

August 7, 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:

We write to express our opposition to the proposed regulatory revision concerning nursing facilities and consumer arbitration agreements and to ask the agency to withdraw it. As finalized on October 4, 2016, the *existing* regulation allows a nursing facility to use a binding 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 a resident's signature long before the relevant incident occurs (a "pre-dispute" agreement) — in most cases, during admission to the facility. Significantly, the proposed regulation would authorize a facility to *require* a pre-dispute binding arbitration agreement as a condition of admission.²

The difference between the existing final regulation and the proposed rule 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 pre-dispute binding 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**. Nursing facilities would quickly institute policies requiring pre-dispute binding arbitration agreements from all incoming residents. This would likely be seen as a green light to require arbitration agreements broadly. Existing residents would no doubt receive the message and feel the pressure: sign an arbitration agreement or else.

We urge the Centers for Medicare and Medicaid Services (CMS) to withdraw the proposed regulation and retain the current ban on pre-dispute binding arbitration. As explained below, the proposed regulation is harmful and disadvantageous to nursing facility residents in numerous ways. In addition, CMS lacks the legal authority to promulgate a regulation that protects providers, not residents, and which inappropriately limits residents' rights under state law.

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, 2017).

A. The proposed regulation would hurt residents, who would be better off with no arbitration regulation than the regulation that CMS now proposes.

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, pre-dispute binding arbitration is extremely disadvantageous for nursing facility residents.

1. Pre-dispute binding arbitration agreements are inherently unfair.

The use of pre-dispute binding arbitration agreements in the nursing facility setting is fundamentally unfair for residents and their loved ones. First and foremost, an essential component of any decision making process is gathering the information needed to make an informed judgment. Yet pre-dispute binding arbitration agreements force persons to make a decision without any information at all about the particulars of a dispute, even when severe neglect, serious injuries or death occurs. It is unreasonable to assume that residents or their loved ones are able to comprehend the likelihood of grievous harm or poor care occurring within a facility when these agreements are signed upon admission. No one should be expected to anticipate or contemplate the occurrence of such tragedies.

Furthermore, nursing facility admission is a difficult and confusing time for residents and their families, who are often under extreme pressure to find nursing facility placement. As a result, they are generally unaware of what they are signing and unlikely to be able to fully appreciate and understand that they are relinquishing a critical legal right with significant and irreversible consequences.

There is also a gross disparity of bargaining power between nursing facilities and potential residents. The process is so irredeemably one-sided that the American Bar Association, the American Health Lawyers Association, and the American Arbitration Association have all issued policies opposing pre-dispute binding arbitration agreements for nursing facility residents.⁴ These agreements are contracts of adhesion in which the party with little negotiating power – the resident – puts his or her life completely in the hands of the party with an overwhelming negotiating advantage – the facility.

Arbitration stacks the deck against consumers. The contracts frequently allow the nursing facility to select the arbitrator, the state in which the arbitration will occur, and the rules for the arbitration process. There is a strong incentive for arbitrators to find in favor of the facility since this can assure them of repeat business. In addition, and particularly because residents have next to no control over the content of pre-dispute binding arbitration agreements, the terms of those agreements are likely to be unfavorable to residents. Some limit the resident’s right to conduct discovery and/or cap the damages that a resident may recover, “even for tragic and possibly preventable deaths.”⁵

2. The proposed regulation would deprive elders and their families of choice.

CMS is wrong in asserting that its proposed regulation would support a resident’s ability to make choices.⁶

Choice of facility

The decision to enter a nursing facility is often a painful and stressful one. It is usually due to a dramatic, sudden change in health or cognition. The assumption that people looking for nursing facility placement can shop around until they find the best facility for themselves is almost always wrong. Prospective residents and their families often have little actual

³ 82 Fed. Reg. at 26,651.

⁴ 81 Fed. Reg. 68,688, 68,797 (2016).

⁵ 81 Fed. Reg. at 68,795.

⁶ 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”).

choice of nursing facilities due to their geographic location, specific needs, or (most significantly) the necessity of immediate placement when facing imminent hospital discharge.

Authorizing pre-dispute binding arbitration agreements would further limit resident choice. An ever growing number of facilities use these agreements. As noted above, it is already difficult enough for individuals to find a nearby nursing facility that provides quality care and is willing to admit them. To find one that also does not include arbitration agreements at admission makes matters even more difficult. Unless potential residents and their family members are able to defer placement to keep looking or accept placement in a nursing facility outside their community, they often have no alternative but to accept a facility with a pre-dispute binding arbitration agreement.

Of particular concern, CMS's proposed regulation would leave residents in a worse position than they are in today by authorizing nursing facilities to require a resident to agree to arbitration as a condition of admission. Given the many ways in which arbitration favors nursing facilities, it is likely that the vast majority of facilities – if not all – will make arbitration agreements a requirement for admission. Individuals will no longer be able to choose a facility without arbitration agreements. Worse, permitting pre-dispute binding arbitration agreements as a condition of admission holds residents hostage; they must sign the agreement and lose their constitutional rights or not receive the care they desperately need. Notably, as explained below, state law generally limits a facility's ability to require arbitration, so the proposed federal regulation would be authorizing a practice that is otherwise frowned upon by state law.

By authorizing mandatory pre-dispute binding arbitration, the proposed regulation would send entirely the wrong message to nursing facilities and nursing facility residents. Nursing facilities would quickly institute policies requiring arbitration agreements from all incoming residents. This would likely be seen as a green light to require arbitration agreements very broadly. Existing residents would no doubt receive the message and feel the pressure: sign an arbitration agreement or else.

Choice between court or arbitration

In our experience, a resident never really "chooses" a pre-dispute binding 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.⁷

The most significant factor in ensuring that arbitration is voluntary is that the decision to agree to arbitration occurs *after* the harm is done. This way, the resident is making the choice at a point when he or she is fully focused on the legal consequences of agreeing to arbitration.

To emphasize: the current regulation does not prevent a resident from choosing to arbitrate a dispute. Rather, the regulation simply requires that arbitration be chosen only after a dispute has arisen, and the resident has knowledge over what is at stake.

3. Pre-dispute arbitration agreements negatively impact residents' health and safety.

By forcing residents into secret proceedings when seeking redress, pre-dispute binding arbitration lessens nursing facility accountability. Allegations of abuse, neglect and poor care are hidden from the public and regulators. This

⁷ 81 Fed. Reg. at 68,792.

diminishes the consequences of negligent care by providing cover for poorly performing facilities. Fewer consequences can allow substandard care to continue.

Because arbitration proceedings are held behind closed doors and confidential, potential residents and others are less likely to know about a facility's care problems.⁸ This deprives consumers of information they need when selecting a nursing facility. It also shields poor performing facilities from the negative impact on their reputation, public opinion, and public pressure that could serve as a deterrent to substandard care.

For these and related reasons, pre-dispute arbitration agreements diminish the overall quality of care. 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

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.”¹⁰
- Authority to establish “such other requirements relating to the health and safety [and well-being] of residents as the Secretary may find necessary.”¹¹
- 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.”¹²

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.

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

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

¹² 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.¹³

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. 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.¹⁴ 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.¹⁵

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.¹⁶ Thus, by authorizing facility's 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 that CMS speaks of reducing the burden on facilities.¹⁷ 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.

C. Conclusion.

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

In justifying the proposed regulation, CMS repeatedly speaks of reducing the burden on facilities.¹⁸ If CMS truly wishes to achieve this goal, 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

¹³ 82 Fed. Reg. at 26,653.

¹⁴ See, e.g., Eric Carlson, Long-Term Care Advocacy § 10.13[4][d][i] & [ii] (collected unconscionability cases).

¹⁵ See 42 C.F.R. § 483.10(k).

¹⁶ *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).

¹⁷ 82 Fed. Reg. at 26,649, 26,653.

¹⁸ 82 Fed. Reg. at 26,649, 26,653.

address a known dispute. Rather than obtaining an arbitration agreement from every single resident upon admission, the facility would seek an arbitration agreements only to address a particular dispute. The administrative burden on both facilities and residents would be reduced tremendously.

The case of Marilyn Young and her family illustrates the harm pre-dispute binding arbitration can cause. A California resident, 88-year-old Marilyn Young had only had one sexual partner her entire life -- her husband of nearly 70 years. Marilyn was raped by a male nursing assistant in the nursing facility that was supposed to be looking after her while she recovered from a stroke. One evening shortly after her admission, Marilyn awoke in her bed to find her gown off, her catheter removed, the call light unplugged, and her bed and body wet. Marilyn remembers a nursing assistant standing over her staring at her naked body and who said "this is why I love my job."¹⁹ Later, Marilyn developed severe vaginal pain and bruising and she was eventually diagnosed with incurable genital herpes, a virus that her husband tested negative for.

Marilyn was raped in a nursing facility, and she and her entire family were devastated by the event. When her family tried to hold the nursing facility publicly accountable in court, the facility tried to force them into private arbitration because of a clause within the resident admission papers which Marilyn's daughter signed. Marilyn's family fought for their right to have their day in court and eventually prevailed, only because the court found that Marilyn's daughter did not have the legal authority needed to sign an arbitration agreement on behalf of Marilyn. Had Marilyn signed those papers, the family would not have been able to seek justice in court.

We urge you to withdraw the proposed regulation and retain the ban on pre-dispute binding arbitration. If, for whatever reason, you are unwilling to continue the current ban on pre-dispute arbitration, we recommend that you revise the federal nursing facility regulations so that they do not address arbitration. The proposed regulations are, by far, worse than nothing, because they would interfere with state consumer laws that offer some protection to residents.

Thank you for your consideration.

Sincerely,

¹⁹ Blake Ellis and Melanie Hicken, *Sick, Dying and Raped in America's Nursing Homes*, CNN.com, available June 17, 2017 at <http://www.cnn.com/interactive/2017/02/health/nursing-home-sex-abuse-investigation/>.