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Long-Term Care Newsletter

Paperless Surveys Coming Your Way By Kevin R. McManaman

Nebraska Department of Health and Human Services has begun developing what will eventually become an entirely paperless survey system. Currently, volunteer facilities across the state are opting to participate in a pilot project that will eventually lead to such a system.

The system being developed will have similarities to those now being used in several other states, including the public posting on the internet of deficiencies, plans of correction/statements of compliance, and other information. Late last summer, the State of Kansas went live with such a system. Presently, edited versions of Nebraska facility deficiency statements are posted on the Medicare site, Nursing Home Compare. Similarly, since the Nebraska paperless system will consist of documents that are publically available, resident names and identifying information will not be included. The pilot system will involve e-mail. Volunteer facilities will receive a "test" e-mail soon. This will allow them to see exactly what a facility will receive after a survey or complaint investigation has been conducted, including an enforcement letter, complaint letter, CMS-2567, E-2567 Provider POC/SOC, Notice of Disciplinary Action, and Request for Information Dispute Resolution. DHHS will send these in PDF format.

Volunteer facilities have been asked to set up and monitor a generic e-mail address that won't change with staff changes. Each time a statement of deficiency is sent, DHHS will include detailed instructions on how to respond electronically. Any plan of correction will be e-mailed back in PDF format, with the facility signing the first page and faxing that back to the state. The 10 days for the return of a Plan of Correction will begin to run when the e-mail is sent. Therefore, the Department will require that the e-mail address be accessible by two staff members such as the Executive Director, Director of Nursing, Office Manager, or someone similar. Facilities are being asked to check the e-mail address daily, Monday through Friday, as a routine matter. Facilities can get more information and sign up for the pilot program by contacting the Department at (402)471-3324.

Is Your Record Retention Policy Compliant with Nebraska Law? By Jeanelle R. Lust

Nebraska imposes these basic requirements for the retention, storage and destruction of resident medical records by skilled nursing facilities.

A nursing home must maintain a clinical record on all residents. Clinical records must contain at a minimum:

1. Sufficient information to identify the resident;
2. A record of the resident's assessments, including those assessments performed by services under agreement with the facility;
3. The plan of care and services including medication administration provided by facility staff and services provided under agreement with the facility;
4. Interdisciplinary progress notes to include effect of care provided, residents' response to treatment, change in condition, and changes in treatment;
5. Medical practitioner orders which are signed and dated;
6. Allergies;
7. Person to contact in an emergency situation;
8. Name of attending medical practitioner; and
9. Advanced directives if available.

Resident clinical records must be maintained and preserved for a period of at least five years or, in case of a minor, five years after the resident becomes of age under Nebraska law. The age of majority under Nebraska law is 19.

Facilities must safeguard clinical record information against loss, destruction, or unauthorized use. In addition, if facilities utilize computer records, safeguards to prevent unauthorized access, and to provide for reconstruction of information must be in place. Facilities must protect the confidentiality of all information contained in a resident's records, regardless of the form or storage method of the records, except when release is authorized. Clinical records must be readily accessible.

If a facility closes, Nebraska law requires that all records of each resident be transferred to the health care facility to which the resident moves. All other resident records of a facility ceasing operation must be disposed of by shredding, burning, or other similar protective measures in order to preserve the resident's rights of confidentiality. Records or documentation of the actual fact of resident medical record destruction must be permanently maintained.

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We Help You Deal With It

Health Care Reform and Its Effect on Post Acute and Long-Term Care by Michael Khalili

President Obama's mantra of change has not just been lip service and change is exactly what has happened to health care. On March 21, 2010, the U.S. House of Representatives took two historic votes on healthcare reform. The first was on the health care reform bill previously passed by the Senate, the Patient Protection and Affordable Care Act (PPACA)(H.R. 3590), which passed largely along party lines 219 to 212. The second vote was on the budget reconciliation package, the Health Care and Education Affordability Act (HCEAA) (H.R. 4872), which passed 220 to 211, again largely along party lines. Since PPACA had passed the Senate on December 24, 2009, and no changes were made by the House, the bill was sent to the White House for the President's signature and became law on March 23, 2010. PPACA contains the vast majority of the provisions constituting health care reform, including those affecting post acute and long term care.

Included in the final health care reform bill are positive and negative provisions for post acute and long term care. Some positive provisions included:

- No targeted reductions to the skilled nursing facility (SNF) market basket for Fiscal Year (FY) 2010 or FY 2011.
- Extension of the exceptions process for the Medicare Part B therapy cap until the end of 2010.
- Wyden MedPAC language stating that Medicaid must be taken into account during its analyses for providers like skilled nursing facilities.

(continued pg. 3)

Requirements for Production of Medical Records by Jeanelle Lust

Under Title 175, Chapter 12-006.16C2 of the Nebraska Administrative Code, facilities must protect the confidentiality of resident records except when authorized by transfer agreement to another health care facility or health care service, law, third party payment contract, or the resident or designee. Records are also subject to inspection by authorized representatives of the Department of Health and Human Services. The Department of Health and Human Services may impose one or several penalties, including a fine not to exceed $10,000 or revocation of a license, for failure to follow proper procedure.

Resident Requests

If a resident or patient makes a written request for copies of his or her medical records, the facility must furnish the requested copies within 30 days after the request is received. In addition, if a resident submits a written request to examine his or her medical records the facility must "(a) Make the medical records available for examination during regular business hours; (b) inform the patient if the records do not exist or cannot be found; (c) if the provider does not maintain the records, inform the patient of the name and address of the provider who maintains such records, if known; or (d) if unusual circumstances have delayed handling the request, inform the patient in writing of the reasons for the delay and the earliest date, not later than twenty-one days after receiving the request, when the records will be available for examination."

Subpoenas

If a facility receives a *subpoena duces tecum* for the production of medical records for use in a proceeding to which the facility is not a party, the facility should first contact its attorney, and then satisfy itself that appropriate notice was given to the other side in the proceedings. If so, within 10 days after service of the subpoena, the facility may serve upon the party for whom the subpoena was issued a written objection to production of any or all of the designated materials or entry upon the premises. If the facility does not object to the subpoena, it shall comply with the request by the designated date or request more time, if necessary, from the party for whom the subpoena was issued. All records provided shall be produced as they are kept in the usual course of business or organized and labeled to correspond with the categories in the demand. If a party or facility feels as if documents requested are privileged, it should object to production of the documents.

Costs

A facility providing copies at the request of a patient "…or under subpoena by a patient or his or her authorized representative…may charge no more than twenty dollars as a handling fee and may charge no more than fifty cents per page as a copying fee." In addition, "[a] provider may charge for the reasonable cost of all duplications of medical records which cannot routinely be copied or duplicated on a standard photocopy machine. A provider may charge an amount necessary to cover the cost of labor and materials for furnishing a copy of an X-ray or similar special medical record. If the provider does not have the ability to reproduce X-rays or other records requested, the person making the request may arrange, at his or her expense, for the reproduction of such records."

Pursuant to Neb. Rev. Stat. 71-8405(1) facilities may not charge patients for copies of medical records for use in supporting applications for disability or other benefits or assistance or appeals relating to the denial of such benefits or assistance under:

(a) Sections 43-501 to 43-536 regarding assistance for certain children;

(b) The Medical Assistance Act relating to the medical assistance program;

(c) Title II of the federal Social Security Act, as amended, 42 U.S.C. 401 et seq.;

(d) Title XVI of the federal Social Security Act, as amended, 42 U.S.C. 1382 et seq.; or

(e) Title XVIII of the federal Social Security Act, as amended, 42 U.S.C. 1395 et seq.

Supreme Court Refuses to Hear Nursing Home Civil Rights Case

By Laura E. Troshynski

Can alleged inadequate nursing home care lead to a civil rights lawsuit? According to the United States Court of Appeals for the Third Circuit, the answer is "yes." In July of 2009, in the case of John J. Kane Regional Centers-Glen Hazel v. Grammer, the Third Circuit held that the Federal Nursing Home Reform Amendments (FNHRA) guarantee a nursing home resident's civil rights. Consequently, according to the Third Circuit, private civil rights lawsuits may be brought against nursing homes in the event of alleged wrongful death or inadequate patient care. Recently, the United States Supreme Court declined to review the case, allowing the Third Circuit decision to stand.

The Third Circuit's ruling was the result of a claim brought by Sarah Grammer against a Pittsburgh-area nursing home. Grammer alleged that her mother, Melvinteen Daniels, was neglected by the John J. Kane Regional Center.

According to Ms. Grammer, the facility provided inadequate care which eventually resulted in her mother's death. Instead of filing a typical negligence claim against the nursing home, Ms. Grammer chose to sue under the Federal Nursing Home Reform Amendments. According to Ms. Grammer, the FNHRA guarantee various patient rights, including the right to quality care. Therefore, Ms. Grammer contended that the alleged inadequate care received by her mother constituted a civil rights violation for which she could bring a civil rights lawsuit under FNHRA. The nursing home, however, contended that the FNHRA were simply meant to outline requirements for Medicaid and Medicare certification

Initially, the District Court ruled in favor of the nursing home facility. However, the Third Circuit overturned the District Court's ruling, holding that the FNHRA creates the right to a private civil rights lawsuit in the event of inadequate care.

Various groups including the AHCA, the American Association of Homes and Services for the Aging, and various individual states petitioned the Supreme Court to review the holding of the Third District. However, despite this petition, the Supreme Court refused to hear the case. Therefore, it appears as if nursing homes throughout the country remain exposed to potential civil rights lawsuits in the event of alleged inadequate patient care.

Health Care Reform (continued from pg. 2)

- Elimination of Medicare Part D cost-sharing for assisted living residents covered by Medicaid under Sec. 1115 or 1915 waivers or under a 1915(i) state plan amendment, who otherwise would be admitted to a skilled nursing facility.
- Co-pays for dual eligibles receiving services in a Medicaid managed care organization also are eliminated.
- Several provisions improving our nation's health care work force programs including a demonstration project providing further training opportunities specifically for direct care workers employed in long-term care settings.
- The Community Living Assistance Services and Supports (CLASS) Act, for the first time, creates a national long-long term care insurance program.
- A Sense of the Congress statement on tort reform.
- State demonstration programs to evaluate alternatives to current medical tort litigation.
- New grants under the Elder Justice section for health information technology and workforce training.
- A General Accountability Office study and report on the Five Star Quality Rating System.

Some neutral or negative provisions in the health care reform bill for post acute and long-term care include:

- A productivity adjustment to the skilled nursing facility market basket will be implemented beginning in FY 2012 (October 1, 2011) estimated to total $14.6 billion over 10 years.
- While implementation of RUG-IV was pushed back a year to October 1, 2011, neither the changes to concurrent therapy requirements nor MDS 3.0 were delayed and they will take effect October 1, 2010.
- A new Independent Medicare Advisory Board (IMAB) was created to make recommendations to Congress about issues, such as Medicare payment rates for skilled nursing facilities. IMAB will submit a list of recommendations to Congress, on which Congress can vote to approve or disapprove. Some providers, such as hospitals, received an exemption from IMAB until 2019. Unfortunately, skilled nursing facilities were not given the same exemption.
- New transparency requirements for nursing facilities.
- Additional background check requirements for skilled nursing facility and nursing facility employees with direct patient access.
- Changes to the reporting of crimes requirements in the Elder Justice section.
- The impact on employers of the health care insurance requirements.