

By Mr. Brett of Boston, petition of James T. Brett for legislation to provide for an appeals procedure of nursing home residents relative to transfers or discharges. Health Care.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Four.

AN ACT PROVIDING FOR AN APPEALS PROCEDURE TO HEAR APPEALS OF NURSING HOME RESIDENTS THREATENED WITH TRANSFER OR DISCHARGE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. The first sentence of section 6B of Chapter 17 of
2 the General Laws is hereby amended by striking the words
3 "officer" and inserting in place thereof "officers", and by striking
4 the word "attorney" and inserting in place thereof "attorneys."
5 The second sentence of section 6B of Chapter 17 of the General
6 Laws is hereby amended by striking the word "He" and inserting
7 in place thereof "They".

1 SECTION 2. The first sentence of the seventeenth paragraph
2 of section 71 of Chapter 111 of the General Laws is hereby
3 amended by inserting after the words "seventy-two A" a comma
4 followed by the following words "sections seventy-two W through
5 seventy-two AA,".

1 SECTION 3. Chapter 111 of the General Laws is hereby
2 amended by inserting after section 72V the following sections: —
3 Section 72W. In sections seventy-two W through seventy-
4 two AA, inclusive, the following words shall have the following
5 meanings:
6 "Emergency" shall mean a situation or condition which presents
7 imminent danger of death or serious harm to patients, residents
8 or others, as determined by the resident's physician. In the event

9 that the resident's physician is unavailable, a physician, nurse
10 practitioner or physician assistant may determine that an
11 emergency exists and may discharge a patient to an acute facility.
12 Documentation of the unavailability of the resident's physician
13 shall be noted in the resident's clinical record.

14 "Transfer" or "Discharge" shall mean any movement of a
15 resident either within or without a nursing facility including, but
16 not limited to, movement between Medicare certified and non-
17 Medicare certified beds and/or between distinctly certified parts
18 of facilities.

19 Section 72X. A nursing facility must permit each resident to
20 remain in the facility and shall not transfer or discharge a resident
21 from the facility unless: (a) the transfer or discharge is necessary
22 for the resident's health care needs and the resident's needs cannot
23 be met in the facility, as documented in the resident's clinical
24 record by the resident's physician; (b) the transfer or discharge
25 is appropriate because the resident's health has improved
26 sufficiently so the resident no longer needs the services provided
27 by the facility, as documented in the resident's clinical record by
28 the resident's physician; (c) the safety of individuals in the facility
29 is endangered by the presence of the resident as documented in
30 the resident's clinical record by objective evidence; (d) the health
31 of individuals in the facility would otherwise be endangered, as
32 documented in the resident's clinical record by a physician; (e) the
33 resident has failed, after reasonable and appropriate written
34 notice, to pay for a stay at the facility, provided that the resident
35 shall have the right to cure up to the time that the transfer or
36 discharge is to be effected and, if full payment is made, shall have
37 the right to remain in the facility; or (f) the facility ceases to
38 operate, converts to a facility with a different classification, or files
39 a notice required by law of its intent to close or convert to a facility
40 with a different classification. A facility shall not transfer or
41 discharge a resident under this section when a state or federal
42 agency refuses, or ceases to authorize payment for a Medicare or
43 Medicaid resident until all administrative appeals have been
44 exhausted;

45 In order to transfer or discharge a resident a nursing facility
46 must document in the resident's clinical record: the specific
47 medical needs of the resident which the facility claims cannot be

48 met; objective medical justification that supports the nursing
49 facility's contention that it cannot meet the resident's needs; all
50 attempts made by the nursing facility to develop an alternative
51 care plan designed to meet said needs; and the results of the
52 alternative care plan. The facility must further show by clear and
53 convincing evidence that a transfer or discharge under this section
54 is necessitated by the resident's needs rather than by an
55 accommodation of the facilities' needs; and document in the
56 resident's clinical record any discharge plans made by the facility
57 and counseling given to the resident in preparation for transfer
58 or discharge.

59 Section 72Y. Whenever a resident is to be transferred or
60 discharged, the facility shall, except in the event of an emergency
61 as defined in this chapter, give the resident and his or her
62 representative both oral and written notice thirty days prior to
63 the proposed transfer and discharge, in language and in a manner
64 which the resident can understand, of the reasons for the proposed
65 transfer or discharge, of the procedures for appealing the
66 proposed transfer or discharge and the proposed effective date of
67 the transfer or discharge.

68 The written notice of intent to discharge, transfer or relocate
69 a resident shall contain, at a minimum: (a) the specific reason(s)
70 for the proposed discharge or transfer; (b) the proposed effective
71 date of the proposed discharge or transfer; (c) the proposed
72 location to which the resident will be transferred or discharged;
73 (d) a statement in not less than twelve point type that reads:

74 "You have the right to appeal the nursing home's plan to
75 discharge or transfer you. If you think you should not have to
76 move or leave this facility, you may file a request for a hearing
77 within 21 days after receiving this notice. The nursing home staff
78 must help you in completing the request for hearing if you request
79 assistance. Except in the event of an emergency, you cannot be
80 transferred until 21 days after the date you receive the decision
81 of the hearing officer. In the event of an emergency, if you file
82 an appeal, the facility must hold your bed until 5 days from the
83 date of your receipt of the decision. If the grounds for your transfer
84 or discharge is non-payment, you have the right to cure by paying
85 any amount owed prior to the date of the transfer or discharge.
86 A form to request a hearing and a stamped addressed envelope
87 to the division of hearings is attached.";

88 (e) a hearing request form, together with a postage paid
89 envelope preaddressed to the division of hearings; (f) the name,
90 address, and telephone number of the person charged with the
91 responsibility of supervising the transfer or discharge; and (g) the
92 names, addresses, and telephone numbers of the Long Term Care
93 Ombudsman Program and local legal services organizations.

94 Copies of the written notice shall be placed in the resident's
95 record. Documentation of the oral notice shall be recorded in the
96 resident's record. Burden of proof of receipt of the notice shall
97 rest on the facility.

98 The facility shall simultaneously notify the Department of
99 Public Health and the Long Term Care Ombudsman Program
100 of its plan to transfer or discharge a resident.

101 Section 72Z. Whenever a facility decides to transfer or
102 discharge a resident, that resident or his or her representative may
103 contest the decision by mailing a written hearing request within
104 twenty-one days after receiving notice of the proposed transfer
105 or discharge, except in the case of an emergency, as defined in
106 this chapter, in which case an expedited hearing process shall
107 apply.

108 If the resident or resident's representative mails the hearing
109 request from the facility, the day he or she places it in the facility's
110 outgoing mail or gives it to a member of the facility staff for
111 mailing shall be considered the date of mailing for purposes of
112 the twenty-one day limit. In all other cases, the postmark date
113 shall be considered the date of mailing.

114 A timely hearing request shall stay the discharge or transfer
115 until thirty days after a decision is rendered, except in the event
116 of an emergency transfer. Within two working days of its receipt
117 of an appeal request, the Department shall give notice to the
118 facility of the filing of the appeal.

119 A hearing held pursuant to this section, including a hearing held
120 under the expedited procedures, shall be conducted in person by
121 a hearing officer designated pursuant to section 6B of chapter
122 seventeen of the General Laws, at a location convenient to the
123 person appealing and shall be conducted as an adjudicatory
124 proceeding under chapter thirty A of the General Laws. The
125 hearing officer may subpoena witnesses, administer oaths, take
126 testimony and secure the production of such books, papers,

127 records and documents as may be relevant to such hearing. The
128 person appealing shall have the opportunity to confront and cross-
129 examine all adverse witnesses and to question or refute any
130 testimony, evidence, materials or legal arguments. The hearing
131 officer shall issue a written decision based solely on the testimony,
132 evidence, materials and legal rules adduced at the hearing. The
133 hearing officer may reopen a hearing for the purpose of
134 considering further testimony, evidence, materials or legal rules
135 before rendering his or her decision and shall, if he or she reopens
136 the hearing, send seven days' written notice to all parties of the
137 reopening and reasons therefor, including the date, time and place
138 of the resumed hearing, which shall be held at a location
139 convenient to the person appealing. The decision of the referee
140 shall be the decision of the department and shall notify the resident
141 of the right to appeal an adverse decision pursuant to chapter
142 thirty A of the General Laws.

143 The burden of proof of establishing cause for transfer shall rest
144 on the facility requesting the transfer or discharge. The standard
145 of proof shall be clear and convincing evidence of the existence
146 of grounds for transfer and of the existence of adequate discharge
147 plans.

148 In the case of a transfer or discharge identified as an emergency,
149 the resident, or his or her representative, may contest the decision
150 by telephoning the Department or by mailing a written hearing
151 request within ten days after receiving notice of the proposed
152 transfer or discharge. In a transfer or discharge identified as an
153 emergency, a timely hearing request shall stay the transfer or
154 discharge until the Department issues its decision or grants
155 conditional approval for the transfer or discharge to occur
156 pending appeal. The Department shall immediately notify the
157 facility of the request for an appeal and shall arrange for an
158 expedited hearing to be held as soon as practicable and in no event
159 in less than ten days after receipt of the hearing request.

160 Section 72AA. Before a resident is transferred or discharged,
161 the facility must develop a discharge plan and a facility
162 representative shall discuss the reasons for the move with the
163 resident, and his or her representative, and shall answer any
164 questions they may have about the proposed transfer or discharge
165 or the resident's rights under this chapter. The facility
166 representative shall offer counseling services to the resident and

167 his or her representative before the move. In the case of a proposed
168 transfer or discharge for non-payment, the facility representative
169 shall explain the resident's right to cure and cancel the transfer
170 or discharge by paying the arrearage at any time before the
171 transfer or discharge is to take place. The contents of any
172 discussions required under this chapter shall be summarized in
173 the discussion, and be made a part of the resident's clinical record.

