LeadingAge New York

OPPOSE

SENIOR HOUSING | ASSISTED LIVING | ADULT CARE FACILITIES | HOME CARE | RETIREMENT COMMUNITIES
ADULT DAY HEALTH CARE | PACE/MLTC | NURSING HOMES

A.10799 (Hevesi)/ S.8764 (Rivera)

An act to amend the public health law, in relation to establishing requirements for the transfer, discharge and voluntary discharge from residential health care facilities

LeadingAge New York and its not-for-profit, mission-driven members oppose this legislation which would codify NY regulations and federal law as they relate to the transfer and discharge of patients from nursing homes. While its intent is laudable, the legislation itself is unnecessary and will only add to the significant compliance burden nursing homes are already experiencing.

The bill defines nursing home discharges, spells out valid reasons for discharge and identifies applicable notice requirements. However, these provisions repeat existing federal (42 CFR § 483.15) and State (10 NYCRR § 415.3) regulatory requirements and, as such, are redundant. The legislation seeks to discourage facilities from involuntarily discharging residents to what are called "temporary housing assistance" settings (i.e., family shelters, shelters for adults, hotels, emergency apartments, domestic violence shelters, or safe houses for refugees), and to prevent facilities from discharging to the home of another individual without mutual consent. Federal and State regulations already require facilities to ensure that residents are discharged to safe and appropriate settings, and do not preclude discharge to the noted housing facilities where appropriate. In fact, some individuals are admitted for short-term nursing home care and are discharged to one of these settings based on previous residence or preference.

Under both federal and State regulations, residents already have well-defined rights to appeal facility-initiated discharge or transfer determinations, and the facility is precluded from discharging or transferring the resident until a decision is made on the appeal. The legislation indicates that a facility may not compel or try to force a resident to voluntarily transfer or be discharged, and that a facility cannot retaliate against a resident that chooses to remain at the facility. However, existing federal regulations at 42 CFR § 483.15(a)(2)(i) already say: "The facility must…[n]ot request or require residents or potential residents to waive their rights as set forth in this subpart…" Furthermore, LTC Ombudsmen who work to advocate for resident safety and quality of life will be permitted to re-enter facilities in July, providing an additional layer of oversight and representation for residents.

The Centers for Medicare and Medicare (CMS) State Operations Manual (SOM), Appendix PP, provides detailed interpretive guidance to surveyors on how to assess compliance with 42 CFR § 483.15. The SOM spells out how any violations of discharge or transfer requirements may be cited under F621 (facility must establish, maintain and implement identical policies and practices on transfer and discharge for all individuals, regardless of source of payment); F622 (circumstances under which discharge or transfer is permitted and required documentation); F623 (notification requirements and contents of notification); and F624 (providing orientation to residents before transfer or discharge). These requirements are reviewed at the time of the facility's certification survey or as part of a complaint survey. Federal and State remedies may be imposed for any violations. CMS is already focused on discharge and transfer practices, as detailed in the agency's Survey and Certification Letter 18-08-NH.

Importantly, the *New York Times* article – which was cited as justification for this legislation – alleges that facilities in some states have unsafely or otherwise inappropriately discharged residents to settings like homeless shelters and motels, largely to be able to admit COVID-positive residents and obtain higher payment rates. This is not true in New York, as the State has not provided any increase to the Medicaid rates for COVID-positive cases, despite the added costs of treating these individuals. Furthermore, occupancy rates at many facilities are now much lower than usual, making it far less likely that a facility would need to discharge or transfer residents to free up beds for COVID-positive patients.

In response to the COVID-19 pandemic, CMS has issued temporary blanket waivers under its statutory authority of some federal transfer and discharge regulatory requirements to facilitate cohorting of residents, as recommended by federal guidance (and required by the State). However, these waivers will be in effect only for the duration of the COVID-19 public health emergency, and it's unclear to what extent the examples provided in the *New York Times* article may reflect the application of these waivers as well as the need to facilitate admissions from hospitals.

In summary, while its intent is admirable, this legislation largely duplicates existing federal and State requirements. Nursing homes are regularly surveyed on these requirements; residents can appeal their discharge/transfer with the added assistance of an Ombudsman; and the State has not financially incentivized facilities to serve COVID-19 residents as suggested in the *New York Times* article.

For these reasons, LeadingAge New York cannot support passage of A.10799/S.8764.

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