Wiggin & Dana

Counsellors at Law

One Century Tower
P.O. Box 1832
New Haven, Connecticut
06508-1832
Telephone: 203.498.4400
Telefax: 203.782.2889

Offices in:
New Haven
Hartford
Stamford
Philadelphia
www.wiggin.com

SPECIAL ADVISORY: STATE LAW AMENDED TO REQUIRE DUAL MEDICARE AND MEDICAID CERTIFICATION OF ALL NURSING HOME BEDS EFFECTIVE JUNE 30, 2002 IMPLEMENTATION DATE SEPTEMBER 30, 2002

Introduction

Nursing homes with rest homes with nursing supervisions ("RHNS") beds or with Medicare distinct parts take note: Under a recent change in Connecticut law (Section 46 of Public Act 02-7, May Special Session) Medicare-distinct parts have been eliminated. As a result, all chronic and convalescent nursing homes ("CCNH"), RHNS (including free-standing RHNS facilities), and chronic disease hospitals associated with nursing homes that participate in the Medicaid program must dually certify all of their beds for participation in both the Medicare and Medicaid programs. The only exception to the dual certification requirement is a CCNH that restricts its services to AIDS patients.

In a letter dated September 13, 2002, the Department of Social Services ("DSS") notified all affected nursing homes that **requests for Medicare certification must be sent to the Department of Public Health ("DPH") by Monday, September 30, 2002**. The letter outlined the steps that a facility must follow to submit the initial request to DPH and for informing DSS of the response from DPH. The steps require the facility to:

(1) send a written request to certify RHNS beds for Medicare to the Certification Unit of the Department of Public Health ("DPH") with a copy to the Office of CON and Rate Setting of the Department of Social Services ("DSS") and

(2) within 7 days of receipt from DPH, submit the approval letter along with the Medicare Intermediary Provider Tie-In Notice, or the denial letter, to DSS. Although the letter does contemplate the possibility that a request for Medicare certification may be denied by DPH, there is no discussion of what actions, if any, a facility may or must take to acquire the necessary DPH approval.

The Writing Was on the Wall: Elimination of the "Level of Care" Exception in the Bed Reservation Law

- Last year, the General Assembly amended the bed reservation law, Conn. Gen. Stat. § 19a-537, by removing all references to "level of care" (Public Act 01-2, June Special Session in 2001). Prior to this change, a nursing home was not required to reserve the bed of a hospitalized Medicaid resident if the resident would be returning to the nursing home at a different level of care.

- Now, since 2001, a nursing home must reserve a resident's bed when the resident goes out to the hospital without regard to the level of care needed by the resident upon return from the hospital. In other words, if a resident in an RHNS bed is hospitalized and requires Medicare covered skilled nursing services, the nursing home must reserve the resident's RHNS bed and accept the resident back into the RHNS bed.

- Because the bed reservation law requires that a nursing home reserve a hospitalized patient's RHNS bed, such patient, otherwise eligible for Medicare reimbursable services, might return to a non-Medicare-certified RHNS bed creating a situation where Medicare payment will be denied and the payer source will default to Medicaid. To avoid this result, the state had been certifying RHNS beds for Medicare when requested. In addition, many facilities have converted their RHNS beds to CCNH beds, and the 2001 legislation gives a 2007 deadline for any RHNS to CCNH conversions. With Medicaid budget pressures and increased focus on third party liability cases, it comes as no surprise that DSS would take action to ensure that Medicare would remain the primary payer source for dually-eligible residents.

- Although the General Assembly removed "level of care" from the bed reservation law, it did not eliminate the RHNS licensure level. In the admissions context, therefore, licensure levels still remain even though the 2001 law eliminates level of care in the bed reservation context. This inconsistency no doubt will be the subject of some interpretation.

How Will the Dual Certification Requirement Affect Nursing Homes?

1. **Staffing**

- Changes in the bed reservation law and the dual certification requirement may lead to increased circumstances where a resident will return from a hospital-stay to an RHNS bed. Assuming that a physician certifies the resident for re-admission to the RHNS, the post-hospitalized resident may still require a level of care and services that typically is not provided by an RHNS-licensed facility.

- In order to ensure that the post-hospitalized resident returning to the RHNS receives the necessary and appropriate care, the nursing home must bring the necessary care to the resident in the RHNS bed. The RHNS facility will need to provide additional staff and/or ensure that the current staff is trained and educated to meet the needs of residents with care needs that exceed the usual RHNS resident.

2. **Medicaid Reimbursement Rate**

- Medicaid reimbursement rates are lower for RHNS beds than for CCNH beds. This is based on the assumption that the level of care provided to residents of an RHNS is less intensive and therefore less costly as compared to the level of care provided to residents of a CCNH. Paradoxically, however, under the current laws, nursing homes now may experience increased costs as a result of the need to provide training and education for RHNS staff and/or to provide for necessary increases in staffing levels as discussed

above. These increases in costs will not be reflected in the RHNS Medicaid rate. Since an RHNS must readmit a Medicare eligible resident, that resident may continue to require a higher intensity of services, even after Medicare coverage expires. The facility will be forced to provide skilled care for the resident in the RHNS, but still will receive only an RHNS Medicaid rate.

- At the September 18, 2002 meeting of the Association of Long Term Care Financial Managers, Michael Starkowski, Deputy Commissioner of Social Services recognized the possibility of increased costs resulting from staffing issues. He did indicate that under such circumstances a nursing home could apply to the Department for an interim rate increase to cover such costs and that the Department would consider the requests although any approvals of interim rate increase requests would, of course, be subject to "available funding."

3. **Transfer/Discharge**

- In the past, inter-facility transfer/discharge statute, Conn. Gen. Stat. § 19a-535, has governed the transfer of a nursing home resident from the RHNS level of care to the CCNH level of care within one facility because the CCNH Medicare certified portion of the facility was considered a Medicare distinct part.

- Now that the Medicare distinct part has been eliminated, all transfers from within a facility will be subject to the room-to-room transfer requirements in Conn. Gen. Stat. § 19a-550(c).

4. **Waiting List**

- Regulations of Connecticut State Agencies § 17-311-209, which govern exceptions to the waiting list admissions procedure, allow for a facility to consider the applicable level of care requirements established by the Public Health Code for CCNH and RHNS licensed beds when considering applicants on the waiting list for admission. The new dual certification requirement does not eliminate the RHNS level of care, and thus facilities should be permitted to consider the two levels in the admission process under the waiting list law.

- Consideration of level of care for new admissions under the waiting list law does seem inconsistent with the elimination of level of care in the bed reservation law and the implementation of the dual certification requirement. It is unclear at this time whether DSS has considered this inconsistency and whether it anticipates any changes in implementation of the waiting list law. CANPFA has raised the issue with DSS and will keep CANPFA members advised on any guidance provided by DSS.

- The waiting list regulations also allow for exceptions to admit eligible residents to certain designated beds set aside for respite care, short-term rehabilitation or specialized units (e.g., Alzheimer's Units or TBI Units). Again, because the dual certification does not eliminate the two tier licensure categories, it remains possible for a nursing home to establish special units within its CCNH for Medicare eligible

residents and to admit medically appropriate residents to these beds. The facility may also present RHNS residents who qualify for Medicare coverage post-hospitalization, with the option of moving to the special unit; however, residents cannot be forced to move into a special unit. Once admitted to a dually certified bed in a special unit, the resident may be transferred involuntarily from the bed within the special unit to another bed within the nursing home once the resident no longer needs the services in the special unit, in accordance with the room-to-room transfer requirements under Conn. Gen. Stat. § 19a-550.

Strategies for Dealing with the New Requirement

1. Meet the September 30, 2003 deadline!

2. As discussed above, the 2001 General Assembly enacted legislation that allows a nursing home with both RHNS and CCNH beds to convert all beds to the CCNH level of care by 2007. Since the dual certification requirement may result in more residents with higher care needs residing in RHNS beds, it may be prudent now to begin the process of converting RHNS beds to CCNH beds.

3. Consider establishing a special subacute or short term rehabilitation unit if you do not already have one in place. Make sure to establish specific criteria for admissions to and discharges from the special unit. In addition, to comply with waiting list law requirements, it is advisable to have your board of directors formally approve creation of the unit; the board resolution creating the special unit should indicate the number of beds designated as the special unit. Educate residents and families about the unit and what it can offer residents if they are hospitalized and then require subacute services. Offer the special unit as an option to RHNS residents who become Medicare eligible as a result of hospitalization. Although residents have the right to be readmitted back to an RHNS bed to receive Medicare services, they can also voluntarily agree to return to your subacute unit. As discussed above, once the resident no longer requires subacute services, the resident can return to the RHNS if appropriate; the facility then can involuntarily transfer the resident back as a permissible room to room transfer if the resident refuses to move.

4. If you anticipate that your RHNS costs will increase as a result of this new requirement, contact DSS about obtaining an interim RHNS rate to cover increased costs.

* * * * * * *

For additional information, contact Maureen Weaver at (203) 498-4384 or mweaver@wiggin.com or Catherine P. Baatz at (860) 297-3748 or cbaatz@wiggin.com.

\695\9\362243.2