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GOVERNMENT STANDARDS & QUALITY ASSURANCE

CMS PUBLISHES FINAL RULES ON EMERGENCY PREPAREDNESS AND HOSPITAL DISCHARGE REQUIREMENTS

EMERGENCY PREPAREDNESS REQUIREMENTS

On September 20, 2018, the Centers for Medicare & Medicaid Services (CMS) issued a [proposed rule](#) to roll back the long-term care emergency preparedness requirements. Most notably, the proposed rule would have allowed nursing homes to review their emergency preparedness programs and to train staff to carry out emergency plans every two years instead of annually. The Long Term Care Community Coalition (LTCCC) and the Center for Medicare Advocacy (the Center) submitted [comments](#) to CMS expressing our opposition to the proposed rule on November 16th of that year.

On September 30, 2019, CMS published rulemaking—the Omnibus Burden Reduction Final Rule—finalizing changes to the emergency preparedness requirements. However, the Final Rule makes clear that CMS is not rolling back the requirements dealing with emergency preparedness review and training for nursing homes. Addressing the decision not to roll back the requirements for review and training, CMS stated the following:

“[D]ue to the vulnerability of residents in LTC facilities, we are not finalizing the [emergency preparedness] proposal for those facilities only and will require them to update their emergency plan annually, as is currently required”

[D]ue to the vulnerability of residents in LTC facilities, we are not finalizing the proposal for those facilities only and will require them to update their emergency plan annually, as is currently required We especially appreciate the comments that provided a very detailed analysis of the lack of emergency response in nursing homes following recent emergency events. We believe that these comments have provided compelling evidence to revise our proposal specific to LTC facilities LTC facilities will be required to continue to meet the current requirement for annual training.

Although CMS is not rolling back requirements in relation to review and training, CMS is “eliminate[ing] the requirement that facilities document efforts to contact local, tribal, regional, State, and Federal emergency preparedness officials and a facility’s participation in collaborative and cooperative planning efforts.” As CMS notes, nursing homes are still required to include a process for collaboration with officials but “would not be required to document efforts to contact these officials.” CMS is also allowing nursing homes to determine the scope of one (e.g., full-scale or facility-based) of their two annually required testing exercises. Lastly, CMS is allowing nursing homes to forgo full-scale or individual, facility-based exercises following the onset of an actual emergency event.

- To read the Final Rule, please visit: <https://www.govinfo.gov/content/pkg/FR-2019-09-30/pdf/2019-20736.pdf>.
- To read a fact sheet detailing the Final Rule, please visit: <https://www.cms.gov/newsroom/fact-sheets/omnibus-burden-reduction-conditions-participation-final-rule-cms-3346-f>.
- To read our joint comments opposing the rollback, please visit: https://nursinghome411.org/wp-content/uploads/2018/11/LTCCC-CMA_CMS-3346-P-Comments.pdf.

HOSPITAL DISCHARGE PLANNING

On September 30, 2019, CMS also published a Final Rule requiring hospitals (and additional Medicare and Medicaid providers) to assist patients and their families in selecting a nursing home by using data on quality measures and resource use measures. Hospitals will be required to ensure that measures are relevant to the patient’s care goals and treatment preferences. Importantly, hospitals will be further required to document in the patient’s medical record that these measures were shared with the patient and used in the discharge planning process. These

requirements stem from the Improving Medicare Post-Acute Care Transformation (IMPACT) Act of 2014.

Under the IMPACT Act, hospitals must provide information about the following quality measures and resource use measures:

Quality Measures

- Skin integrity and changes in skin integrity;
- Functional status, cognitive function, and changes in function and cognitive function;
- Medication reconciliation;
- Incidence of major falls; and
- Transfer of health information and care preferences when an individual transitions.

“New discharge planning requirements, as mandated by the IMPACT [A]ct . . . requires facilities to assist patients, their families, or the patient’s representative in selecting a post-acute care (PAC) services provider or supplier by using and sharing PAC data on quality measures and resource use measures.”

- CMS

Resource Use and Other Measures:

- Resource use measures, including total estimated Medicare spending per beneficiary;
- Discharge to community; and
- All-condition risk-adjusted potentially preventable hospital readmissions rates.

In the Final Rule, CMS notes that the quality measures dealing with functional status, skin integrity, incidence of falls, and resource use and other measures are publically available on CMS’s Nursing Home Compare website. CMS adds that “providers [are] to make reasonable efforts to use the quality and resource use measure data that are currently available to them until all of the measures stipulated in the IMPACT Act are finalized and publicly reported.”

- To read the Final Rule, please visit: <https://www.govinfo.gov/content/pkg/FR-2019-09-30/pdf/2019-20736.pdf>.
- For more information about the IMPACT Act, please visit: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014/IMPACT-Act-of-2014-Data-Standardization-and-Cross-Setting-Measures.html>.

IMPORTANT UPDATE TO NURSING HOME COMPARE WILL ENABLE PUBLIC TO I.D. FACILITIES WITH A HISTORY OF ABUSE

On October 7, 2019, the Centers for Medicare & Medicaid Services (CMS) announced changes to Nursing Home Compare that make it easier for residents and families to identify facilities with a history of resident abuse, neglect, or exploitation. As of October 23rd of this year, consumers will now see a new icon (a red circle with a hand—right) on a facility’s Nursing Home Compare profile if that facility has been cited for either or both of the following deficiencies:



1. A harm-level (scope and severity level G or higher) abuse citation on the most recent standard survey cycle or complaint survey within the past 12 months.
2. An abuse citation where residents were found to be *potentially* harmed (scope and severity level D or higher) on the most recent standard survey cycle or complaint survey within the past 12 months and on the previous standard survey cycle or complaint survey in the prior 12 months.

Additionally, revisions to the [Five Star Technical Users' Guide](#) reveal that facilities meeting either of these criteria will have their **health inspection rating “capped at a maximum of two stars . . . [and that] the best overall quality rating a facility that has received the abuse icon can have is four stars.”**

The changes come after several years of increased recognition of, and concern about, nursing home resident abuse. Most recently, the U.S. Senate Committee on Finance held two hearings on resident abuse and federal reports issued this past summer documented persistent, widespread resident abuse across the country.

While the Long Term Care Community Coalition thanks CMS for helping consumers identify nursing homes with a history of abuse, our organizations would like to remind consumers that **the absence of an abuse icon on Nursing Home Compare does not necessarily indicate the absence of abuse.** Federal reports over the last few decades have documented that state survey agencies (health inspectors) have missed problems and failed to cite violations. Moreover, violations indicating the existence of abuse or potential abuse may be cited under other federal tags, resulting in their exclusion from this initiative.

LTCCC urges nursing home consumers to continue using all available resources when choosing a nursing home for themselves or a loved one.

- For more information about addressing resident abuse, as well as resources for tracking and reporting abuse, please see [LTCCC's Abuse, Neglect, and Crime Reporting Center](#).

LTC NEWS & BRIEFS

[CMS IMPLEMENTS NEW MEDICARE PAYMENT MODEL, THREATENING RESIDENTS' ACCESS TO SKILLED THERAPY](#)

On October 1, 2019, the Centers for Medicare & Medicaid Services (CMS) began implementing a new payment system—the [“Patient Driven Payment Model”](#) (PDPM)—for Medicare-covered nursing home care. PDPM creates a new set of financial incentives for nursing homes when deciding whom to admit, what type of care to provide, and when to discharge residents. LTCCC is greatly concerned about PDPM's impact on residents in need of skilled therapy services.

In the final rule's impact analysis, CMS indicates that nursing homes will have a greater financial incentive under PDPM to provide as little therapy as possible to residents. Furthermore, the final rule makes clear that nursing homes will be able to provide 25 percent of a resident's total therapy regimen, by

“PDPM creates a new set of financial incentives for nursing homes when deciding whom to admit, what type of care to provide, and when to discharge residents.”

discipline, in group and/or concurrent therapy settings. Astonishingly, CMS notes that there will be no penalty for exceeding this 25 percent cap on non-individualized care. Within days of PDPM's implementations, [reports](#) surfaced that therapists were being laid off and other therapists were being encouraged to utilize group and concurrent therapy rather than one-on-one care.

Despite a change in the financial incentives, CMS has made clear that PDPM does not change Medicare coverage and eligibility. CMS states that a resident's care needs must still drive care decisions, including the type, duration, and intensity of skilled therapy services. Nevertheless, given the early negative reports about PDPM's impact on skilled therapy, LTCCC encourages residents and their families to be vigilant about ensuring that residents are receiving therapy services.

- For more information about advocating for skilled therapy under PDPM, please visit: <https://nursinghome411.org/issue-alert-medicare-skilled-therapy-under-pdpm/>.
- To access LTCCC's Nursing Home Therapy Services fact sheet, please visit: <https://nursinghome411.org/fact-sheet-nursing-home-therapy-services/>.
- For more information about PDPM's financial incentives, please see: <https://nursinghome411.org/joint-statement-the-patient-driven-payment-model-what-does-it-mean-for-residents/>.
- To view LTCCC's webinar on the new nursing home payment system and its potential impact on residents, visit our YouTube channel at https://www.youtube.com/watch?v=zujTWw0V_3U.

PHARMACEUTICAL COMPANY TARGETING VULNERABLE NURSING HOME RESIDENTS TO PAY MILLIONS TO RESOLVE FEDERAL AND STATE ALLEGATIONS

In October 2017, CNN [reported](#) on the widespread and inappropriate use of Nuedexta – a psychotropic drug– in nursing homes. The drug is intended for individuals with a diagnosis of pseudobulbar affect (PBA), a condition affecting less than one percent of the U.S. population, and its materials note that it was not “extensively studied in elderly patients.” Nonetheless, CNN found approximately 14 million pills were sent to long-term care facilities in 2016 alone. CNN obtained internal emails from Avanir Pharmaceuticals, the drug's manufacturer, showing the company benefited from a “crackdown” on antipsychotic drugs in nursing homes by targeting sales with previously high rates of antipsychotic drugging.

On September 26, 2019, the Department of Justice (DOJ) announced that Avanir has agreed to a settlement after being “charged for paying kickbacks to a physician to induce prescriptions of its drug Nuedexta.” According to a DOJ press release, Avanir has agreed to “pay over \$95 million to resolve civil False Claims Act allegations of kickbacks as

“Kickbacks have the power to corrupt a provider's medical judgment . . . And it is particularly concerning when a pharmaceutical company uses kickbacks to drive up sales in connection with a vulnerable population, such as elderly patients in nursing care facilities.”

- Assistant Attorney Jody Hunt,
Department of Justice's Civil Division

well as its false and misleading marketing of Nuedexta to providers in long term care facilities to induce them to prescribe it for behaviors commonly associated with dementia patients, which is not an approved use of the drug.” In total, Avanir will pay [\\$116 million](#) in criminal and civil penalties to federal and state governments.

- For more information about this settlement or related cases, please visit: <https://www.justice.gov/opa/pr/pharmaceutical-company-targeting-elderly-victims-admits-paying-kickbacks-resolves-related>.
- For more information about antipsychotic drugging in nursing homes, please see LTCCC’s Dementia Care & Antipsychotic Drugging Advocacy Toolkit: <https://nursinghome411.org/learning-center/dementia-care-advocacy-toolkit/>.

FEDERAL REPORT FINDS THAT NEW YORK STATE FAILED TO PROPERLY OVERSEE NURSING HOMES’ EMERGENCY PREPAREDNESS

In August 2019, the Office of the Inspector General (OIG) for the U.S. Department of Health and Human Services issued a report finding that New York State (NYS) failed to ensure nursing homes participating in the Medicare and Medicaid programs adhered to federal life safety and emergency preparedness requirements. The report, *New York Should Improve Its Oversight of Selected Nursing Homes’ Compliance With Federal Requirements for Life Safety and Emergency Preparedness*, concluded residents at all nursing homes identified for review were placed at an increased risk of injury or death.

“New York did not ensure that selected nursing homes in the State that participated in the Medicare or Medicaid programs complied with CMS requirements for life safety and emergency preparedness.”

- Office of the Inspector General, U.S Department of Health and Human Services.

The report indicates that the OIG identified deficiencies at all 20 nursing homes selected for review. The report states that there were “205 areas of noncompliance with life safety requirements related to building exits and fire barriers, fire detection and suppression systems, carbon monoxide detectors, hazardous storage, smoking policies and fire drills, and elevator and electrical equipment testing and maintenance.” Similarly, the OIG discovered “219 areas of noncompliance with emergency preparedness requirements related to written emergency plans; emergency supplies and power; plans for evacuation, sheltering in place, and tracking residents and staff; emergency communications; and emergency plan training.” The report identified poor management oversight at the nursing homes and high staff turnover as reasons for these violations.

- For more information about nursing home care in NYS, including a 2019 assessment of nursing home staffing and quality, please visit our LTC in NY State [webpage](#).

STUDY FINDS THAT THE PRESENCE OF AN OMBUDSMAN DURING A HEALTH INSPECTION INCREASES THE NUMBER AND SCORE OF IDENTIFIED VIOLATIONS

The Long-Term Care Ombudsman Program (LTCOP) is a federal advocacy program, administered by the Administration for Community Living, which operates in every state in the country. Ombudsmen serve all communities in their state, helping residents and families identify, investigate, and resolve complaints. The LTCOP operates in New York State (NYS) through the [Office of the State Long Term Care Ombudsman](#). According to a recent study published in *The Journal of Post-Acute and Long-Term Care Medicine (JAMDA)*, the presence of a long-term care ombudsman during a nursing home's annual survey (health inspection) is associated with increases in the total number of identified deficiencies and deficiency scores.

“Nationally, the presence of an ombudsman increased the number of deficiencies and deficient scores by 6.5 percent and 11.3 percent, respectively.”

The study, “The Impact of Long-Term Care Ombudsman Presence on Nursing Home Survey Deficiencies,” identified the presence of ombudsmen at poorly performing facilities as a source of heterogeneity in the annual survey process. Nationally, the presence of an ombudsman increased the number of deficiencies and deficiency scores by 6.5 percent and 11.3 percent, respectively. The study also found that the presence of an ombudsman had a greater effect on quality of life and administrative deficiencies compared to quality of care.

- For more information about the LTCOP, please visit: <https://ltcombudsman.org/about/about-ombudsman>.

INVESTIGATION UNCOVERS HORRIBLE CONDITIONS IN NURSING HOME KITCHENS

A five-month [FairWarning](#) investigation found that too many nursing home residents across the country are at risk due to dangerous and unhealthy conditions in their nursing home's kitchen. In an article published in October, FairWarning noted that, from 1998 to 2017, 230 foodborne illness outbreaks were reported, resulting in 54 deaths, 532 hospitalizations, and 7,648 sickened people.

The article indicated that unsafe food handling was the third most frequently cited violation in 2018, with 33 percent of nursing homes cited for “violating the federal requirement to safely store, prepare and serve food.” According to FairWarning's analysis, approximately one-third of all nursing homes have been cited two or more times for the same food violation since 2016.

Unfortunately, the Trump Administration has proposed rolling back standards dealing with the qualifications of directors of food and nutrition services. Richard Mollot, Executive Director of LTCCC, is quoted in the article, stating that “[t]hey're clearly weakening the standards regarding food service and the safety of food handling.” LTCCC and the Center for

“FairWarning's investigation, based on inspection reports, federal data and interviews with residents and long-term care experts, found that residents nationwide are at risk for foodborne illness from unsafe kitchens.”

- Marji Lundstrom,
FairWarning (Oct. 2019).

Medicare Advocacy submitted joint comments opposing the Administration's rollback of resident protections.

- To read our comments, please visit: <https://nursinghome411.org/comments-on-requirements-for-long-term-care-facilities-regulatory-provisions-to-promote-efficiency/>.

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, please 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.

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