

Bed Exceptions, Transfers and Replacements - Legal and Operational Issues Relating to SNF Expansion, Right-Sizing and Reconfigurations

David C. Marshall, Esq.
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Introduction

- ▶ Multiple factors are converging and causing providers to rethink the size and structure of their nursing facilities:
 - Staffing Concerns
 - Regulatory and Reimbursement Concerns
 - Occupancy Issues
 - COVID and its implications
 - Overall operational costs
 - Market forces and the desires of seniors

Introduction

- ▶ Changing the size and structure of a nursing facility involves a significant analysis:
 - Costs of construction
 - Impact on revenues
 - Overall strategic plan of the organization
- ▶ Types of Restructuring Options
 - Adding new beds to the Nursing Facility or dropping current beds to change the overall licensed capacity
 - Converting units/wings to a different use (e.g. NF to PCH/AL)
 - Replacing the existing facility, with potential changes in overall licensed bed capacity
- ▶ Each of these options requires regulatory approvals from various PA agencies

Introduction

- ▶ **Bed Transfer:** The transfer of beds between two facilities (both current MA providers) within the same county or an acceptable distance (25/50 miles) based on MSA geographic region.
- ▶ **Bed Exception:** A request to add beds to a facility through the addition of new beds to the overall MA inventory.
- ▶ **Replacement Project:** Replacing an existing MA certified facility through development of new building, or renovation to the existing facility where cost meets or exceeds 50% of the facility's appraised value.

Introduction

- ▶ Important Regulations and Web Sites
 - 55 Pa.Code Section 1187 Chapter L (“Nursing Facility Participation Requirements and Review Process”)
 - DHS OLTL Participation Review Web Page:
 - [Bed Requests \(pa.gov\)](http://pa.gov)
- ▶ 55 Pa.Code 1187.21(2): Every bed licensed by the Department of Health in a nursing facility that participates in the MA Program shall be certified for MA participation.
 - This regulation effectively prohibits “distinct part units” or the addition of a “Medicare only” wing on to an existing MA nursing facility
 - Eliminate this regulation, and much of the Bed Exception/Bed Transfer process becomes moot

Bed Transfer Process

▶ Finding a Bed Transfer Partner

- Both facilities must be existing MA certified providers*;
- The facilities must (a) located within the same county; (b) located within 25 miles of each other if located in a MSA Level A; or (c) located no more than 50 miles from each other (even if crossing county lines) if not in an MSA Level A
- The “Surrendering Facility” must agree to keep the beds to be transferred on its license until such time as the “Receiving Facility” can put the beds into service (i.e. no “bed banking”)
 - So, is construction or renovation required at the Receiving Facility?
 - Is the Surrendering Facility undergoing renovation, and has a “time limit” on how long it can keep the beds to be transferred online?
 - Does this limitation impact on a choice of bed transfer partner?

Bed Transfer Process

- ▶ Developing the Bed Transfer Agreement between the parties
 - Bed Price
 - Deposit
 - Contingent on DHS Approval
 - Handling of Denial and Appeal
 - Overall “deadline” to secure approval before termination of Agreement
 - Termination and Payout issues

Bed Transfer Process

- ▶ Bed Transfer Request Process and Timelines
 - Bed Transfer Request Application form is on DHS website; You will need to supplement the form itself with additional information/narrative
 - Bed Transfer Requests are considered in the order in which they are received
 - DHS posts all Bed Transfer Requests within 15 days of the end of each calendar month on its website, and accepts comments of those requests for a period of 15 days following the date the list is posted online
 - DHS decision due within 120 days of end of public comment period*
 - Parties can request an expedited review, but that is solely at the discretion of DHS, and in no event will the decision be issued prior to the close of the public comment period

Bed Transfer Process

- ▶ Contents of Bed Transfer Request
 - Ownership information for both parties
 - Narrative description of proposed transfer and “project overview”
 - Financial Information
 - Feasibility, market study or financial projections for project reflecting
 - Project costs
 - Sources of project funds
 - Projected revenue by payor type
 - Assumptions and expected occupancy rates
 - Independent audit report or reviewed financial statements for requesting facility for most recent fiscal year (if none, then provide for the parent organization)

Bed Transfer Process

▶ Contents of Bed Transfer Request

- Compliance History of Ownership, including
 - For past 3 years, any Corporate Integrity Agreement?
 - For past 3 years, was any facility owned, operated or managed by the requestor:
 - Precluded from participating in the Medicare Program or any State Medicaid Program.
 - The facility had its license to operate revoked or suspended.
 - Subject to the imposition of civil monetary penalties, sanctions or remedies under State or Federal law for resident rights violations.
 - Subject to the imposition of remedies based on the failure to meet applicable Medicare and Medicaid Program participation requirements, and the facility's deficiencies were graded as immediate jeopardy to resident health and safety.
 - Designated a special focus facility by the Federal Centers for Medicare and Medicaid Services, indicating a poor performing facility.

Bed Transfer Process

▶ Approval Requirements/Issues

◦ MA Occupancy

- Receiving Facility must agree to achieve and maintain an MA day-one admission rate that is equal to or greater than the surrendering provider's MA day-one admission rate or another MA day-one admission rate as may be agreed to by the Department.
 - Typically, DHS requires the Receiving Facility to at least maintain an MA Occupancy requirement that is equal to that of the County.
 - This requirement applies to the entire Receiving Facility, not just the beds that are transferred
 - This is a significant issue for Receiving Facilities whose MA occupancy is currently lower than (a) the County average and/or (b) the Surrendering Facility, and may effectively "kill" the ability to effectuate a bed transfer
 - This is a significant issue for high MA Occupancy facilities seeking to transfer beds to others, as the high occupancy rate for the Surrendering Facility may not be compatible or palatable for potential partners

Bed Transfer Process

▶ Approval Requirements/Issues

- Change in bed complements must maintain or improve access to nursing services for MA beneficiaries
- Neither facility can receive an increase in its MA reimbursement as a result of the change in bed complements; there will be no costs added to the MA Program, and any change in Peer Groups will not have a negative effect on the MA Program or other facilities within the Peer Group.
- The parties must agree to a simultaneous certification/decertification of the beds to be transferred

Bed Transfer Process

- ▶ Regardless of the satisfaction of the criteria above, DHS can still deny the request, within its own discretion, if it determines that:
 - Approval of the request would negatively affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients; or
 - There are alternatives to the transfer of beds, such as an increase in home and community-based services, that would be less costly, more efficient or more appropriate in assuring that long-term living care and services will be provided under the MA Program in a manner consistent with applicable Federal and State law; or
 - Approval of a bed transfer request is not a determination that additional MA-certified beds are needed to maintain or improve MA recipients' access to medically necessary services in the primary service area or county in which the receiving provider is located.

Bed Transfer Process

▶ Settlement/Appeal Issues

- Safe to say that most Bed Transfer Requests are initially denied
 - Proposed transfers between related facilities through common ownership are looked upon somewhat more favorably
 - Proposed transfers intended to “enroll” a Medicare-only facility will almost always be initially denied
 - Proposed transfers outside of the geographic parameters will almost always be initially denied
 - If DHS has “issues” with one or both of the providers, the request will almost always be initially denied
 - Star Rating
 - Survey history
 - Ownership issues/concerns

Bed Transfer Process

▶ Settlement/Appeal Issues

- Can you negotiate an “appropriate” MA Occupancy requirement?
 - “First Come First Served” admission policy vs. mandatory MA minimum occupancy?
 - Receiving facility may be forced to increase its MA Occupancy in order to secure the beds.
 - Note that if a settlement is reached, the provider will be required to submit regular status reports to confirm compliance with the occupancy requirement
- Can you agree to provide additional HCBS or other services as a condition of receiving bed transfer approval?
 - i.e. Personal Care (with SSI); Assisted Living; Home Care; Home Health; low-income housing

Bed Transfer Process

▶ Settlement/Appeal Issues

- The “catch all” categories provide DHS wide latitude to deny a request
 - DHS has, for example, cited beds moving from a “higher star rated” facility to a “lower star rated” facility as problematic
 - Although the regulations discuss the requirement for bed transfers to “maintain or increase” access to services, DHS has denied bed transfer requests which “do not address the surplus” that DHS believes is in the area
 - DHS does not publish any guidance on what it considers to be the “surplus” in the various counties of the Commonwealth;
 - Is DHS implicitly saying that bed transfers must operate to “reduce the overall” MA bed complement in order to be approved?
- Litigation of denied Bed Transfers is challenging, given the regulations and the standard of review applied in the BHA, and, ultimately, the Commonwealth Court.

Bed Exception Process – Adding New Beds

- ▶ Bed Exception Requests are handled/reviewed in Groups
 - Group 1: Requests received between Jan. 1 to June 30 of each year; Decisions issued by December 31
 - Group 2: Requests received between July 1 to December 31 of each year; Decisions issued by June 30
 - As with Bed Transfers, Bed Exception Requests are put on the DHS website for public comment; DHS has the discretion to extend the decision deadlines by 90 days if additional information is requested
 - Providers can request an expedited review, but again, it is within DHS' discretion to grant, and no decision will be issued before the public comment period has ended

Bed Exception Process – Adding New Beds

- ▶ Contents of Bed Exception Request
 - Again, DHS has published a “form” on its website to use
 - Essentially, the same contents required for a Bed Transfer Request apply to a Bed Exception Request
 - Ownership history
 - Description of project/narrative
 - Demonstration of compliance history
 - Financial feasibility
 - Market Analysis to show need for new beds*
 - Again, you will need to supplement the form to provide a cohesive narrative of the proposal, indexed to the various Bed Exception requirements

Bed Exception Process – Adding New Beds

▶ Approval Requirements/Issues

- The most important issue in a Bed Exception Request is whether there is a showing of need for additional beds within the MA inventory
- The regulations require a provider to demonstrate need for more beds in the Primary Service Area based on any of the following:
 - The existing MA-certified bed capacity in the primary service area or the county in which the subject facility is or will be located is insufficient to assure that MA recipients have access to medically necessary nursing facility services.
 - Systemic barriers prevent MA recipients from accessing the existing MA-certified bed capacity in the primary service area or the county in which the subject facility is or will be located.
 - The applicant is proposing to admit and serve MA recipients who require specialized medical services in the subject facility and MA recipients do not have access to the specialized medical services in the existing MA-certified bed capacity in the primary service area or the county in which the subject facility is or will be located.

Bed Exception Process – Adding New Beds

▶ Approval Requirements/Issues

- Primary Service Area is defined as either (a) The county in which the subject facility is or will be physically located; or (b) The geographic area from which the subject facility draws or is expected to draw at least 75% of its resident population, as determined by the Department.
By regulation, unless the overall occupancy percentage of the PSA/county is greater than 95%, there is no need for new beds in the PSA
- Expert report conundrum:
 - DHS expects an independent feasibility study to demonstrate that there is a need for the new beds/new facility in the area
 - Such studies are costly to providers
 - DHS almost invariably rejects those studies, but does not publish its own studies to demonstrate need in the various parts of the Commonwealth
- It can be generally stated, that outside of the cities of Pittsburgh and Philadelphia, DHS considers the Commonwealth to be “overbedded”.

Bed Exception Process – Adding New Beds

▶ Settlement/Appeal Issues

- Again, MA Occupancy minimum requirements
- Tying approval to expansion of HCBS or other senior housing options, in addition to new nursing beds
- From a litigation perspective, the appeal will turn on whether the provider can clearly show that there is a need for new beds in the area, contrary to DHS' decisions
 - Battle of expert studies
 - What is the overall occupancy of the PSA/county? (ex. Argument regarding counties with a single NF in the county/PSA)

Replacement Bed Process

- ▶ A facility that seeks to either relocate to a brand-new building, or plans on renovations that are equal to 50% or more of its current appraised value, must seek approval from DHS in order to retain the capital cost component of its Medicaid rate
 - Although CHC is now in play, certain services continue to be reimbursed under the Case Mix System. This regulation has yet to be rescinded by DHS and is still enforced. But should it be?
- ▶ Replacement Bed requests are reviewed on an “as filed” basis
- ▶ A “form” is available on DHS’ website; Again, you will need to supplement the form

Replacement Bed Process

▶ Contents of Request

- Description of Project, addressing
 - What, if any, licensure violations/waivers will be corrected through the replacement?
 - Will residents have access to private rooms?
 - What is the cost of replacement vs. renovation?
 - What is the timeline for construction?
 - Why is this project necessary for the health, safety, welfare of residents?
 - What HCBS considerations, in lieu of the replacement?
 - How will the former space be utilized? Or will it be demolished?

Replacement Bed Process

▶ Approval Requirements/Issues

- Must demonstrate that construction of the replacement beds is necessary to assure that MA recipients have access to nursing facility services and to ensure the health, safety, welfare of residents.
 - This language gives DHS latitude; Why is the building being replaced? Is it old, and needs to be modernized?
- Absent exceptional circumstances, the replacement facility (if a new building), must be located within 1 mile of the existing building
- Absent exceptional circumstances, if only a portion of the existing facility is being replaced, then the “addition” must be physically attached or immediately adjacent to the existing building

Replacement Bed Process

▶ Approval Requirements/Issues

- Do building code violations/waivers exist at the current location? Will these be eliminated through the construction of a new building or the renovation of the existing?
 - DHS would want any outstanding waivers to be eliminated.
- Has the facility considered the development of HCBS in lieu of replacement? Are there HCBS options within the area?
- Do the total and MA occupancy levels at the facility itself and in the county as a whole indicate there is a need for replacement?
 - Historically, MA occupancy issues weren't considered much as part of these requests. DHS has fluctuated on this issue recently, seeming to apply a "need" test here, much like they do with Bed Exceptions and Bed Transfers.
- If proposing to construct a new facility or wing, must demonstrate that it would be more costly to renovate than to build new.
- What will be done with the "old" building?
 - Demolished? Repurposed to new function (e.g. PCH/AL)?

Conclusions

Contact Information

David C. Marshall, Esq.

Latsha Davis & Marshall, P.C.
1700 Bent Creek Blvd., Suite 140
Mechanicsburg, PA 17050
Phone: 717-620-2424
Email: dmarshall@ldylaw.com