

THE LTC JOURNAL

Spring 2019

The Long Term Care Community Coalition

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GOVERNMENT STANDARDS & QUALITY ASSURANCE

CMS ANNOUNCES SIGNIFICANT CHANGES IN ANTICIPATION OF SENATE FINANCE HEARING ON NURSING HOME ABUSE AND NEGLECT

The U.S. Senate Committee on Finance held a hearing on March 6, 2019, entitled “[Not Forgotten: Protecting Americans From Abuse and Neglect in Nursing Homes](#).” In anticipation of the hearing, the Centers for Medicare & Medicaid Services (CMS) issued three Quality, Safety & Oversight (QSO) memorandums detailing (1) enhanced oversight and enforcement of select nursing homes that have failed to reduce their antipsychotic drugging rate, (2) revisions to the definition of immediate jeopardy in Appendix Q of the State Operations Manual, and (3) updates to CMS’s Nursing Home Compare website. Following is a brief overview of some of the key changes:

1. [Enhanced oversight and enforcement of deficient nursing homes](#). CMS will enhance oversight and enforcement of 235 (out 1,500) nursing homes that continue to have high

rates of deficiencies related to antipsychotic drugs. Facilities cited for three or more deficiencies at a D or above scope and severity level will be subject to denial of payment for new admissions (DPNA) and per-day civil money penalties (CMPs) starting on the first day of the survey. Facilities with two deficiencies will only be subject to a DPNA, in addition to remedies required by law.

2. **Revisions to immediate jeopardy in Appendix Q.** In order to cite immediate jeopardy, surveyors will now be required to determine that “(1) noncompliance (2) caused or created a likelihood that serious injury, harm, impairment or death to one or more recipients would occur or reoccur; and (3) immediate action is necessary to prevent the occurrence or reoccurrence of serious injury, harm, impairment or death to one or more recipients.” CMS seems to be weakening a surveyor’s ability to cite immediate jeopardy by requiring that there be a “likelihood,” rather than a “potential,” of serious resident harm.
3. **Updates to CMS’s Nursing Home Compare Website.** CMS is reducing the number of days that nursing homes can have without a registered nurse (RN) before getting an automatic one-star staffing rating from seven days to four days.

LTCCC is concerned by CMS’s decision to make the changes announced in the QSO memos. While some of the changes improve existing policies, the changes highlighted above either do not go far enough in addressing the underlying issue or weaken previous positions.

First, CMS must not allow nursing homes that have been identified as providing deficient care by inappropriately drugging residents to avoid enhanced oversight and punishment. About [one in five](#) nursing home residents nationwide continue to be given antipsychotic drugs every day. In order to address this persistent problem, **all** facilities that inappropriately administer antipsychotic drugs to residents must be subject to a DPNA and CMPs. Furthermore, CMS must impose CMPs starting on the first day of noncompliance and not just on the first date of a survey. Failing to account for past noncompliance or existing noncompliance means that CMS is paying facilities for resident care while also allowing them to violate minimum standards of care for days, weeks, and even months.

Second, CMS [data](#) show that less than four percent of nursing homes are ever cited for immediate jeopardy deficiencies. The vast majority of citations for failing to meet minimum health standards are cited as causing residents “[no harm](#),” meaning that facilities all too often are not properly penalized with fines for poor care or neglect. Revising immediate jeopardy in Appendix Q to require surveyors to determine likelihood, rather than a potential, of serious resident harm raises the already high bar that surveyors have meet to cite immediate jeopardy. Given that instances of resident pain, suffering, and humiliation are called no harm nearly 95 percent of the time that they are cited, CMS must take action to make it easier for surveyors to

“Seniors in nursing homes are among the people most vulnerable to the life-threatening consequences of abuse and neglect . . . that vulnerability is being exploited in unimaginably cruel ways in nursing homes that are unsafe, under-staffed and uninterested in providing even the most basic, humane level of care.”

- [Senator Ron Wyden](#), Ranking Member of the Senate Finance Committee.

cite immediate jeopardy and train surveyors about appropriate citation levels, not make it harder to cite immediate jeopardy and signal to surveyors that immediate jeopardy citations should be even more infrequently cited.

Lastly, CMS's decision to reduce the number of days without an RN from seven days to four days for the purposes Nursing Home Compare's star-rating system is an improvement. However, the federal Nursing Home Reform Law requires facilities to have an RN on duty eight hours a day, seven days a week. It is, in fact, the only numerical staffing requirement in the federal regulations. Nursing homes should be held accountable for meeting it.

[HOUSE CHAIRMAN SENDS LETTER TO THE ADMINISTRATOR OF CMS REGARDING THE ONGOING INAPPROPRIATE USE OF ANTIPSYCHOTIC DRUGS IN NURSING HOMES](#)

On January 22, 2019, Congressman Richard Neal, Chairman of the House Committee on Ways and Means, sent a letter to Centers for Medicare & Medicaid Services (CMS) Administrator Seema Verma regarding the ongoing use of antipsychotic drugs in nursing homes. In the letter, Chairman Neal explains that CMS's latest [National Partnership to Improve Dementia Care in Nursing Homes](#) data is "extremely disappointing, showing that progress reducing inappropriate use of antipsychotics in nursing homes has slowed."

The letter questions whether reported improvements in the reduction of antipsychotic drug use are the result of prescribing behavior. Chairman Neal points to a study indicating that reduction in use may be linked to falsified diagnoses. Describing the seriousness of the problem, Chairman Neal states that, despite the high percentage of inappropriate use, "less than one percent of all citations . . . identified resident harm."

The letter comes nearly eight years after the HHS Office of the Inspector General's [2011 report](#) on antipsychotic drug use in nursing homes, which found a high percentage off-label use among residents. With the release of that report, Inspector General Daniel R. Levinson [stated](#) that "[g]overnment, taxpayers, nursing home residents, as well as their families and caregivers should be outraged - and seek solutions." Unfortunately, as Chairman Neal's letter shows, there has been little improvement in reducing the inappropriate antipsychotic drugging of nursing home residents.

"Because the research is clear that inappropriate prescribing of antipsychotics does indeed result in resident harm, these data suggest severe under-enforcement persists."

- Congressman Richard Neal,
House Ways and Means
Committee Chairman.

- For more information about the federal standards of care for antipsychotic drugging, please see LTCCC's issue alert: <https://nursinghome411.org/issue-alert-antipsychotic-drugs/>.
- To access LTCCC's Dementia Care & Antipsychotic Drugging Advocacy Toolkit, please see: <https://nursinghome411.org/learning-center/dementia-care-advocacy-toolkit/>.
- To learn more about the antipsychotic drugging rates of nursing homes around the country, including those in your state, please see LTCCC's database: <https://nursinghome411.org/learning-center/dementia-care-antipsychotic-drugging/>.

LTC NEWS & BRIEFS

[NEW STUDY CONCLUDES THAT NURSING HOMES ARE UNDERREPORTING THEIR ANTIPSYCHOTIC DRUGGING RATES](#)

In “Nursing homes underreport antipsychotic prescribing,” published in *Aging & Mental Health* (Feb. 2019), researchers found that nursing homes did not report the antipsychotic drugging of roughly 6,000 residents every quarter. The study also found that nursing homes located in the southern states and operating as for-profit entities were more likely to underreport. Although the Centers for Medicare & Medicaid Services (CMS) claims that its [National Partnership to Improve Dementia Care in Nursing Homes](#) has lowered antipsychotic drugging rates among nursing home residents, the study found that the “underreporting grew at the same time there was increased pressure to reduce antipsychotic prescribing.”

“Nursing home facilities underreport their antipsychotic prescribing despite federal regulations mandating full disclosure.”

- Becky A. Briesacher et al.

The study is aligned with previous reports examining antipsychotic drug use among U.S. nursing home residents. In a [March 2018](#) study published in the *Journal of the American Medical Association (JAMA) Internal Medicine*, researchers indicated that the overall decline of antipsychotic drugging rates has been met with an increase in the use of mood stabilizers. The authors of the 2018 study specifically noted that [r]ather than increasing the use of nonpharmacological treatments, prescribers may have shifted from prescribing antipsychotics to mood stabilizers even though mood stabilizers have less evidence of benefit for the behavioral and psychological symptoms of dementia.” Similarly, a [2017 study](#), published in *Clinical Gerontologist*, found that reduction in antipsychotic drug use is correlated to an increase in individuals receiving diagnoses of Huntington’s disease, Tourette’s syndrome, and schizophrenia—the three conditions excluded by CMS when it publishes each nursing home’s antipsychotic drugging rate.

- For additional information and resources on antipsychotic drugging in nursing homes, please see the materials listed [above](#) (page 2).

[DOL INSPECTOR GENERAL IS INVESTIGATING THE DEPARTMENT OF LABOR’S DECISION TO ROLL BACK NURSING HOME RESIDENT AND CHILD-LABOR PROTECTION](#)

As previously noted in the [Fall 2018](#) and [Winter 2019](#) Editions of *The LTC Journal*, the Department of Labor issued a notice of proposed rulemaking (NPRM) to allow trained 16 and 17-year olds to operate patient lifts without the supervision of a qualified adult caregiver. The Labor Department’s proposed rule is in direct opposition to the National Institute for Occupational Safety and Health’s (NIOSH) [2011 report](#), which clarified that 16 and 17-year olds “cannot safely operate power-driven hoists to lift and transfer patients by themselves . . .” LTCCC joined other advocates in opposing the roll back of this protection and submitted

“There’s clearly a pattern of the Department of Labor hiding information that is inconvenient and does not support the department’s position, in violation of well-known and established laws.”

- Deborah Berkowitz (NELP)

[comments](#) detailing how the rule would place nursing homes residents at a greater risk of experiencing harm.

On January 25, 2019, the Labor Department’s Inspector General sent a [letter](#) to Members of Congress indicating that his office is conducting an investigation into the Department’s rulemaking process and will be reviewing the proposed rule. Specifically, the Inspector General stated that his office “identified the need for a broader review of the rulemaking process at DOL. The objective of this review is to determine how well DOL manages the issuance of regulations.” LTCCC applauds the Inspector General’s decision to investigate the Labor Department’s decision to roll back the resident and child-labor protection.

- To learn more about the federal standards for people providing resident care, please see LTCCC’s fact sheet: <https://nursinghome411.org/fact-sheet-standards-for-people-providing-resident-care/>.

THE COMMONWEALTH FUND FINDS THAT MEDICARE BENEFICIARIES WITH A NEED FOR LONG TERM SERVICES AND SUPPORTS ARE AT A GREATER RISK OF DELAYING NECESSARY CARE

According to “The Financial Hardship Faced by Older Americans Needing Long-Term Services and Supports,” two-thirds of older adults on Medicare use long-term services and supports (LTSS) or have trouble undertaking the activities of daily living (ADLs). While a majority of Medicare beneficiaries are in need of LTSS services, the program does not cover the cost of such care. As a result, beneficiaries have to depend on Medicaid, if eligible, or pay out-of-pocket.

The Commonwealth Fund’s report finds that Medicare beneficiaries in need of LTSS are more likely than those without a need to experience severe adverse consequences. The report identifies that older beneficiaries with a high LTSS need are twice as likely to skip meals and are more likely to not be able to pay rent or utilities. The report further notes that those in need of LTSS “are nearly three times more likely to be unable to pay their medical bill or prescription copayments, impeding their ability to follow through with care plans.”

“Medicare beneficiaries with LTSS needs will continue to be at greater risk of delaying necessary care, being placed in a nursing home prematurely, and having to “spend down” into the Medicaid program.”

- Amber Willink et al.

The report concludes by pointing out that the needs of Medicare beneficiaries have grown beyond what the program envisioned 50 years ago. The report further adds that “[w]ithout significant updates to the program, many beneficiaries will continue to face significant financial burden, delay necessary care, and experience avoidable adverse outcomes.”

- **NOTE:** Nursing home residents are too often discharged from facilities when their Medicare benefit period ends or is terminated. Residents cannot be discharged for nonpayment when a Medicaid application has been submitted or when a Medicaid application denial has been appealed. For more information, please see LTCCC’s transfer & discharge fact sheet: <https://nursinghome411.org/fact-sheet-nursing-home-transfer-discharge-rights/>.

THE BUFFALO NEWS IDENTIFIES LOW CITATION RATES FOR UNDERSTAFFING IN NEW YORK STATE

In “Understaffing often plagues nursing homes, but state rarely cracks down,” reporter Lou Michel finds that the New York State Department of Health (DOH) investigated complaints regarding poor staffing at 35 nursing homes in Erie and Niagara counties. Shockingly, DOH “substantiated only six of the 145 allegations . . .” *The Buffalo News* article notes that these findings were contrary to complaints from residents, families, and nursing home staff.

As the article indicates, understaffing is not just limited to Western New York but is a problem for the entire state (as well as the country). Despite the persistent problem, according to the article, DOH “cited nursing homes for insufficient staffing in only 6 percent of the 1,030 complaints it investigated over five years.” Advocates told *The Buffalo News* that the low rate of citations is linked to the state’s lack of a staffing ratio.

LTCCC’s Position on Staffing

LTCCC strongly supports meaningful minimum safe staffing standards, both in New York and on a national level. However, even in the absence of a numerical standard, all federally licensed nursing homes are required – and paid – to have sufficient staff to meet the medical and quality of life needs of their residents, 24-hours a day, seven days a week. Federal standards clearly lay out, time and again, that facilities must have sufficient staff, with the appropriate skills, to ensure that every resident is able to attain and maintain his or her highest practicable physical, social, and emotional well-being.

“We are talking about vulnerable people here and the Health Department has a responsibility to ensure they are properly cared for.”

- Assembly Majority leader
Crystal D. Peoples-Stokes

We encourage residents, families, and those who work with them to learn about the staffing levels in their facilities and use this knowledge to support good choices and resident-centered advocacy.

Following are links to more information and resources:

- To learn more about the federal staffing requirements, please LTCCC’s fact sheet and issue alert: <https://nursinghome411.org/fact-sheet-standards-for-nursing-home-services/>; <https://nursinghome411.org/ltccc-issue-alert-nursing-home-staffing-requirements/>.
- To find the latest reported staffing in your nursing home, visit <https://nursinghome411.org/nursing-home-data-information/staffing/>. [Note: Staffing data are reported on this page on a quarterly basis. All licensed nursing homes in compliance with federal staff reporting requirements are included in easy-to-use files.]
- Safe staffing legislation in New York. NY Assembly Member Aileen Gunther is sponsoring [legislation](#) that would impose minimum safe staffing levels in both nursing homes and hospitals. LTCCC strongly supports this bill. The bill is available here: <https://nyassembly.gov/leg/?bn=A02954&term=2019>.

- Tell your story! Your story about your experience - whether positive or negative – can make a difference in our efforts to ensure that every resident receives the care he or she needs. Visit <https://nursinghome411.org/tell-your-story/> for the form.
- Speak out in support of safe staffing! Visit the Action Center at <https://nursinghome411.org/action-center/> to send a quick, free message to your political representatives.

LOS ANGELES CITY ATTORNEY ANNOUNCES SETTLEMENT IN IMPROPER NURSING HOME DISCHARGE CASE

On February 8, 2019, Los Angeles City Attorney Mike Feuer announced a \$600,000 settlement with Lakeview Terrace Skilled Nursing Facility in Westlake/MacArthur Park. The settlement resolves allegations that the “facility improperly discharged homeless and mentally-impaired residents, and failed to meet quality of care standards as required by law.”

The settlement requires the facility to retain an independent monitor responsible for overseeing the facility’s operations for two years, ensuring that discharges are proper and care is improved. The facility is also required to hire a director of resident care & compliance, along with related staff, who will be responsible for implementing the discharge planning policies. Other requirements include offering homeless residents the best housing option available at the time of discharge and funding temporary housing for those unable to find a suitable placement, allowing appropriate agencies to assist homeless residents in post-discharge planning, and providing comprehensive staff training.

City Attorney Mike Feuer thanked Molly Davies, vice president of WISE & Healthy Aging Long-Term Care Ombudsman Program, for providing assistance with

the matter. As reported in [*The Santa Monica Daily Press*](#), WISE received “hundreds of complaints about Lakeview Terrace Skilled Nursing Facility, most of which alleged that the nursing home released residents onto the street, locked them out at night or neglected their care.”

"This settlement is another step in assuring all patients, especially those contending with homelessness or mental health issues, receive the safe and lawful care they deserve—including when they're discharged."

- L.A. City Attorney Mike Feuer

- For more information about the federal transfer & discharge requirements, please see LTCCC’s fact sheets: <https://nursinghome411.org/fact-sheet-nursing-home-transfer-discharge-rights/>; <https://nursinghome411.org/fact-sheet-nursing-home-transfer-discharge-rights-ii/>.
- To learn about resident admission & discharge rights in New York State, please see LTCCC’s fact sheet: <https://nursinghome411.org/ltccc-fact-sheet-admission-discharge-rights-in-ny-state-nursing-homes/>.

FREE LTCCC RESOURCES

LTCCC's resources are free to use and share. To access all of our materials, please visit our homepage www.nursinghome411.org. We thank the [Fan Fox & Leslie R. Samuels Foundation](#) and [The New York State Health Foundation](#) for supporting the development of these resources.

To sign-up for updates & alerts, visit www.nursinghome411.org/join/ or call 212-385-0355.

LTCCC LEARNING CENTER

[LTCCC's Learning Center](#) offers visitors resources and tools designed for resident-focused advocacy. The Learning Center displays LTCCC's most recent and most relevant materials, including easy-to-use [record-keeping forms](#), [handouts](#), and [fact sheets](#), that residents, families, ombudsmen, and nursing home staff can utilize when advocating for the rights and protections of a resident.

LTCCC WEBINARS

LTCCC conducts [free monthly webinars](#) on a variety of timely nursing home topics, ranging from the survey process to resident rights. Recordings of past webinars are available on [LTCCC's YouTube](#) page.

SAVE-THE-DATE FOR LTCCC'S ANNUAL SYMPOSIUM ON NURSING HOME CARE

On June 17, 2019, with support from the New York State Health Foundation, we will be hosting a ½ day program for nursing home families, caregivers, ombudsmen, and advocates: [Coming Together To Create Change: A Symposium For The Nursing Home Community](#). For more information, email sara@ltccc.org, call 212-385-0355, or visit <https://nursinghome411.org/coming-together-to-create-change-a-symposium-for-the-nursing-home-community/>.

The LTC Journal

Spring 2019 Volume 5, Number 2. ©2019 The Long Term Care Community Coalition.

The LTC Journal is published quarterly by the Long Term Care Community Coalition, One Penn Plaza, Suite 6252, New York, NY 10119. Visit us on the Web at www.nursinghome411.org.

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Note: This document is the work of the LTCCC. It does not necessarily reflect the views of the Department of Health, nor has the Department verified the accuracy of its content.