

# LTSS Policy Changes in Response to COVID-19

Natalie Kean and Eric Carlson, Justice in Aging  
November 20, 2020

# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

# Key Lessons

- Nursing facility residents and their families must be strong in asserting the resident's right to receive visitors.
- Civil Rights protections apply and include access to support persons in hospitals.
- Emergency rule waivers will likely be in effect for some time longer.
- States may make some Home & Community-Based Services (HCBS) program modifications permanent.

# Nursing Facilities

# Relevant Resident Rights from Federal Nursing Facility Law

- Right to have visits from family or friends at any time of day or night.
- Able to speak privately to ombudsman program representatives.
- Eviction only under six specified conditions, with right to appeal through administrative hearing.
  - Code of Federal Regulations, Title 42, sections 483.10(f)(4), 483.15(c).

# Blanket Waiver of Rights

- Initially issued in March 2020 by CMS
- Waiver included
  - Visitation
  - Eviction and in-facility transfer protections, if move related to “cohorting”
  - In-facility socialization

# Limits on Visitation

- Almost no in-person visitation, beginning in March 2020.
- Contact with family and friends limited to phone calls, video chats, and “window visits.”

# Recent Increase in Visitation

- Resumption of resident's right to visitors.
- But the right is dependent on no new cases in facility within previous 14 days.
- Facility can set limits, e.g., number of visitors, length of visits.
  - But right to visitors limited if local COVID positivity rate is greater than 10%.
  - Also, facility has discretion to limit visits based on any relevant factor related to COVID-19.
    - CMS, Nursing Home Visitation – COVID-19, QSO-20-39-NH (Sept. 17, 2020).

# Other Visitation Options

- Outside visitation now is generally allowed, and is recognized as a safer alternative.
- Throughout the pandemic, visits have been allowed in “compassionate care” situations.
  - Including but not limited to end-of-life situations.
- Resumption of general right to visit with Long-Term Care Ombudsman Program representative.

# Testing Visitors

- CMS does not require, but does “encourage” facilities in counties with infection rates greater or equal to 5% to test visitors, “if feasible.”
- Facilities also may “encourage” visitors to be tested on their own.
- Talk of “encouragement” indicates that facilities should not require visitors to pay for and undergo testing as precondition for visiting.

# Implementation Problems in Visitation

- Compassionate care has been interpreted narrowly.
- Re: current standards
  - State policies may be inconsistent with federal guidance.
  - Individual facilities may resist visitation.

# Real-World Problems

- Wiggle room in CMS guidance to the right to have visitors. Facility can restrict visits for:
  - County infection rate exceeding 10%;
  - Resident's COVID status;
  - Visitor's COVID symptoms;
  - Noncompliance with infection control practices (e.g., no mask); or
  - “Other relevant factor” related to COVID public health emergency.
- Any limit on visitation must be based on a “reasonable clinical or safety cause.”

# What To Do

- Assert right to visitation under section 483.10(f).
  - Facility's limitations must be reasonable.
  - File complaint with survey agency if necessary.
- Comply with all appropriate precautions.
- Recognize reality of current “surge” in COVID infections.

# Leaving the Facility for Holiday Visits

- “CMS recommends against residents leaving the nursing home during this [public health emergency].”
- BUT residents do have the right to leave.
- When residents return, facilities should:
  - Monitor for signs and symptoms of COVID.
  - Test for COVID if indicated by symptoms or by possible exposure.
  - Quarantine if resident has symptoms or was exposed.
  - “Consider” quarantine if resident was gone for more than 24 hours.
    - [CMS Alert](#), Issued on 11/18/20.

# If You Want to Leave the Facility for a Short Visit with Family

- Think about whether the visit is worth the risk.
- Take all appropriate precautions – masks, physical distancing, small groups, etc.
- Talk with the nursing facility ahead of time to avoid surprises.

# In-Facility Activities

- CMS waiver has allowed facilities to limit communal meals and other activities.
- Recent guidance has recognized in-facility meals and activities as beneficial, provided that precautions are followed.

# Reporting COVID Info to Residents and Families

- By next day, report when there is
  - One or more COVID-19 infection in resident or staff member, or
  - Three or more residents or staff members with COVID-19 symptoms.
- Discretion in how to notify, e.g., posting, listservs, robocalls, etc.
  - 42 C.F.R. § 483.80(g)(3).

# Reporting COVID Info to Federal Government

- Reported to CDC, which shares the info with CMS for posting on internet.
  - CMS, [COVID-19 Nursing Home Data](#); *see also* 42 C.F.R. § 483.80(g)(1), (2).
- Posted data includes:
  - Confirmed COVID cases.
  - Suspected COVID cases.
  - Deaths.
  - COVID deaths.

# Surveys

- From March until now, surveys have largely been limited to
  - Infection control surveys (without assessment of penalties).
  - Investigations of “immediate jeopardy” situations.
- As states “reopen” their nursing facility systems, surveyors will resume annual surveys and complaint investigations.
  - This appears to be moving slowly, particularly as COVID rates increase.

# Civil Rights

# Civil Rights Protections

- HHS Office for Civil Rights has issued two bulletins reminding health care entities and states of obligations under civil rights laws
  - Anti-discrimination laws “remain in effect” during the crisis
    - The [Health Care Rights Law](#) (ACA §1557) and other laws prohibit discrimination on the basis of race, color, national origin, disability, age, sex
  - Specific guidance on standards of care and treatment decision
  - [Specific guidance](#) on discrimination on the basis of race, color, and national origin during COVID-19

# Equal Access to Treatment

- Entities are obligated to make reasonable modifications to ensure equal access to treatment, including:
  - Effective communication for people who are deaf, blind, or have communication or cognitive disabilities.
  - Accommodations for people with mobility impairments, use assistive devices, durable medical equipment, etc.
  - Interpreters for people with limited English proficiency.
  - Plain language and multiple formats.

# Hospital Visitation Policies

- Federal law requires “reasonable modifications” of no-visitor policies when necessary to ensure equal access to treatment
  - May be necessary due to intellectual, cognitive, communication, or behavioral needs.
  - Policies can account for safety needs (e.g., requiring PPE).
  - Numerous states have issued statewide policies requiring hospitals to make exceptions for people with disabilities.
    - Example: California’s policy says hospitals should make changes to COVID-19 visitor limits so patients can have a family member, personal care person, communicator, or other helper present.
    - Support person must not have COVID-19 or any signs of being sick with COVID-19, and must follow any rules about wearing PPE.
- [Evaluation Framework for COVID-19 Hospital Visitation Policies](#) from Disability Advocacy Organizations.

# Vaccine Access

- Residents and staff of nursing facilities identified as “high priority” populations
- HHS and Department of Defense have agreements with CVS and Walgreens to provide and administer COVID-19 vaccines to residents of long-term care facilities nationwide
  - No out-of-pocket costs for residents & no charge to facilities.
  - Includes skilled nursing facilities, nursing homes, assisted living facilities, residential care homes, and adult family homes *where most residents are age 65+.*
  - Facilities must opt in and be within 75 miles of a CVS or Walgreens.
- [CDC's FAQs on the Long-Term Care Pharmacy Partnership Vaccine Distribution Program](#)

# Emergency v. New Normal

# Continuing Public Health Emergency

- Public health emergency effective through January 21, 2021 – and likely will be extended beyond that time.
- Appendix K waivers by their terms last one year, but CMS has indicated that they will be renewed routinely.
  - The Appendix K waivers allow for flexibility in home and community-based services provided under HCBS waivers.

# Advantages of Continuing Emergency Designation

- Service flexibility.
  - E.g., greater access to telemedicine, ability to provide services across state lines.
- Eligibility expansions and protections.
  - E.g., Medicaid maintenance of effort requirements that obligate state Medicaid programs to continue beneficiary eligibility.
  - Medicare flexibilities, such as elimination of 3-night hospitalization requirement for Part A coverage of nursing facility services.

# Problems with Emergency Provisions

- Waiver should be revisited, but has not been revisited, when quality of care is implicated.
  - E.g., waiving training and testing requirements for nursing aides in nursing facilities.
- Protections are being eliminated from original waivers.
  - E.g., CMS is now changing interpretation of “maintenance of effort” to allow state Medicaid programs to reduce benefit packages.

# Resources

- [Justice in Aging COVID-19 Resources for Advocates](#)
- [25 Common Nursing Home Problems – and How to Resolve Them](#)

# Visit Our Website: [ncler.acl.gov](http://ncler.acl.gov)

NATIONAL  
CENTER ON  
**LAW &  
ELDER  
RIGHTS**

Search for resources

**Read practice tips**

Sign up for the email list

**Request a case consultation**

Learn about upcoming trainings

[ncler.acl.gov](http://ncler.acl.gov)



# Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).