

**Resident's Rights regarding Transfer/Discharge and Readmission
Project 2025 LTC Audio-Conference Series**

August 14, 2008

Speakers

Joani Latimer
*State Long-Term Care Ombudsman
Office of the State Long-Term Care Ombudsman*

Kathy Pryor, Esq.
*Elder Law Attorney
Virginia Poverty Law Center*

- Today's session on a nursing home resident's rights regarding involuntary transfer or discharge from a nursing home and the right of readmission after a hospital stay
- Other sessions scheduled (all at 10:00am Eastern)
 - ❖ November 13th: Alternatives to Nursing Homes
 - ❖ November 20th: Care Issues
 - ❖ December 3rd: Residents' Rights & Surrogate Decision Making
- Materials on these topics can be found at www.valegalaid.org under Elder Law

Our topic today is a nursing home resident's rights with regard to an involuntary transfer or discharge initiated by the nursing home.

Q) First, could you explain what we mean by an involuntary transfer or discharge?

A)

- Transfer is moving a resident from one facility to another legally responsible institutional setting—typically, moving a resident from one nursing home to another nursing home. Also can have a transfer from one “distinct part” of the facility to another within the same facility if it is separately certified under Medicare or Medicaid—all notice and appeal protections apply to this type of transfer. But a move from one bed to another in the same certified section is not a transfer to which notice and appeal rights attach.
- Discharge means moving a resident to a non-institutional setting—most typically to the resident's home or the home of a family member.
- Involuntary—whenever the transfer or discharge is initiated by the facility, not by the resident. These protections apply whenever the facility initiates the transfer or discharge.

Q) Does a resident have the right to refuse a transfer to another bed within the facility?

A) Yes, if the purpose of the transfer is to relocate a resident of a skilled nursing facility from a SNF to a NF certified section or vice versa in order to obtain Medicare or Medicaid eligibility. But if resident is not in a properly certified bed, may not be covered, so this right may only be helpful if the beds are dually certified. Just a move from one bed to another in the same certified section requires some notice, but is not appealable.

Q) Do the rules we are going to talk about today apply to residents of assisted living facilities as well as nursing home residents?

A) No, these protections apply only to residents of nursing homes. The rules regarding transfer/discharge for assisted living residents are much less helpful and there is no appeal. We are talking today just about nursing home residents' rights.

Q) Can a nursing home resident be discharged or transferred because he breaks a rule or complains about nursing home policy?

A) No, there are only six allowable reasons a nursing home resident can be involuntarily transferred or discharged and complaining or breaking a rule, unless it puts others' safety or health at risk, is not grounds for discharge.

Q) What are the six allowable reasons for transfer or discharge under federal law?

A)

- (1) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- (2) The resident's health has improved sufficiently so resident no longer needs nursing home care;
- (3) The safety of individuals in the facility is endangered by the resident;
- (4) The health of individuals in the facility is endangered;
- (5) The resident has failed, after reasonable and appropriate notice, to pay;
- (6) The facility ceases to operate.

Most frequent reasons are (1), (3), and (5) and we'll be talking about these reasons in more detail.

Q) What is the role of the resident's doctor in making the decision about discharge? What documentation is required?

A) If the facility says the resident's needs cannot be met in the facility or that the resident's health has improved sufficiently that he no longer needs nursing home care, the resident's physician must document that in the clinical record. If the facility claims that the health of other residents is endangered, a physician (but not necessarily the resident's doctor) must document the clinical record. For the other reasons, any capable member of the facility's staff can document the chart.

In addition, state law requires that, except in an emergency, the patient's attending physician (or if unavailable, the facility's medical director along with the nursing director, social worker or another health professional) be consulted and the attending physician is required to make a written notation in the resident's record approving the discharge after consideration of the effects of the transfer or discharge, appropriate actions to minimize the effects, and the care and kind of service the patient needs upon transfer or discharge.

Q) Can a nursing home force the family to take the resident out without giving any notice?

A) No, federal law requires a facility to give written notice of the proposed transfer or discharge.

Q) Who should receive the notice and how much notice is required?

A) The notice must notify the resident, and if known, a family member or legal representative of the transfer or discharge and the notice should be in language they understand. Generally, 30 days' notice prior to the discharge is required but there are some exceptions to the 30 day requirement.

Q) What must the notice include?

A)

- Reason for the transfer or discharge;
- Effective date;
- Location to which the resident is to be moved;
- Right to appeal to DMAS;
- Name, address and phone number of the State Long Term Care Ombudsman;
- Possibly other contact people who might be able to assist.

Q) Can the nursing home simply require the family to find a placement for their loved one or put the resident out without any assurance that she has a safe place to go?

A) No. Unfortunately, nursing homes do sometimes try to put the burden on the family to find a place for the resident to go. A nursing home is obligated to “ensure the safe and orderly transfer or discharge from the facility.” Failure to find an appropriate placement or to put in place appropriate services can be grounds to challenge the transfer or discharge.

Q) What can a resident or family member do if they receive a notice that the facility is transferring or discharging the resident?

A) There are several things the family can do. One is to immediately contact the local long term care ombudsman to see if he or she can assist. If the facility’s action is inappropriate, the ombudsman may be able to convince the facility to back down and rescind the discharge. The family may also want to contact legal aid quickly if the ombudsman is not able to convince the facility to drop the discharge.

Any involuntary transfer or discharge by a facility that is certified by Medicare or Medicaid can be appealed to DMAS. The transfer/discharge action is appealable to DMAS whether or not the resident is on Medicaid—in other words, a private pay resident can also appeal the discharge action to Medicaid.

The appeal needs to be filed before the date of the discharge. The facility will be told by DMAS that they must allow the resident to remain in the

facility until a hearing decision is reached, so this is an important protection to maintain the status quo until the Medicaid hearing is held and a hearing decision is issued.

Q) Is there anyone who can help with this process?

A) The ombudsman and legal aid can be very helpful in this process. Depending on how determined the facility is to “get rid” of the resident, an ombudsman or lawyer may be able to persuade the facility to drop the discharge if the facility can be shown that their notice was defective or that the discharge was inappropriate for some other reason.

Q) What are some valid defenses to an involuntary discharge or transfer?

A)

- Defective notice—e.g., doesn’t state location to which to be transferred; doesn’t give enough time; fails to give accurate appeal rights, etc.
- Lack of proper documentation of the resident’s chart
- Lack of an appropriate discharge plan;
- The reason for the threatened transfer or discharge is not valid or the facts do not justify the reason stated.

Q) How do you know whether the nursing home has made an appropriate discharge plan?

A) The discharge plan must be safe and appropriate such that the resident will not be at risk if sent to the proposed location.

Examples that are not appropriate discharge plans:

- Sending a resident “home” to someone who is either not willing or unable to care for him—e.g. inappropriate to discharge resident to home of his 80 year old mother who had admitted son with traumatic brain injury 1 month earlier because she could no longer care for him; or to send resident to home of his guardian who barely knew him and was himself elderly; or to send resident to last known address of estranged son who had misappropriated his funds, not seen father in over a year, and facility did not even know whether son still lived there.

- Have adequate care arrangements been made—e.g. facility was sending lady home to her home and had contacted a care provider, but lady required 24-hour care and care provider couldn't provide that—so facility backed down.
- Is plan reasonable?—e.g. sending a Virginia resident to a Florida facility when they had no family or friends in FL; sending a resident to a Salvation Army shelter where there was no one to provide care and where the people had to leave during the day time.
- If intend to transfer to another nursing home, is the other facility any better equipped to care for this resident than the current home? If not, why is transfer appropriate?

Q) Is there any defense to non-payment?

A) Yes, there may be. For example, if the resident's family failed to pay his bill but resident wasn't at fault—and particularly if the current payment situation is resolved and the monthly bill is now being paid—why should the resident be discharged? Or if the facility failed to take timely actions to help the resident apply for Medicaid such that a bill accrued, the resident should not bear the responsibility. Sometimes there is something that can be done to help the resident become eligible for Medicaid. Sometimes a back balance can be resolved by adjustment of the patient pay obligation for someone on Medicaid. Legal aid can be particularly helpful in these cases where Medicaid eligibility is involved or where there is a back bill from before Medicaid eligibility was established. In these cases, sometimes both the resident and the facility can benefit from legal assistance to get the resident on Medicaid.

Q) What if the resident was admitted to the nursing home from the hospital for rehabilitation as a skilled patient covered by Medicare and Medicare coverage is now ending? If the facility tells the family they have to take the resident home, must they do so?

A) No. Frequently, a nursing home tells the resident that they are accepting him for rehabilitation only and once Medicare coverage ends, he'll have to leave. Too often the family simply takes the resident home “voluntarily.” That's fine if the resident is ready to go home and can manage fine at home. But sometimes the resident still needs to be in a nursing home and still qualifies for nursing home level of care. The same six reasons for discharge apply in this case and the written notice and appeal rights apply. Just

because Medicare coverage is going to end, doesn't mean there is yet a non-payment situation.

- If the resident receives notice that Medicare is being cut off, it may be advisable to appeal the Medicare decision.
- In addition, the family may need to be applying for Medicaid coverage if the resident does not have enough resources to pay as a private pay resident.
- If the resident is eligible for Medicaid, he should be sure he is in a Medicaid-certified bed. Some facilities have all dually certified beds so there would be no reason to move the resident simply because he is now covered by Medicaid rather than Medicare.
- The family also needs to be paying most of the resident's monthly income to the nursing home—this is called the “patient pay obligation” under Medicaid and is generally the resident's monthly income less the \$40/month personal needs allowance.
- Conversion from Medicare to Medicaid or from private pay to Medicaid is not non-payment and does not by itself justify discharge. There must first be an existing unpaid balance and reasonable and appropriate notice must have been sent.

Q) What if the facility claims they cannot meet the needs of the resident? Isn't that a clue that you really don't want your loved one there if they are saying they cannot provide adequate care?

A) Although this is a frequently stated reason for discharge, this should rarely be a bona fide reason for discharge. While saying that the discharge is “necessary for the resident's welfare” sounds like the facility is looking out for the resident's interests, most of these cases involve a resident who simply requires more care and takes more staff time—or perhaps is more difficult to deal with—so that the facility would prefer to replace her with a resident who requires less care.

A facility is required to “provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being” of each resident. In many cases, the facility has not met its burden if they are claiming they can't meet the resident's needs.

Might ask the following questions or consider these issues:

- Has there been a significant change in the resident's condition and if so, has there been a new assessment?
- What care planning efforts have been made to attempt to meet the resident's needs? [May want to request a care planning meeting if there has not been one recently and may want to include the long term care ombudsman in that meeting]
- Resident has the right to refuse treatment, so refusal of treatment is not grounds for discharge;
- What can the new facility provide that the current one cannot? If the new facility isn't any better equipped to deal with this resident's needs, there should be no reason to transfer her.
- Facility cannot simply fail to provide appropriate care and then claim they cannot meet the resident's needs.
 - Example: Family complained of facility's failure to change resident's underwear or to give regular baths; failure to put resident on a toileting schedule; failure to chop up food so that resident didn't choke on it; failure to diagnose a UTI; failure to transfer resident gently enough that she wasn't bruised; failure to keep resident's nails and teeth cleaned; and failure to do proper wound care. As a result of these complaints about routine care, the facility claimed they could not meet resident's needs and that she needed to find another facility that could meet her needs.
 - Example of resident who had repeated falls due to her condition—facility claimed they couldn't meet her needs and wanted to send her home to her family—who were of course not trained—as nursing home staff supposedly are—to avoid falls.
- Arguably, the only permissible reason for discharge on this ground would be if the resident needs a service that is not mandated by the Nursing Home Reform Law—such as a ventilator—and this facility does not offer this service but the other facility to which the resident is to be transferred does provide ventilator service.

Q) If the nursing home says that the resident is a danger to the safety of others, is there anything the family can do?

A) Yes, these cases are often worth appealing because often the resident is not truly a danger to the safety of others.

- What interventions has the facility attempted and why have they been unsuccessful. Have these interventions been fully implemented? Are there other interventions that might be tried? Transfer should be a last resort and certainly not be the first attempt to deal with the problem.
- Is the behavior simply a symptom of the resident's condition and beyond his control and behavior which the staff should be trained to deal with?
- Does the facility to which the transfer is planned have specialized services to benefit the resident—if it is no better equipped to deal with the problem, why put the resident through the disruption of a move?
- Is the behavior truly a danger to the safety of others? Or is it merely offensive speech, or striking out at staff because they have not yet learned how to approach the resident effectively? Is the resident too weak or limited in mobility to genuinely pose a danger to the safety of others?
- Has the staff been trained how to deal with dementia or how to approach someone who strikes out when being bathed or changed?
- There is often an adjustment period for a new resident and it takes some time for the staff to learn how to approach the resident. Example of case where the facility initiated discharge proceedings one month after admission; by time received hearing decision, the staff had learned how to approach the resident and the facility no longer wanted to discharge him.
- Fact that this resident is too staff-intensive or too expensive to deal with is not grounds for discharge. Need for more extensive or expensive care is not one of the six reasons for discharge.

Q) Are there any protections for a nursing home resident if she is admitted to the hospital and then, when the hospital is ready to discharge her, the nursing home refuses to readmit her? Must the family pay to hold the bed while the resident is in the hospital?

A) Yes there are some protections. This is too often a way a nursing home attempts to circumvent the transfer/discharge protections and “to dump” a

difficult resident or a resident with an unpaid balance without having to go through the notice and discharge planning process.

- Medicaid does not pay to hold the bed for hospitalizations. Does pay for up to 18 therapeutic leave days within a 12 month period.
- Unless the family pays to hold the bed, there is no guarantee that the resident can return from the hospital to the same bed.
- The nursing home is required to give two notices about the bed hold policy—one probably at time of admission and another any time the resident is sent to the hospital or leaves on therapeutic leave.
- Facility is required to have a written policy under which a resident whose hospital stay or therapeutic leave exceeds the bed hold period, must be readmitted to the first available bed in a semi-private room as long as the resident still needs nursing home care and is eligible for Medicaid nursing facility services.
- Definitely means that a resident on Medicaid must be readmitted to the first available bed in the nursing home as long as he still needs nursing home care.

Q) What can be done if the nursing home persists in refusing readmission?

A)

- Ombudsman can be helpful and may be successful in getting the resident back in without an appeal.
- Could also call OLC and licensure office may tell the facility to readmit.
- If nursing home refuses to readmit and the resident is on Medicaid, should immediately file an appeal with DMAS.
- Problem is that appeals take time and it is likely that the hospital will have to send the resident somewhere else, often at some distance from the family. But may be able to get resident back into the original facility through an appeal.

Q) If the nursing home sends a discharge notice or refuses to readmit a resident after a hospital stay, what can a resident or family member do?

A) If the family or ombudsman is unable to resolve the problem and get the resident readmitted or the discharge notice rescinded and assuming the resident wants to stay in this facility, the resident or family should file an

appeal with the Department of Medical Assistance Services. The appeal must be filed before the date of the threatened discharge. Assuming the resident is still in the facility, the facility will be required to keep the resident until after the hearing is held and decision rendered.

Q) What is a Medicaid fair hearing like?

A)

- Generally, in a hearing on the issue of a nursing home discharge, the hearing will be held at the facility so the resident can be present if she wishes.
- Often the hearing officer will participate by phone unless you request well in advance that the hearing officer be present in person. It is usually best to request the hearing officer be present in person.
- The facility is required to draft an appeal summary explaining their actions and you should receive this at least 10 days before the hearing.
- If you have authority from the resident, you have the right to review and copy the file at the nursing home;
- The resident has a right to be represented at the hearing. The resident's representative has a right to cross-examine the facility's witnesses and to present any witnesses for the resident.
- Witnesses will testify under oath;
- The hearing is taped so there is a record of what happened at the hearing.
- The hearing officer will hear from the witnesses on both sides, will consider the admission of documentary evidence, and will later issue a written decision based on the evidence and testimony at the hearing.
- The resident has the right to remain in the facility until the hearing decision is issued.

Q) What can a hearing officer do?

A) The hearing officer can sustain the action of the facility (agree with facility's action), can reverse the action (find that it was improper and that the facility cannot transfer or discharge the resident), or can remand the case for the facility to take further steps before they can discharge the resident.

Q) What if you get an unfavorable hearing decision?

A)

- An unfavorable decision can be appealed to state circuit court through an appeal under the Administrative Process Act.
- There are very strict time deadlines for such an appeal.
- An appeal is based on the record made at the hearing and no new evidence will be taken.
- The standard of review is very limited so an appeal to state court will only be a good option where the hearing officer made a clear error of law or it is clear that the hearing decision is not supported by the evidence.
- Another problem is that there is no injunctive relief under the Administrative Process Act so, unless other action is also taken or the facility agrees not to discharge pending the court appeal, the resident could be discharged while the case is pending in state court.
- Sometimes the resident's circumstances have changed by the time the decision is rendered such that the facility decides not to pursue discharge even though the hearing decision allows them to proceed.
- Further negotiation or a settlement agreement may also stop further action.