

Patients' Right to Freedom of Choice of Providers: Complaint by Provider against Hospital Substantiated by State Surveyors

Providers must have a steady stream of referrals in order to be viable. By the same token, all patients have the right to choose the providers who render care to them.

Several sources affirm the right of patients to choose their providers, including the following:

- Court decisions establish the right of patients to control the treatment they receive, including the right to determine who provides care. Thus, one source of patients' right to freedom of choice of providers is the so-called "common law." The right of freedom of choice of providers based upon the common law applies to all patients, regardless of treatment setting or payor source.
- Federal statutes of both the Medicare and Medicaid Programs guarantee patients whose care is paid for by these Programs the right to freedom of choice of providers, regardless of treatment setting.
- The Balanced Budget Act of 1997 and Conditions of Participation (COP's) of the Medicare Program require hospitals *only* to develop a list of home health agencies that: (1) are Medicare-certified, (2) provide services in the geographic area in which patients reside, and (3) ask to be on the list. In addition, if hospitals have a financial interest in a home health agency that is included on the list, the hospital's financial interest must be disclosed on the list. This list must be presented to patients discharged from hospitals who receive home health services.

Providers that are not owned by or affiliated with hospitals have long complained that hospitals repeatedly violate patients' right to freedom of choice of providers. They have frequently asked what enforcement action may be taken in such instances.

Patients must be willing to pursue violations of the common law right to freedom of choice of providers and the federal Medicare and Medicaid statutes guaranteeing this right. Understandably, patients are often unwilling to do so. Responsible providers recognize that putting pressure on patients or putting them in the middle of conflict between agencies is simply unacceptable practice.

With regard to the provisions of the Balanced Budget Act, providers who alleged violations could certainly make reports to the regional and central offices of the Centers for Medicare and Medicaid Services (CMS). They could also make reports to The Joint Commission when they suspected violations. On the whole, however, post-acute providers remain quite concerned about the lack of enforcement regarding this important right.

Action taken by a post-acute provider in Indiana and other post-acute providers points to another possible enforcement route. Specifically, the provider documented instances of alleged violations and reported them to the state survey agency. Surveyors treated the reports like a complaint and conducted a complaint survey of the hospital's practices. Surveyors concluded that the hospital violated its own policies and procedures, the provisions of the Balanced Budget Act, and CoP's in the process of making referrals for home health services. The hospital received a statement of deficiencies and was required to submit and follow a plan of correction (POC).

These instances open the door for clear enforcement action against hospitals that violate patients' right to freedom of choice. If violations are at the condition level of deficiencies, hospitals could lose their right to participate in the Medicare/Medicaid Programs.

Hospitals, hospital-based providers, and providers that are not affiliated/owned by hospitals must exercise caution as follows:

- Hospitals should carefully review their internal policies and procedures related to these issues. A careful reading of the Statement of Deficiencies issued to the hospital in the case described above seems to indicate that the hospital's policies and procedures were unnecessarily restrictive with regard, for example, to whether coordinators/liaisons from home health agencies, HME companies, and other providers could participate in discharge planning meetings.
- Providers that are not owned or affiliated with hospitals must carefully document alleged violations of patients' right to freedom of

choice of providers, preferably through signed statements from patients. They are likely to make little progress with regard to such violations if the word of staff members is pitted against the word of hospital staff.

The right of patients to choose providers has generated considerable conflict within the provider community. Knowledge and understanding of what is required of discharge planners/case managers and providers in this regard will go a long way to alleviating unnecessary contention.

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