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Protecting Nursing Home Residents from Involuntary Transfers

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NSCLC

National Senior Citizens Law Center

Protecting the Rights of Low-Income Older Adults

The National Senior Citizens Law Center is a non-profit organization whose principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of local advocates, we seek to ensure the health and economic security of those with limited income and resources, and preserve their access to the courts. For more information, visit our Web site at www.NSCLC.org.

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
 - Surveyor's Guidelines in Appendix PP to State Operations Manual
 - VERY few published cases.

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.

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 to Notice Requirements

- “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.”
 - Surveyor’s Guideline to 42 CFR 483.12(a)(7), located in Appendix PP to CMS’s State Operations Manual.

Also, 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.”
 - 42 CFR 483.20(1)(3)

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.

Improper Justifications

- Residents should win most appeals.
- Facilities commonly allege facts that, even if true, should not warrant involuntary transfer.

“Resident Is Disruptive”

- Disruptive behavior is not equivalent to endangering health or safety.
- Oftentimes the allegedly disruptive behavior is function of health condition, e.g., dementia.

“Resident Is Noncompliant”

- Resident retains rights to make decisions.
 - Resident can refuse treatment.
 - Facility must make reasonable accommodations to address resident’s preferences.

“Our Quality of Care Is Insufficient to Meet Resident’s Needs”

- But facility’s inadequacy cannot be justification for involuntary transfer.
 - 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).

“Caring for Resident Is Too Expensive”

- Facility is obligated to provide care that resident needs to reach highest practicable level of well-being.
- Discrimination based on payment source, i.e., Medicaid, is prohibited.

“Resident Is Refusing Treatment”

- Resident doesn't surrender rights by moving into nursing facility.
- Resident has right to refuse treatment.
 - 42 CFR 483.10(b)(4)
- “A facility may not transfer or discharge a resident for refusing treatment unless the criteria for transfer or discharge are met.”
 - Surveyor's Guideline to 42 CFR 483.10(b)(4)

“Resident Does Not Need Facility’s Specialized Services”

- Facilities not allowed to cherry-pick particular type of resident.
 - Resident’s right to stay trumps potential benefits of facility specialization.

“Resident Is No Longer Under Medicare Reimbursement”

- Facility’s claim driven by preference for Medicare reimbursement.
- Facility must accept any payment source
 - Medicare, Medicaid, or private-pay.
 - Medicare-certified bed also will likely be certified for Medicaid reimbursement.
- Also, resident may still be entitled to Medicare reimbursement.
 - *See Jimmo v. Sibelius re “plateauing.”*

“Facility Is Part of Hospital”

- Nursing facilities within hospitals remain obligated to follow Reform Law.
- Caveat – Medicaid likely often will not be willing to pay higher reimbursement rate that may be owed to facilities located within hospitals.

“Resident’s Medicaid Application Is Being Processed”

- “A resident cannot be transferred for non-payment if he or she has submitted to a third party payor all the paperwork necessary for the bill to be paid.”
 - Surveyor’s Guideline to 42 CFR 483.12(a).

“Facility Has Voluntarily Withdrawn from Medicaid Program”

- Statutory change (1999) in response to evictions by Vencor facilities in Florida.
 - 42 USC 1396r(c)(2)(F)
- New(er) law protects all residents in facility when facility first moves to decertify.
 - Applies regardless of resident’s payment source at that time.

“Resident Has Exhausted Savings”

- Tennessee does not allow partial Medicaid certification.
 - Wrong if facility claims that it does not have a “Medicaid bed” -- informal quotas not allowed.

Defenses

- Facility has made procedural mistake.
 - *e.g.*, no MD documentation, no listed destination.
- These mistakes should not be ignored – otherwise, facility would have incentive to ignore procedural requirements.

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 same level of care as current nursing facility.

Returning to Nursing Facility After Hospital Stay

- Bedholds – ten days annually in Tennessee
 - Tenn. Comp. R. & Regs. R. 1200-13-01-.03(9), 1200-13-01-.06(2)(d)(6)
- Also, if bed hold period has been exceeded, right to return to next available bed.
 - 42 CFR 483.12(b)(3)

Advocating for Readmission: Time Is of the Essence

- Options:
 - Filing complaint.
 - Requesting transfer/discharge hearing.
 - Seeking court order.

Questions?

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- 20 Common Nursing Home Problems – and How to Resolve Them
 - Downloadable from www.nsclc.org