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INVOLUNTARY TRANSFER AND DISCHARGE[1]

Eric Carlson
National Senior Citizens Law Center
Los Angeles, California
(213) 639-0930

OUTLINE OF LAW

Allowable Reasons for Involuntary Transfer or Discharge

Under the federal Nursing Home Reform Law, a nursing facility can conduct an involuntary transfer or discharge only under one of the following six circumstances:

(1) The transfer or discharge is necessary to meet the resident's welfare, and the resident's welfare cannot be met in the facility;
(2) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
(3) The safety of individuals in the facility is endangered;
(4) The health of individuals in the facility would otherwise be endangered;
(5) The resident has failed, after reasonable and appropriate notice, to pay (or to have paid under Medicaid or Medicare on the resident's behalf) for a stay at the facility; or
(6) The facility ceases to operate.[2]

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[1] Portions of this outline are, with permission, reprinted or adapted from chapter four of Long-Term Care Advocacy, by Eric Carlson, a publication of Matthew Bender & Co.

[2] 42 C.F.R. § 483.12(a)(2). "42 C.F.R." signifies Title 42 of the Code of Federal Regulations. These regulations, along with the corresponding interpretive guidelines, are contained in the Surveyor's Guidelines distributed by the federal Health Care Financing Administration (HCFA). These regulations are sometimes referenced by specific "F-Tags" in the Surveyor's Guidelines.

Notice Requirements

If a facility intends to conduct an involuntary transfer or discharge against a resident, the facility must notify the resident and, "if known, an immediate family member of the resident or legal representative."[3] The notice must be written, in a language that the resident and/or resident's representative will understand.[4]

The written notice must include the reason for the transfer/discharge, along with the date on which it is to be carried out and the location to which the resident is to be moved.[5] The notice must state that the resident has the right to appeal the proposed transfer/discharge to the appropriate state agency.[6]

To ensure that the resident has adequate support, the notice must list certain advocacy organizations. All notices must list the name, address and telephone number of the Long-Term Care Ombudsman Program.[7] If the resident has a developmental disability or is mentally ill, the notice must include the mailing address and telephone number of the agency responsible for those individuals' protection and advocacy.[8]

Tennessee law requires that a facility notify the Ombudsman Program and the Health Department of the proposed transfer or discharge.[9]

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[3] 42 C.F.R. § 483.12(a)(4)(i).

[4] 42 C.F.R. § 483.12(a)(4)(i).

[5] 42 C.F.R. § 483.12(a)(6)(i)-(iii).

[6] 42 C.F.R. § 483.12(a)(6)(iv).

[7] 42 C.F.R. § 483.12(a)(6)(v).

[8] 42 C.F.R. § 483.12(a)(6)(vi), (vii).

[9] Tenn. Code Ann. § 68-11-803(b)(4).

In general, a facility must provide the notice at least 30 days before the proposed transfer/discharge,[10] although the exceptions to this rule are numerous. Notice may be given as soon as "practicable" before transfer/discharge if:

(1) The transfer/discharge is based on allegations that the resident's welfare requires a move to another facility, and "a more immediate transfer or discharge is necessitated by the resident's urgent medical needs;"
(2) The transfer/discharge is based on allegations that the resident is a danger to the safety or health of others;
(3) The transfer/discharge is based on allegations that the resident no longer needs the services provided by the facility, and "the resident's health improves sufficiently to allow a more immediate transfer or discharge;" or
(4) The resident has not resided in the facility for 30 days.[11]

The federal government has not indicated what length of notice is considered "practicable" in the instances when a 30-day notice is not mandatory. At a minimum, the notice period should be long enough to ensure that the resident can obtain a hearing decision before the effective date of the proposed transfer/discharge.

Nursing facilities often claim that notice of less than 30 days should be allowed when the transfer/discharge is based on allegations of nonpayment, but the federal government rejected this argument in the discussion accompanying the Federal Register release of the transfer/discharge regulations:

> Congress specifically intended a 30 day notice because [in the Nursing Home Reform Law] it exempted a 30 day notice for a number of reasons ... but not for nonpayment of services. We interpret this exemption as leaving the Department without discretion to consider the commenter's suggestion [to authorize notice of less than 30 days in instances of alleged nonpayment].[12]

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[10] 42 C.F.R. § 483.12(a)(5)(i).

[11] 42 C.F.R. § 483.12(a)(5)(ii).

[12] Medicare and Medicaid; Requirements for Long Term Care Facilities, 56 Fed. Reg. 48,826, 48,840 (1991).

Required Documentation in Clinical Record

The basis for the transfer/discharge must be documented in the resident's clinical record, unless the reason for the transfer/discharge is that the facility is ceasing operations.[13] If the transfer/discharge is based on allegations that the resident's welfare requires the transfer/discharge, or that the resident no longer needs the services provided by the facility, then the documentation must be performed by the resident's physician.[14] If the transfer/discharge is based on allegations that the resident endangers the health of others, then the documentation may be performed by any physician.[15] In all other instances, the required documentation may be done by any capable member of the facility's staff.

Preparation for Transfer or Discharge

If a nursing facility proposes to carry out an involuntary transfer or discharge, the "facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge."[16] Orientation may include (according to the Surveyor's Guidelines) "trial visits, if possible, by the resident to a new location."[17] These obligations, specific to involuntary transfers and discharges, are in addition to a facility's general obligation to prepare a resident to leave the facility. Pursuant to this general obligation, when a resident is expected to move from the facility in the near future, the 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."[18]

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[13] 42 C.F.R. § 483.12(a)(3).

[14] 42 C.F.R. § 483.12(a)(3)(i).

[15] 42 C.F.R. § 483.12(a)(3)(ii).

[16] 42 C.F.R. § 483.12(a)(7).

[17] Surveyor's Guideline to 42 C.F.R. § 483.12(a)(7).

[18] 42 C.F.R. § 483.20(e)(3).

ADVOCACY TIPS

Improper Justifications for Transfer or Discharge

1) Resident is disruptive.
2) Resident is argumentative and/or obnoxious.
3) Resident does not follow facility policies.
4) Resident has injured staff members.
5) Resident refuses treatment.
6) Caring for resident is too burdensome and/or expensive.
7) Facility is exposed for potential legal liability for injuries suffered or caused by resident.
8) Resident does not need facility's specialized services.
9) Medicaid has ruled that resident does not need nursing facility care.[19]
10) Resident's Medicaid application is in process; facility has not been paid.
11) Resident has exhausted savings; now is Medicaid-eligible.
12) Facility has voluntarily withdrawn from Medicaid program.
13) Facility is part of hospital complex.

Defenses to Involuntary Transfer or Discharge

1) Facility able to meet resident's needs.
2) Resident poses no danger to safety or health of others.
3) Resident's physician has not documented need for transfer.
4) Facility has not identified more appropriate facility.
   a) Alternative facilities do not provide appropriate level of care.
   b) Alternative facilities not significantly different than current facility.
5) Facility has provided inadequate notice of proposed transfer or discharge.
6) Facility has failed to prepare resident for transfer or discharge.

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[19] But Georgia law specifically says that such a Medicaid determination establishes the appropriateness of the resident's transfer or discharge. *See* Ga. Code Ann. § 31-8-116(a); Ga. Comp. R. & Regs. r. 290-5-39-.11. Although language of state law generally is not relevant to an interpretation of federal law, a Georgia hearing officer likely would approve transfer or discharge in situations in which the Medicaid program previously had found that the resident did not need the facility's level of care.

TRANSFER & DISCHARGE ISSUES
Ombudsman Regional Conference
June 13, 2001

I. Introduction

II. Transfer & Discharge Basics

A. Definitions

1. Transfer - moving resident to another legally responsible institutional setting
2. Discharge - moving resident to a non-institutional setting when the releasing facility ceases to be legally responsible for the resident's care
3. T/D protections are applicable ANYTIME the facility initiates the T/D, even where the resident agrees to the facility's decision

B. Permissible T/Ds

4. necessary for resident's welfare AND facility cannot meet
5. resident's health has sufficiently improved
6. resident is danger to health or safety of him/herself
7. resident is danger to health or safety of others in facility
8. after reas and appro notice, resident has failed to pay of services
9. facility ceases to operate

C. Documentation

1. Basis must be documented in resident chart, except for #6
2. Resident's dr. must document if #1- #3
3. Any dr. if #4
4. Any capable NH staff if #5

D. Notice

1. Written
2. Resident AND if known, an immed. family member or legal rep.
3. Must include:
   a. reason
   b. date of T/D
   c. location of T/D
   d. right to appeal
   e. LTCO contact info.
   f. P & A contact info., if DD/MI

4. Generally 30 D notice, except may be given as soon as practicable if:

a. resident's welfare req. move to another facility AND a more immed T/D is recess by resident urgent med. needs
b. T/D based on allegations that resident is danger to health/safety of others
c. resident no longer needs services provided by facility AND resident health improves sufficiently to allow more immed T/D

E. Sufficient Preparation & Orientation to Ensure Safe & Orderly D/C

1. Including trial visits if possible
2. In addition to facility's general obligation to prepare resident to leave facility
   a. Post-D/C plan of care
      i. assists resident in adjusting to new living environment
      ii. resident & family help develop

F. Appeals

1. Usually carried out by state Medicaid agency, if not then must have right to appeal to State agency

2. Governed by fair hearing process
   a. states must issue & publish fair hearing procedures
   b. residents must be informed in writing of right to hearing
   c. residents must be informed in writing of how to request hearing
   d. OK to require that request for hearing be in writing

3. Conduct of hearing
   a. reasonable time, date & place
   b. must be conducted by impartial hearing officer
   c. Burden of proof governed by state law

4. Resident's Hearing Rts
   a. Prior to hearing, right to examine files, documents, and records to be used at hearing, subject to reas. time/place
   b. Rt to be represented by person of choice, NO RIGHT to an attorney
   c. Bring witnesses
   d. Rt to question and refute any testimony or evidence, including opportunity to confront & cross examine adverse witnesses
   e. Rt to continued Medicaid payment for care until hearing is held and decision is reached

5. Hearing Record & Decision
    a. record consists ONLY of transcript, papers filed in the hearing, and recommendation/decision of hearing officer
    b. resident must have access to record at convenient time & place
    c. decision must be based exclusively on evidence introduced at hearing
    d. decision must summarize facts & id. regs that support decision
    e. if decision favorable
        i. agency must make corrective payments retroactive to the date of the action
        ii. if appropriate, provide for admission or readmission of individual to facility

G. Bed-hold

1. Written notice to resident and legal rep/family member before transfer of state's bed-hold policy
2. Second written notice upon transfer
3. If exceed bedhold days AND Medicaid eligible AND require services provided by nursing facility, resident has rt to first available bed (Medicare and private pay residents do NOT have this right)

III. Common Situations

A. Facility says resident needs more services than it can provide

1. Argue that "must provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with written plan of care." Therefore, facility must show what it has done to meet this burden and why this does not meet the resident's needs
2. If T/D to another facility, argue that this shows need for nursing facility care. Facility must show why the other facility can provide what they cannot. If not, argue that facility is merely refusing to provide what this resident needs.
3. Really only permissible T/D on this ground is where resident needs services not mandated by the Nursing Home Reform Law, ex. ventilators

B. Resident's behavior is aggressive/disruptive and threatens others

1. Facility must show what services it offered to alleviate these behavior problems. T/D should NOT be first on this list.
2 Show that there are other resident with similar problems.

3. If injury has occurred, appropriateness of T/D will likely turn on severity of injury.
4. If injury to staff look at what training has been provided in dealing with these problems

C. Facility has not been paid

1. Argue that law provides for T/D ONLY when RESIDENT has not paid. Resident should not be penalized where a family member or conservator is not paying.
2. Facility has obligation under social services to assist resident with legal/financial problems. Focus on what facility has/has not done to address underlying payment problems

IV. The Case of John Strong, Demonstrative Hearing

V. Wrap-Up