

**LONG TERM CARE (LTC) E- NEWSLETTER** – February 2014: Volume 12, Number 2

The [LTC E-Newsletter](#) is a monthly electronic newsletter of the [Long Term Care Community Coalition](#). Note to Readers: To go directly to an article, click on its page number in the Table of Contents. Once you are at the article, click on any underlined text for a link to more information or to send a message in “Spotlight on Advocacy.”

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### [CMS Issues Final Rule for Medicaid Home and Community Based Services Settings](#)

On January 10, 2014, the Centers for Medicare and Medicaid Services (CMS) issued a final rule establishing new requirements that apply to Medicaid Home and Community Based Services (HCBS). The rule, which was several years in the making, is of particular importance because it requires that HCBS settings meet certain qualifications in order to be eligible for Medicaid reimbursements.

This rule is of great important for current and future residents of assisted living, adult homes and other residential care facilities. These facilities hold themselves out as providing residential care and safety in a setting that avoids the institutional nature of the traditional nursing home. However, as LTCCC’s studies (and others) have found, too often adult homes and assisted living are, in fact, highly institutional, restricting resident choice and autonomy in significant ways.

As more lower and middle income individuals seek to access residential care outside of nursing homes, and as more assisted living facilities market themselves to meet that demand, we think it is essential that there be meaningful criteria in place to ensure that those assisted living are *truly* non-institutional settings. Fundamentally, we believe that public funds should only be used to support a model of assisted living that fulfills the promise of assisted living: providing choice, autonomy, privacy and a quality of life that is centered on the individual and his or her needs and desires. Public funds for assisted living should not be used for a setting that is providing a lifestyle similar to that in a traditional nursing home.

LTCCC and others, including the [Assisted Living Consumer Alliance](#), advocated for strong consumer protections in the new rule. The rule's requirements include that HCBS settings should:

1. be integrated in and support full access to the greater community;
2. be selected by consumer choice from among setting options;
3. ensure individual rights of privacy, dignity and respect, and freedom from coercion and restraint;
4. optimize autonomy and independence in making life choices; and
5. facilitate choice regarding services and who provides them.

The rule also identifies which settings are not HCBS settings and describes locations that will be considered institutional unless determined otherwise through some type of review process. According to the bulletin released by CMS,

The final regulation provides for a transition process that will allow states to implement this rule in a manner that supports continuity of services for Medicaid participants and minimizes disruptions in service systems during implementation. New 1915(c) waivers or 1915(i) state plans must meet the new requirements to be approved. For currently approved 1915(c) waivers and 1915(i) state plans, states will need to evaluate the settings currently in their 1915(c) waivers and 1915(i) state plan programs and, if there are settings that do not meet the final regulation's home and community-based settings requirements, work with CMS to develop a plan to bring their program into compliance. The public will have an opportunity to provide input on states' transition plans. CMS expects states to transition to compliance in as brief a period as possible and to demonstrate substantial progress towards compliance during any transition period. CMS will afford states a maximum of a one year period to submit a transition plan for compliance with the home and community-based settings requirements....

These regulations are an important step toward ensuring that this promise is a reality for current and future assisted living residents. However, in order for the regulations to be meaningful, it will be critical that they are understood and enforced.

[For the CMS page on the new regulations, go to <http://www.medicaid.gov/HCBS>. For LTCCC's website on assisted living, with information and resources for consumers, go to [www.assisted-living411.org](http://www.assisted-living411.org).]

## **Johnson & Johnson Whistle-Blowers Receive Over \$20 Million in \$2.2 Billion Illegal Antipsychotic Drug Marketing Case**

The inappropriate and dangerous use of powerful antipsychotic drugs is widespread problem in nursing homes and other settings. LTCCC has been focusing on this issue on the national and state levels for several years, particularly since the U.S. Inspector General wrote in 2011

[d]espite the fact that it is potentially lethal to prescribe antipsychotics to patients with dementia, there's ample evidence that some drug companies aggressively marketed their products towards such populations, putting profits before safety.

Government, taxpayers, nursing home residents, as well as their families and caregivers should be outraged - and seek solutions.

In November 2013, Johnson & Johnson settled some of the criminal and civil allegations that it illegally marketed these drugs. As reported in [injurylawyer-news.com](http://injurylawyer-news.com),

The agreement forms part of a larger settlement deal made with the U.S. Justice Department, finalized in November 4, 2013. Johnson & Johnson has set aside \$2.2 billion to resolve civil and criminal charges that the manufacturer marketed Risperdal, Invega and Natrecor for uses for which it was never approved by the FDA. The \$2.2 billion also includes fines for millions in illegal kickbacks given to doctors, nursing homes, and other medical facilities. According to the Risperdal lawsuit settlement, Janssen Pharmaceuticals – whose parent company is J&J – will pay \$334 million in penalties, while also agreeing to forfeit \$66 million.

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The Department of Justice (DOJ) began investigating Johnson & Johnson's marketing tactics for Risperdal in 2004, after allegations of a kickback scheme between the drug maker and Omnicare emerged. Omnicare supplies drugs to nursing homes, where Risperdal is used to restrain violent and unruly patients suffering with dementia. In a civil False Claims Act complaint filed against Johnson & Johnson by the DOJ in 2010, Omnicare was accused of accepting millions of dollars from the drug maker to promote the 'off-label' use of Risperdal, concealing the kickbacks as administrative fees. A \$112 million settlement was reached between Omnicare and the DOJ.

From LTCCC's perspective, compensation for individuals who take substantial personal and professional risks to report corporate wrongdoing is an important tool to improve public safety and the financial integrity of our public programs. According to a [2012 report by Bloomberg News](#),

Risperdal, once J&J's best-selling drug, generated worldwide sales of \$24.2 billion from 2003 to 2010, peaking at \$4.5 billion in 2007. After that, J&J lost patent protection and sales declined.

Risperdal profit was 97 percent of its sales, or \$28.9 billion, from 1994 to 2010, Judge Roger L. Couch of South Carolina Circuit Court in Spartanburg said in his June 3 decision on damages, citing trial testimony.

[For the article on this case go to <http://injurylawyer-news.com/2013/12/risperdal-settlement-earns-millions-whistle-blowers/>. For more information and resources on antipsychotic drugs and dementia care, go to <http://www.nursinghome411.org/articles/?category=antipsychotic.>]

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## **[Spotlight on Advocacy: Speak Out to Support Safe Staffing for Quality Care Act in NY State](#)**

Nursing homes in New York and across the country too often fail to provide safe care and a dignified quality of life for their residents. The problem in many facilities is lack of staffing - about 90% of the nursing homes in NY do not have enough staff to provide adequate care for their residents!

This not only hurts residents, it hurts care staff too. Nurse aides have high rates of injury. Nurses and aides get burnt out.

It is about time that NY join with the large majority of states that have minimum staffing standards for the nursing homes caring for vulnerable elderly and disabled individuals. Now that NY will begin mandating private Managed Care for nursing home access this year, a base staffing standard is even more crucial. Please send a quick message now in support of decent staffing standards – [click here](#) or go to

[http://capwiz.com/nhcnys/issues/alert/?alertid=62598586&MC\\_plugin=3202](http://capwiz.com/nhcnys/issues/alert/?alertid=62598586&MC_plugin=3202).

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## **We're on the Web!**

[www.ltccc.org](http://www.ltccc.org): Our main website, with access to all of our issues, policy briefs and research.

[www.assisted-living411.org](http://www.assisted-living411.org): For information on assisted living, including consumer issues and policies.

[www.nursinghome411.org](http://www.nursinghome411.org): For information on developments in nursing home care, regulation and policy issues.

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## **LTCCC Links of Interest**

[View](#) the latest enforcement actions against nursing homes in New York State.

[Read](#) the latest edition of LTCCC's quarterly newsletter, *The Monitor*.

LTCCC's dedicated [webpage on antipsychotic drugs and dementia care](#).

[Report on NY State Nursing Homes in Managed Long Term Care](#)

[Piecing Together Quality Long-Term Care: A Consumer's Guide to Choices and Advocacy in New York](#).

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