

## Legal Issues



By Janet K. Feldkamp,  
JD, RN, LNHA

# Safety and Liability Beyond Your Walls

The previous column in this series focused on long-term care facilities' obligation to prevent resident falls and other accidents—and the substantial verdicts or out-of-court settlements that can result when that obligation isn't met ("Lessons from Nursing Facility Accidents," February 2010, p. 17).

But what about accidents that occur outside a facility? Is there an obligation to protect residents from hazards that they voluntarily encounter on authorized leaves? Possibly, according to a recent decision by the Departmental Appeals Board (DAB) of the Department of Health and Human Services.

The accident at issue involved a legally competent 56-year-old Ohio man with advanced Parkinson's disease. A neurologist ordered a motorized wheelchair for the resident's independence and mobili-

ty, and he purchased the vehicle himself.

He regularly used it to leave the facility, sometimes at night, to travel down a rural highway to visit establishments including stores and bars (although evidence indicated that the resident did not drink at the bars). A physician had authorized the resident's unsupervised departures in his wheelchair.

In May 2008, shortly after midnight, the resident was traveling down the road in his wheelchair when he was struck and killed by an automobile.

State surveyors determined that the nursing facility was not in substantial compliance with the accident prevention participation requirement under 42 CFR 483.25(h)(2) (included in F-tag 323), which states that a facility must ensure that "(1) The resident environment remains as free of accident hazards as is possible; and (2) each resident receives

adequate supervision and assistance devices to prevent accidents."

An administrative law judge upheld the citation, and the facility appealed the judge's decision to the Departmental Appeals Board. In a decision issued in December 2009, the board sent the case back for further consideration—which is ongoing—because the judge had failed to follow certain procedural rules.

Nevertheless, the board's decision indicated that a facility is not absolved from responsibility for a resident's accident just because it occurs off the facility's grounds. Further, the board interpreted this regulation to require a facility to take "all reasonable steps to ensure that a resident receives supervision and assistance devices that meet his or her assessed needs and mitigate foreseeable risks of harm from accidents."

### Environmental Issues

The board handled the two parts of 42 CFR 483.25(h)(2) differently. The regulation first requires the facility to ensure that the "resident environment" is as free from accident hazards as possible. Because the State Operations Manual indicates that the "resident environment" includes the physical surroundings to which the resident has access, including the resident's room, common areas, and the facility grounds, the board held that this requirement does not apply to hazards outside of the facility's control (such as hazards that a competent resident encounters on an authorized departure).

However, the board did not explicitly decide whether a facility must assess a resident's supervision and assistance needs to "prevent accidents" during authorized leaves. The board left open the possibility that the surveyors may be able to show a duty on the part of the facility to actually go off of the facility's grounds to observe and evaluate a resident's interactions with potential hazards. Nevertheless in this case, the board held that the surveyors had not introduced sufficient evidence to the administrative law judge to uphold such a finding, so the judge should reconsider this issue.

So although the board held that a facility does not have to eliminate hazards that are out of its control (such as those that a resident may encounter off facility grounds), it did indicate that a facility has some obligation to take steps to protect residents from harm when they leave temporarily. For example, said the board, the facility should be aware of when the resident is expected to return and factors that could affect the resident's health and safety when away (such

as the resident's need for medication during the furlough).

### 'See Ya' Isn't Good Enough

Finally, the Departmental Appeals Board stated that a resident's decision to leave the facility, even for authorized leaves, may, in a sense, be considered a refusal of the care and supervision that the facility would otherwise provide.

Under F-tag 115 of the State Operations Manual, if a resident refuses treatment, the facility must determine exactly what the resident is refusing and why. Then, to the extent that the facility is able, it should address the resident's concerns, attempt to clarify the consequences of the refusal, and educate the resident as to those consequences. The facility must also offer the resident alternative treatment and continue to provide the resident with all other services.

While the board recognized a competent resident's right to leave a facility unaccompanied, it indicated that the resident's rights must be weighed against the facility's duty to assess the potential consequences of the resident leaving and the alternatives that the facility could reasonably offer.

This board's decision opens the possibility of facility liability (both through survey enforcement and civil litigation) resulting from accidents that occur even when residents are on authorized leaves from the facility. Facilities therefore must have and enforce policies requiring residents to sign in and out for all authorized leaves and addressing residents' medication and other health care needs when they're away.

In addition, this decision suggests that facilities should assess potential harm that residents may encounter outside their grounds, educate the residents about these risks, and offer alternatives that keep residents at home. These steps are especially advisable when residents choose to leave unattended. Taking these steps will reduce the likelihood that a facility will be cited for failure to comply with the accident-prevention standard and receive a civil judgment against it.

*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. She is affiliated with Benesch Friedlander Coplan & Aronoff LLP of Columbus, Ohio.*

## Peace of Mind.

LTC Physicians  
**Insurance**  
Endorsed by **amda**



Being a member of AMDA makes you eligible for a variety of benefits including...

*Peace of Mind.*

Exclusively for AMDA members, *The LTC Physicians Insurance Program* is your one-stop resource for comprehensive, competitively priced professional liability insurance. Call today for a free quote and leave your insurance worries behind.

**(888) 544-2183**  
**www.ltcins.locktonaffinity.com**

Insurance Program Administered by Lockton Risk Services