Iowa Health Care Association
Iowa Center for Assisted Living
Iowa Center for Home Care

Practice Tips Regarding

SNF Involuntary Discharge

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PRACTICE TIPS REGARDING SNF INVOLUNTARY DISCHARGE

Recent changes to the federal certification guidelines relating to involuntary discharge has limited the scope of justifications that can be relied upon in pursuing discharges. In addition, a trend has developed by Administrative Law Judges during contested administrative proceedings, reversing involuntary discharge actions for failing to strictly comply with required notice provisions.

A. States Rules Relating to Involuntary Discharge Notices:

Prior to an involuntary discharge, there shall be "a written notice to the resident and the responsible party." Id. § 58.40(5)(a). The notice: shall contain all of the following information: (1) The stated reason for the proposed transfer or discharge. (2) The effective date of the proposed transfer or discharge. A statement, in not less than 12-point type, that reads as follows:

> You have a right to appeal the facility's decision to transfer or discharge you. If you think you should not have to leave this facility, you may request a hearing, in writing or verbally, with the Iowa department of inspections and appeals (hereinafter referred to as "department") within 7 days after receiving this notice. You have a right to be represented at the hearing by an attorney or any other individual of your choice. If you request a hearing, it will be held no later than 14 days after the department's receipt of your request and you will not be transferred before a final decision is rendered. Extension of the 14-day requirement may be permitted in emergency circumstances upon request to the department's designee. If you lose the hearing, you will not be transferred before the expiration of either (1) 30 days following your receipt of the original notice of the discharge or transfer, or (2) 5 days following final decision of such hearing, including the exhaustion of all appeals, whichever occurs later. To request a hearing or receive further information, call the department at (515)281-4115, or write to the department to the attention of: Administrator, Division of Health Facilities, Department of Inspections and Appeals, Lucas State Office Building, Des Moines, Iowa 50319-0083.

The notice shall be personally delivered to the resident and a copy placed in the resident's record." Id. § 58.40(5)(b). Further, "[a] copy shall also be transmitted to [DIA]; the resident's responsible party; the resident's primary care provider; the person or agency responsible for the resident's placement, maintenance, and care in the facility; and the department on aging's office of the long-term care ombudsman."

The notice must also "indicate that copies have been transmitted to the required parties by using the abbreviation 'cc:' and listing the names of all parties to whom copies were sent." Importantly, the notice "shall be provided at least 30 days in advance of the proposed transfer or discharge" absent three conditions, including "an emergency transfer or discharge" that is "mandated by the resident's health care needs and is in accordance with the written order and medical justification of the primary care provider" or that is "mandated in order to protect the health, safety, or well-being of other residence and staff form the resident being transferred."

"Within 48 hours after notice of involuntary transfer or discharge has been received by the resident, the facility shall discuss the involuntary transfer or discharge with the resident, the resident's responsible party, and the person or agency responsible for the resident's placement, maintenance,

and care in the facility." Id. § 58.40(9). In this discussion, "[t]he facility administrator or other appropriate facility representative serving as the administrator's designee shall provide an explanation and discussion of the reasons for the resident's involuntary transfer or discharge." Id. § 58.40(9)(a).

Further, "[t]he content of the explanation and discussion shall be summarized in writing, shall include the names of the individuals involved in the discussion, and shall be made part of the resident's record." Id. § 58.40(9)(b). The only exception to this meet and confer requirement is "if the involuntary transfer or discharge has already occurred pursuant to [an emergency exception in the rules] and emergency notice is provided within 48 hours." Id. § 58.40(9)(c). There are also certain discharge planning requirements that are always applicable and certain counseling requirements that can be omitted if "the discharge has already occurred pursuant to subrule 58.40(6) and emergency notice is provided within 48 hours." Id. § 58.40(10). "The burden of proof by a preponderance of the evidence rests on the party requesting the transfer or discharge." Id. §§ 58.40(7)(d).

B. Case Study in Involuntary Discharge Appeal

The Administrative Law Judges are well versed on these state regulatory requirements and will closely examine the written notice to assure that it complies with each of the notice requirements and that the facility has followed the other rules relating to clinical documentation and issuing the discharge notice to the individuals in the form set forth in the rules.

It is imperative that the language in the written notice strictly complies with applicable state and federal rules. Recently we have seen Administrative Law Judges reverse involuntary discharge actions for failure to strictly comply with required notice provisions.

In one appeal the ALJ reversed a facility's action in pursuing involuntary discharge, based on alleged flaws in the written notice. The Resident and his/her representative did not raise the issue with the notice. Rather the ALJ on his own authority questioned the notice and based his decision to reverse the discharge based solely on the written notice.

The notice in question left out five words contained in the language set forth in 58.40(5)," *including the exhaustion of all appeals*" which the ALJ determined was a "fatal" mistake:

> "Here, the rule governing involuntary discharges demand strict compliance in part because the rule uses mandatory language such as "shall" and because the regulation's purpose to protect often vulnerable and impaired residents cannot be achieve through lower compliance. In fact, this case somewhat proves the need to strict compliance because neither [resident] nor her representative appeared to fully grasp the issues and nature of the hearing, as evidence in part by the dispute over liens and the title of the Notice. When [facility] chose to ignore the law and utilize the wrong advisory language, it created a potentially erroneous impression of when a discharge could occur if an appeal were taken. This is never acceptable, and given the Tribunal has a duty to develop the record and ensure the law is followed, the fact [resident] did not specifically raise this issue is irrelevant"

> The ALJ raised a second issue, but did not rely on it in reaching his decision noting, "the governing rules require the ccs to have the "names of all parties to whom copies [of the Notice] were sent"; however, [facility] merely used the title responsible party, which is a required recipient, instead of identifying the name of the party in its ccs.

This is likely the beginning of trend that has developed in other states to use any error in the discharge notice as a basis to thrown out the discharge and require a facility to start the discharge process over again.

C. Federal Rules Relating to Involuntary Discharge Documentation:

The federal regulations require that certain documentation must be prepared and maintained in the resident's clinical record. This is a different requirement from the involuntary discharge notice that is required to be provided to the resident.

Per F622 [§483.15(c)(2)], when the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

Documentation in the resident's medical record must include:

> (A) The basis for the transfer (one of the six reasons under Section II above).
>
> (B) In the case of transfer or discharge based on an assertion that the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, the documentation must provide the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

The documentation required to be contained the resident's clinical record must be made by:

> (A) The resident's physician when transfer or discharge is necessary under either the justification that "transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility" or "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.
>
> (B) A physician, but not necessarily the treating physician (e.g. – medical director, or non-physician practitioner (NPP) in accordance with State law) must provide documentation in the clinical record when transfer or discharge is necessary and the justification for discharge is based on "the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident" or "the health of individuals in the facility would otherwise be endangered"

It is anticipated that ALJs may seek confirmation that this documentation is contained in the resident's clinical record as a condition of upholding the discharge action, imposing a duty on facilities to introduce this documentation as an exhibit in the discharge administrative proceeding.

D. Federal Involuntary Discharge Notice Requirements

Per F623 [§483.15(c)(3)] where there is a facility-initiated involuntary discharge, before a facility transfers or discharges a resident, the facility must provide a written notice with the following requirements:

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

(ii) Record the reasons for the transfer or discharge in the resident's medical record; and

(iii) Include in the notice each of the following items:

(a) The reason for transfer or discharge;
(b) The effective date of transfer or discharge;
(c) The location to which the resident is transferred or discharged;
(d) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests (DIA); and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;
(e) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;
(f) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities (Disability Rights Iowa); and
(g) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder (Disability Rights of Iowa.

E. Guidance Regarding Pre-Admission Assessment

The Guidance under F622, notes that section §483.15(c)(1)(i) provides that a facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless justified by one of the stated bases for allowable discharge. This means that once admitted, for most residents (other than short-stay rehabilitation residents) the facility becomes the resident's home. Facilities are required to determine their capacity and capability to care for the residents they admit. Therefore, facilities should not admit residents whose needs they cannot meet based on the Facility Assessment.

There may be rare situations, such as when a crime has occurred, that a facility initiates a discharge immediately, with no expectation of the resident's return.

Thus, if a resident has a history of behavioral issues that are known during the pre-admission process, it will be more difficult for a facility to seek discharge for the same behaviors that continue during the resident's stay at the nursing facility.

F. Assessment and Care Plan Requirements Before Initiating Discharge

The State Operations Manual guidance further provides that prior to initiating involuntary discharge, the facility is required to re-assess a resident to determine if revisions to the care plan would allow the facility to meet the needs of the resident:

> "If transfer is due to a significant change in the resident's condition, but not an emergency requiring an immediate transfer, then prior to any action, the facility must conduct and document the appropriate assessment to determine if revisions to the care plan would allow the facility to meet the resident's needs. (See §483.20(b)(2)(ii), F637 for information concerning assessment upon significant change.)

A resident's declination of treatment does not constitute grounds for discharge, unless the facility is unable to meet the needs of the resident or protect the health and safety of others. The facility must be able to demonstrate that the resident or, if applicable, resident representative, received information regarding the risks of refusal of treatment, and that staff conducted the appropriate assessment to determine if care plan revisions would allow the facility to meet the resident needs or protect the health and safety of others."

It is expected that residents appealing an involuntary action will push this issue as a basis for reversing an involuntary discharge, by accusing a facility of not conducting adequate re-assessments or implementing new care plan interventions to address negative resident behaviors. The facility has the burden of establishing that subsequent interventions have been unsuccessful, before initiating discharge proceedings.

G. Emergency Discharge Requirements

Emergency discharges are only allowed in limited circumstances: "The facility may not transfer or discharge the resident while the appeal is pending . . . when a resident exercises his or her right to appeal a transfer or discharge notice from the facility . . . unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

If the resident, or if applicable, their representative, appeals his or her discharge while in a hospital, facilities must allow the resident to return pending their appeal, unless there is evidence that the facility cannot meet the resident's needs, or the resident's return would pose a danger to the health or safety of the resident or others in the facility.

H. Emergent Transfer to Acute Care (Hospital)

Per the State operations Manual guidance under F622, residents who are sent to the emergency room, must be permitted to return to the facility, unless the resident meets one of the criteria under which the facility can initiate discharge. In a situation where the facility initiates discharge while the resident is in the hospital following emergency transfer, the facility must have evidence that the resident's status is not based on his or her condition at the time of transfer) and meets one of the criteria at §483.15(c)(i)(A) through (D). [resident's welfare, health improved, safety of individuals in the facility, health of individuals is endangered].

However, if the resident's condition has changed during the hospitalization (e.g. resident now requires ventilator) this change can serve as a basis for discharge.