

THE LTC JOURNAL

Fall 2016

The Long Term Care Community Coalition

Note to Our Readers

LTCCC is committed to providing news and information on the issues effecting residents in nursing homes, assisted living and other facilities. In addition to *The LTC Journal*, we invite you to connect with us on **Facebook** (<http://www.facebook.com/lccc>) & **Twitter** (twitter.com/LTCconsumer). Visit us on the Web at www.lccc.org & www.nursinghome411.org.

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Obama Administration Announces Overhaul of Nursing Home Standards

Brief Background

Federal law, and the regulations which implement the law, are the basis for all of the residents' rights, quality of care, quality of life and other standards that exist for virtually every nursing home in the United States (every facility which receives funding from Medicaid and/or Medicare). Individual states can have additional protections (for instance, most states require that nursing homes meet or exceed certain staffing levels). However, states cannot diminish the resident protections mandated by federal law.

The primary federal law for nursing homes is the Nursing Home Reform Law, which was passed in 1987. The regulations that implemented the Reform Law were promulgated in 1991. Though there have been additions and modifications to the regulations over the years, they have never been substantially re-written – until now.

In September, the Centers for Medicare and Medicaid Services (CMS, the federal agency which both pays for and oversees nursing home care) issued the first major overhaul of federal nursing home regulations in 25 years. The new regulations are being implemented in three stages: Phase 1 on November 28, 2016, Phase 2 on November 28, 2017 and Phase 3 on November 28, 2019.

The Good

Following are several of the provisions of the new federal Rule which LTCCC has identified as potentially beneficial to residents and their families.

The published rule is over 700 pages long, to which CMS will be adding official guidelines and other instructions in the coming months and years. For updates on future developments and LTCCC's educational programs for consumers, ombudsmen and providers, please email info@ltccc.org.

1. **Residents rights.** CMS explicitly stated that it has kept all existing residents' rights and made some additions to them. Given the confusion that will undoubtedly occur as the regulations are implemented in the coming years, LTCCC urges residents, families, ombudsmen and advocates to remember that even if the regulatory language or numbering has changed, the residents' rights which we have long counted on endure.
2. **Resident care planning.**
 - a. Immediate action required. Facilities must develop a baseline plan of care within 48 hours of a resident's admission (as opposed to within 14 days). Baseline plan "includes the instructions needed to provide effective and person-centered care that meets professional standards of quality care."
 - b. Care planning team. Resident assessment and care planning are essential bases for identifying a resident's need and preferences and devising a plan to meet those needs and preferences. Too often, both assessment and care planning fall short of what is needed to ensure that a resident receives appropriate care and is treated humanely. To

help address this, the new regulations require that a nurse aide and a member of the food and nutrition services staff are part of the team that develops the comprehensive care plan.

3. **Discharge protections and planning:**

a. Discharge protections.

- i. if a facility is claiming that it cannot meet a resident's needs, it must document how it tried to meet those needs and must also document how the place where the resident is going can meet those needs.
- ii. It must provide notice to the resident "and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand."
- iii. Notice must be sent "to a representative of the Office of the State Long-Term Care Ombudsman."
- iv. To address the issue of residents being dumped in hospitals, the new rules mandate that facilities follow these transfer/discharge requirements when it claims that a hospitalized resident cannot return to the facility.

b. Discharge planning. CMS states: "We are requiring that facilities develop and implement a discharge planning process that focuses on the resident's discharge goals and prepares residents to be active partners in post-discharge care, in effective transitions, and in the reduction of factors leading to preventable re-admissions. We are also implementing the discharge planning requirements mandated by The Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act) by revising, or adding where appropriate, discharge planning requirements for LTC facilities."

4. **Trauma-informed care.** CMS has added provisions to better address the needs of residents who have experienced trauma, including Holocaust survivors and veterans.
5. **Complaint handling:** Facilities must now have a grievance officer and policy relating to grievances. Facilities must provide complainant with a written response that includes the steps taken to investigate, a summary of the finding or conclusions, a statement as to whether the grievance was confirmed or not confirmed, and the action taken or to be taken by the facility.
6. **Right to sue for abuse & substandard care.** The new regulations prohibit nursing homes from inserting pre-dispute arbitration clauses into their residency agreements. Pre-dispute arbitration agreements are a significant concern to nursing home residents because they strip the resident (and his or her loved ones) of potentially important legal rights. Generally speaking, a pre-dispute mandatory arbitration clause obligates the resident and his or her representatives to use arbitration for any dispute they might have in the future. In other words, the resident is forfeiting his or her right to *ever* sue the facility at any time in the future when there are allegations of serious resident abuse and neglect (even when that abuse or neglect is believed to have resulted in the resident suffering or dying). LTCCC (along with other consumer organizations) urged CMS to prohibit re-dispute arbitration agreements, on the grounds that it is unconscionable to ask someone to sign

away their future legal rights. We believe that pre-dispute arbitration clauses are fundamentally unfair and un-American. In the nursing home context, people enter a facility under stressful circumstances, in which there is often little opportunity to carefully review and understand every word in every page of the paperwork put before them. Importantly, people enter a nursing home expecting that they will get good care and be treated humanely.

It is important to note that the American Healthcare Association, which represents for-profit providers, sued the U.S. in October to overturn this prohibition and (as of November 26, 2016) has received a temporary injunction to stop the ban on pre-dispute arbitration clauses. LeadingAge, the association for non-profit providers, did not join in this lawsuit.

The Bad

1. **No minimum staffing standards.** Insufficient staffing is one of the biggest – if not the biggest – problems in U.S. nursing homes. Since 1991, nursing homes have been required to have “sufficient” staffing to ensure that every resident receives the care and services needed to attain – and maintain – his or her highest practicable physical and psycho-social well-being. Unfortunately, because “sufficient” is not a specific number, many nursing homes are able to flout this requirement. LTCCC’s 2015 study found that state survey agencies (which are responsible for enforcing this and other nursing home standards) rarely hold nursing homes accountable for insufficient staffing. Thus, we were disappointed that CMS declined to set a specific criteria for nursing home staffing, thus perpetuating a major and widespread problem.
2. **Implementation:** We are deeply concerned that this overhaul will be disastrous for many people for many years to come. In addition to revising the regulatory language, CMS has moved categories of different standards (see #3 below for one example) and will be totally revising the F-tag system used by the states to classify problems. The comments published by CMS with the new Rule indicated that many providers – and state surveyors – were clearly uninformed about the rules which existed for 25 years. How are they going to handle all of these changes? How will residents be protected from abuse and neglect while nursing homes and state surveyors figure things out?
3. **Dementia care and antipsychotic drugging:** Protections against inappropriate antipsychotic drugging have long been specifically addressed in the section of the regulations on quality of care. Even then, over 200,000 U.S. nursing home residents are administered these dangerous drugs for off-label purposes. In the new regulations, inappropriate antipsychotic drugging has been combined with other psychotropic medications into pharmacy services. While we agree that pharmacists should have a stronger role in monitoring the

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appropriateness of the drugs residents receive, we are deeply concerned that this will further dilute the campaign to stop inappropriate drugging and improve dementia care.

4. There are several provisions in the new regulations that call on facilities to self-assess the services they are providing to identify and address problems, including whether they have sufficient – and sufficiently trained – staff to meet the needs of their residents. While we **do** believe that nursing homes should be identifying and addressing problems, we **do not** believe that self-assessment is an appropriate component of a regulatory framework upon which – presumably – states will undertake meaningful enforcement to ensure that residents are protected and receive the quality of care that nursing homes are paid to provide. Fundamentally, we believe that the emphasis on self-assessment will further undermine accountability when a facility fails its residents and the tax-payers who pay for a majority of nursing home care.

New Resources For Residents, Families, Ombudsmen & Advocates

Fact Sheet: Medicare Coverage of Skilled Nursing & Skilled Therapy Services

Accessing physical therapy and other skilled services can be a challenge for nursing home residents and the families, LTC Ombudsmen and advocates who work with them. Too often, we have been told, therapy services are denied or terminated because a determination has been made that the individual is no longer improving or has “plateaued.” In fact, **improvement is not required** to obtain Medicare coverage for skilled nursing and skilled therapy services, including physical therapy. This Fact Sheet provides information that can be useful in understanding an individual’s right to receive therapy services and accessing those services.

Fact Sheet: Admission & Discharge Rights in NY State Nursing Homes

LTCCC has learned that some nursing homes are telling people that the facility only provides short-term rehab services and does not provide long-term care. Some people who go into a facility for short-term care and wind up needing long-term care are even being told that they will need to go to another facility. The reason for this is that short-term rehab services tend to pay much more than long-term care services. However, since most nursing home care is paid for through public programs (Medicare and Medicaid), there are important standards to protect residents from unfair discharge or transfer. This Fact Sheet provides information on the important state and federal rights that residents can use to protect themselves.

Highlights of the Inspector General’s 2017 Work Plan re. Nursing Home and Long-Term Care

The mission of the US DHHS Office of the Inspector General (OIG) is to protect the integrity of public health programs and fight waste, fraud and abuse in Medicare, Medicaid and other programs. Over the years, the OIG has conducted numerous investigations that have been important in identifying serious problems, including significant deficiencies in the quality of care provided to nursing home residents that state and federal survey agencies too often fail to

identify and address in their oversight. This brief report provides an overview of the planned OIG activities which we have identified as most relevant to nursing home and long-term care.

Updated: *Piecing Together Quality Long-Term Care: A Consumer's Guide to Choice and Advocacy in New York*

In 2013, with funding from the National Consumer Voice, LTCCC adopted a national guide for consumers and those that work with them on accessing long-term care. The purpose of the guide is to help individuals facing LTC decisions gain a better understanding of their choices and options and how they can advocate for themselves to get the services they need and want. In November 2016 we updated this guide to provide current information and links to outside resources.

LTC NEWS & BRIEFS

New Study Assesses Relationship Between Continuity of Care & Outcomes for People With Dementia

In September the journal *JAMA Internal Medicine* published the results of a study which examined the effect that continuity of care (having a continuous care relationship with one's clinicians) has on older adults with dementia. The study focused on Medicare beneficiaries who live in the community (i.e., not in an institution such as a nursing home). Researchers found that higher continuity of care for older adults with dementia led to less hospitalization, emergency department visits, testing, and health care spending.

Research Results: Nursing Home Residents Benefit From Palliative Care Consults

Brown University reported in September that researchers had conducted the first study of the effect of palliative care consults in nursing homes. According to the Brown University news release, they found that that the practice is associated with less hospitalization and intensive treatment... at no net additional cost to Medicare.

“These findings have never been shown in nursing homes,” said study corresponding author Susan Miller, a Brown University gerontologist and School of Public Health professor. “It’s important that we document this because essentially when people are in the nursing home for a long stay, that’s their final residence. These are people in need of supportive care and expertise in palliative care.”

The results appear in the *Journal of the American Geriatrics Society*.

[<https://news.brown.edu/articles/2016/09/palliative>]

Federal Study Says Improvement Needed in Accuracy & Transparency of Money Spent by Nursing Homes

In October the GAO (Government Accountability Office) released a report, *Skilled Nursing Facilities: CMS Should Improve Accessibility and Reliability of Expenditure Data*. GAO found that CMS (the Centers for Medicare and Medicaid Services) has not taken key steps necessary to

ensure that the public has accurate information on expenditure information on the nursing homes in their states and communities.

According to the GAO,

CMS has not provided the data in a readily accessible format and has not posted the data in a place that is easy to find on its website, according to public stakeholders and GAO's observations. In addition, **CMS does little to ensure the accuracy and completeness of the data.** Federal internal control standards suggest that agencies should make data accessible to the public and ensure data reliability. Until CMS takes steps to make reliable SNF [skilled nursing facility] expenditure data easier to use and locate, **public stakeholders will have difficulty accessing and placing confidence in the only publicly available source of financial data for many SNFs.**

GAO found that, for each fiscal year from 2011 through 2014, **direct and indirect care costs were lower... on average, at for-profit SNFs compared with nonprofit and government SNFs.** Direct and indirect care costs were similarly lower at chain SNFs compared with independent SNFs. In addition, the median margin, which measures revenue relative to costs, was higher for for-profit and chain SNFs than for other SNFs in each of the 4 years. [Editor's Note: "direct and indirect care costs" relate to the moneys that a nursing home receives that it is spending on resident care. Money *not* spent on care can go to profits, administrative salaries and other purposes that may have little or no direct benefit to the residents living in a facility.]

The relationship between SNFs' nurse staffing levels (hours per resident day) and their margins varied by ownership type in each fiscal year from 2012 through 2014, the 3 years with complete staffing data. **For-profit SNFs generally had lower nurse staffing ratios than did nonprofit and government SNFs.** [Emphases added.]

[http://www.gao.gov/products/GAO-16-700?utm_medium=email&utm_source=govdelivery]

CMS: Nursing Homes Must Report Current & Accurate Ownership Information

In a [September 22 news alert](#) for providers, CMS alerted the industry to the requirement that providers (including nursing homes, hospitals and home health agencies) must report all individuals and entities with a 5 percent or more ownership or controlling interest and that any changes in ownership must be reported within 30 days. The CMS alert referred to a recent (May 2016) [report from the Office of Inspector General \(OIG\)](#) which found that

Over three-quarters of Medicare providers in our review had owner names on record with CMS that did not match those that providers submitted to OIG. Further, nearly all providers in our review had owner names on record with CMS that did not match those on record with State Medicaid programs. The prevalence of nonmatching owner

names raises concern about the completeness and accuracy of information about Medicare providers' ownership. It also demonstrates that providers may not be complying with the requirement to report ownership changes to CMS. [Emphases added.]

[*Medicare: Vulnerabilities Related to Provider Enrollment and Ownership Disclosures*, OEI-04-11-00591, US Department of Health Office of the Inspector General (May 2016). Accessed at <https://oig.hhs.gov/oei/reports/oei-04-11-00591.pdf>.]

Why are the Inspector General's findings important? As noted in the OIG's rationale CMS can prevent inappropriate payments, protect beneficiaries, and reduce time-consuming and expensive "pay and chase" activities by ensuring that providers that intend to engage in fraudulent or abusive activities are not allowed to enroll in Medicare. For CMS to identify potentially fraudulent providers, as well as those that may be associated with excluded individuals or entities, providers must disclose information on owners and others with control interest in the business.
[*Id.*]

Research Indicates Higher Education & Late-Life Obesity Associated With Decreased Risk of Dementia

A study published in November in *JAMA Internal Medicine* found that the prevalence of dementia among people 65 years and older in the U.S. has decreased "significantly, from 11.6% in 2000 to 8.8% in 2012." Furthermore, it corroborated that higher education was associated with decreased dementia, though noting that "the full set of social, behavioral, and medical factors contributing to the decline is still uncertain." Higher education has been identified as an indicator in the past though, as noted above, the nature of this association is not known (for instance, individuals with higher education may be able to compensate for or "hide" symptoms of dementia for a longer period of time than individuals with lower formal education. Interestingly, this is the first study (of which we are aware) that found an inverse relationship between being overweight and having dementia, which the authors refer to as the "obesity paradox."

CMS Announces New Survey Process for Nursing Homes to Debut in Late 2017

On September 29, *McKnight's* reported that Evan Shulman, CMS Deputy Director in the Division of Nursing Homes, Survey and Certification Group, announced at a meeting of the American Association of Directors of Nursing Services that there will be a new survey process launched in 2017. According to the article in *McKnight's*, the new survey process will take components from the two survey processes currently used by states across the country: the traditional survey and the Quality Indicator Survey. *McKnight's* quotes: "The new survey process leverages best practices of both," he said. It will be computer-based. "It's time to stop carrying around a thick binder."

Please check future issues of the *LTC Journal* and our www.nursinghome411.org website for updates on the new survey process – and its implication for nursing home residents – as we learn of them.

Nation’s Largest Nursing Home Pharmacy to Pay Over \$28 Million to Settle Kickback Allegations

On October 17, the US Department of Justice (DOJ) announced that it had reached a settlement with Omnicare Inc. to resolve allegations that it had solicited and received kickbacks from pharmaceutical manufacturer Abbott Laboratories in exchange for promoting the prescription drug, Depakote, for nursing home patients. Deputy Assistant Attorney General Benjamin C. Mizer, head of the Department of Justice’s Civil Division, stated “Every day, elderly nursing home residents suffering from dementia rely on the independent judgment of our nation’s healthcare professionals for their personal care and their medical treatment. Kickbacks to entities making drug recommendations compromise their independence and undermine their role in protecting nursing home residents from the use of unnecessary drugs.”

LTC Ombudsman Program Seeks Volunteers in NY State

The LTC Ombudsman Program (LTCOP) is dedicated to ensuring that residents in long term care facilities have good care and are treated with dignity. Being an Ombudsman volunteer is both challenging and rewarding. Volunteers receive extensive training to advocate for, educate and empower family members and residents living in nursing homes, assisted living, and family type homes. They can make a big difference in the lives of some of the most vulnerable people in our communities.

The LTCOP is seeking volunteers who can contribute a minimum of two hours a week to help residents in facilities in their communities. The Hudson Valley LTCOP currently has volunteer opportunities in Dutchess, Ulster, Orange, Sullivan, Columbia and Greene counties.

To volunteer in the Hudson Valley, please call 845-229-4680 or email Gloria@hudsonvalleyltpop.org. To volunteer in another area of New York State, please go to the “Who is My Ombudsman” page on the NYS LTC Ombudsman Program’s website: <http://www.ltpopombudsman.ny.gov/whois/index.cfm>.



NY State Nursing Home Enforcement Actions

Where to Find the Latest NYS Nursing Home Enforcements & Penalties

LTCCC is now posting all available enforcement actions from the state and federal governments on our dedicated website page, [New York State Nursing Home Enforcements \(http://www.ltccc.org/enforcements/archives.shtml\)](http://www.ltccc.org/enforcements/archives.shtml). While in the past we have posted quarterly data on our website and in our newsletter, these data will now be provided in files that cover each calendar year in its entirety. This way, visitors can look in one file to see any recent citations, rather than having to view separate files for individual quarters.

In addition, we are now posting on the [Enforcements page](#), on an annual basis, all of the NY State nursing home deficiencies that are currently on the federal website, [Nursing Home Compare](#). Nursing Home Compare provides information on nursing home staffing, inspections and quality for the last three years. We believe that this information will be useful to consumers, families and LTC Ombudsmen now and in the future, since it will enable them to access current and historical information on nursing homes in their communities.

For information on all U.S. nursing homes, our www.nursinghome411.org website has user-friendly information, including rates of antipsychotic drugging, staffing levels, star ratings and more. This information is provided in Excel files which we have formatted to make them as easy-to-use as possible. The files can be searched for an individual facility's name, a listing of facilities by city or state, etc...

LTCCC offers trainings for LTC ombudsmen and other groups on how to use this and other publicly available information effectively, to understand the quality of care nursing homes are providing and to support advocacy for better care. Email info@ltccc.org for more information.

Annual Appeal: A Voice for Decent Care and Dignity in LTC

The challenges to getting good care and living with choice and dignity in nursing homes and assisted living are great. LTCCC fights year-round to help frail elderly and disabled residents access the best care and quality of life possible.

Please join in support of our Annual Appeal, which provides critical support for our work in the year to come. **You can donate on-line**

now at <http://ltccc.org/ltccc.orgsupport.shtml> or send a check to Long Term Care Community Coalition, One Penn Plaza, Suite 6252, NY, NY 10119.

All donations are 100% tax-deductible.

Any amount is truly appreciated.

Thank you for your consideration and best wishes for a happy holiday season!



The LTC Journal

Fall 2016 Volume 2, Number 4. ©2016 The Long Term Care Community Coalition.

The LTC Journal is published by the Long Term Care Community Coalition, One Penn Plaza, Suite 6252, New York, NY 10119.

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Benefactors: This newsletter is made possible through the generous donations of our supporters, The New York Community Trust and FJC – Foundation of Philanthropic Funds.