

Memorandum Urging Approval

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER #11-GOV

December 8, 2017

S. 6559
A. 8338

By: Senator Hannon
By: M of A Gottfried
Senate Committee: Rules
Assembly Committee: Health
Effective Date: Immediately

AN ACT to amend the public health law, in relation to reserved bed days.

THE NEW YORK STATE BAR ASSOCIATION ELDER LAW AND SPECIAL NEEDS SECTION SUPPORTS THIS BILL TO REINSTATE RESERVED BED DAYS or “BED HOLD” FOR MEDICAID RECIPIENTS LIVING IN NURSING HOMES AND URGES ITS APPROVAL

This proposal would restore provisions of the NYS Public Health Law (“PHL”) that were amended in the NYS budget for fiscal year 2017 - 2018¹ (“NYS FY 2017 - 2018 Budget”), reinstating a critical longstanding protection for nursing home residents. Before these sections of the PHL were amended by the FY 2017 - 2018 budget, PHL §§ 2808 and 2801-e reimbursed nursing homes for up to 14 days per year while a long-term nursing home resident was hospitalized. This ensured that nursing home residents were guaranteed the same bed that they occupied before leaving the facility for hospital care.

BACKGROUND

Prior to the enactment of the NYS FY 2017 - 2018 Budget, New York had long exercised an option under federal Medicaid law² to reimburse nursing homes, on a limited basis, while a long-term resident was hospitalized. This option, known as “reserved bed days” or “bed hold,” was codified in PHL §§ 2808 and 2801-e. Reimbursement was limited to 14 days per year, was solely for residents who had been in the nursing home for at least 30 days,³ and was made only if the vacancy rate in the nursing home was below five

¹ L. 2017 Ch. 57, Part E § 2.

² 42 C.F.R. §447.40

³ 18 NYCRR 505.9(d)

percent. *Id.* The NYS FY 2018 Budget repealed these reserved bed day payments for adult nursing home residents who are hospitalized, effective April 1, 2017.⁴

After the budget was passed, many nursing homes sent letters to families of residents warning them that they would have to pay privately to hold their loved one's bed if the resident was hospitalized. Residents and their families are afraid and confused, fearful of having to make a decision to go to the hospital and receive the care they need, or refuse hospitalization in order to reserve their current bed in a particular nursing home.

Soon after the budget was enacted, on May 12, 2017, the State Health Commissioner issued a letter to Nursing Home Administrators, postponing implementation of the changes in state law until regulations are promulgated.⁵ This moratorium affords the opportunity to maintain the *status quo* by reinstating the longstanding bedhold payments, through enactment of this bill. Passage of this legislation would obviate the need to spend administrative resources on implementing this massive change, and avoiding the widespread confusion caused to nursing home residents and their families and nursing home staff.

DISCUSSION

This change enacted in the budget was justified by claiming that despite eliminating reimbursement to nursing homes for bed hold days, it was still “preserving the requirement for nursing homes to hold beds for residents who temporarily leave the nursing home.” FY 2017 - 2018 NYS Executive Budget Health & Mental Hygiene Bill Article VII Bill Memorandum in Support, p. 12. However, nursing homes are only required to re-admit residents who were in the facility for more than 30 days “...to their previous room **if available or immediately upon the first availability of a bed in a semi-private room....**” 42 CFR §483.15(e)(emphasis added), incorporated in State regulations at 10 NYCRR §§ 415.3(h)(3), 447.40. Thus a resident who may have been in a nursing home for years has, in fact, no right to return to her same bed in her same room, or to any bed in the facility, if none are available.

The reserved bed hold is an important protection because nursing homes have no incentive to re-admit residents after a hospital stay. Absent Medicaid reimbursement or private funding, the nursing home is left with a vacant bed and incurs a loss for any reserved bed day. The New York State Department of Health has reiterated bedhold

⁴ L. 2017 Ch. 57, Part E § 2. The budget left intact reserved bed day payments for children in nursing homes, and for adults who leave the nursing home for “therapeutic leave,” such as visits to family for the holidays. However, the most common reason for leaving the nursing home is for hospital care.

⁵ The letter is not posted on the Department of Health website, but was posted by LeadingAge NY. <https://www.leadingageny.org/providers/nursing-homes/survey-clinical-and-quality/doh-issues-update-on-reserved-bed-days/>.

policy to nursing home administrators on a number of occasions. In a “Dear Administrator Letter” [DAL] issued in September 2015, the Department noted its “concern regarding provider trends related to resident transfer and discharge, including ... [the] [r]efusal to readmit nursing home residents who are temporarily hospitalized.”⁶ [“2015 DAL”] By removing the Medicaid funding for bedholds, while simultaneously requiring it in the regulations, nursing homes are being saddled with an unfunded mandate. The situation created by this change is to place Medicaid patients at a distinct disadvantage with respect to other patients in the same facility.

People with dementia or other cognitive or mental impairments are particularly vulnerable in these situations. In the 2015 DAL, the Department of Health reminded facilities that:

...When sending residents with episodes of acting out behavior to hospitals for treatment, the nursing home is responsible to readmit the resident and/or develop an appropriate discharge plan. In these cases, the hospital is not considered to be the final discharge location. With imminent danger transfers, the facility is required to hold the bed for the resident.

2015 DAL (DAL NH 15-06), see footnote 4 supra [Emphasis added].

The elimination of bedhold payments will exacerbate situations by removing any incentive for facilities to hold residents while an appropriate discharge plan is developed for the difficult residents and encourage institutions to use hospitals as dumping grounds for undesirable residents. Residents, fearful of losing their familiar surroundings or even placement in an area where loved ones can easily visit them, may refuse needed hospital care.

Discharges from nursing homes to hospitals for treatment and a consequent refusal to readmit the resident because of a lack of beds has been used in some cases as a pretext to circumvent the federal protections that permit transfer and discharge of nursing home residents only for limited reasons and with advance written notice and the opportunity for a hearing. 42 CFR 483.15(c) and 10 NYCRR Section 415. The 2015 DAL, like the

⁶ September 23, 2015, DAL NH 15-06 - Transfer & Discharge Requirements for Nursing Homes, available at https://www.health.ny.gov/professionals/nursing_home_administrator/dal_nh_15-06_transfer_and_discharge_nh_requirements.htm (last accessed Feb. 19, 2017). Earlier reminders of the same policy include:

- [NH DAL 11-11: Nursing Home Discharge Requirements](#) - September 29, 2011
- [DAL 06-23 - Transfer and Discharge Rights](#)
- [DAL 04-02 Revised Interim Policy for Transfer/Discharge of Nursing Home Residents](#)

All available at https://www.health.ny.gov/professionals/nursing_home_administrator/#dal

earlier ones cited in footnote 4, reminded nursing homes of these requirements. Uninformed residents do not know their rights and lack the wherewithal to demand re-admission.

In other cases, nursing homes interested in maximizing reimbursement rates continue to prefer sub-acute or rehabilitation care; advocates and the Department of Health have noticed more incidents where nursing homes have transferred long-time residents to free up beds for short-term rehab patients. Although the 2015 DAL and earlier ones remind nursing homes that this is not allowed, they will have fewer reasons to follow the law if the bedhold payments are not reinstated.

CONCLUSION

Based on the foregoing, the New York State Bar Association Elder Law and Special Needs Section **SUPPORTS** this bill, to reinstate the provisions of the Public Health Law that provide for payment of reserved bed days to nursing homes for adult residents who are temporarily hospitalized and **urges its approval by the Governor.**