

Benefits for Consumers in the Revised Nursing Facility Regulations

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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.

Introduction

The federal Nursing Home Reform Law was enacted in 1987, and became effective in October 1990. The Reform Law governs any nursing facility that accepts reimbursement from Medicare or Medicaid and, in almost all instances, applies to any resident in any such facility, regardless of the individual resident's payment source.¹ In other words, the law applies whether the resident's bill is paid privately by the resident, or is reimbursed through Medicare, Medicaid, private insurance, or some other source.

Accompanying regulations were released in September 1991.² In recent years, the Centers for Medicare & Medicaid Services (CMS) began work on updating the regulations, and released a proposed set of revised regulations in July 2015.³ CMS accepted comments on those proposed regulations and, after considering those comments, released final regulations in October 2016.⁴

The revised nursing facility regulations become effective in three phases. Phase 1 regulations became effective on November 28, 2016. Phase 2 and 3 regulations become effective one year later (11/28/17) and three years later (11/28/19), respectively. Most regulations are classified as Phase 1. **All regulations discussed in this issue brief are Phase 1 regulations that already are in effect.**⁵

This issue brief discusses some provisions of the revised regulations that provide additional benefits to nursing facility residents, focusing on certain resident rights, and protections related to the admissions process. This brief certainly does not cover every relevant provision of the revised regulations. Justice in Aging will be producing additional educational material on the revised nursing facility regulations, often in conjunction with the National Consumer Voice for Quality Long-Term Care, and the Center for Medicare Advocacy.

Resident Rights

A resident must have opportunities to interact with the community outside of the facility.

The regulations establish that a resident “has a right to interact with members of the community and participate in community activities both inside and outside the facility.”⁶ A related provision requires that the facility provide activities that “encourage[e] both independence and interaction in the community.”⁷

Not surprisingly, the level of community interaction will vary from resident to resident. In comments accompanying the final regulations, CMS recognizes limitations faced by some residents, while also reaffirming the facility's duty to encourage and facilitate resident independence:

Some residents may not, realistically, be able to participate in activities outside the facility. However,

many may be able to do so, particularly with family or other assistance or planning. The facility has a responsibility to promote and facilitate resident self-determination, rather than act as a hindrance or barrier. At the same time, we recognize that there may be safety and security concerns with unfettered access to outside spaces and in and out of the facility. These competing interests must be balanced, taking into consideration the needs and preferences of residents in the facility.⁸

There is undoubtedly much work to be done in this area by residents, family members, and resident advocates. In too many facilities, residents never travel outside of the facility's property line, and may spend almost all their time inside the facility's walls. Given that level of isolation, it is hardly surprising that many residents show signs of depression.

A resident and any resident representative should ask early and often for the type and frequency of community involvement that the resident wants. The care planning process is a good place to start. Furthermore, the resident or representative should not be dissuaded by facility resistance. Many facilities at this point are not accustomed to facilitating community access for residents. Changing facility procedures in this area will require strong advocacy.

The nursing facility must be able to communicate with the resident in his or her language.

The regulations refer to the nursing facility's obligation to communicate with the resident in a language that he or she can understand. The regulations explicitly mention this obligation as it applies to the facility's duty to inform the resident of legal rights, resident rights and responsibilities, the resident's "total health status," any proposed involuntary transfer or discharge, and binding arbitration agreements.⁹

These language requirements are not brand new. Some commenters had complained that a language competence requirement would be too expensive; one commenter specifically pointed out that the requirement would require facilities to "employ translators, procure translation technology, or overhaul facility communications."¹⁰ In reply, CMS agreed that facilities would have to incur such expenses, but added that such language requirements predated the revised regulations:

Facilities should already have access to these services. Facilities are currently required to have the ability to communicate effectively, verbally and in writing, with residents. For example, facilities must inform residents in a language they can understand of their total health status and to provide notice of rights and services both orally and in writing in a language the resident understands.¹¹

A nursing facility cannot transfer a resident within the facility for staff convenience, or with the purpose of moving the resident to or from a Medicare-certified room.

Under the Reform Law and the previous regulations, a resident could refuse an intra-facility transfer if the purpose of the transfer was to move the resident to or from a Medicare-certified room.¹² Otherwise, the law merely required that a resident receive notice before a change in room or roommate.¹³

The revised regulations retain the right to refuse a Medicare-motivated transfer, but add the right to refuse a transfer within the facility if the purpose of the transfer is "solely for the convenience of staff."¹⁴ Furthermore, the revised regulations require written notice of the change, including the reason for the change.¹⁵

To be sure, the resident still does not have any right to an administrative hearing regarding an intra-facility transfer, but these new provisions nonetheless should be helpful in limiting unnecessary transfers within a facility. A facility will be more hesitant in initiating an intra-facility transfer, since it now has to justify its actions in writing. Also, a resident can make a complaint to the state enforcement agency regarding a regulatory violation, even if no administrative hearing is available.

Admission

A nursing facility may not obtain a third-party guarantee of payment from a resident's family member or friend.

The federal Nursing Home Reform Law prohibits a nursing facility from requiring a third-party financial guarantee as a condition of admission or continued stay.¹⁶ The regulations improve on the statutory protection by prohibiting a facility from requiring *or requesting* a financial guarantee.¹⁷ Some nursing facilities have justified financial guarantees by claiming, implausibly, that guarantors have *volunteered* to take on financial liability,¹⁸ but this gambit is made less viable by the regulations' added prohibition against requesting a financial guarantee.

The revised regulations do not address another strategy used by nursing facilities in recent years to impose financial liability on persons other than the resident. Often, if a family member or friend has access to the resident's money, the facility admission agreement will require that person to take all necessary steps to ensure that the resident's money is used to pay facility charges. In addition, the admission agreement generally obligates that person to take all necessary steps to arrange for Medicaid eligibility, if and when the resident's resources are inadequate to cover facility charges. Then, if the resident's bill is unpaid at some point, the facility may sue the family member or friend under the admission agreement. The facility claims that it is not in violation of federal law because the relevant provision is not a financial guarantee, but instead establishes a duty that is violated if the facility's bill is unpaid.

Courts have taken different positions when ruling on whether a nursing facility can seek payment based on an admission agreement that purports to impose a duty on a family member or friend to pay the resident's money to the facility, and to take all necessary steps to apply for Medicaid eligibility on the resident's behalf. Courts that rule against the facility generally cite the Reform Law's prohibition against third-party guarantees, and the general agency rule that an agent is not liable for the principal's debts. On the other hand, when a court rules for the facility, the court generally focuses on the language of the admission agreement. In some cases, rulings for a facility likely are driven by the court's lack of sympathy for the defendant, who may be a family member or friend who has misused the resident's money rather than paying the facility for services rendered.¹⁹

In the discussion accompanying the release of the regulations, CMS noted that "[s]ome commenters were concerned that facilities evade the prohibition on requiring a third-party to guarantee payment ... by using contracts that require a resident representative to commit to paying facility charges out of resident resources and suing the representative for breach of contract if the resident's bill is unpaid."²⁰ CMS deferred any action on this issue, saying that the agency will "further investigate this concern and consider it for future notice and comment rule-making."²¹

The regulations broadly prohibit a nursing facility from obtaining waivers of a resident's rights.

The previous nursing facility regulations prohibited a nursing facility from "requir[ing] residents or potential residents to waive their rights to Medicare or Medicaid."²² The revised regulations offer additional protections. The new language states that a facility must "[n]ot request or require residents or potential residents to waive their rights as set forth in this subpart and in applicable state, federal or local licensing or certification laws, including but not limited to their rights to Medicare or Medicaid."²³ An additional provision states that the facility may "[n]ot request or require residents or potential residents to waive potential facility liability for losses of personal property."²⁴

These provisions together should be extremely helpful in addressing a longstanding problem. Over the years, multiple studies have documented that nursing facility admission agreements frequently misstate the law.²⁵ The agreements typically claim illegitimate justifications for eviction, for example, or disclaim that facility's duty to provide one-on-one care, even when that level of care is required by the resident's condition. These are the types of provisions that now are in direct violation of the regulations.

An additional regulatory provision addresses the admissions agreement directly: “The terms of an admission contract by or on behalf of an individual seeking admission to the facility must not conflict with the requirements of these regulations.”²⁶ In the past, most government surveyors would refuse to process complaints about admission agreement misrepresentations, claiming that such misrepresentations might violate state consumer protection law, but did not violate the Nursing Home Reform Law and its implementing regulations. Now, however, federal regulations broadly prohibit waiver of a resident’s rights, and require that admission agreements not conflict with federal requirements. As a result, improper waivers and misrepresentations now fall clearly within surveyors’ jurisdiction.

The regulations do not allow a facility to obtain a pre-dispute arbitration agreement from the resident, but a court has enjoined enforcement of this provision.

In recent years, nursing facilities commonly have obtained pre-dispute arbitration agreements from residents, or from resident representatives acting on a resident’s behalf. Under these agreements, the resident and the facility must resolve disputes through arbitration, rather than through a court trial. The agreements are termed “pre-dispute” because they generally are entered into at the time of admission, long before any dispute has arisen.²⁷

The regulations now bar a facility from entering into a pre-dispute arbitration agreement.²⁸ Furthermore, various requirements apply if a resident voluntarily agrees to arbitrate a dispute *after* the dispute has arisen. The facility must ensure that any such post-dispute arbitration agreement is explained to the resident and resident representative in a form and language that they understand. The agreement itself must provide for selection of an arbitrator by the parties’ mutual agreement, and for the arbitration to be conducted in a place convenient to both parties.²⁹ When a dispute between the facility and a resident is resolved through arbitration, the facility for five years must retain a copy of both the signed arbitration agreement and the arbitrator’s final ruling.³⁰

Prior to the effective date of the arbitration, a lawsuit was filed against CMS in Mississippi by the American Health Care Association and several individual nursing facilities.³¹ On November 7, 2016, the federal district court ruled in favor of the plaintiffs and issued a nationwide preliminary injunction enjoining the federal government from enforcing the ban against pre-dispute nursing facility arbitration agreements. The judge noted, in dicta, that pre-dispute arbitration agreements were not an efficient means of resolving nursing facility disputes, because disputes about the agreements’ enforceability often take years to resolve. Nonetheless, the judge then ruled in favor of the facilities, concluding that the arbitration regulation likely conflicted with the Federal Arbitration Act, and exceeded CMS’ authority.³² CMS has appealed to the Fifth Circuit Court of Appeals, but the appeal was filed by CMS during the final weeks of the Obama presidency, and CMS under incoming President Trump may take a different position on this issue.

Conclusion

The revised regulations provide important resident rights, including the right to access the community, and the right to converse with staff in the resident’s language. A facility now cannot transfer a resident within the facility for staff convenience, and all intra-facility transfers require written notice that includes the reason for the transfer. A nursing facility cannot require or request a third-party guarantee of payment, or use an admission agreement to waive the resident’s rights under federal or state law. The regulations also prohibit the facility and resident from entering into a pre-dispute arbitration agreement, although this provision has been enjoined by a federal court through a preliminary injunction.

Additional Resources

- Eric Carlson, ecarlson@justiceinaging.org
- Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016).

- 42 C.F.R. §§ 483.1 through 483.95.
- 42 U.S.C. §§ 1395i-3 (Medicare-certified facilities), 1396r (Medicaid-certified facilities).
- CMS, Guidance to Surveyors for Long-Term Care Facilities, Appendix PP to CMS State Operations Manual.
- Eric Carlson, Long-Term Care Advocacy (Lexis Publishing 2016).
- 20 Common Nursing Home Problems – and How to Resolve Them (Justice in Aging 2015), justiceinaging.org/20-common-nursing-home-problems.
- National Consumer Voice for Quality Long-Term Care, theconsumervoic.org.
- Center for Medicare Advocacy, Nursing Home information, medicareadvocacy.org/medicare-info/skilled-nursing-facility-snf-services.

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

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Endnotes

- 1 42 U.S.C. §§ 1395i-3 (Medicare-certified facilities), 1396r (Medicaid-certified facilities). These two statutes are virtually identical.
- 2 56 Fed. Reg. 48,826 (Sept. 26, 1991).
- 3 80 Fed. Reg. 42,168 (July 16, 2015).
- 4 81 Fed. Reg. 68,688 (Oct. 4, 2016).
- 5 81 Fed. Reg. at 68,696-98.
- 6 42 C.F.R. § 483.10(f)(3).
- 7 42 C.F.R. § 483.24(c).
- 8 81 Fed. Reg. at 68,718-19.
- 9 42 C.F.R. §§ 483.10(c)(1) (health status), (g)(3), (4) (legal rights), (16)(i) (resident rights and responsibilities), 483.15(c)(3)(i) (transfer or discharge), & 483.70(n)(2)(i)(A) (arbitration).
- 10 81 Fed. Reg. at 68,707.
- 11 81 Fed. Reg. at 68,707.
- 12 42 U.S.C. §§ 1395i-3(c)(1)(A)(x), 1396r(c)(1)(A)(x); previous 42 C.F.R. § 483.10(o)(1)(i).
- 13 42 U.S.C. §§ 1395i-3(c)(1)(A)(v)(II), 1396r(c)(1)(A)(v)(II); previous 42 C.F.R. § 483.15(e)(2).
- 14 42 C.F.R. § 483.10(e)(7)(iii).
- 15 42 C.F.R. § 483.10(e)(6).
- 16 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii).
- 17 42 C.F.R. § 483.15(a)(3).
- 18 Eric Carlson, Long-Term Care Advocacy, § 3.06[2][a] (Lexis Publishing).
- 19 Eric Carlson, Long-Term Care Advocacy, § 3.06[2][a].
- 20 81 Fed. Reg. at 68,732.
- 21 81 Fed. Reg. at 68,732.
- 22 Previous 42 C.F.R. § 483.12(d)(1)(i).
- 23 42 C.F.R. § 483.15(a)(2)(i).
- 24 42 C.F.R. § 483.15(a)(2)(iii).
- 25 See Eric Carlson, National Senior Citizens Law Center, Think Twice Before Signing: Improper and Unfair Provisions in Missouri Nursing Home Admission Agreements (2007); Office of New York State Attorney General, Press Release, Nursing Homes Agree to Revise Admission Policies (Mar. 13, 2003) (facilities agreeing to eliminate illegal provisions in admission agreements), available at oag.state.ny.us/press/2003/mar/mar13a_03.html; Eric Carlson, Bet Tzedek Legal Services, “If Only I Had Known”:

Misrepresentations By Nursing Homes Which Deprive Residents of Legal Protection (1995); Rebecca Benson, Check Your Rights at the Door: Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements (1997); Patricia Nemore, *Illegal Terms in Nursing Home Admissions Contracts*, 18 Clearinghouse Rev. 1165 (1985); Charles Sabatino, *Nursing Home Admission Contracts: Undermining Rights the Old-Fashioned Way*, 24 Clearinghouse Rev. 553 (1990).

26 42 C.F.R. § 483.10(g)(18)(v).

27 81 Fed. Reg. at 68,794.

28 42 C.F.R. § 483.70(n)(1).

29 42 C.F.R. § 483.70(n)(2)(i), (ii).

30 42 C.F.R. § 483.70(n)(2)(vi).

31 Complaint, American Health Care Ass'n v. Burwell, Civ. Action No. 3:16-CV-00233 (N.D. Miss. 2016).

32 Order, American Health Care Ass'n v. Burwell, Civ. Action No. 3:16-CV-00233 (N.D. Miss. Nov. 7, 2016).