

Testimony on HB 1416
House Human Services Committee
January 23, 2007

Chairman Price and members of the House Human Services Committee, thank you for the opportunity to testify in support of HB 1416. My name is Shelly Peterson, I'm President of the North Dakota Long Term Care Association. On behalf of our members, we ask for your support of HB 1416 and I'd like to explain to you why we feel this legislation is important.

I understand that NDCC 14-09-10 Reciprocal Duty of Support – support of poor, was enacted in 1877. I'm not sure why it was enacted and to my knowledge it has been used very little in the past 100 plus years. We are proposing HB 1416 to help facilities receive payment for individuals in their care.

Approximately one in ten residents in a nursing facility have issues with paying for their nursing facility care. One of the top issues in not getting paid, and certainly the one that yields the greatest financial losses, is when an individual believes Medicaid is going to pay the bill and they find out they are not eligible because of assets transferred to children.

HB 1416 accomplishes one purpose, it states that if a resident of a basic care or nursing facility is determined ineligible for Medicaid benefits because of a disqualifying transfer to an adult child, we may discharge the resident to the care of the child (who received the asset) unless the child pays for the long term care stay, up to the value of the asset transferred to the child.

In these circumstances, since Medicaid won't pay for the care the facility's legal options are to try and retrieve the asset so the resident has funds to pay for their care. What's good about HB 1416 is that children are put on notice that if you receive assets from your parents and they suddenly need long term care and Medicaid disqualifies them, they may need to care for their parent or make funds available from the proceeds of the asset that originally belonged to the parent.

I want to assure you that facilities will not be discharging a parent to the home of a child where it is not safe, appropriate or where the parent will not get the care and services they need. How can I assure that to you?

Federal regulations govern every step of the discharge process and first and foremost we must find a suitable discharge location. Further nursing facilities do the right thing and ethically and morally would not complete a discharge where the resident would not be appropriately cared for.

Federal regulations give nursing facilities the right to discharge a resident for non-payment. When we discharge for non-payment we must:

1. Provide a 30 day advance notice of the discharge.
2. The written notice must be in a language and manner that the resident, family member or legal representative understands. The facility needs to be conscious of language barriers, visual barriers or physical and mental limitations of the resident.
3. The notice must be in accordance with North Dakota Administrative Code Section 75-01-03-06.2
4. The notice of discharge must state the specific location of where the resident is being discharged to.
5. The notice of discharge must state the resident has the right to appeal the action to the State Appeals Supervisor.
6. The notice must contain the name, address and telephone number of the State Long-Term Care Ombudsman and Protection and Advocacy.

Regarding the specific location of where the resident is being discharged to, facilities have a specific federal regulation regarding preparation and orientation of the resident to the new location.

CFR 483-12(A)(7) Orientation for Transfer and Discharge – a facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

Interpretive Guidelines 483.2(a)(7):

“Sufficient preparation” means the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation. The facility should actively involve, to the extent possible, the resident and the resident’s family in selecting the new residence. Some examples of orientation may include trial visits, if possible, by the resident to a new location; working with family to ask their assistance in assuring the resident that valued possessions are not left behind or lost; orienting staff in the receiving facility to resident’s daily patterns; and reviewing with staff routines for handling transfers and discharges in a manner that minimizes unnecessary and avoidable anxiety or depression and recognizes characteristic resident reactions identified by the resident assessment and care plan.

When facilities are faced with an issue of non-payment it is very difficult on everyone. First the parent, if they are cognitively intact, are worrying about the bill and where will they go to for care. Secondly, children fighting over assets can be very troubling to the parents mental and physical health. Long term care facilities are caught in the middle; they really don't want to discharge but need to get paid so they can pay their bills. It is almost impossible to find a new location for the resident. When they call other facilities and tell them you are discharging for non-payment, no one will take them. No one will take them and they have no place to go. The option of sending a resident back home could never occur if in our assessment the children were ill equipped to care for the parent.

Parents and children need to know that when transfers of property and possessions are occurring, they need to plan how they will pay for their long term care should they need it. The discussion and planning needs to occur when property is being given away. Children need to know that if they receive assets from a parent and the parent suddenly needs 24-hour care, the assets may need to be available for their care. The ideal solution in all of this is planning for your long term care and if you have assets you want to protect, purchase long term care insurance.

In summary, HB 1416 puts into statute a process to help assure individuals can receive care and provide payment from assets they've accumulated. If they can't get access to their asset, and children can't care for them, what should we do with them? HB 1416 provides that solution. This concludes my testimony and I would be happy to try and answer any questions you may have.

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Amendment to HB 1416

Page 1, Line 13, after "for" insert "basic care assistance or" and replace "benefits" with "long term care coverage."

IMPLEMENTATION OF TRANSFER OR DISCHARGE REQUIREMENTS BY NURSING FACILITIES

1. Develop facility policies and procedures for transfer or discharge.
2. Write the notice in a language and manner the resident and family member or legal representative understands. Be conscious of language barriers, visual barriers, or physical limitation of the resident.
3. Type a form using 12 point type and facility identifying information.
4. Give notice in accordance with North Dakota Administrative Code (NDAC) Section 75-01-03-06.2 which provides as follows:
 1. Any notice required to be given by this chapter may be given by first class mail or personal delivery unless some provision of law specifically requires notice to be given in another manner.
 2. Any notice required to be given by certified or registered mail may be so given without requesting a return receipt unless some provision of law specifically requires a return receipt to be requested.
 3. Any notice given by certified or registered mail, return receipt requested is deemed to be effectively given if delivered or if refused.
 4. Any notice required to be given by certified or registered mail, return receipt requested, if returned undelivered but not refused, may be supplemented by a notice given by first class mail. A notice given by first class mail, in supplementation of such a returned notice, is deemed to have been received unless it is shown, by a preponderance of the evidence that:
 - a. The mail was not properly addressed;
 - b. The mail containing the notice was returned by the postal service;
 - c. The mailing of the notice cannot be shown by an affidavit.
5. Give the original notice to the resident, a copy to the resident's family/legal representative, and a copy is placed in the resident's medical record.
6. Refer to 42CFR 483.12(a)(3){F202}, regarding a physician's documentation supporting the transfer or discharge, in the resident's clinical record.
7. To calculate the correct date for the appeal, always add 30 days to the date the notice will be issued to the resident. Count the days on a calendar for the exact date to be recorded in the Right to Appeal section of the forms.
8. DO NOT give a Notice of Transfer or Discharge for Nonpayment for a failure by a resident or their representative to pay for charges for private rooms, bedholds in excess of 15 consecutive hospital days or 24 therapeutic leave days per calendar year, or special services not included in the daily rate. (Refer to NDAC Chapter 75-01-03-08(7)(j)).
9. Only issue both a written transfer or discharge notice and the facility's bedhold notice when a resident is hospitalized. (The requirements for bedhold do not apply for a Medicare only hospital based distinct part nursing facility, or a swing bed unit.

NOTICE OF TRANSFER OR DISCHARGE FOR NONPAYMENT

Resident Name _____

Transfer or Discharge Information:

NDAC 75-01-03-08.1(7)(j) authorized a transfer or discharge due to lack of payment for nursing facility covered services.

- j. The resident fails to pay, or to arrange for payment of, any part of charges based on the daily rate established under chapter 75-02-06, provided that no involuntary transfer or discharge may be based on a failure to pay charges for private rooms, bedholds in excess of fifteen consecutive hospital days or eighteen therapeutic leave days per calendar year, or special services not included in the daily rate.

You are being transferred or discharged to _____ on _____
(Location) (Date)

because _____

(Reason)

Right to Appeal:

If you do not agree with this transfer or discharge, you have the right to appeal within 30 days after the date of this notice. Your written request for a hearing must be made by 5:00 p.m. (CT) on _____ to:
(Date)

Appeals Supervisor
Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505
Phone: (701)328-2341

If your appeal request is filed before the transfer or discharge is to occur, the transfer or discharge will be delayed until the hearing decision is made.

If the Medicaid program is paying for any of the cost of your services in the facility, Medicaid will continue to pay for these services until the hearing decision is made unless you are notified in writing that:

1. There is a change in your eligibility for the Medicaid program and benefits; or
2. That the Medicaid payments for services will stop because of a specific state or federal law or policy which prohibits such payments.

Right of Representation:

You have the right to represent yourself at the hearing or may use legal counsel, a relative, a friend, or another spokesperson.

If you would like assistance with your appeal, you may also contact:

Helen Funk
State Long-Term Care Ombudsman
Aging Services Division
600 E Boulevard Ave Dept 325
Bismarck, ND 58505-0250
701-328-4601 or 1-800-451-8693

If you are a resident with a developmental disability or are mentally ill, assistance may be obtained from:

Office of Protection and Advocacy
400 E Broadway Ste 409
Bismarck, ND 58501-4071
701-328-2950 or 1-800-472-2670

Persons Notified: _____ (Resident) _____ (Date)
_____ (Family Member/Legal Representative) _____ (Date)

Facility Representative Who Completed Form _____ Date _____

Summary of the Transfer of Asset Provisions

1. Extension of Look-back Period and Computation of Penalty Period

- a. The “**look-back period**” is **lengthened** from the 36 months prior to the month of application to **60 months** prior to the month of application.
- b. The **penalty period** no longer begins with the date of transfer, but now **begins** on the later of the date of transfer or the date **the individual would otherwise be eligible** for Medicaid coverage of long-term care expenses.
- c. For transfers that are less than the average cost of care for one month, **States must impose partial month penalties.**

2. Promissory Notes, Loans and Mortgages

The DRA also addresses the treatment of promissory notes, loans, and mortgages. Often, individuals would transfer large sums of money, **claiming that the transfer was not a gift but a loan, when in fact there was no meaningful repayment plan.** The DRA provides that any purchase of a note, or any loan or mortgage, will be treated as a transfer, subject to penalty unless specific conditions are met.

3. Life Estates

At times, individuals pay sums of money to others in exchange for the right to live in that individual's home. The purchaser has no right to sell or take a loan against the property, only the right to use it as a residence. The DRA provides that **the purchase of a life estate (the right to reside in property which belongs to another) is a transfer of assets unless the purchaser actually resides in the property for at least one year after the date of purchase.**

4. Undue Hardship

The DRA does mandate that every State implement undue hardship provisions that allow for the waiver of a penalty period where an individual would be deprived of medical care such that the individual's life or health would be endangered, or that the individual would be deprived of food, clothing, shelter or other necessities of life.

5. Annuities

Section 6012 of the DRA addresses the use of annuities as a method of sheltering assets. To discourage the use of annuities to shelter funds for heirs while qualifying for Medicaid, this provision requires specific criteria to be met.

- a. **Applicants must disclose to the State any interest** the applicant or spouse has in any annuity;
- b. **The State must be named as the remainder beneficiary**, or as the second remainder beneficiary after a community spouse or minor or disabled child, for an amount at least equal to the amount of Medicaid benefits provided; and
- c. **Annuities** purchased by or on behalf of the applicant **must be part of a bona-fide retirement plan** or must be irrevocable, non-assignable, **actuarially sound**, and provide for equal monthly payments.

An annuity purchased after February 7, 2006 that does not meet the requirements above will be treated as a transfer of assets subject to penalty.

6. **The "Income First Rule"**

Section 6013 of the DRA addresses the methodology for calculating the amount of resources that may be preserved for a community spouse. The "income first rule" requires that the amount of the institutionalized spouse's **income that would be made available to the community spouse be considered to be available to the community spouse before computing the amount of additional resources that would be required to bring the community spouse's income up to the standard.**


7. **Home Equity Provision**

Section 6014 of the DRA imposes a **limit of \$500,000** on the value of an individual's home equity. **States may increase this figure up to \$750,000** by submitting a State Plan amendment.

8. **Deposits with Continuing Care Retirement Communities (CCRC)**

Section 6015 pertains to deposits individuals make with continuing care retirement communities (CCRC) or life care communities. Such communities require large sums to be deposited upon entrance to the community. The DRA specifies that **these funds are countable**, precluding eligibility until these funds, in addition to any other countable assets, are within the State's Medicaid limits.

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