



## JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

## LONG TERM CARE COMMUNITY COALITION

*Advancing Quality, Dignity & Justice*

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# COVID-19: ADVOCATING FOR NURSING HOME RESIDENTS, PART IV

May 15, 2020

# Agenda

- I. Introduction and housekeeping
- II. Transfer Requirements and Waivers
- III. COVID-only facilities
- IV. Nurse Aide Training
- V. Testing of Residents and Staff
- VI. Other Updates
- VII. Q&A/Discussion

# Presenters

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- Toby Edelman, Senior Policy Attorney, Center for Medicare Advocacy
- Sam Brooks, Program Manager, National Consumer Voice for Quality Long-Term Care
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## Nursing Facility Transfer/Discharge During COVID-19 Outbreak

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Eric Carlson, Directing Attorney

May 15, 2020

# “Normal” Standards

- Transfer/Discharge only for six specified reasons.
  1. Nonpayment.
  2. Needing higher level of care.
  3. Not needing nursing facility care.
  4. Endangering others' safety.
  5. Endangering others' health.
  6. Facility closing.

# Procedural Protections

- Advance written notice, generally 30 days prior to date of proposed transfer/discharge.
- Right to appeal hearing in front of administrative law judge.

# Waiver of Regulations in Only Three Situations

1. Resident with COVID-19 transferred to COVID-dedicated facility.
2. Resident without COVID-19 transferred to No-COVID facility.
3. Transfer for 14-day observation.

# What Is This “Other” Facility?

- The CMS “Blanket” Waiver refers to transfer to “another LTC facility.”
- But the “transfer scenario” memorandum (QSO-20-25-NH) refers to transfer to “another long-term care facility, or to other non-certified locations designated by the State.”



# Waiving Certain Subsections of 42 C.F.R. § 483.15

- (c)(3) – Advance notice.
- (c)(4)(ii) – Shortened notice standards.
- (c)(5)(i), (iv) – Notice must list reason, and statement of appeal rights.
- (d) – Notice of bed hold rights.

# What Does This Mean?

- “[W]e are 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.”
  - CMS, COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers.

# Discretion to Facilities in Devising Transfers

- CMS initially says, no gov't approval needed for "cohorting" transfer between "two or more certified LTC facilities."
  - But State Agency must approve transfer to non-certified location.
- ADVOCACY PRIORITY – Convince your state to designate COVID-dedicated facilities, with appropriate standards.

# How Does this Play Out in Real Life?

- Listing the waived regulations leaves some ambiguity.
  - Unfortunately, the “Transfer Scenarios” in QSO-20-25-NH are rudimentary, and focused mostly on facility reimbursement.
- Probable – CMS doesn’t necessarily want to give precise details, given the hard realities in “cohorting” decisions.

# The Bottom Line

- Waived regulations allow “cohorting” transfers without advance notice.
- What can resident do?
  - Talk early and often with facility, MD, ombudsman, etc.
- What can policy advocates do?
  - Seek state policies to
    - Require consultation/notice.
    - Set standards for COVID-dedicated facilities.

# Hard Questions

- Can a resident refuse a “cohorting” transfer?
  - Under the federal waiver, a facility has significant discretion to make a transfer without a resident’s consent.

# Hard Question: Return to Facility

- Does a resident have right to return to first facility?
  - Probably not under bed hold. Bed holds depend on state law, and may require a hospitalization.
  - Probably yes under federal right-to-return law, which covers return after hospitalization or “therapeutic leave.”
    - Federal guidelines (Appendix PP) define “therapeutic leaves” as “Absences for purposes other than required hospitalization.”
      - BUT THIS MAY BE DIFFICULT NONETHELESS!

# Related Question

- Are transfers to hospitals affected by these regulatory waivers?
  - No. But, for extra security, the resident should talk to the facility before going to the hospital, to ensure that the facility is intending to allow the resident to return.



# Don't Forget

- All non-waived regulations remain in force
  - residents retain all rights to fight back against non-cohorting transfer/discharge.
- States can add protections for “cohorting” transfers.



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# COVID-19 ONLY NURSING FACILITIES

# SEGREGATING RESIDENTS BY COVID-19 STATUS

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- Grouping residents by COVID-19 status (“cohorting”) is considered best practice to prevent spread of virus.

# COVID-ONLY FACILITIES

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- No current federal standards.
- Some states (e.g., CT, MA) are identifying COVID-only facilities.
- Some states are allowing volunteers.

# ADVOCATES' RECOMMENDATIONS FOR COVID-ONLY FACILITIES

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- Our preference:
  - Use distinct part SNFs in acute care hospitals.
  - Convert recently vacated nursing facilities into COVID facilities (if available and appropriately staffed).
  - At least, group residents by COVID-19 status, with separate staff.

# ADVOCATES' RECOMMENDATIONS FOR HIGHER STANDARDS FOR COVID-19 FACILITIES

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- Private rooms
- RN presence 24 hours per day
- Staffing of nurses and nurse aides, at least 4.1 hours per resident per day
- Infection preventionist on-site full-time
- Adequate personal protective equipment

# ADVOCATES' RECOMMENDATIONS FOR EXCLUSION CRITERIA FOR COVID-19 FACILITIES

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- Waivers of nurse staffing levels.
- Poor quality care (Special Focus Facility or candidate, rating of one or two stars)
- As of March 2020,
  - Denial of payment for new admissions
  - Civil money penalty exceeding \$5000
- Abuse icon on *Nursing Home Compare*

# QUALITY CARE FOR NURSING HOME RESIDENTS AND WORKERS DURING COVID-19 ACT OF 2020 (H.R. 6698)

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- CMS to specify criteria for COVID-19 facilities, including
  - 24 hour RN coverage
  - Companion bill in the Senate (Blumenthal, Booker)



# HEALTH AND ECONOMIC RECOVERY OMNIBUS EMERGENCY SOLUTIONS ACT (HEROES ACT, H.R. 6800)

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- By 2 weeks after enactment, Secretary must establish a program for designating COVID-19 facilities or portions of facilities (§30208)
- Amending 42 U.S.C. §§1395i-3(k), COVID-19 Designation Program

# DESIGNATION OF COVID-19 FACILITIES AND PORTIONS OF FACILITIES AS COVID-19 TREATMENT CENTERS

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- Facility applies to Secretary for designation.
- Requirements
  - 4- or 5-star rating on staffing on *Nursing Home Compare* for 2 prior years
  - 4- or 5-star rating on health inspections
  - No infection control deficiency cited as immediate jeopardy

# DESIGNATION OF COVID-19 FACILITIES AND PORTIONS OF FACILITIES

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- More requirements:
  - Facility provides care only to eligible individuals (defined as person was tested COVID-19 positive “during the 30-day period ending on the first day on which such individual is a resident of a COVID-19 treatment center” or the center is so designated).
  - Facility arranges for transfer of ineligible residents to other SNFs (or portions).

# DESIGNATION OF COVID-19 FACILITIES AND PORTIONS OF FACILITIES

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- More requirements:
  - Facility complies with notice requirements within 72 hours and notifies residents of
    - Designation as COVID facility
    - Ineligible residents to be transferred (or moved within facility) or go to another setting (including home) selected by resident
    - Contact information for ombudsman program

# DESIGNATION OF COVID-19 FACILITIES AND PORTIONS OF FACILITIES

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- Facility reports to Secretary weekly, number of
  - COVID-19 related deaths at facility
  - discharges from facility
  - admissions to facility
  - beds (occupied, available)
  - residents on ventilators
  - clinical and nonclinical staff providing direct patient care; and more

# DURATION OF DESIGNATION

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- Designation begins on date specified by Secretary.
- Revocation of designation on date specified by Secretary and earliest of
  - Revocation of designation
  - Facility notifies Secretary of termination
  - Termination of program

# REVOCATION OF DESIGNATION BY SECRETARY

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- If Secretary determines facility is not in compliance with a requirement.

# TERMINATION OF PROGRAM

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- Upon termination of emergency period.
- No administrative or judicial review of facility designation or revocation of designation.



# PAYMENT INCENTIVE

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- 20% increase in per diem Medicare payment.



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# NURSE AIDE TRAINING

# NURSING HOME REFORM LAW (1987)

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- Nurse aides may not work more than 4 months unless they are trained and determined to be competent.
  - 42 U.S.C. §§1395i -3(b)(5), 1396r(b)(5), Medicare and Medicaid, respectively.
  - 42 C.F.R. §§483.35(d)(1)(i), (ii), 483.35(c).

# CMS WAIVER OF 4-MONTH RULE

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- CMS waives the 4-month rule, but not competency requirement.
  - CMS, “Long Term Care Facilities (Skilled Nursing Facilities and/or Nursing Facilities): CMS Flexibilities to Fight COVID-19” (Mar. 28, 2020), <https://www.cms.gov/files/document/covid-long-term-care-facilities.pdf>

# WHO'S PROVIDING CARE

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- As staff become sick?

# AMERICAN HEALTH CARE ASSOCIATION

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- Temporary Nurse Aide
  - Free 8-hour on-line training course
  - A “temporary position intended to address the current state of emergency.”

<https://educate.ahcancal.org/products/temporary-nurse-aide>

# STATES ADOPTING AHCA TRAINING PROGRAM

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- AHCA reports the program “meets standards” in DE, IN, IA, NE, NJ, NY, and WV.
- AHCA reports additional training may be required in AL, DC, GA, KS, MS, PA, SC, TN.

# AHCA TRAINING PROGRAM

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- We've been told
  - More than 10,000 people have taken the training course.
  - CMS is not tracking where these people are working or anything else about them.



# CONCERNS

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- Who's determining competency now? Nursing facilities?  
On what basis?
- What happens to these “temporary” workers when the pandemic is declared to be over?
  - “grandfathered in” and become permanent staff?
  - Lose their jobs?
  - Required to take training and be tested?

# STAFFING

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- Be aware.
- Please let us know what is happening in your state.

# MORE INFORMATION ABOUT COVID-19

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- CMA, COVID-19: An Advocates Guide to Beneficiary-Related Medicare Changes, <https://www.medicareadvocacy.org/wp-content/uploads/2020/05/COVID-Advocates-Guide-PDF-Updated-May-10-2020.pdf>
  - Updated regularly.



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## **STATE POLICIES FOR COVID-19 TESTING IN NURSING HOMES AND ASSISTED LIVING FACILITIES**

**May 15, 2020**

# The Current State of Testing in Nursing Homes

- Different states adopting different policies.
- Only 18 states have policy of testing all residents.
- 8 states only testing when there is an outbreak in a facility
- 5 states testing some facilities, but no stated policy
- 16 states not requiring any testing
- 4 states unclear or discussing testing residents
- Testing hampered by limited testing supplies
- No federal requirements.

# States Requiring Testing of All Residents

- AZ, CT, DE, KY, MD, NJ, NM, ND, OK, RI, SC, TN, TX, VA, WA, WV, WI.
- NH and WV are only known states to have completed testing.
- Some states have not even started.
  - 9 states only made their announcement this week.
- Only NJ had plans to continuously test all residents. Every 3-7 days.
  - NM tests a facility with a confirmed case weekly and only 15% of residents and staff in facilities with no confirmed cases weekly.



# States Requiring Testing Cont'd.

- Details on who and how are lacking.
- Many states conducting test themselves.
  - Help of National Guard, private labs, hospitals.
- Some states mandating the testing be done by facilities.
  - Various states providing the tests free to facilities.
- Concerns that there are not enough tests to fill mandate

# States Testing Only After An Outbreak or Testing Without A Clear Policy

- States testing only after and outbreak.
  - AK, IN, IA, LA, MA, OH, UT, VT.
- States testing, but not stated/clear policy.
  - CO, FL, GA, IL, OR.

# States Testing in Assisted Living Facilities

- 10 States requiring testing of all residents in ALFs
  - AZ, DE, MD, MS, NJ, NM, ND, TX, VA, WA.
- 3 States testing in ALFS only after outbreaks:
  - IA, IN, MA.
- In 9 states it is unclear if ALFs are tested as a part of their testing protocol.
  - AR, CO, GA, KY, LA, OH, OR, VT,

# States Requiring the Testing of Nursing Home Staff

- 13 states requiring testing of all staff with residents.
  - AZ, DE, KY, MD, NJ, NM, OK, SC, TN, VA, WA, WV, WI
- 6 states requiring testing of staff only when an outbreak occurs.
  - AR, IA, IN, LA, UT, VT.
- NY only state requiring testing of all staff but not residents.
- FL, GA, IL test some staff, but without any stated policy.

# Next Steps

- States where testing is required:
  - Asking facilities where they are in testing.
    - Do they have the tests and staff?
  - How will facilities be using the results?
    - Are they able to cohort residents based on test results?
    - Do they have staff and supplies?
  - Will the facility be testing again? How frequently?
- States where testing is not required:
  - Reaching out to governors, legislators, and policymakers.
    - Pressure on facilities to test all residents after Vice President Pence's recommendation that all residents be tested.
    - Emphasizing that NH residents are the hardest hit in pandemic and proactive solutions are necessary to avoid continued infections.



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# Other Updates:

## **Coronavirus Commission on Safety and Quality in Nursing Homes**

- Purpose – to help inform immediate and future responses to COVID-19 in nursing homes
- Commission will:
  - conduct a comprehensive assessment of the overall response to COVID-19
  - Inform immediate and future actions to address the virus
- To include industry experts, clinicians, resident advocates, family members, ethicists, administrators, academics, infection control and prevention professionals, state and local authorities, and other stakeholders

Nominations can be submitted at: <https://sites.mitre.org/nhccovidcomm/>

**Due by Friday, May 22, 5:00pm ET**

QA





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