Legal Issues

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Avoid Legal Difficulties While Ensuring Care Of Residents With Severe Mental Illness

Mental illness touches all segments of the U.S. population, including nursing facilities and other long-term care settings. For a variety of reasons, including the lack of availability of inpatient facilities for care of persons with chronic mental illness, nursing facilities provide care for many residents with those diagnoses.

In a study from the early 1990s, it was determined that approximately 65%-91% of our nation's 1.5 million adults living in nursing facilities had a significant mental disorder (J. Am. Ger. Soc. 2003;51:1299-304).

Many older persons diagnosed with severe mental illness (SMI) are being cared for in long-term care because of comorbidities as well as mental illness issues. An SMI generally is defined as schizophrenia, bipolar disorder, or other psychoses.

Some reports indicate that the severity of behavioral syndromes of nursing facility residents is comparable with those of psychiatric inpatients (J. Am. Ger. Soc. 2004;52:2031-8).

Having individuals with SMIs in nursing facilities can have significant organizational and legal implications. This article will explore the scope of the problem and discuss steps nursing facilities can take to avoid legal difficulties.

History

In the 1980s, the Medicaid program encouraged states to reimburse for care in nursing facilities for patients with psychiatric disorders but not for care in mental hospitals.

The number of mentally ill patients in nursing facilities increased significantly during that time.

Subsequently, Congress enacted the Omnibus Budget Reconciliation Act of 1987 to target the oversight and quality of care provided in nursing facilities in the United States. Part of the act mandated preadmission screening for SMIs through the use of the Preadmission Screening and Annual Resident Review (PASARR) program.

Primary Screening Mechanism

The PASARR screens prospective and current residents of Medicaid-certified nursing facilities for mental illness, mental retardation, and conditions associated with mental retardation. Today, the PASARR system is the primary screening mechanism that nursing facilities use to monitor individuals with SMI in the nursing facility.

The nursing facility must perform a PASARR level I identification screening prior to patient admission. Once the Level I screening triggers the possibility of a mental condition, the patient must receive a level II in-depth screening. Although the program is federally mandated, states use slightly different procedures for processing the PASARR. The nursing home also must repeat the PASARR assessment when a resident experiences a significant change in physical or behavioral health, which may affect or change PASARR review.

Since Congress mandated PASARR use, there has been a decrease in the frequency of individuals admitted to nursing facilities with SMI. However, the PASARR has been criticized as being markedly ineffective in screening out patients with SMI whose care needs go beyond the scope of what a nursing facility can provide adequately and who would be better served at a psychiatric care center. Additionally, many nursing facility administrators have reported that the PASARR has no effect on nursing facility admission practices.

Risk to Patient Safety

Patients diagnosed with SMI present a special risk to patient safety. They tend to be younger, stronger, and more physically able—a higher threat to other residents and staff. Residents with SMI can place frail nursing facility residents at risk during physically aggressive episodes. Also, individuals with SMI may be more verbally abusive and aggressive to others than the more traditional nursing facility resident.

Specialized Training

Nursing facility administrators have expressed concern regarding staff competency and the lack of specialized training in caring for residents with SMI.

Training of nursing staff in these facilities is focused on broad and general concerns.

The specialized knowledge about providing nursing care to individuals with SMIs is difficult to emphasize properly in staff training. In addition, specialized training is a cost to the nursing facility in staff time away from patients, materials, and hiring competent educators. High turnover of nurses in nursing facilities adds to the difficulty of maintaining an adequately trained staff.

Providing the appropriate level of staffing for residents with SMI also is challenging. Caring for physically aggressive residents who receive multiple psychotropic medications places an additional strain on nursing facility staff.

Payment Issues

An additional concern exacerbating the issue of caring for individuals with SMI in the nursing facility setting is lack of adequate reimbursement for mental health services and adequate staffing. The current Medicare payment system does not estimate staffing needs based on the acuity of the patient population. Lump-sum payments are based on averages and do not relate to or compensate for the level of direct nursing care and assistance with the activities of daily living that the nursing home staff provides.

Additionally, social work services were bundled with other care items such as ADLs under the prospective payment system in 1999. Poor compensation for the increased care of residents with SMIs combined with lack of payment for some psychiatric services results in poor incentives for nursing facilities to address the psychiatric issues of nursing facility residents.

Case Example

Departmental Appeals Board (DAB) cases involving nursing facilities and the Centers for Medicare and Medicaid Services demonstrate the legal ramifications nursing facilities face in caring for patients with SMI.

In *St. Catherine's Care Center of Findlay v. Centers for Medicare & Medicaid Services*, the DAB held that a Civil Money Penalty (CMP) totaling $40,850 was appropriate when the nursing facility failed to provide adequate care for three aggressive patients with SMIs that included schizophrenia and psychotic disorder. Each patient also was on multiple psychiatric medications.

The decision included descriptions of various incidents in which the patients were physically aggressive, including hitting, punching, pushing, slapping, and kicking residents and staff (*St. Catherine's v. CMS*, DAB Decision No. Cr1190, June 14, 2004).

In its defense, the nursing facility cited poor Medicare and Medicaid reimbursement policies for denying residents psychiatric care. The facility stated that the physician was limited to seeing the patient once per month and had to rely on laboratory reports of therapeutic medication levels rather than actual clinical assessment, which created a barrier to adequate care. Additionally, the PASARR indicated that the residents were appropriate for placement in the nursing facility.

CMS upheld the high civil money penalty despite the facility's arguments. The agency reasoned that Medicare and Medicaid reimbursement and the failure of the PASARR screening to prevent the patients' admission were not good enough reasons to excuse the facility. CMS stated that, "[n]otwithstanding the purported opinions or policies of any outside agency, a facility is charged with limiting its admissions to those residents for whom it is capable of providing that care and those services." In each case, the PASARR indicated that the residents were appropriate for placement in the nursing home.

Tips for Nursing Facilities

Nursing facilities can take measures to avoid or lessen the legal ramifications of caring for individuals with SMI. Ultimately, the facility is legally responsible for taking "reasonable" care to address a significant, identified medical condition, including SMIs. What constitutes "reasonable care" in a court of law often is fact and case specific, but in general, reasonable care includes:

- Updating the care plan once the resident becomes aggressive to ensure that it accurately reflects his or her needs.
- Developing individualized behavior management programs.
- Using flow sheets to monitor the effects of pharmacologic interventions and individualized behavior management programs.
- Documenting the resident's incidents, including mentioning any procedures that the nursing facility took to protect residents and staff from his or her aggressive behavior.
- Ensuring the resident receives appropriate psychiatric care.
- Monitoring psychotropic medications and obtaining psychiatric care to change and adjust such medications when needed.
- Taking action to mitigate foreseeable risks of harm, such as providing resident supervision and assistive devices when needed.

Providing care to residents with SMI is a multifaceted endeavor. Nursing facilities must be proactive in their approach to caring for residents with SMI in a setting with many challenges, such as poor reimbursement rates and staffing. Taking a proactive approach potentially lessens a facility's liability in caring for this challenging population.

This column is not to be substituted for legal advice. The writer, Janet K. Feldkamp, *practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. Ms. Feldkamp is affiliated with Benesch, Friedlander, Coplan & Aronoff LLP of Columbus, Ohio.*

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