

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Nursing Facilities and Assisted Living During the COVID-19 Outbreak

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April 3, 2020

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Justice in Aging is a national organization that 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.

Since 1972 we've focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency.

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To achieve Justice in Aging, we must:

- Acknowledge systemic racism and discrimination
- Address the enduring negative effects of racism and differential treatment
- Promote access and equity in economic security, health care, and the courts for our nation's low-income older adults
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, economic class

What We All Know

- COVID-19 presents unprecedented risks.
- Residents of LTC facilities at heightened risk, due to:
 - Age.
 - Serious underlying medical conditions.

Nursing Facilities & Assisted Living

- Presentation focuses on nursing facilities, but advocacy strategies similar for assisted living residents.
- Assisted living remedies will be entirely at state level.



Changes Within Nursing Facility

Social Distancing in Nursing Facilities

- CMS issues guidance & waives regulations to
 - Eliminate communal meals and other communal activities.
 - Prohibit visitation except for “compassionate situations.”
 - “Compassionate situations” including but not limited to end of life visitation.

Few “Essential” Persons

- Visitation restrictions include:
 - Family and friends.
 - Ombudsman program representatives.
 - Non-essential health care providers.
 - “Essential” read narrowly.
- Also, no access for ANYONE with symptom of respiratory infection.

When Visits Do Take Place

- Limited to resident's room or other designated room, e.g., "clean" room.
- Must wear Personal Protective Equipment, e.g., face masks.
- "Hand hygiene."
- "Suggest refraining from physical contact."

Alternatives to In-Person Visiting

- Phone calls, video calls, standing outside window, etc.
- Suggestions/recommendations from CMS, rather than mandate.
- Limitations: facility buy-in and possible lack of technology.
 - One response – New Mexico authorizes state funds to purchase tablets for use in facilities.

Facilitating Contact with Ombudsman, etc.

- “If in-person access is not available ..., facilities need to facilitate resident communication (by phone or other format) with”
 - Ombudsman program;
 - Resident’s representative;
 - Resident’s physician; or
 - Representative of protection and advocacy agency.

Other Changes

- Waiver of nurse aide training requirements, except for “competency.”
- Immediate use of temporary facilities.
- Conversion of rooms (e.g., activity rooms, dining rooms) into resident rooms.



Admissions from Hospital

Loosened Medicare Requirements

- Coverage for nursing facility care does not require 3-night hospital stay.
- Still requires that resident requires either:
 - Daily skilled nursing care (above and beyond typical nursing oversight and medication administration); or
 - Skilled therapy at least five days/week.

Accept New Resident with COVID-19?

- CMS says:
 - OK, “as long as the facility can follow CDC guidance for Transmission-Based Precautions.”
 - “Nursing homes should admit any individuals that they would normally admit to their facility, including individuals from hospitals where a case of COVID-19 was/is present.”

State Guidance on Admitting Residents from Hospital

- New York **requires** admission:
 - “No resident shall be denied re-admission or admission to the NH solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.”
 - [N.Y. Dep’t of Health, Advisory: Hospital Discharges and Admissions to Nursing Homes \(3/25/20\).](#)

On the Other Hand ...

- Louisiana **prohibits** nursing facilities from admitting hospital patients with
 - COVID-19,
 - Pending COVID-19 test, or
 - Active respiratory symptoms.
 - [La. Dep't of Health, Healthcare Facility Notice/Order on Hospital To Nursing Facility Discharges \(3/26/20\).](#)

No Federal Policy on Admissions from Hospitals

- CMS states informally that they are deferring to states and localities, because states/localities presumably know more about health system capacity issues.



Transfer/Discharge

Transferring Residents Based on Diagnosis?

- CMS waives some portions of transfer/discharge regulations, but only in 3 situations:
 - Transferring residents **with COVID-19 or respiratory infection symptoms** to facility dedicated to care of such residents;
 - Transferring residents **without diagnosis or symptoms** to facility dedicated to care of such residents; or
 - Transferring residents without symptoms of a respiratory infection to another facility for 14-day observation.

Process for “Cohort” Transfers

- “New” facility must agree to accept resident.
- Advance notice is not required.
 - CMS is “only waiving the requirement ... for the written notice of transfer or discharge to be provided before the transfer or discharge. This notice must be provided as soon as practicable.”

Notice AFTER Transfer?

- Consider: Notice “as soon as practicable” is of little use if transfer already has taken place.

States Likely Will Set Policies

- E.g., Massachusetts broadly waived state transfer/discharge regulations to move residents from facility designated for care of residents with COVID-19.
- Connecticut issued joint memorandum from Public Health and Ombudsman, with some focus on communicating with residents and family members.

Transfer **Within** Facility

- **For sole purpose of separating COVID+ and COVID- residents,** CMS has waived regulatory rights to:
 - Share a room by consent of both persons.
 - Receive notice before transfer within facility.
 - Refuse certain transfers within facility.



Survey Activities

Survey Prioritization

- Survey activities limited to
 - Surveys for “immediate jeopardy” situations.
 - Targeted infection control surveys, conducted along with Centers for Disease Control and Prevention (CDC).
 - Initial certification surveys.
- Also, facilities have infection control checklist for self-assessments.

Additional Limitations on Survey/Enforcement System

- No on-site survey if surveyor cannot obtain Personal Protective Equipment.
- No enforcement remedies, except for immediate jeopardy violations.
- Non-immediate-jeopardy complaints will be logged into tracking system; resolution will depend on future guidance.



What to Do

Tips for Representing Residents

- Most regulations are still effective.
 - E.g., Except in three limited situations, transfer/discharge protections are still in place.
 - The First Rule in Transfer/Discharge Disputes: Don't Move!
- File complaints, even if their future resolution is murky.
- Court resolution may still be available.

Tips for Representing Residents (cont.)

- Keep advocating with facility, through discussions and/or formal written grievances.
 - E.g., seeking better electronic communication with resident.
- Acknowledge real-life changes caused by current situation, but don't allow crisis to completely override individual residents' lives.

Tips for Administrative Advocacy

- Difficult to concede important quality of care protections in federal nursing facility law.
- Must push CMS and states to not lose sight of individual resident needs.
 - Better to think of modification of regulations, rather than pure waiver, so appropriate resident protections can be maintained.
 - Federal or state guidance should fill holes where waiver has left vacuum.

Additional Resources

- [CMS Memo QSO 20-14-NH](#) (3/13/20)
(visitation restrictions, etc.).
- [CMS Memo QSO 20-20-NH](#) (3/23/20)
(prioritization of survey activities,
including infection control self-
assessment).

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Additional Resources (cont.)

- [CMS Findings](#) re: Waiving of 3-Night Hospitalization Requirement for Medicare Coverage of Nursing Facility Care (3/13/20).
- CMS, COVID-19 Emergency Declaration [Blanket Waivers](#) for Health Care Providers.

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Questions?

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