Legal Issues

By Janet K. Feldkamp, JD, RN, LNHA

Address Risks Before They Cause Accidents

If an accident hasn't occurred in a nursing facility, how can it cause liability? The answer is that the potential for accidents can cause citations and sanctions, as shown in three survey-appeal cases this year.

The Centers for Medicare & Medicaid Services' Departmental Appeals Board and its administrative law judges have confirmed that skilled nursing facilities (SNFs) can be penalized up to hundreds of thousands of dollars for putting residents in immediate jeopardy of "foreseeable risks." The decisions highlight the importance of accident prevention, thorough investigations of near accidents, and remedial action plans.

Meadowwood Nursing Center v. CMS (CR2829, June 2013) was the appeal of a 123-day immediate jeopardy finding with a civil money penalty of more than $433,000. The case started when a survey team cited the facility for failure to provide adequate supervision and accident prevention involving side rails.

In the facility's documentation, surveyors discovered that a resident had been found uninjured with a side rail resting on her neck. The bed rails in use were full length side rails that are known to have gaps between them and the mattress or bed frame when the head of the bed is elevated.

Although the facility argued that it took reasonable steps to eliminate the foreseeable risk of bed rail entrapment, the administrative law judge determined that the actions weren't enough to mitigate potential risks to other residents with side rails on their beds. The judge's discussion centered on the well-known fact that side rails can entrap a person and be dangerous, so this is a hazard that can be avoided.

The two other cases involve elopements from SNFs. *Courtyard Healthcare Center v. CMS* (CR2712, March 2013) was based on the wandering of a resident during the second day of a survey. An 83-year-old resident was found unharmed about a block away from the Goshen, IN, facility at a busy intersection without sidewalks.

On investigation of the exit system, surveyors found that a door with a keypad didn't prevent residents from exiting the building when someone wearing a security bracelet was near the door. The surveyors issued a citation at the immediate jeopardy level. A civil money penalty of $3,750 was imposed by an administrative law judge and then upheld by the Departmental Appeals Board.

In *Glenoaks Nursing Center v. CMS* (CR2660, Nov. 2012 and CR2522, June 2013), the board upheld an immediate jeopardy citation for more than a month for the Lucedale, MS, facility's failure to prevent foreseeable accidents related to elopement. The civil monetary penalty amounted to nearly $130,000.

In Jan. 2011, a cognitively impaired resident was noticed walking outside the building when staff were taking a break. The facility had a system whereby residents at risk of wandering wore a special armband, but surveyors found that some staff were unaware whether or not the resident had been identified as a wanderer or wore the armband. The staff also were unaware that a care plan had been developed to assure this resident's safety because she was at risk of wandering.

The surveyors determined, and the Departmental Appeals Board upheld, that the facility didn't take all reasonable steps to ensure that residents receive supervision and assistance to avoid foreseeable risks of harm from accidents.

Accident prevention is an ongoing challenge for facilities; however, appropriate actions must be undertaken by a nursing facility's safety committee or quality assurance committee to provide an ongoing and comprehensive review of safety policies, procedures, protocols and equipment needs.

The three cases summarized here suggest some general guidelines:

- When accident hazards are identified, take decisive action to mediate concerns. Thoroughly review the action with the quality assurance committee.
- Use resident-assessment information to develop a complete care plan that addresses accident prevention and is consistently implemented.
- Perform and document routine evaluation of safety equipment such as door keypads, locking devices, door alarms and resident-wanderer bracelets.

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, OH. Comment on this and other columns at www.caringfortheages.com, under "Views."*

Medical Expert Perspective

In both the civil and regulatory arenas, elopement, accident and fall cases are high-profile and potentially high-dollar nursing home (and assisted living) negligence categories. Obviously, not all of these events are foreseeable, and residents' rights and dignity clearly must be factored into any decisions about prevention measures, but it's important to identify the risks and at least consider (and document consideration of) a variety of care plans.

It's also important to seek out, and document, the desires of the resident or that person's decision makers. Informed consent and its refusal are important aspects of accident-and-elopement policies, and the interdisciplinary team should never make decisions unilaterally. However, sadly, it should be noted that even when someone has refused recommended interventions (such as alarms, side rails, etc.) in an informed and amply documented fashion, facilities and clinicians can still be sued and found liable. Juries, judges and surveyors sometimes look merely at a bad outcome and conclude that it must have been somebody's fault.

One lesson from the regulatory cases cited here is that when you do have a plan of care for a resident, you need to be sure that *everyone* is aware of it. If not all staff know that a particular resident is an elopement risk, someone may hold the door open as that person walks out of the building.

Also, it is advisable to have a concrete action plan for elopements and to run drills from time to time. Clearly, the sooner an elopement is identified and a search begun, the better the chances of locating the wanderer.

—Karl Steinberg, MD, CMD, Editor in Chief