

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

August 3, 2017

Seema Verma
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Ave. S.W.
Washington, D.C. 20201

**Re: Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities:
Arbitration Agreements
CMS-3342-P
RIN 0938-AT18**

Submitted electronically through <http://www.regulations.gov>

Dear Administrator Verma:

Justice in Aging is an advocacy organization with the mission of improving the lives of low income older adults. Justice in Aging uses the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources. We have decades of experience with Medicare and Medicaid, with a focus on the needs of low-income beneficiaries, including those dually eligible for both programs. Thank you for the opportunity to comment on the above-referenced proposal.

We write to express our opposition to the proposed regulatory revision concerning nursing facilities and arbitration agreements. The *existing* regulation allows a nursing facility to use an arbitration agreement only if the agreement was signed by the resident¹ after the occurrence date of the incident in dispute. The proposed regulation, however, would allow a nursing facility to obtain the resident's signature long before the relevant incident occurs — in most cases, during admission to the facility. Significantly, the proposed regulation would authorize a facility to *require* an arbitration agreement as a condition of admission.²

¹ Due to Alzheimer's disease or other dementias, many nursing facility residents are unable to sign on their own behalf. They enter into arbitration agreements and other contracts through the actions of representatives. For purposes of simplicity, this letter generally will refer to residents' signatures, which should be read to include the signatures of residents' representatives.

² Notice of Proposed Regulation, CMS-3342-P, 82 Fed. Reg. 26,649, 26,653, proposed 42 C.F.R. § 483.70(n)(1)(i) (June 8, 2018).

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The difference between the existing regulation and the proposed regulation is vast. The existing regulation is designed to ensure that a resident enters into an arbitration agreement only if he or she knows what is at stake and has made a conscious decision to choose arbitration. The proposed regulation, on the other hand, would lead to the routine use and enforcement of arbitration agreements that were signed when the resident knew nothing of the dispute that ultimately is arbitrated, and **signed only because the resident had to agree to arbitration in order to be admitted**.

We urge the Centers for Medicare and Medicaid Services (CMS) to withdraw the proposed regulation. As explained below, the proposed regulation deprives nursing facility residents of important rights. Importantly, CMS lacks the legal authority to promulgate a regulation that limits residents' rights under state laws.

A. To Ensure that Arbitration Is Chosen Voluntarily, Nursing Facilities Should Use Arbitration Agreements Only for Disputes Known at the Time the Arbitration Agreement Is Signed.

Citing comments submitted in response to the 2015 proposed regulations, CMS states now that, “[u]pon reconsideration, we believe that arbitration agreements are, in fact, advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the costs and expense of litigation.”³ We disagree. As explained immediately below, arbitration is often disadvantageous for nursing facility residents. In addition, the ultimate issue is not whether “arbitration” is beneficial — the existing regulation, after all, allows for arbitration. The central issue is whether CMS can authorize facilities to **require** arbitration as a condition of admission, in conflict with state consumer laws that often invalidate arbitration agreements that are forced on consumers.

1. Pre-Dispute Arbitration Agreements Negatively Impact Residents' Health and Safety.

An arbitration agreement is characterized as “pre-dispute” if it is signed before a dispute arises. In the release of the final nursing facility regulations, CMS concluded ten months ago that pre-dispute arbitration agreements are detrimental to residents' health and safety.⁴ Due to a gross disparity of bargaining power between nursing facilities and potential residents, combined with the tumult of the admissions process, residents generally are unaware of the content of what they are signing. The process is so irredeemably one-sided that the American Bar Association, the American Health Lawyers Association, and the American Arbitration Association all issued policies against pre-dispute arbitration agreements for nursing facility residents.⁵

Furthermore, and particularly because residents have next to no control over the content of pre-dispute arbitration agreements, the terms of those agreements are likely to be unfavorable to residents. Some arbitration agreements limit the resident's right to conduct discovery. Other agreements cap the damages that a resident may recover, “even for tragic and possibly preventable deaths.”⁶

For these and related reasons, pre-dispute arbitration agreements diminish the overall quality of care. Some providers are more prone to provide negligent care because they feel insulated from potential

³ 82 Fed. Reg. at 26,651.

⁴ Release of Final Nursing Facility Regulations, CMS-3260-F, 81 Fed. Reg. 68,688, 68,793 (Oct. 4, 2016).

⁵ 81 Fed. Reg. at 68,797.

⁶ 81 Fed. Reg. at 68,795.

liability.⁷ Also, arbitration decisions are generally not publicly available and, as a result, potential residents and others are less likely to know about a facility's care problems.⁸

The importance of these care issues cannot be emphasized enough. Common legal claims against nursing facilities involve pressure ulcers, infections, broken bones, malnutrition, dehydration, asphyxiation (due to improper use of restraints), and sexual assault.⁹ When horrible injuries occur, residents should be able to pursue a remedy through the applicable court process, under state law and the constitutional right to a jury trial.

2. To Protect Resident Choice, Nursing Facilities Should Be Allowed to Use Only Post-Dispute Arbitration Agreements.

As discussed above, pre-dispute arbitration agreements are harmful both to nursing facility residents and to nursing facility quality of care. Furthermore, in our experience, a resident never really “chooses” a pre-dispute arbitration agreement — instead, he or she signs an arbitration agreement because there seems to be no alternative. We wholeheartedly agree with CMS's 2016 summary of the situation:

We are convinced that requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen. We believe that LTC residents should have a right to access the court system if a dispute with a facility arises, and that any agreement to arbitrate a claim should be knowing and voluntary.¹⁰

We respectfully suggest that the current regulation strikes the proper balance. If a resident truly wants to arbitrate a dispute, he or she can make that choice after the dispute has arisen, not as part of the admissions process and, crucially, not as a requirement to be admitted to the nursing facility in the first place. CMS now says that its proposed regulatory revision would support a resident's ability to make choices.¹¹ This goal undoubtedly is advanced by the existing regulation but not the proposed regulation, which would authorize the facility to require arbitration for all residents.

CMS discussed in 2016 how “unequal bargaining power” leads to arbitration agreements that are unfair to nursing facility residents.¹² Indeed, courts frequently find pre-dispute nursing facility arbitration agreements to be unconscionable.¹³ This unfairness and unconscionability would only be more

⁷ 81 Fed. Reg. at 68,793.

⁸ 81 Fed. Reg. at 68,794.

⁹ See, e.g., Eric Carlson, Long-Term Care Advocacy § 10.11 (Lexis Publishing 2016) (fact patterns in published nursing facility court rulings).

¹⁰ 81 Fed. Reg. at 68,792.

¹¹ 82 Fed. Reg. at 26,649 (“support the resident's right to make informed choices about important aspects of his or her health care”), 26,651 (“enabling residents to make informed choices about important aspects of his or her healthcare”), & 26,653 (“supports the resident's right to make informed choices about important aspects of his or her healthcare”).

¹² 81 Fed. Reg. at 68,797.

¹³ See, e.g., Eric Carlson, Long-Term Care Advocacy § 10.13[4][d][i] (dozens of published cases finding that pre-dispute nursing facility arbitration agreement was unconscionable).

pronounced under the proposed regulation, which would authorize facilities to require arbitration agreements from all residents.

We note that CMS claims that the current regulation, by allowing only post-dispute arbitration agreements, imposes a burden on facilities.¹⁴ Actually, facilities can reduce their “burden” by using only post-dispute arbitration agreements. If, as CMS claims, arbitration is a beneficial option for residents, a facility and resident could enter into an arbitration agreement to address a known dispute. Rather than obtaining an arbitration agreement from every single resident upon admission, the facility would seek an arbitration agreement only to address a particular dispute. The administrative burden on both facilities and residents would be reduced tremendously.

B. Because the Proposed Regulation Would Deprive Residents of Rights, CMS Lacks Authority to Promulgate It.

CMS cites the following authority for the proposed regulation:

- Authority to promulgate regulations that are “adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys.”¹⁵
- Authority to establish “such other requirements relating to the health and safety [and well-being] of residents as the Secretary may find necessary.”¹⁶
- Authority to establish “other right[s]” for residents, in addition to those set forth in statute, to “protect and promote the rights of each resident.”¹⁷

Notably, all of this authority is predicated upon protecting residents, and thus none of it can justify the proposed regulation. The proposed regulation would *not* protect residents, and instead would deprive residents of protections that they currently hold under state law.

As discussed above, the proposed regulation would deprive residents of the benefits of the current regulation. Furthermore, from a resident’s perspective, the proposed regulation would be worse than having no federal arbitration regulation at all. If CMS were to promulgate the proposed regulation, it would be depriving residents of rights, and it has no statutory authority to do so.

Here are the proposed regulation’s core provisions:

1. If an arbitration agreement is a condition of admission, the agreement must be in plain language in the admission contract.
2. The arbitration agreement must be in plain language.
3. The arbitration agreement must be explained to the resident in a form, manner and language that he or she understands.
4. The resident must acknowledge that he or she understands the arbitration agreement.
5. The arbitration agreement must not contain any language that limits or discourages a resident’s communication with surveyors and other government officials.

¹⁴ 82 Fed. Reg. at 26,653 (“We believe this proposal is consistent with our approach to eliminating unnecessary burden on providers, and supports the resident’s right to make informed choices about important aspects of his or her healthcare... .”)

¹⁵ 42 U.S.C. §§ 1395i-3(f)(1), 1396r(f)(1).

¹⁶ 42 U.S.C. §§ 1395i-3(d)(4)(B), 1396r(d)(4)(B).

¹⁷ 42 U.S.C. §§ 1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi); *see also* 82 Fed. Reg. at 26,651 (listing of authority).

6. A notice regarding the use of arbitration agreements must be posted in an area of the facility visible to residents and visitors.
7. If a facility and resident resolve a dispute through arbitration, a copy of the arbitration agreement and the arbitrator's final decisions must be retained by the facility for at least five years, and be available for inspection by CMS.¹⁸

Provision # 7 offers some limited benefit to residents, although it is unclear what, if anything, surveyors and CMS might do with the facility's arbitration agreements and arbitration decisions. Provisions ## 2 through 6 also offer some limited benefit, but that benefit is far outweighed by the likelihood that facilities will cite these provisions as proof that their arbitration agreements are not unconscionable. As mentioned earlier, arbitration agreements are frequently challenged as being unconscionable under state law, due to (among other things) the vulnerability of nursing facility residents and the traumatic, chaotic nature of many nursing facility admissions. If these proposed regulations were to become law, facilities almost certainly would cite these minimal federal requirements (plain language, language that a resident understands, etc.) as CMS's seal of approval for the facility's arbitration agreements. This will interfere with a court's ability to independently evaluate, under state law, whether an arbitration agreement was unconscionable either procedurally or substantively.¹⁹ Also, regarding provision #5, an existing regulation already prohibits a nursing facility from interfering with a resident's communications with surveyors and other government officials, so this "new" provision adds little to existing law.²⁰

Worse, CMS's authorization of *mandatory* arbitration (provision #1) would directly conflict with the many state unconscionability cases that find, with reason, that an arbitration agreement was obtained in a procedurally unconscionable manner if the resident was forced to sign it as a condition of admission. A mandatory arbitration provision is a textbook contract of adhesion — a provision that a consumer is forced to accept — and does not in any way promote a consumer's ability to make choices.²¹ Thus, by authorizing facilities' use of mandatory arbitration agreements, CMS would be depriving consumers of rights and choices, limiting residents' rights under state law, and acting outside the scope of its statutory authority.

We note again that CMS speaks of reducing the burden on facilities.²² If a "burden" justification were to be sustainable, it would be focused on reducing burden otherwise imposed by federal regulation. CMS's proposed regulation, however, would not just reduce a supposed burden imposed by an existing federal regulation. Instead, it would limit facilities' long-standing obligations under state consumer law to avoid procedural and substantive unconscionability.

¹⁸ 82 Fed. Reg. at 26,653.

¹⁹ See, e.g., Eric Carlson, Long-Term Care Advocacy § 10.13[4][d][i] & [ii] (collected unconscionability cases).

²⁰ See 42 C.F.R. § 483.10(k).

²¹ *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 544 (E.D. Pa. 2006) (mandatory arbitration; procedural unconscionability); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 7735 (Tenn. Ct. App. 2003) (same).

²² 82 Fed. Reg. at 26,649, 26,653.

C. Conclusion.

CMS proposes to promulgate a regulation that would authorize nursing facilities to require arbitration agreements as a condition of admission. This is bad public policy, and would directly conflict with CMS's stated intention to expand resident choice.

Among other things, the proposed regulation would reduce residents' existing rights under state consumer law. CMS's stated statutory authority is based on *protecting* residents, and cannot be used to justify a regulation that would protect facilities at the expense of residents.

We urge CMS to withdraw the proposed regulation and defend the existing regulation against pending legal challenges. Please feel free to contact me at jgoldberg@justiceinaging.org with any questions about this submission.

Sincerely,



Jennifer Goldberg
Directing Attorney
Justice in Aging