

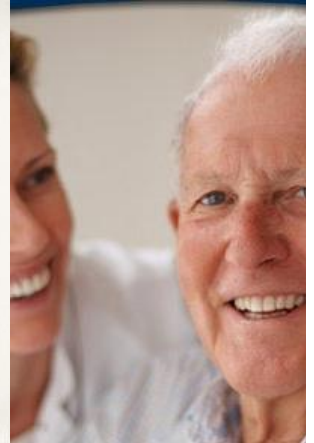


Wyoming's Involuntary Nursing Facility Discharge and Appeal Process
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Overview

- Between 1996 and 2006, the number of complaints received each year by the U.S. Administration on Aging about nursing facility discharge practices DOUBLED (4,000 to 8,000).



Overview

- Discharges from Medicare or Medicaid participating nursing facilities in Wyoming are governed by the combination of federal and Wyoming law.
- These regulations intentionally make it very difficult for nursing facilities to involuntarily discharge residents, to protect the rights of vulnerable adults.



Overview Important Note!

- Involuntary discharge is not an "eviction".
- Eviction (forcible entry and detainer) is a different process, applies to rented residences.
- A nursing care facility is a health care facility, like a hospital.
- Patients contract with you to provide long-term medical services, not simply rent a residence.
- Residents are discharged, not evicted.



Six acceptable bases for involuntary discharge - 42 C.F.R. 483.12(a)(2)

- ✦ The transfer or discharge is necessary for the residents welfare and the resident's needs cannot be met in the facility;
- ✦ The transfer or discharge is appropriate because the residents health has improved sufficiently so the resident no longer need the services provided by the facility;
- ✦ The safety of individuals in the facility is endangered;
- ✦ The health of individuals in the facility would otherwise be endangered;
- ✦ The resident has failed, after reasonable and appropriate notice, to pay for parentheses or to have paid under Medicare or Medicaid) a stay at the facility.
- ✦ The facility ceases to operate.

Disruptive Residents

- ✦ Notably, federal law does not permit discharging simply for disruptive conduct or violating the nursing facility's policies.
- ✦ Courts and administrative agencies have required disruptive conduct rise to level of endangering other residents or staff in order to justify discharge.



In Re J.S.

- ✦ Minnesota Ct. of Appeals
- ✦ Resident was schizophrenic, refused medical treatment and was unstable.
- ✦ Routinely violently verbally abusive, physically threatening and unpredictable -
 - ✦ Invaded a 100 year old blind resident's room at 2 AM screaming obscenities and accused him of running a prostitution ring.
 - ✦ Went into other residents' rooms and took possessions.
 - ✦ Pushed another resident's wheelchair into a desk.

In Re J.S.

- ✦ NF finally discharged resident after 20 years on the basis that resident's needs could not be met by facility and discharge was necessary for her welfare.
- ✦ NF stated that it was not equipped to deal with unstabilized schizophrenia and that other facilities were better equipped.
- ✦ NF also discharged on the basis that the resident posed a danger to other residents.

In Re J.S.

- ✦ Court overturned discharge.
- ✦ NF determination that it was not an appropriate facility for unstabilized schizophrenic was not the product of comprehensive care planning process with mental health professionals.
- ✦ "Not enough for [the facility] to hypothesize that a care plan would not have been enough. Rather, [the facility] must show through clinical evidence that a negative outcome was unavoidable."
- ✦ "The involuntary transfer or discharge of a nursing facility resident must be the last resort. A facility must first exhaust the options available to it within the level of care it is authorized to provide."

In Re J.S.

- ✦ Court also overturned discharge on the basis that resident was a danger to others.
- ✦ Court found it "difficult to believe that [federal law] requires that another resident must be physically harmed or suffer a serious adverse reaction before there is a finding of endangerment."
- ✦ But under the rules of the hearing, court did not find that Dept. Of Health's finding (which was being appealed) that the resident was not a big enough danger to others was arbitrary or capricious.
- ✦ Clearly, a very high bar for disruptive conduct discharges.

Liability to Staff When Residents Are Disruptive

- ✦ Disruptive residents can cause serious staff morale issues, turnover or difficult to replace employees.
- ✦ Could also expose NF to legal liability - *Ligenza v. Genesis Health Ventures* (Mass. Fed. Dist. Ct. 1998) -
- ✦ Respiratory therapist sexually harassed by a resident, sued NF on the basis NF didn't take action to remediate the hostile work place created by bed ridden resident's sexually inappropriate comments.

Liability to Staff When Residents Are Disruptive

- ✦ NF was aware the resident made sexually inappropriate comments, instituted a care plan to address, including requiring staff to document all incidents and telling the resident to stop.
- ✦ When that didn't work, NF provided counseling and psychotherapy. That didn't help either.
- ✦ When therapist sued, NF claimed it did everything it could because it could not discharge the resident under federal law.
- ✦ Court was unsympathetic - "Although patients have rights, employees of long-term care facilities also have the right to a workplace free from sexual harassment. Thus, Genesis may not disclaim all responsibility towards its employees in the name of patient care."

Failure to Pay - Medicaid Application

- ❖ Residents who have submitted all of the application paperwork to Medicaid, but have not yet received final denial or approval, cannot be discharged until a final determination is made.
- ❖ Even when Medicaid has denied the application, all appeal rights (administrative, court) must be exhausted before discharge.
- ❖ Unclear if this includes federal court challenges, the end result of which would be a United States Supreme Court appeal.
- ❖ This can postpone involuntary discharge almost indefinitely.

Documentation of Discharge

- ❖ Documentation of reason and basis for discharge is critical, and must be in the resident's clinical record.
- ❖ Resident's physician must document if discharge:
 - ❖ Is necessary for resident's welfare and needs cannot be met in facility; or
 - ❖ Is appropriate because the resident's health has improved to the point nursing facility care is unnecessary.
- ❖ Other physician can document if discharge is necessary because other individuals' health is endangered.



Comprehensive Care Planning Process

- ❖ Important that any medical reasons for discharge are the result of the the Comprehensive Care planning process.
- ❖ Courts have rejected discharges where the facility failed to go through that process on the basis it would be futile.
- ❖ Facility must demonstrate it has gone through that process before determining resident's needs and discharge is necessary for the resident's welfare.

Implementing the Discharge

- ❖ First step - 30 day notice of discharge.
 - ❖ In most situations, must be made as soon as practicable.
- ❖ Federal law sets out requirements:
 - ❖ Provide notice to resident, family member (or legal representative) of discharge and reasons.
 - ❖ Must be provided in a language and manner they understand.
 - ❖ Must be recorded in resident's clinical record.



Implementing the Discharge

- ✦ Notice must state:
 - ✦ Reason for the discharge
 - ✦ Effective date
 - ✦ Location to which the resident will be discharged.
 - ✦ Statement of the right to appeal discharge to the State.
 - ✦ Name, address, telephone number of State long term care ombudsman (Wyoming Senior Citizens, Inc. - Wheatland, Riverton, Casper (vacant)).
 - ✦ Additional requirements if the resident is developmentally delayed or mentally ill.



Discharge Planning - Orientation

- ✦ Federal law requires the facility to provide "sufficient preparation and orientation to residents to ensure safe and orderly" discharge.
- ✦ Wyoming's nursing facility licensing regulations (Wyoming Department of Health, Aging Division, Rules for Program Administration of Nursing Care Facilities, Ch. 11, section 10) :
 - ✦ Facility must have a "centralized, coordinated program to ensure that each resident has a planned program of continuing care which meets the post discharge needs."
 - ✦ Must have an "organized discharge planning program", written discharge planning procedures.

Discharge Appeal Process

- ✦ Nursing Home Reform Act of 1987 (42 U.S.C. 1396i-3 and 1396r)
 - ✦ Requires States to "provide for a fair mechanism for hearing appeals on transfers and discharges of residents."
 - ✦ Mechanism must meet federal standards for hearing appeals.
- ✦ Federal government created the standards, but Wyoming hasn't created a specific "mechanism", though other states have.



✦ Is Discharge "Stayed" if the Resident Appeals to the Department of Health?

- ✦ Probably not. Federal law leaves this up to states.
- ✦ Unlike other states, Wyoming has not passed a regulation "staying" the discharge during the appeal process.
- ✦ Wyoming's Medicaid hearing process states that Medicaid beneficiaries keep benefits during the appeal process.
- ✦ This doesn't technically apply to nursing facilities, but since Wyoming doesn't have a "discharge-specific" hearing process, it's unclear whether a hearing officer will interpret it to give the resident the right to stay during appeal.
- ✦ Wyoming Department of Health has informally cautioned against it.
- ✦ Under certain circumstances (ie. unsafe discharge) discharge during the appeal process could result in a complaint to the Department's licensing division, triggering a licensing survey and potentially adverse action.
- ✦ Potentially risk of liability for what happens to the resident after discharge if discharge is unsafe and appeal process is ongoing.

Are Non-Medicaid Residents Entitled to Appeal Rights?

- ✦ Yes.
- ✦ Even if the resident is not a Medicare beneficiary, you are required to follow the discharge process under federal law for all residents, if you are Medicaid-participating.



What if the discharged resident fails to leave?

- ✦ The 30 day discharge notice must state the location to which the resident is to be discharged.
- ✦ Technically, a resident that has been discharged is trespassing, and can be removed by the police.
 - ✦ Having the police remove a resident is NOT RECOMMENDED, but you may have no choice.
- ✦ Working through the discharge and planning process, you should have plenty of notice whether there will be problems.
- ✦ If it becomes apparent during the discharge planning process the resident will not leave willingly, give law enforcement a lot of notice that they may be needed.

Notice of Appeal

- ✦ The resident files a "Notice of Appeal" with the Department of Health.
- ✦ Notice not required to state specific grounds for the appeal.
- ✦ Notice not required to be filed by a lawyer.
- ✦ Resident, family member or friend can file on the resident's behalf.



Appeal Process

- ✦ Process governed by Wyoming law.
- ✦ Nursing Home Reform Act of 1987 required federal government to provide guidelines for states to use to create regulations (state plan) for nursing facility involuntary discharges.
- ✦ Federal guidelines for state plans - 42 C.F.R. 431, Subpart E.
- ✦ Wyoming has never created specific regulations implementing a state plan.

Wyoming Hearing Requirements

- ❖ Wyoming uses Wyoming Medicaid Rules for Contested Case Hearings (Wyoming Department of Health, Medicaid Rules, Ch. 4)
- ❖ The Medicaid Hearing Rules are primarily written to govern applicant, beneficiary and provider appeals of Medicaid denials and "fraud and abuse" sanctions.
- ❖ They don't clearly apply to nursing home discharges, but that's what the Department of Health uses.

Medical Appeal Hearing Process

- ❖ Under the Wyoming Medicaid Hearing Rules, an involuntarily discharged resident is treated as an "applicant" or "client".
- ❖ Request for hearing must be made by resident (or resident's "authorized representative") to the Department of Health within 30 days of receiving notice of involuntary discharge.
- ❖ No specific requirements for contents of the request for hearing.

Appeal Process

- ❖ DOH has 10 days from receipt of the request for hearing to evaluate the request and notify the resident that the request has been accepted.
- ❖ DOH may appoint hearing officer, or use the Office of Administrative Hearings (OAH).
- ❖ Nursing facility's first notice is usually the referral to OAH..



Medicaid Appeal Hearing Process

- ❖ The appeal hearing must be held within 40 days of the hearing request (80 days from notice of discharge being provided) **unless both parties agree or otherwise provided by law.**
- ❖ Resident discharged - typically wants the hearing quickly.
- ❖ Resident not yet discharged - may try waive the 40 day requirement, stay in the facility as long as possible.
- ❖ Hearing officers have allowed waiver irrespective of nursing facility's agreement, irrespective of rule.

Medicaid Appeal Hearing Process

- ✦ Once discharge appeal is assigned to OAH, proceeds like any other administrative hearing.
- ✦ Hearing officer contacts both parties for scheduling conference, sets schedule for the hearing and hearing date.
- ✦ Discovery - each party can require production of evidence to use at the hearing, take depositions.
- ✦ Final prehearing conference.

Who Has The Burden of Proof?

- ✦ Confusing under Wyoming's Rules.
 - ✦ Ordinarily - the person appealing bears the burden.
 - ✦ Federal guidelines don't place the burden on either.
- ✦ Most state regulations require nursing facility to prove the discharge was appropriate. Wyoming Rules says the DOH bears the burden but DOH not a party.
- ✦ Resident should have to prove the discharge was not appropriate.
- ✦ Hearing officer may try to place the burden on the nursing facility, due to the nature of the proceeding.

The Hearing

- ✦ Hearing held within 40 days of request before hearing officer.
- ✦ Required to be held either in Cheyenne, or in the resident's county of residence.
- ✦ Both sides may appear by phone or video.
- ✦ Each side provides evidence in support - witnesses, documents.
- ✦ Rules of evidence are relaxed in administrative hearings - hearsay permitted.
- ✦ Court reporter creates transcript of hearing (DOH pays).



The Hearing

- ✦ Hearing officer takes all of the evidence to create the record, reviews, creates proposed findings fact and conclusions of law (proposed decision) within 20 days (100 days after notice of discharge), provide to parties and DOH.
- ✦ Parties can submit proposed findings of fact/conclusions of law within 10 days of close of hearing (90 days of notice of discharge).
- ✦ DOH has 10 days to issue a final decision, based on the hearing officer's proposed FOF/COL's.
 - ✦ DOH makes final decision on evidence at hearing.
 - ✦ DOH's final decision, not the hearing officer's recommended decision, is final action.

Court Appeal

- ✦ Losing party can appeal DOH's final decision to the District Court within 30 days.
- ✦ District Court reviews DOH's decision on "arbitrary, capricious or otherwise contrary to law" standard, reviewing the record of the hearing. New evidence rarely permitted.
- ✦ The losing party can then appeal to the Wyoming Supreme Court.



Conclusion

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