

# THE LTC JOURNAL

Summer 2019

The Long Term Care Community Coalition

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## GOVERNMENT STANDARDS & QUALITY ASSURANCE

### [CMS FINALIZES ROLL BACK OF THE PRE-DISPUTE ARBITRATION BAN AND PROPOSES TO ROLL BACK IMPORTANT STANDARDS OF CARE](#)

On July 18, 2019, the Centers for Medicare & Medicaid Services (CMS) published a [Final Rule](#) rolling back regulations from the Obama Administration that prohibited facilities from requiring residents to enter into pre-dispute arbitration agreements. Despite rolling back this resident protection, CMS has maintained the ban on requiring residents to sign arbitration agreements as a condition of admission or as a requirement for continued care. The Final Rule also contains other resident protections, such as allowing residents (or their representatives) to rescind an agreement within 30 days of signing.

LTCCC is troubled by CMS's decision to roll back the ban on pre-dispute arbitration agreements. The Final Rule unnecessarily burdens residents with deciding whether arbitration is the right form of dispute resolution for them before even knowing what the dispute is about or when it might occur. CMS should reverse its decision to allow facilities to enter into pre-dispute arbitration agreements with residents and reinstate the 2016 regulations. At the very least, CMS must promulgate regulations allowing residents and their representatives to also rescind an arbitration agreement within 30 calendar days after the incident giving rise to the dispute occurred.

In addition to finalizing the pre-dispute arbitration agreement reversal, CMS published a [proposed rule](#) rolling back provisions dealing with several critical standards, including bed rails, infection preventionists, antipsychotic drugging, ombudsmen notices of facility-initiated transfers, dieticians, and facility assessments. **LTCCC is closely reviewing the proposed changes and will be submitting comments opposing the changes before the deadline on September 16, 2019.**

- To learn more about the pre-dispute arbitration agreement Final Rule, please see our joint statement with the Center for Medicare Advocacy (Center): <https://nursinghome411.org/cms-finalizes-rollback-of-pre-dispute-arbitration-protections/>.

### **FEDERAL REPORTS FIND INCIDENTS OF NURSING HOME RESIDENT ABUSE ARE ON THE RISE, BUT STILL UNDERREPORTED**

On July 23, 2019, the U.S. Government Accountability Office (GAO) published a report on nursing home resident abuse, [Improved Oversight Needed to Better Protect Residents from Abuse](#). The GAO found that, in the span of five years, the number of cited abuse deficiencies more than doubled from 430 in 2013 to 875 in 2017. The GAO also found that 42.6 percent of abuse deficiencies in 2017 were cited at the highest levels of severity, compared to 31.9 percent of abuse deficiencies in 2013. The report noted that a small proportion of nursing homes (8.4 percent) had multiple abuse deficiencies over the five-year period.

*The GAO found that, in the span of five years, the number of cited abuse deficiencies more than doubled from 430 in 2013 to 875 in 2017.*

Additionally, the GAO discovered that the majority of the abuse deficiencies were identified through complaint and facility-reported incident investigations. Sadly, even when an abuse deficiency was cited, enforcement actions (such as a fine) were not frequently implemented. Specifically, the GAO found that “one-third of abuse deficiencies had an enforcement action imposed but not implemented, and less than 8 percent of abuse deficiencies had enforcement actions that were implemented against the nursing home.”

**According to the GAO’s analysis, resident abuse (perpetrated by staff 58 percent of the time) fell within three categories:**

- **Physical Abuse.** 46 percent of abuse deficiencies were identified as physical abuse.
- **Mental/Verbal Abuse.** 44 percent of abuse deficiencies were identified as mental and/or verbal abuse.
- **Sexual Abuse.** 18 percent of abuse deficiencies were identified as sexual abuse.

The GAO also conducted stakeholder meetings in five states consisting of state survey agencies, Adult Protective Services, law enforcement, Medicaid Fraud Control Units, ombudsmen, and nursing home administrators and clinical staff. The stakeholders identified several risk factors for resident abuse, including (1) residents with infrequent visitors or cognitive impairments and (2) nursing homes with insufficient staffing, staff training, and staff screening. The stakeholders noted that “[s]taffing issues are not just risk factors for staff as perpetrators of abuse, but they can also limit a staff member’s ability to identify and report abuse.”

Similarly, the Inspector General of the U.S. Department of Health and Human Services issued a report regarding nursing home resident abuse and neglect. The June 2019 report, [Incidents of Potential Abuse and Neglect at Skilled Nursing Facilities Were Not Always Reported and Investigated](#), found that **one in**

**five** high-risk Medicare claims for nursing home residents who received hospital emergency room services in 2016 indicated potential abuse or neglect. The report noted that, based on sample results, 7,831 out of the 37,607 high-risk hospital emergency room claims reviewed were the result of potential resident abuse or neglect. The report added that nursing homes failed to report 84 percent of the 7,831 potential abuse and neglect incidents to state survey agencies.

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On July 23, 2019, the U.S. Senate Committee on Finance held a hearing on nursing home resident abuse, entitled “Promoting Elder Justice: A Call for Reform.” Representatives from both the GAO and OIG provided testimony, detailing their recent reports. Lori Smetanka, Executive Director of the National Consumer Voice for Quality Long-Term Care, testified on behalf of her organization, as well as LTCCC and California Advocates for Nursing Home. To watch a recording of the hearing, please visit:

<https://www.finance.senate.gov/hearings/promoting-elder-justice-a-call-for-reform>.

- For more information about nursing home abuse, please visit LTCCC’s Abuse, Neglect, and Crime Reporting Center at <https://nursinghome411.org/learning-center/abuse-neglect-crime/>.

### **SENATORS RELEASE REPORT ON SPECIAL FOCUS FACILITIES, CALLING FOR MORE TRANSPARENCY**

Every month, the Centers for Medicare & Medicaid Services (CMS) identifies nursing homes with an extremely poor record of resident care for inclusion in the Special Focus Facility (SFF) program. This program is a federally mandated initiative to address nursing homes with persistent problems through enhanced oversight. Over an 18 to 24-month period, CMS expects SFFs to significantly improve quality of care and implement practices to ensure that poor performance does not reoccur. Facilities that succeed graduate from the program while facilities that do not face termination from participating in Medicare and Medicaid. Termination from Medicare and Medicaid typically results in a facility’s closure.

***[A]n additional 2.5 percent of all certified nursing homes (about 400 facilities) are identified as SFF candidates by CMS based on their “persistent record of poor care.”***

While there are many nursing homes with persistent, serious problems, CMS presently limits the SFF program to just 88 facilities nationwide. A June 2019 report by U.S. Senators Bob Casey and Pat Toomey, [\*Families’ and Residents’ Right to Know: Uncovering Poor Care in America’s Nursing Homes\*](#), found that an additional 2.5 percent of all certified nursing homes (about 400 facilities) are identified as SFF candidates by CMS based on their “persistent record of poor care.” CMS does not select these facilities to participate because it limits the resources dedicated to the SFF program. The report notes, “[a]s a result, individuals and families making decisions about nursing home care for themselves or for a loved one are unlikely to be aware of these candidates.”

With the report’s publication, Senators Casey and Toomey released the names of the April 2019 SFF candidates. The Senators state that they would work with CMS to make future lists public. Days after the report’s release, Dr. Kate Goodrich (Director, Center for Clinical Standards and Quality and CMS Chief Medical Officer) issued a statement noting that CMS is committed to posting the list of SFF candidates moving forward. However, she gave no indication as to when

and where CMS will begin posting the list. Dr. Goodrich's statement adds, "CMS urges all Americans to consult their physician, family, and Nursing Home Compare before choosing a nursing home for their loved ones."

As of the date of publication, the SFF candidate list is now available on Nursing Home Compare but only through a link to a [separate website](#). Because CMS has not integrated the candidate list into Nursing Home Compare, a candidate's Nursing Home Compare page does not indicate its inclusion on the candidate list. Failure to integrate the SFF candidate list into Nursing Home Compare conceals critical information and can ultimately leave average consumers in the dark. For example, the Nursing Home Compare page for New York's Cayuga Nursing and Rehabilitation Center gives no indication that the facility has been considered a SFF candidate for the last 51 months (over four years).

LTCCC is extremely concerned that CMS's failure to integrate the SFF candidate list into Nursing Home Compare may hide the status of SFF candidates from consumers. CMS must integrate the Special Focus Facility candidate list into Nursing Home Compare.

- To access the Senators' full report, please visit:  
<https://www.casey.senate.gov/newsroom/releases/casey-and-toomey-secure-secret-document-from-administration-list-includes-hundreds-of-poorly-performing-nursing-homes-across-the-country>.

## LTC NEWS & BRIEFS

### HEALTH AFFAIRS STUDY PROVIDES FURTHER EVIDENCE OF LOW STAFFING LEVELS IN U.S. NURSING HOMES

Last year, [The New York Times reported](#) that most nursing homes have been overstating their self-reported staffing levels for years. Payroll-based journal (PBJ) data from the newly implemented reporting system indicated that nursing homes had less staffing, especially on weekends, than they previously reported to the government under the old self-reporting system. Specifically, the data showed that seven out of 10 nursing homes had "lower staffing . . . with a 12 percent average decrease." *The Times* also found that, for at least one day in the last quarter of 2017, 25 percent of facilities "reported no registered nurses at work." Unfortunately, a recently published study provides further evidence that nursing homes are failing to maintain adequate staffing levels to meet the needs of residents.

***"New payroll-based data reveal large daily staffing fluctuations, low weekend staffing, and daily staffing levels often below the expectations of the Centers for Medicare & Medicaid Services (CMS)."***

In "[Daily Nursing Home Staffing Levels Highly Variable, Often Below Expectations](#)," from the July 2019 issue of *Health Affairs*, researchers found that PBJ data revealed "large daily staffing fluctuations, low weekend staffing, and daily staffing levels often below the expectations of the Centers for Medicare & Medicaid Services (CMS)." Following are the key findings from the study:

- **PBJ vs. Self-Reported.** Seventy percent of facilities had higher total direct staffing time per resident under the self-reporting system. On average, for-profit facilities had the highest discrepancy between PBJ and self-reported data.
- **Staffing During Inspections.** Mean staffing levels were higher than annual staffing levels in the weeks before and after a nursing home's annual survey. Staffing levels reached a peak during the time of the annual survey. Registered nurse (RN) staffing had the largest increase at the time of the survey.
- **Weekend Staffing.** On average, RN staffing was 42 percent less than weekday staffing, LPN staffing was 17 percent less than weekday staffing, and nurse aide staffing was nine percent less than weekday staffing.
- **Expected Staffing Levels.** Fifty-four percent of nursing homes met CMS's expected total staffing less than 20 percent of the time. Ninety-one percent of nursing homes met the RN expected staffing levels less than 60 percent of the time.
- **Federal RN Requirement.** Approximately 96 percent of nursing homes met the RN staffing requirement for only 80 percent of the days during the time of the study. (Note: Federal requirements mandate that nursing homes have an RN on duty eight hours a day, seven days a week. The finding here suggests that the majority of nursing homes are failing to meet the federal requirement 20 percent of the time.)

Staffing is one of the most critical indicators of nursing home quality and safety. A landmark federal study in 2001 identified that at least 4.1 hours of direct care staff time is typically needed to meet a resident's basic clinical needs. The increased care needs of residents over the past 19 years suggest that even higher levels of staffing may be necessary today. Sadly, as these reports show, inadequate staffing continues to be widespread. Although some nursing homes provide adequate staffing to residents, too many nursing homes fail to allocate enough resources to maintaining proper staffing levels in the absence of limits on profits and administrative costs.

- For more information about the federal staffing standards, please see LTCCC's Nursing Home Staffing Requirements Issue Alert: <https://nursinghome411.org/ltccc-issue-alert-nursing-home-staffing-requirements/>.
- To learn about the quality and quantity of staffing at a nursing home in your community, please visit: <https://nursinghome411.org/nursing-home-data-information/staffing/>.
- For more information about what can be done to limit nursing home profit and administrative expenses, please read our joint statement with the Center for Medicare Advocacy, California Advocates for Nursing Home Reform, Justice in Aging, and Consumer Voice: <https://nursinghome411.org/consumer-statement-nursing-home-payment-accountability/>.

### **THE NEW YORK TIMES REPORTS ON HUD-BACKED NURSING HOMES**

According to a recent report by *The New York Times*, the U.S. Department of Housing and Urban Development (HUD) administers a government-backed mortgage program for residential care facilities. Under what is known as a [Section 232](#) loan agreement, HUD has the authority to guarantee bank loans made to nursing homes for the purposes of purchasing, refinancing, constructing, or substantially rehabilitating a facility. However, the financial guarantee is not without conditions. Nursing home

owners must adhere to certain requirements, such as reporting problematic surveys and fines, as well as working with HUD to establish an action plan for removing a nursing home from the Special Focus Facility list.

*The Times* reports that the program currently guarantees \$20 billion in mortgages for 2,300 nursing homes—or about 15 percent of nursing homes nationwide. *The Times*' analysis shows that these nursing homes are "more likely to receive one-or-two-star ratings from Medicare than other nursing homes." Unfortunately, *The Times* also notes that, "[b]y the government's own admission, the federal agency's stewardship of the program has been haphazard." Reports on the program spanning several decades indicate poor oversight. For example, *The Times* identifies a 1995 Government Accountability Office (GAO) report which documents that staff do not focus on "nursing home loans unless financial trouble appears imminent or a default occurs." *The Times* also points to a recent report by the HUD Inspector General finding that HUD failed to "penalize operators that did not submit accurate and complete data in a timely manner."

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As *The Times*' report highlights, the recent collapse of a Chicago-based nursing home operator demonstrates the program's problems. The owners stopped making payments on the mortgage of "their crown jewel, the Rosewood Care Centers, barely a year after buying it in 2013 . . . some money meant for the 13 nursing homes and assisted-living facilities went to prop up another investment." Ultimately, the business defaulted on \$146 million in HUD-backed loans in 2018—the biggest failure in the history of the program. *The Times* adds that, in addition to covering the defaulted mortgages, HUD has spent \$15 million since August 2018 keeping the facilities operating.

- To read LTCCC's full statement with the Center about HUD-backed nursing homes, please visit: <https://nursinghome411.org/the-new-york-times-reports-on-hud-backed-nursing-homes/>.

### **NURSING HOME STUDY FINDS DISCHARGES LINKED TO MEDICARE COPAYMENTS**

Medicare beneficiaries are entitled to a maximum of 100 days of skilled nursing facility (SNF) care in a benefit period when they meet specific coverage criteria. However, Medicare Part A only covers the full cost of a beneficiary's skilled care during the first 20 days of a nursing home stay. Starting on day 21, beneficiaries are responsible for paying a daily copayment (\$170.50 in 2019). A recently published study in the *Journal of the American Medical Association (JAMA) Internal Medicine*, "Association Between High Discharge Rates of Vulnerable Patients and Skilled Nursing Facility Copayments," indicates that many nursing homes seem to be discharging residents immediately before the daily copayment takes effect.

***Beneficiaries discharged from nursing homes tend to be racial and ethnic minorities and to live in lower socioeconomic areas.***

Looking at a population of beneficiaries in traditional Medicare, the study finds that Medicare beneficiaries are "more often discharged from SNFs on benefit day 20 than on benefit days 19 or 21."

Beneficiaries discharged from nursing homes tend to be racial and ethnic minorities and to live in lower socioeconomic areas. Additionally, beneficiaries discharged on day 20 are also "more likely to have 5 or more comorbidities (42.2%) than patients discharged on days 19 and 21 (39.9% and 40.6%, respectively . . .)." The study's authors note that, in some cases, nursing homes may be "prematurely



discharge[ing] some patients to avoid the risk of accruing bad debt from partially uncompensated postacute care.”

- To read LTCCC’s full statement about the nursing home discharge study, please visit: <https://nursinghome411.org/nursing-home-study-finds-discharges-linked-to-medicare-copayments/>.
- For more information about the limited circumstances under which nursing homes can discharge a resident, please see our fact sheet: <https://nursinghome411.org/fact-sheet-nursing-home-transfer-discharge-rights/>.

## 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](http://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, please visit [www.nursinghome411.org/join/](http://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.

### LTCCC’S ANNUAL SYMPOSIUM ON NURSING HOME CARE

On June 17, 2019, LTCCC hosted a half-day program for nursing home families, caregivers, ombudsmen, and advocates entitled Coming Together To Create Change: A Symposium For The Nursing Home Community.

#### Speakers included:

- Dr. Jonathan Evans, Vice President, The National Consumer Voice for Quality Long-Term Care
- Lindsay Heckler, Supervising Attorney, Center for Elder Law & Justice
- Deborah Truhowsky, President, Long Term Care Care Community Coalition, The Law Firm of D.F. Truhowsky
- Claudette Royal, New York State Ombudsman
- Richard Mollot, Executive Director, Long Term Care Community Coalition



We thank everyone who joined us for an enjoyable and informative day! LTCCC especially thanks the New York State Health Foundation for supporting our program and ArchCare at Terence Cardinal Cooke Health Care Center for hosting us.

- To view or download the symposium presentations, please visit:  
<https://nursinghome411.org/coming-together-to-create-change-a-symposium-for-the-nursing-home-community/>.
- To sign-up for LTCCC updates and receive an invitation to next year's symposium, please email [sara@ltccc.org](mailto:sara@ltccc.org).

## ***The LTC Journal***

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