

LETTER OPINION
98-L-188

October 19, 1998

Ms. Carol K. Olson
Executive Director
Department of Human Services
State Capitol, Judicial Wing Dept. 325
600 East Boulevard Avenue
Bismarck, ND 58505-0250

Dear Ms. Olson:

Thank you for your letter regarding the statutory right of residents of long-term care facilities under N.D.C.C. § 50-10.2-02(1)(g) to be fully informed in writing of all charges by the facility.

The North Dakota Department of Human Services ("Department") operates the state ombudsman program for residents of various nursing facilities, including long-term care facilities, under North Dakota Century Code (N.D.C.C.) ch. 50-10.1. See also 42 U.S.C. § 3058g. The program is administered by the state ombudsman, who investigates potential violations of rights of nursing facility residents established under N.D.C.C. ch. 50-10.2, commonly called the North Dakota health care facility resident "Bill of Rights." Resident rights include a "right to be fully informed in writing prior to or at the time of admission and during one's stay, of services provided and the charges for those services, including ancillary charges." N.D.C.C. § 50-10.2-02(1)(g). Federal law and regulations have similar provisions for nursing facilities participating in the Medicare and Medicaid programs which provide that the facility "must inform each resident before, or at the time of admission . . . of services available in the facility and of charges for those services" 42 C.F.R. § 483.10(b)(6). See also 42 U.S.C.S. §§ 1395I-3(c)(1)(B)(iii) and (d)(4)(A) (Medicare); 1396r(c)(1)(B)(iii), (iv) and (d)(4)(A) (Medicaid).

You ask whether a facility has complied with N.D.C.C. § 50-10.2-02 when an attachment to a nursing facility's admission contract labeled "Medicare covered services and charges" indicates that a resident covered under Medicare Part B is liable for 20 percent coinsurance for certain ancillary services, and advises that a list of all

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charges is available upon request, but fails to mention any responsibility of the resident for a deductible.

To comply with N.D.C.C. § 50-10.2-02, a facility must hand-deliver to each resident a written statement of the resident's rights at the facility, including the resident's "right to be fully informed in writing . . . of services provided and the charges for those services, including ancillary charges." N.D.C.C. § 50-10.2-02(1)(g). This statement must be provided when the resident is admitted to the facility and orally explained within 30 days of admission and annually thereafter. Id. I will assume for the purposes of this opinion that the facility provided this statement to its residents in a timely fashion.

The rights provided to nursing facility residents in N.D.C.C. § 50-10.2-02 ensure that residents have the means to make informed decisions about their nursing care. See Hearing on S. 2299 Before the House Comm. on Social Services and Veterans' Affairs, 48th N.D. Leg. (March 10, 1983) (Testimony of Rep. Sanstead).

While North Dakota law advises a resident that there is a right to be fully informed of charges for services, the comparable federal law and regulations provide that a facility "must inform each resident" of services that are available and the charges for those services. Compare N.D.C.C. § 50-10.2-02(1)(g) with 42 U.S.C.S. §§ 1395i-3(c)(1)(B)(iii) and (d)(4)(A) (Medicare); 1396r(c)(1)(B)(iii), (iv) and (d)(4)(A) (Medicaid) and 42 C.F.R. § 483.10(b)(6). See also Sullivan's Wholesale Drug Co., Inc. v. Faryl's Pharmacy, Inc., 573 N.E.2d 1370, 1378 (Ill. App. Ct. 1991) (nursing home was obligated under federal regulations to affirmatively disclose charges). This difference is not legally significant because N.D.C.C. § 50-10.2-02(1) mandates that a facility not only give residents a statement of rights but "shall treat residents in accordance with provisions in the statement." Based on the information provided, in my opinion, the residents you refer to were not fully informed of charges for services.

The state ombudsman is authorized to investigate and resolve complaints that adversely affect the personal rights of residents and to act as an advocate for them. N.D.C.C. § 50-10.1-03(1),(6). An analysis of information regarding complaints and conditions is to be submitted to the State Department of Health, which is responsible for the licensing of nursing facilities, as well as to the appropriate federal agency, the Health Care Financing Administration (HCFA).

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N.D.C.C. § 50-10.1-06. See also N.D.C.C. §§ 23-01-03, 23-16-01; N.D. Admin. Code § 33-07-03.2-03 (regarding licensing of nursing facilities by the Department of Health).

A violation of a resident's rights can have consequences at the federal level as well. Whether a facility meets Medicare and Medicaid participation requirements is determined by a Department of Health survey. See 42 C.F.R. § 488.1 (state survey agency means the state health agency). See also 42 C.F.R. § 488.332 (providing a state survey agency is required to investigate complaints of violations of participation requirements). The survey must include a review of compliance with residents' rights requirements. 42 C.F.R. § 488.305(a)(4). Certifications of noncompliance are reviewed by HCFA. 42 C.F.R. § 488.24. Various remedies may be applied by HCFA or the state if the facility is not in compliance, ranging from a directed plan of correction to denial of payment for all residents and civil money penalties. 42 C.F.R. §§ 488.400, 488.402, 488.406, 488.408. See also N.D. Admin. Code ch. 33-07-05 (regarding state sanctions when a nursing facility no longer meets federal requirements relating to residents' rights).

You also ask whether a facility may bill for or collect charges about which the residents were not informed. The residents' right is the right to be fully informed of the facility's services and the charges for those services, including ancillary charges. N.D.C.C. § 50-10.2-02(1)(g). A violation of this right occurs when a facility does not inform a resident of the charges for a service and proceeds to charge for that service. However, there can be no violation of the resident's right to be informed of a charge if the facility never, in fact, bills for or attempts to collect charges for that service. Therefore, it is my opinion that a facility violates a resident's rights under N.D.C.C. § 50-10.2-02(1)(g) if that facility attempts to bill or collect for a service provided to a resident and that resident was not fully informed in writing in advance of the charge for that service.

Further, N.D.C.C. § 50-10.2-04 provides for injunctive relief against a facility violating N.D.C.C. ch. 50-10.2. An injunction might prohibit action by a facility because of a violation or require a facility to take affirmative action to comply with N.D.C.C. ch. 50-10.2. A resident is specifically entitled to make a claim for relief for a violation of N.D.C.C. ch. 50-10.2. N.D.C.C. § 50-10.2-02(1)(o). Testimony before a legislative committee indicated a resident as well as the Attorney General or a states

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attorney may be able to seek injunctive relief for a violation of N.D.C.C. ch. 50-10.2. See Hearing on S. 2510 Before the House Comm. on Human Services and Veterans Affairs, 50th N.D. Leg. (March 5, 1987) (Testimony of Elise Donnelley, Legal Assistance of North Dakota, Inc., responding to Rep. Schneider). Therefore, the ombudsman or the resident may be able to seek injunctive relief for a violation of a resident's rights under N.D.C.C. ch. 50-10.2.

Because the situation presented in your letter also falls within the regulatory jurisdiction of the State Department of Health, I am forwarding a copy of this opinion to that agency.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tam/vjk
cc: Murray Sagsveen, State Health Officer