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Involuntary Transfer and Discharge: Hot Topic Issues

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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.

Mary Ann will discuss strategies