#### October 14, 2015

Andy Slavitt Acting Administrator for the Centers of Medicare and Medicaid Services (CMS) Department of Health and Human Services Room 445-G, Hubert H. Humphrey Building 200 Independence Ave., S.W. Washington, DC 20201

## **RE:** Docket No. CMS-3260-P, Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities

Dear Administrator Slavitt,

We appreciate the opportunity to submit comments on the Center for Medicare and Medicaid Services' (CMS) notice of proposed rulemaking to Reform of Requirements for Long-Term Care Facilities. Standards for nursing facilities are essential to maintaining quality of care and protecting residents' rights.

As part of the rule CMS rightly recognizes the significant negative impact of pre-dispute arbitration and seeks to address forced, binding arbitration clauses in nursing facility contracts. We are concerned, however, that the language as written could severely undercut residents' rights and make the current pre-dispute arbitration system *significantly worse* for nursing facility residents. Though we appreciate the attempt by CMS to prohibit the conditioning of admission to a facility on the signing of an arbitration agreement, as a practical matter this will not make the arbitration truly voluntary. 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. Without explicit prohibitions on pre-dispute arbitration, the proposed rule will be used as a shield by nursing facilities to insulate themselves from wrongdoing and liability. In order to safeguard the rights of nursing facility residents, the undersigned groups urge CMS to revise the arbitration criteria to clarify that arbitration clauses should only be presented to residents and their families post-dispute. Specifically, we recommend that the proposed language be deleted and replaced with the following at§ 483.70:

## (*n*) *Binding arbitration agreements.* A facility may not enter into a pre-dispute agreement for binding arbitration with its residents.

Only through the elimination of pre-dispute arbitration clauses will residents and their families be able to make a fully informed, voluntary choice to arbitrate.

# <u>Nursing home contracts with pre-dispute arbitration clauses are inherently unfair and disadvantageous to nursing home residents.</u>

The use of pre-dispute arbitration agreements in the nursing home setting is fundamentally unfair for nursing home residents and their loved ones for several reasons. First and foremost, an essential component of any decision making process is gathering the information needed to make the best decision. Yet, pre-dispute arbitration agreements force individuals to make a decision without any information at all about the dispute, even in cases of alleged severe neglect, serious injuries or death. Typical nursing home claims involve failure to prevent and treat pressure sores that led to infection; amputated limbs; suffocation on bedrails and other restraints; choking; broken limb from physical abuse or neglect; sexual assault; renal failure and other conditions caused by dehydration; malnutrition and severe weight loss; severe burns; drowning; gangrene; extreme, untreated pain; disfiguring contractures; and other avoidable conditions.

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.

In addition, by signing an arbitration agreement, the resident loses a basic constitutional right and is barred from bringing *any* claim against a facility in court. Nursing home admission is often a stressful and confusing time for residents and their families, and they are unlikely to be able to fully appreciate they are relinquishing a critical right, and the significant and irreversible consequences of that decision.

#### <u>Revising the proposed rule would allow residents to choose arbitration after the dispute</u> <u>arises.</u>

Unlike other types of pre-dispute arbitration agreements, which may cover a single transaction or a specific type of dispute, pre-dispute arbitration agreements in the nursing home setting cover every single aspect of an individual's life and care once he or she enters into the facility. The span of time an individual will reside within a nursing home averages roughly two and a half years.<sup>1</sup> From the moment these agreements are signed by residents or their loved ones, anything that may occur to residents – no matter how big or small the issue may be – will be subject to arbitration and never allowed to be addressed publicly in a court of law.

Nursing facilities insert pre-dispute arbitration clauses in their contracts to ensure that they will never be held publicly responsible for their actions, no matter how egregious their conduct. The contracts are offered on a take-it-or-leave it basis, usually within the admission forms, and the contracts typically allow the nursing home to select the arbitrator, the state in which the arbitration will occur, and the rules for the arbitration process. Even with CMS' proposed protections, the egregiousness of requiring the potential resident or their loved ones to make a

<sup>&</sup>lt;sup>1</sup> Jones AL, Dwyer LL, Bercovitz AR, Strahan GW. The National Nursing Home Survey: 2004 overview. National Center for Health Statistics. Vital Health Stat 13(167). 2009

decision to forgo court pre-dispute remains. The proposed nursing home reform rule presents an opportunity to fully protect nursing home residents from abusive pre-dispute arbitration clauses. By explicitly prohibiting this practice through the language we suggest above, CMS will not only restore residents' constitutional rights, but also better ensure that none of the other requirements in the proposed rule will be rendered unenforceable.

For example, consider the case of Elizabeth Barrow and her family's experience with pre-dispute arbitration. When Elizabeth was admitted to a nursing home at the age of 96, the lengthy admissions documents included a pre-dispute arbitration clause that forced Elizabeth to surrender her right to go to court if she was injured or killed because of the nursing home's actions. Three years later, Elizabeth's roommate killed her – beating, strangling and asphyxiating her with a plastic bag over her head.<sup>2</sup> Her son Scott brought a wrongful death action against the nursing home, arguing the facility didn't do enough to protect her and failed to address previous violent tendencies of her roommate. Elizabeth's case was kicked out of court and forced into arbitration with the facility.

According to CBS Boston, Scott says in the hours leading up to his mother's death, her roommate, Laura Lundquist had several violent episodes. The staff left her in the room with his mother and never let him know there was a problem. Scott says, "The thing that wakes me up at night is thinking that if I had been called I would have taken her home." Elizabeth's family is fighting to hold the facility accountable but the nursing home forced them into arbitration proceedings to evade public responsibility. Ultimately, despite the overwhelming evidence of wrongdoing, the arbitrator ruled in favor of the facility.<sup>3</sup>

Unfortunately Elizabeth's case is not unique. More than one third of Medicare patients admitted a nursing facility has suffered a medical error, infection, or other serious injury.<sup>4</sup> In order to protect others from experiencing this injustice, we urge CMS to move towards a truly fair, voluntary process by amending the criteria on pre-dispute arbitration clauses in the final rule so they can no longer be presented to residents or their families on a pre-dispute basis. Without this change, these regulations could unintentionally present further harm individuals who have rights both as nursing home residents and as U.S. citizens.

Thank you for your consideration.

Sincerely,

ACCSES AFSCME

<sup>&</sup>lt;sup>2</sup> Eric Tucker. "Laura Lundquist, 98, Accused of Killing Elizabeth Barrow, 100, Roommate in Nursing Home." *The Huffington Post*, August 10, 2015. Available at <u>http://www.huffingtonpost.com/2009/12/12/laura-lundquist-98-accuse\_n\_389978.html.</u>

<sup>&</sup>lt;sup>3</sup> Kathy Curran. "Nursing Home Found Not Negligent In Murder of 100-Year-Old Woman." *WBZ-TV CBS Boston*, March 9, 2012. Available at <u>http://boston.cbslocal.com/2012/03/09/family-of-100-year-old-murder-victim-files-suit-against-nursing-home/.</u>

<sup>&</sup>lt;sup>4</sup> HHS IG Report on Skilled Nursing Facilities. Available at <u>http://oig.hhs.gov/oei/reports/oei-06-11-00370.pdf</u>

Aging Life Care Association Alliance for Retired Americans Altarum Institute American Association for Long Term Care Nursing (AALTCN) American Association of Nurse Assessment Coordination (AANAC) American Association on Health and Disability (AAHD) Brain Injury Association of America (BIAA) **Caring Across Generations** Center for Medicare Advocacy Disability Rights Legal Center (DRLC) Families for Better Care Gerontological Advanced Practice Nurses Association (GAPNA) International Association for Indigenous Aging (IA2) Judge David L. Bazelon Center for Mental Health Law Justice in Aging Lakeshore Foundation Leadership Conference on Civil and Human Rights (LCCHR) Long Term Care Community Coalition (LTCCC) Medicare Rights Center National Academy of Elder Law Attorneys (NAELA) National Adult Protective Services Association (NAPSA) National Association of Directors of Nursing Administration in Long Term Care (NADONA/LTC) National Association of Local Long Term Care Ombudsmen (NALLTCO) National Association of Social Workers (NASW) National Association of State Long-Term Care Ombudsman Programs (NASOP) National Committee for the Prevention of Elder Abuse (NCPEA) National Committee to Preserve Social Security National Consumer Voice for Quality Long-Term Care National Gerontological Nursing Association (NGNA) National Multiple Sclerosis Society National Partnership for Women & Families National Women's Law Center Service Employees International Union (SEIU) Special Needs Alliance (SNA) The Arc of the United States The Hartford Institute for Geriatric Nursing **United Spinal Association**