated above. Your request ignores the sustained professional relationship RTF has had with Mr. Italiano. Your request also ignores AAA's interference with Mr. Italiano's rights and its obstruction of RTF's work.

The Case and Desist request must be retracted:

- RTF was never informed of any complaint against it,
- RTF was never informed that there was any investigation, RTF was never interviewed regarding the allegations in your letter,
- RTF is unaware of any effort to resolve any complaint (if there was a complaint), and
- RTF was never provided an opportunity to respond to the allegations.

Also, we are not aware of any authority in the Ombudsman to issue "cease and desist" demands, especially where such demands are issued with no prior notice, and with no effort on your part to obtain relevant information from the recipient.

Moreover, there is long-standing evidence that RTF's contact with Mr. Italiano, and RTF's advocacy has been with Mr. Italiano's consent and at his request.¹⁵ You assert that "Mr. Italiano and his guardian have clearly indicated to my office that he does not wish to have any further contact with your organization or its representatives." However, you do not provide any documentation or details to support that assertion. And, it is true, it would be inconsistent with the dozens of interactions over the last more than two years in which during which Mr. Italiano and the prior guardian engaged deeply with RTF at his request.¹⁶

¹⁵ See discussion above demonstrating Mr. Italiano's repeated requests for assistance from RTF, and his confirmation that he seeks that assistance,

¹⁶ We recognize that, as you surely know from your experience, that someone who is in a controlled environment, and who justifiably fears retaliation and repercussions for asserting his rights, may be pressured with regard to what they are able to say.


The federal regulation you cite at the outset of your letter speaks to the Ombudsman's obligation to seek to "resolve" complaints. Although to our knowledge there has been no complaint to you regarding RTF (you have provided none, and your letter does not state that there has been any complaint), we suggest that the surprise ambush-like issuance of the "cease and desist" request is inconsistent with an effort to "resolve" whatever disagreement there may be.

Therefore, in addition to retraction of your letter, we respectfully request that you:

- Provide RTF with any complaint against it (if there was any complaint);
- Provide RTF with the unspecified documentation and information on which your letter relies, including but not limited to what you refer to as "conversations with involved parties;"
- Provide RTF with all evidence that "Mr. Italiano and his guardian have clearly indicated to my office that he does not wish to have any further contact with your organization or its representatives."

We are prepared to meet with you to discuss all issues and, in good faith, seek to resolve them.

Sincerely,


Misty Dion

Chief Executive Officer

Roads to Freedom Center for Independent Living of North Central PA