

Legal Issues



By Janet K. Feldkamp, JD, RN, LNHA

Medical Directors Have Leadership Obligations

Even when residents reject help, leadership calls for sincere, documented efforts to reduce risks involved.

Medicare-Medicaid certification imposes a duty on a nursing facility to have a medical director to coordinate the medical care in a nursing facility and to implement the resident care policies through collaboration with other facility leaders. The case of *Van Duyn Home and Hospital v. CMS* illustrates the importance of this leadership.

The Van Duyn Home in Syracuse, N.Y., was cited in a 2009 survey for failing to provide adequate supervision and assistance to prevent accidents. As a result of the citation – for immediate jeopardy – the facility was fined for multiple days and the Centers for Medicare & Medicaid Services banned it from payment for new admissions for 48 days. The facility appealed.

The citation was based on the facility's failure to "exhaust all reasonable means of providing protection" for its residents. Triggering the citation were two residents' unsupervised outings from the facility. Each was physically and cognitively impaired and had a history of making poor decisions that sometimes exacerbated their medical conditions.

The residents, a 49-year-old man and a 53-year-old woman, both wheelchair-bound, were known to leave the facility together and not return for long periods of time, sometimes overnight. The staff observed the woman returning with alcohol and the man being "drunk and loud."

On May 20, 2009, they left the Van Duyn Home, and the woman returned that afternoon. The man did not. He tried to spend the night in a homeless shelter, was turned away, and then had a seizure and a fall, ending up in a hospital emergency room.

Although the facility argued that it was not a prison and couldn't hold residents against their will, the survey agency cited the Van Duyn facility for failure to assess the residents adequately, prevent accidents, administer the facility appropriately, and ensure that the medical director was overseeing resident care and resident care policies and procedures.

Balancing residents' needs for medical care and supervision against their rights as competent adults can be a difficult task for facilities and their medical directors. However, the requirement for safety demands oversight of each resident's needs, as identified by an assessment.

The Van Duyn facility's failures appeared to include the lack of formalized assessment protocols and policies and procedures to ensure the safety of residents leaving the premises unassisted. The medical director's testimony indicated that there was an assessment and evaluation process, but the facility could not produce any written version.

Neither residents' care plans nor medical records contained an assessment or itemization of the risks that each might experience when out of the facility unattended on pass. Also, there was no documentation of any analysis of how such risks might be reduced.

The facility failed to prove that staff or other care providers had taken reasonable steps to either assess or protect the residents. The 2011 Health and Human Services Department Appeals Board decision emphasized that it was

not important whether or not the residents would have rejected attempts to reduce their risks. The facility had to show proof that the risks were identified and interventions were offered.

The medical director's cited failure to adequately oversee the residents' care was specifically because of the lack of protocols. Creating protocols while trying to balance care needs and the right to independent decision making is challenging for a medical director. However, F Tag 501 requires the medical director to collaborate with the facility to guide, through policies and procedures, clinical decision making, treatment selection, and monitoring of the risks and benefits of interventions. This leadership role for medical directors is vital to the daily delivery of care that meets current standards of practice.

Most facilities have "challenging" residents who might push the boundaries of good decision making, but the Van Duyn case provides lessons on how facilities can strike a balance between risk and safety in assessing residents' decisions:

- ▶ The medical director should be involved in the ongoing development of resident care policies and procedures, and develop and continually review protocols determining the appropriateness of residents leaving the building unattended. Such protocols might include documentation of data from assessments of decision-making capabilities, physical limitations, and risks that may be encountered because of the resident's medical and psychological limits.
- ▶ Document the process of determining the safety of each resident requesting to leave the building unaccompanied and include the facility's recommendations.
- ▶ Seek additional guidance from psychiatrists or other appropriate medical or legal professionals if a resident's safety is in question because of his or her decision making.
- ▶ Periodically review with the interdisciplinary team any determination that it is safe for a resident to leave unattended.
- ▶ Seek guidance if a challenging situation arises.
- ▶ Create a plan of care to address the resident's unaccompanied absences from the building.

Risk can be reduced if a facility and its medical director work cooperatively to identify and address situations in which residents' face risks such as unattended leave. Careful development and implementation of policies and procedures can improve the delivery of care – while reducing the facility's potential exposure to regulatory or legal action – to residents who make choices that conflict with the recommendations of care professionals. 

Medical Expert Perspective

Skilled nursing facility medical directors are responsible under federal law – 42 CFR 483.75(i) – for implementation of policies and the coordination of medical care in the facility. AMDA has additional guidance on the nuances of the medical director's duties (www.amda.com/about/roles.cfm).

This mandate certainly encompasses a broad set of tasks that often seem far out of proportion to what the medical director is paid and that might be difficult to achieve even with a full-time position. But that is the reality of what is expected of us.

In recent years (really dating back to the revision of the F tag 501 guidance to surveyors in 2005), more scrutiny has been placed on the medical director's role (or lack thereof) in the quality assessment and assurance process and in ensuring appropriate and up-to-date policies and procedures. While deficiencies under F tag 501 are usually tied to multiple other tags, they specifically cite lack of medical director leadership or involvement, as in the case discussed here.

Of course, the deficiency applies only to the facility, and ultimately it is the facility's responsibility to hire a medical director who is engaged, involved, knowledgeable, and competent. There are still homes out there that hire medical directors as referral sources who may be woefully inept in the machinations of the nursing home world.

Having a CMD on board is an excellent idea for a nursing home where quality (and not just census) is the overarching goal, and with QAPI (the Quality Assessment and Performance Improvement program) looming, I think we will see more of a push for competent, certified medical directors.

We have also seen civil lawsuits where the medical director is specifically named as a defendant based on his or her involvement in that capacity (with or without involvement as the attending physician). A survey deficiency or citation under F tag 501 may be admissible in court and, if so, will certainly add to the probability of a verdict for the plaintiff.

Medical directors should be sure that they have adequate protection, either written into the facility's medical director contract, listed explicitly on the facility's insurance, or included on their own policy. Not many of these causes of action have been successful as of now, but they can be, and regular professional liability (malpractice) insurance typically will not cover medical director duties. Don't take a chance.

—Karl Steinberg, MD, CMD, Editor in Chief

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. You can comment on this and other columns at www.caringfortheages.com, under "Views."