

Dealing with the dangers of private duty attendants

Because many seniors in retirement communities develop a need for assistance with their daily care, they may opt to hire their own private duty attendant (PDA) instead of, or in addition to, using the assistance provided by the facility staff. The Fair Housing Act and the Americans With Disabilities Act prohibit discrimination in residential housing and public accommodations on the basis of disability. Legally, providers must make reasonable accommodations to enable residents to fulfill their activities of daily living. Permitting a person with a disability to hire his or her own PDA is considered a reasonable accommodation.

Such an arrangement requires much coordination, communication, and planning between the vested parties, especially as care practices overlap. Providers should know the potential liability exposures that exist every time an outside agent is on their property and take proactive steps to protect themselves. The following case study involves a retirement community that didn't have a plan in place and ended up paying a huge price. Please be aware of the circumstances surrounding the case, and make changes as appropriate at your facility.

The Situation

An elderly resident of an independent living facility hired a PDA to assist her with her daily home care needs. After a few years, the resident's osteoarthritis and other medical problems forced her to move to a skilled nursing facility in the same complex so she could receive closer medical attention. The decision to move was not easy for the resident, but she agreed to do so on the condition that she would be allowed to retain the PDA's services.

The administrative staff at the skilled nursing facility did not have a formal plan in place to address the PDA issue, so they simply developed a plan of care for their CNAs to assist the PDA whenever needed. In turn, the agency that provided the PDA assigned a social worker to develop a specific plan of care for the PDA to follow. The agency's social worker kept in contact with the facility's nurses to assess the resident's needs and how the care was to be provided between the parties. The social worker would periodically visit the facility to review the resident's records and talk to the staff or simply exchange information over the phone. Both parties agreed that the resident was to be transferred with a non-weight-bearing lift, and a care card with transfer instructions was placed in the resident's room.

One morning, a CNA was assisting the PDA with morning care, and the two decided to transfer the resident from her bed to a wheelchair by holding onto the waistband of her pants. During the transfer, the resident's leg buckled, and she was lowered to the floor. The resident sustained a fracture to her left leg and was immediately sent to the hospital. When she returned to the facility, the resident's plan of care was changed to require the assistance of three people, including one nurse to supervise, and the continued use of a non-weight-bearing mechanical lift for all transfers. The agency that provided the PDA increased the PDA's services from 12 to 24 hours daily at no extra charge.

A year later, the staff decided that a nurse was no longer needed to supervise the resident's transfers, since she had no other falls or incidents. One day, the PDA asked a nurse what the best transfer method was to give the resident a tub bath, since she had not received one in several months

and would enjoy it. The nurse suggested that a stretcher device be used to lower the resident into the tub. The PDA wanted to give the resident her bath in the evening and requested two CNAs to assist her during the procedure.

That evening the PDA informed the CNAs that they were going to use a mechanical lift that required the resident to support her own weight with her legs to transfer her to the tub and back to her room. The two CNAs questioned the PDA about the use of this lift but were told that it was all right. The CNAs did not verify this information with the nurse and instead assisted the PDA using the weight-bearing lift with the resident. During the second transfer from the bath chair to her bed, the resident's legs again buckled, this time causing her to fall. She fractured both legs, a hip, and a shoulder. She was immediately transferred to the hospital and died a week later after returning to the facility.

The resident's children were extremely upset with the facility's staff and filed a lawsuit alleging the wrongful death of their mother. They felt that the facility had the ultimate responsibility to care for their loved one and that there was little to no liability on the part of the agency that provided the PDA. Their demand to settle was \$550,000.

During the PDA's deposition, she admitted that she violated the physician's order concerning transfers, the resident's established plan of care, and the care card that was in the resident's room. The resident's family changed their minds about the agency's liability involvement, accepted a \$300,000 settlement from the facility, and subsequently pursued a lawsuit against the agency for the remainder of their demand.

Protective Measures

The circumstances surrounding this tragedy are unfortunate. While the resident's family depended on the facility's staff to control and coordinate the resident's care in their building, the facility's staff operated as subordinates to the PDA. No one seemed to know who had authority for what. To protect your facility against retaining legal responsibility for outside agents, consider taking the following risk management precautions:

For PDAs hired by residents. Because PDAs are not employees of the facility, the staff need to be careful not to impose the same rules on them that they require of their own employees, which would create the perception of an employer-employee relationship. However, the facility can require that PDAs follow certain company policies, including a chain of command and reporting mechanism, as long as they are reasonable. These policies should be documented as necessary for the health and safety of all residents.

Consult with your legal representative and determine what you can require of PDAs. It's also important to make sure residents understand the facility's requirements for PDAs and adhere to them. Develop policies and rules that will clarify potential misunderstandings, and ask residents to agree to them upon admission.

For agency staff hired by the provider. A special risk exposure exists when a facility uses agency staff (or a similar independent contractor) who appear to a third party to be an employee of the facility. To minimize this liability risk, facilities should:

- Avoid directly or indirectly portraying these individuals as employees or allowing them to suggest such a relationship to others. Make sure your staff understands their relationship with the facility. Require the individual to wear an identification badge.
- Never place these individuals in positions in which they are given incentives to act like or represent that they are employees. As an example, be cautious about placing an agency nurse in an acting DON position.
- Incorporate into the contract an agreement stating that the individual will not present him/herself as an employee or having authority to speak for or bind the facility legally.

Recommendations for either party be-fore hiring an outside agent.

1. When hiring a contractor or lessee, make sure to check credentials, experience, education, and training. Also review answers on applications, investigate any red-flag responses, and perform background and reference checks.

2. Consult with your legal representative to develop or review all contracts prior to consent. Make sure the work that is to be done and leasing terms are clearly stated, and that the contractor or lessee will maintain exclusive control over the manner in which they perform their tasks.

- Incorporate hold-harmless agreements that are favorable to your facility into the contract. Suggested wording: "[Contractor or lessee] shall indemnify and hold [facility] harmless from and against any claims, brought by any person, arising out of or related to the services provided according to this agreement."
- Make sure the contract contains language that clearly states both parties are responsible for complying with applicable laws. Suggested wording: "Both parties shall be responsible for compliance with any federal, state, or local law or ordinance which may apply to their respective duties pursuant to this agreement."

3. Make sure your facility enforces safe operating procedures that are in compliance with applicable safety codes. For maintenance or construction workers, require that they read and sign a prework safety agreement stating they will operate according to your procedures and that they will immediately notify the facility of any unsafe conditions or accidents. Provide routine safety inspections to monitor work and ensure safety compliance.

4. Require that the contractor or lessee provide a Certificate of Insurance from a recognized insurance carrier with an A.M. Best rating of A- or above. Review the certificate to make sure it is on a standard form, such as an ACORD Form 25 (Certificate of Insurance), and ensure that it has limits equal to those expressed in your facility's own insurance program. You might want to ask your insurance agent to review the certificate, which he/she should be glad to do. Maintain a current copy of this certificate in your facility's files. (Note: New York also requires facilities to have an additional insured endorsement attached to the contractor or lessee's policy.)

By planning ahead following these risk management precautions, your facility can protect itself and ensure proper care for residents who opt to use PDAs. ■

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