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Well, Here's Another Nice Mess You've Gotten Me Into: Managing Difficult Admissions and Discharges

VHCA 2007 Convention

Presented by Peter M. Mellette, Esq.

Panelists:

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Admission Issues: Preventing Resident Problems Before They Begin

- The best way to avoid a problem resident in the future is to not admit a prospective resident.
- Key Advice: Resist the urge to admit the high revenue resident before
 - completing the preadmission screening process
 - getting a decision maker's signature on your admissions agreement
 - doing a financial screening



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Preadmission Screening in Virginia

- Virginia requires a comprehensive assessment for all potential residents (12 VAC 5-371-250(A)).
- An assessment must describe the resident's capabilities and impairments.
- Before admittance, a facility must make a determination of a resident's needs based on:
 - the completed assessment,
 - a physical examination, and
 - an interview between the facility and the resident

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Admissions Agreement

- Includes:
 - signature of competent resident and/or responsible party
 - HIPAA and care designations/consents
 - financial responsibility
 - including DMAS application and Medicare RP
 - arbitration clause, if desired
 - duties, rights and services
 - readmission and discharge
- To be reviewed annually

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Financial Screening



- Payor source
- Power of Attorney (POA) with control over assets
- No unexamined “red flags”
 - different general POA and medical POA
 - no POA for potentially incompetent
 - POA out of state or non-relative
 - evidence of recently transferred assets
 - refusal to use acceptable ancillary source or refusal by source to provide service

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Admissions Policy

Reviewed annually

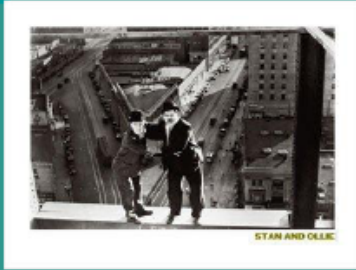
Under the Fair Housing Act (FHA), it is unlawful to discriminate in the sale or rental of property due to a renter or buyer's handicap.

- A handicap includes “a physical or mental impairment which substantially limits one or more of . . . [a] person's major life activities”.

There is the potential for a nursing facility to be faced with a discrimination claim for denying a prospective resident admission on the basis of his or her health assessment.



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Ways to avoid possible discrimination claims

- An individual's medical requirements, not physical or mental limitations, should control the admission decision.
- Avoid committing to and putting in writing an admission policy that prefers private payors over Medicaid or Medicare recipients.
- Remember, in some cases a facility is better off not admitting a patient, even if it leads to potential litigation or even regulatory pressure.

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Other Admission “Red Flags”

- mental status
- habilitative needs
- sex offender
- isolation requirements
- ancillary needs



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BASES FOR DISCHARGE

- Necessary for resident's welfare
- Resident's needs cannot be met in facility
- Resident no longer needs the services of the facility
- Safety of individuals in facility is endangered
- Health of individuals in facility is endangered
- Resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility
- Facility ceases to operate

42 CFR 483.12(a)(2) and Va. Code Section 32.1-138(A)(5)

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ACTIONS NEEDED BEFORE ANY DISCHARGE

- Give **notice** to resident (in writing if time permits) and to responsible party/legal representative.
- Document **reasons for transfer** in clinical record.
- Identify **discharge location**.
- **Physician must review** above information and approve a non-emergent transfer.

42 CFR 483.12(a)(6) and Va. Code Section 32.1-138.1

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ANY DISCHARGE: GIVE WRITTEN NOTICE



Must be given to resident and legal representative with reasons for the discharge.

Contents:

- Reasons
- Effective date
- Location
- Appeal Rights
- Ombudsman info
- VOPA info

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30-DAY NOTICE RULE FOR ANY DISCHARGE

- Notice must be given 30 days prior to non-emergency transfer/discharge, however, exceptions to the 30-day notice rule include:
 - Safety risk
 - Health risk
 - Improved health
 - Urgent medical needs
 - Did not reside for more than 30 days



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OTHER REQUIREMENTS FOR ANY DISCHARGE

- Facility must provide orientation for transfer/discharge.
- Written notice of bed-hold policy, if any, including first availability rule for Medicaid beneficiaries.
- Seek to obtain informed consent for the transfer/discharge from the resident or a responsible party.
- Provide for consultation with patient, family, responsible party, and patient's attending physician (exception for emergencies).

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INVOLUNTARY TRANSFER/DISCHARGE



- In the case of involuntary transfer, the facility must ensure that there are:
 - Notations in the resident's record by attending physician or medical director approving the transfer/discharge after consideration of effects of transfer/discharge;
 - Appropriate actions to minimize effects of the transfer/discharge;
 - Current assessments of care needs and the kind of service the resident needs upon transfer/discharge;
 - Written notices to the resident/responsible party.

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HEARING PROCESS: RIGHT TO APPEAL



- Regardless of payor, resident and/or the resident's family member, responsible party, or legal representative has the right to appeal the nursing facility's decision to transfer or discharge involuntarily through an administrative law hearing conducted by DMAS.
- Need to decide how far to go before appeal starts.

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HEARING PROCESS: HOW TO REQUEST AN APPEAL

- The transfer/discharge notice must include information about how to request a hearing before DMAS and the resident's rights to use legal counsel or other spokesmen at the hearing.
- DMAS has had 127 appeals in the last 3 years – 57% have been resolved before appeal, only 16-19% have upheld a discharge.



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HEARING PROCESS: NOTICE OF APPEAL RIGHTS

- A resident must be given notice of the right to appeal 10 days before the discharge/transfer is to take place.

Note: Best practice is to include this information in the 30-day notice letter.

- DMAS has required facilities to retain residents during appeal.

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REFUSAL TO RE-ADMIT RESIDENTS: INTENT TO RETURN

- If nursing facility transfers resident to a hospital or other facility and the resident has manifested the intent to return, the nursing facility has a regulatory duty to give 30 days written notice and re-admit the resident pending 30 days expiration except in certain situations.
- Issue is possible regulatory citation and ill will versus risk removal.



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APPROPRIATE REASONS TO REFUSE RE-ADMITTANCE

- The resident's documented medical needs are greater than the nursing facility can provide.
- The resident has an infectious disease that cannot be managed in the nursing facility.
- Nursing facility cannot accommodate the resident's mental condition and needs without endangering the health and safety of other residents.

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Confusion over DMAS's update to the Nursing Facility Provider Manual

- On November 3, 2006, DMAS released a memo purporting to update the rules relating to a nursing facility's refusal to re-admit a resident whose hospitalization or therapeutic leave exceeded the bed-hold period.
- The memo stated that a facility could not refuse to re-admit a resident for the following reasons:
 - The resident had medical and/or behavioral needs that could not be met by the nursing facility;
 - The resident was judged by a physician to be a danger to self or others;
 - The resident had an outstanding payment due to the facility for which he or she was responsible.

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Confusion over DMAS's update to the Nursing Facility Provider Manual (con't.)

- However, in a Sample Compliance Plan that DMAS included with the memo, the notice stated that a facility must re-admit at “the next available vacancy with the following exceptions,” which include resident’s needs cannot be met by the facility, resident is danger to self or other, or resident has an outstanding payment.
- This update memo generated confusion among providers, but the status of the memo is still pending resolution.



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BEHAVIORAL ISSUES: RESIDENT VISITATION RIGHTS

A resident has the right to, and the nursing facility must provide, immediate access to family members and other visitors, e.g., VOPA.

The resident can deny or withdraw consent to visitation by family members at any time.

Visitation by others is limited by reasonable restrictions and the resident's right to deny or withdraw consent at any time.

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RESIDENT-TO-RESIDENT ABUSE



- Residents who are abusive to other residents must be monitored and must have a care plan that addresses the abusive behavior.
- Those residents subject to abuse must be protected from further injury.
- Residents whose behavior is a safety or health danger to another resident can be transferred or discharged.

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ABUSIVE OR VIOLENT VISITORS

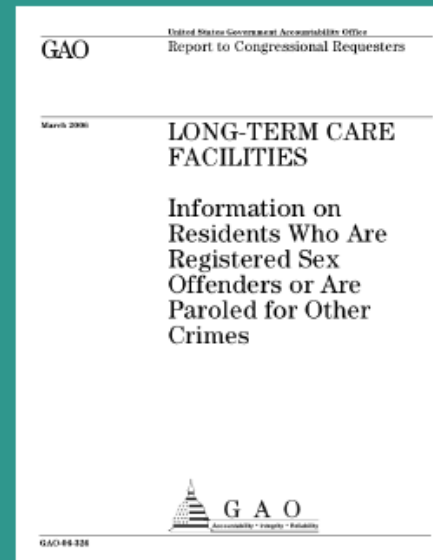
- Likewise, a nursing facility has a duty to respond to family member's or visitor's behavior when that behavior rises to a violent or abusive level and poses a foreseeable, ongoing danger to residents or staff.



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SEX OFFENDERS LIVING IN LONG TERM CARE FACILITIES

- A recent GAO report noted that over 650 sex offenders are currently residing in nursing facilities and state laws regarding whether the convicted offender must notify the nursing facility of the prior conviction vary between states.
- New Virginia law requires nursing facility due diligence.



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SEX OFFENDERS LIVING IN LONG TERM CARE FACILITIES (con't.)

- Nursing facilities may subject a resident to supervision or separation based on the resident's prior convictions if the resident presents a current safety or health concern.
- Whether a nursing facility can discharge a convicted sex offender for the prior conviction may depend on whether the individual currently poses a safety and/or health risk to other individuals in the facility.
- Unless the convicted sex offender poses an immediate health and/or safety danger, he or she probably cannot be discharged without 30-day notice.

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SUMMARY: CONDUCTING SMOOTH AND ORDERLY RESIDENT DISCHARGES

- Ensure the notice is properly given to resident, family members, responsible party, and legal representative to give residents and family time to prepare for the transfer or discharge.
- Involve the resident and family members in planning the discharge or transfer, e.g., give the resident a tour of the destination before the relocation date to minimize transfer trauma.

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CONDUCTING SMOOTH AND ORDERLY RESIDENT DISCHARGES (con't.)

- Ensure that nursing facility has obtained approval for the discharge from the provider's medical director and the resident's attending physician.
- Ensure that reasons for the discharge/transfer have been well documented in the resident's clinical record.



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CONCLUSION AND MORAL



- Hard to lose if you don't admit.
- A comprehensive up-to-date admissions agreement and policy is a nursing facility's best defense.
- Remember that decertification of beds and refusal to re-admit following a hospitalization may not work as a substitute to discharge.

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PANEL DISCUSSION

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