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HOSPICE AND PALLIATIVE CARE PRACTICE GROUP

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FINAL RULE OUTLINES WHEN HOSPICES MAY DISCHARGE PATIENTS FOR CAUSE

January, 2006

On November 22, 2005, the Centers for Medicare and Medicaid ("CMS") released a final rule[1] (the "Rule") which will amend the Code of Federal Regulations by revising 42 C.F.R. § 418. The revision is effective on January 23, 2006. Part of the revision adds a new section 418.26, which specifies when and how a hospice may discharge a patient from its care. Under this section, hospices may discharge patients for cause under very limited circumstances. CMS recognized that in the absence of regulations or guidance regarding situations involving abusive or uncooperative behavior on behalf of a patient (or other persons in the patient's home), hospices were uncertain as to their authority to act to resolve this type of problem in the event the patient refused to revoke the benefit voluntarily.[2] CMS intends for the Rule to clarify when a discharge could be indicated. We provide a brief overview of the Rule as it pertains to discharges for cause and a brief outline of the CMS guidance that accompanies the Rule.

I. The Rule. The new section 418.26, specifies that a hospice may discharge a patient from its care if (1) the patient moves out of the hospice's service area or transfers to another hospice; (2) the hospice determines that the patient is no longer terminally ill; or (3) the hospice determines that the patient's (or other persons in the patient's home) behavior is disruptive, abusive or uncooperative to the extent that

[1] 70 Fed. Reg. 70532, 70536 (Nov. 22, 2005) (to be codified at 42 C.F.R. § 418.26).

[2] *Id*.

delivery of care to the patient or the ability of the hospice to operate effectively is seriously impaired (discharge "for cause").[3]

In the event a for cause discharge is considered, the hospice must, pursuant to a policy set by the hospice, notify the patient of such consideration, make a serious effort to resolve the problem(s), determine that the patient's proposed discharge is not due to the patient's use of necessary hospice services and document the problem(s) and efforts made to resolve the problem(s).[4] This documentation must be entered into the hospice medical records. In addition, the hospice must obtain a written physician's discharge order from the hospice medical director. If a patient has a separate attending physician involved in his or her care, the Rule states that this physician should be consulted before discharge and his or her review and decision should be included in the discharge note.[5]

II. CMS Guidance Regarding For Cause Discharges. The Rule includes commentary, provided by CMS, that was intended to clarify how the Rule may be applied. We have outlined CMS's commentary regarding the Rule, which may offer some guidance with respect to for cause discharges.

- CMS indicated that patients or persons in the home of the patient might be a source of problems that could be a reason to consider a discharge for cause. An example of this would be patients and their family members or primary caregivers who elected hospice and subsequently become hostile (including threats of physical harm).[6] In addition, discharge may be appropriate when patients or persons in the home become uncooperative to the extent that the situation interferes with the ability of the hospice staff to provide care efficaciously. However, as indicated in the Rule, CMS expects the hospice to make

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[3] *Id*. at 70547 (to be codified at 42 C.F.R. § 418.26(a)(3)).

[4] *Id*.

[5] *Id*.

[6] *See id*. at 70536.

[7] *Id*. at 70540.

[8] *Id*. at 70541-70542.

every effort to rectify the situation before ending its services, with documentation of what transpired in the case. Alternative suggestions and referrals for care should be presented to the patient and his or her caregiver before ending services.

- CMS indicated that although it may be appropriate to discharge a patient in the event the patient fails to follow important clinical features of the plan of care, discharge is not a valid response to single instances of the patient/family going to the emergency room without prior authorization from the hospice. "[A] panicked reaction to an emergency should not be, by itself, a reason to terminate services. It is important for the patient and family to be educated before the start of care that hospice entails certain limits in the way care will be provided once hospice services begin, among them being restrictions on obtaining care outside those provided or arranged for by the hospice, and the patient's potential liability for care received without the hospice's involvement. It is particularly important that the patient and caregiver be instructed on what to do in a crisis or emergency."[7]

- CMS indicated that it recognized that it may be very difficult to implement post-discharge care plans for a patient who has proven to be disruptive, abusive or uncooperative to the extent that services cannot be provided. CMS stated that post-discharge care would not be the responsibility of the hospice. The hospice would engage in and prepare for after hospice care, but it is up to the patient (and the patient's supporters) to take advantage of other sources of care after discharge. "Though not entirely analogous, it is similar to a physician prescribing medication, but it is the responsibility of the patient to take the medication, even after the physician has fully informed the patient of the importance of doing so."[8]

- CMS expressed concern that allowing discharge for cause could offer opportunity for abuse, and hospices need to be able to clearly demonstrate that any discharge for cause is a last resort for behavior issues, not time or effort or cost factors in providing services to a particular patient/family. The fact that some patients require more services must not influence a discharge decision.

CMS plans to offer further guidance and examples in the Hospice Manual. A complete version of the Rule may be obtained on the internet at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=70532&dbname=2005_register.

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