



JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

LONG TERM CARE COMMUNITY COALITION

Advancing Quality, Dignity & Justice

COVID-19: ADVOCATING FOR NURSING HOME RESIDENTS, PART XIII

October 2, 2020

Agenda

- I. Introduction and housekeeping
- II. Overview of CMS Guidance on Visitation
- III. What the Guidance Allows and Requires
- IV. Shortfalls of the Guidance
- V. Advocacy Strategies
- VI. Q&A/Discussion

Presenters

- Robyn Grant, Consumer Voice
- Jocelyn Bogdan, Consumer Voice
- Eric Carlson, Justice in Aging

Yes, BUT...

What the Guidance Allows

- Outdoor visitation
- Indoor visitation
- Compassionate care
- Ombudsman access
- Communal activities and dining
- Use of CMP funds

Guidance: <https://www.cms.gov/files/document/qso-20-39-nh.pdf>

Summary: https://theconsumervoice.org/news/detail/news_list/cms-issues-revised-guidance-on-visitation-in-nursing-homes

What the guidance requires

- Visitation in certain circumstances
- Visits under the ADA (with exceptions) to allow equal access to care
- Healthcare workers who provide direct care (not employed by facility) subject to work exclusions

Guidance: <https://www.cms.gov/files/document/qso-20-39-nh.pdf>

Summary: https://theconsumervoice.org/news/detail/news_list/cms-issues-revised-guidance-on-visitation-in-nursing-homes

WHAT THE GUIDANCE ALLOWS:

Allows: Outdoor Visitation

- Outdoor visitation is preferred – poses a lower risk of transmission.
- Visits should be outdoors wherever practicable.
- Should be routine – except for weather considerations, individual's health status, or facility's outbreak status.
- Facilities should create space – patios, parking lots, tents.
- Process for limiting the number and size of visits happening simultaneously and reasonable limits on number visiting a resident at the same time.
- County positivity rate does NOT need to be considered for outdoor visitation (but it can be.)

Allows: Indoor Visitation

Guidelines

- No new onset of COVID-19 cases in 14 days and not conducting outbreak testing.
- Visitors adhere to core principles and staff monitor those with difficulties (like children.)
- Limit the number of visitors per resident at one time, limit total number of visitors, consider scheduling certain lengths of time.
- Limit movement in the facility.

Additionally:

- County positivity rate must be Low or Medium. (If it's High, visitation only in compassionate care situations)
- Facilities may monitor other factors – rates of COVID-like illness, visits to the ED, and positivity rate of neighboring county.

CMS does not distinguish between “Essential Caregivers” and other visitors. Visitation is person-centered.

Allows: Compassionate Care Visitation

- Compassionate care goes beyond end of life.
- Facility should work with residents, families, caregivers, resident representatives, and the Ombudsman program to identify need for visits.
- New examples, not limited to:
 - Residents who were living with family, recently moved into a nursing home and is struggling with lack of family support and changed environment
 - Resident grieving after death of friend or family
 - Resident who needs cueing and help with eating and drinking, previously provided by family or caregiver, who is losing weight or dehydrated
 - Resident who used to talk and interact who is experiencing emotional distress, not speaking, crying more frequently.
- Visits include: Any individual who can meet the residents needs – family, friends, clergy, laypeople offering spiritual support.
- Social distancing – but in CC, personal contact following guidelines for a limited amount of time.
- Visits allowed for residents on transmission-based precautions for COVID.

Compassionate Care Continued

So what don't we know?

- Are they allowed when there is new onset COVID in the facility?
 - Maybe, yes! Because residents on transmission-based precautions for COVID can still receive compassionate care.
- How long can the visits be?
- How frequent?
- For what duration?

Allows: Ombudsman Access

- Immediate access to any resident.
- “During this PHE, in-person access may be limited due to infection control concerns and/or transmission of COVID-19; however, in-person access may not be limited without reasonable cause.”
- “If in-person access is not advisable, such as the Ombudsman having signs or symptoms of COVID-19, facilities must at a minimum facilitate alternative resident communication with the ombudsman....”
- NH are required to allow the Ombudsman to examine resident’s medical, social, and administrative records as otherwise authorized by State Law.

Allows: Communal Activities and Dining

Status quo!

- “Facilities should consider additional limitations based on status of COVID-19 infections in the facility.”
- Residents may eat in the same room with social distancing.
- Group activities may be facilitated (for residents fully recovered from COVID, and those not in isolation for observation or with suspected or confirmed COVID status) with social distancing, appropriate hand hygiene, and use of face coverings.
- Examples: Book clubs, crafts, movies, exercise, bingo.

Allows: Use of CMP Funds

- Facilities may apply to use CMP funds to help facilitate in-person visits.
- CMS has approved CMP funds for tents and or clear dividers.
- Limited to a maximum of \$3,000 per facility.

WHAT THE GUIDANCE REQUIRES

Requires: Visitation in Certain Circumstances

“Facilities may not restrict visitation without a reasonable clinical or safety cause...”

HOWEVER... Facilities may still restrict visitation due to:

- The COVID-19 county positivity rate,
- The facility’s COVID-19 status, a
- Residents COVID-19 status,
- Visitor symptoms,
- Lack of adherence to proper infection control practices,
- Other relevant factors related to the COVID-19 PHE.

Example: “If a facility has had no COVID-19 cases in the last 14 days and its county positivity rate is low or medium, a nursing home **MUST** facilitate IN-PERSON visitation consistent with the regulations which can be done by applying the guidance stated above.”

Failure to facilitate without adequate reason related to clinical necessity or resident safety – would leave a facility subject to citation and enforcement actions.

Required Visitation: Who is it for?

- Residents on transmission-based precautions for COVID should only receive virtual and window visits and compassionate care.
- However, this restriction should be lifted once the precautions are no longer required!

Requires: Visits Under the ADA for Equal Access to Care

- Facilities MUST comply with federal disability rights law.
- Example: “If a resident requires assistance to ensure effective communication and the assistance is not available by onsite staff or effective communication cannot be provided without such entry, the facility MUST allow the individual entry into the nursing home to interpret or facilitate, with some exceptions.”

What does “with some exceptions” mean?

- “Does not preclude nursing homes from imposing legitimate safety measures that are necessary for safe operations, such as requiring such individuals to adhere to the core principles of COVID-19 infection prevention.”
- But it’s not clear.

Requires: Health Care Workers Who Provide Direct Care

Health Workers who are not employees of the facility but provide direct care.

Examples:

- Hospice Workers
- EMS
- Dialysis technicians
- Laboratory technicians
- Radiology technicians
- Social workers
- Clergy
- Etc.

As long as they do not have signs or symptoms of COVID-19 after being screened.

*EMS does not need to be screened.

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Implementation Issues for Revised CMS Visitation Guidance

Eric Carlson, Directing Attorney

October 2, 2020

Exceptions

- County positivity rate.
- Facility's COVID-19 status.
- Resident's COVID-19 status.
- Visitor's symptoms.
- Lax infection control practices (presumably by visitor).
- Other relevant factor related to public health emergency.

Compassionate Care Visits

- Important to ensure continued access to compassionate care visits.
 - Compassionate care visits explicitly allowed even if resident has COVID-19.
 - Compassionate care visits also should be allowed even if “regular” visitation is not allowed.

Outdoor Visits

- Visits should be outdoors “whenever practicable.”
- The preference for outdoor visits should not apply to compassionate care visits or visits by ombudsman program.
 - Reasoning:
 - Outdoor/indoor discussion seems distinct from discussions of compassionate care, ombudsman programs, other health professionals, etc.
 - Would not be practicable to do outdoor visits for compassionate care or ombudsman visits.

Length of Visit, and Number of Visitors

- These limitations should not be applied to compassionate care, ombudsman program, other health professionals, etc.

Access to Advocacy Assistance

- Ombudsman visits can be limited “due to infection control concerns and/or transmission of COVID-19.”
- But no such limitations cited in discussion of access of Protection and Advocacy programs.

Access to Other Professionals

- E.g., hospice staff, dialysis techs, social workers, clergy, etc.
- Access required “as long as they are not subject to a work exclusion due to an exposure to COVID-19 or show signs or symptoms of COVID-19.”

Testing “Encouraged”

- “While not required, we encourage facilities in medium or high-positivity counties to test visitors, if feasible.”
- “Facilities may also encourage visitors to be tested on their own prior to coming to the facility (e.g., within 2-3 days) with proof of negative test results and date of test.”

Fundamental Implementation Issues

- Noncompliance by states?
- Noncompliance by facilities?



The National
CONSUMER VOICE
for Quality Long-Term Care
formerly NCCNHR

ADVOCACY STRATEGIES

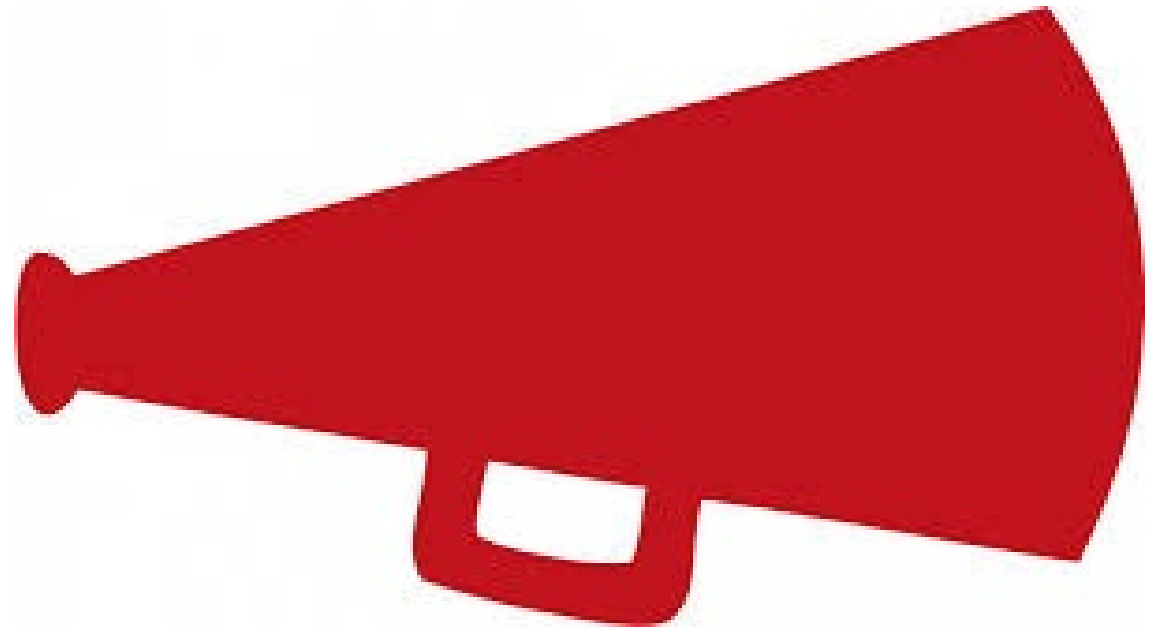
Robyn Grant

Director of Public Policy and Advocacy

www.theconsumervoice.org

Advocacy Strategies

- At the facility level
 - Individual family member
 - Family council
- At the state level



At the Facility Level

Three approaches if you're denied visitation

#1: "Only with reasonable cause" argument

- Permissible reasons for visitation restrictions
 - COVID-19 county positivity rate
 - Facility's COVID-19 status
 - A resident's COVID-19 status
 - Visitor symptoms
 - Lack of adherence to proper infection control practices
 - Other relevant factor related to the COVID-19 Public Health Emergency

“Trust, But Verify”



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- Covid-19 cases
- County positivity rate

COVID-19 Cases

§ 483.80 Infection control.

(g) *COVID-19 Reporting.* The facility must—

- (1) Electronically report information about COVID-19 in a standardized format specified by the Secretary. This report must include but is not limited to--
 - (i) Suspected and confirmed COVID-19 infections among residents and staff, including residents previously treated for COVID-19;
 - (ii) Total deaths and COVID-19 deaths among residents and staff;
 - (iii) Personal protective equipment and hand hygiene supplies in the facility;
 - (iv) Ventilator capacity and supplies in the facility;
 - (v) Resident beds and census;
 - (vi) Access to COVID-19 testing while the resident is in the facility;
 - (vii) Staffing shortages; and
 - (viii) Other information specified by the Secretary.
- (2) Provide the information specified in paragraph (g)(1) of this section at a frequency specified by the Secretary, but no less than weekly to the Centers for Disease Control and Prevention's National Healthcare Safety Network. This information will be posted publicly by CMS to support protecting the health and safety of residents, personnel, and the general public.
- (3) Inform residents, their representatives, and families of those residing in facilities by 5 p.m. the next calendar day following the occurrence of either a single confirmed infection of COVID-19, or three or more residents or staff with new-onset of respiratory symptoms occurring within 72 hours of each other. This information must—
 - (i) Not include personally identifiable information;
 - (ii) Include information on mitigating actions implemented to prevent or reduce the risk of transmission, including if normal operations of the facility will be altered; and
 - (iii) Include any cumulative updates for residents, their representatives, and families at least weekly or by 5 p.m. the next calendar day following the subsequent occurrence of either: each time a confirmed infection of COVID-19 is identified, or whenever three or more residents or staff with new onset of respiratory symptoms occur within 72 hours of each other.

County Positivity Rate

- Posted on CMS website:

- <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/>
 - Scroll down to: COVID-19 Testing
- As part of CMS' commitment to protecting nursing home residents, and to boost the surveillance of COVID-19, nursing homes are now required to conduct testing of residents and staff. More information about these requirements and guidelines can be found [here](#). These guidelines include testing staff on a certain frequency based on the COVID-19 positivity rate for the county the nursing home resides in. Rates of county positivity are posted [here](#). (Archive is [here](#).) Facilities should monitor these rates every other week and adjust staff testing accordingly.

County Positivity Rate

- <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg>

AutoSave Off Test_Positivity_Rates - Read-Only - Excel

File Home Insert Page Layout Formulas Data Review View Help

Clipboard Font Alignment Number Styles Cells Editing Ideas Sensitivity

UPDATES AVAILABLE Updates for Office are ready to be installed, but first we need to close some apps. Update now

A128 Fulton County, AR

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q
128	Fulton County, AR	5049	AR	6	12,477	Non-core	214	1,715	17.3%	Yellow							
129	Garland County, AR	5051	AR	6	99,386	Small metro	4,969	5,000	4.0%	Green							
130	Grant County, AR	5053	AR	6	18,265	Medium metro	757	4,145	4.6%	Green							
131	Greene County, AR	5055	AR	6	45,325	Micropolitan	2,488	5,489	4.9%	Green							
132	Hempstead County, AR	5057	AR	6	21,532	Non-core	361	1,677	5.3%	Yellow							
133	Hot Spring County, AR	5059	AR	6	33,771	Micropolitan	2,534	7,503	6.4%	Yellow							
134	Howard County, AR	5061	AR	6	13,202	Non-core	160	1,212	10.0%	Yellow							
135	Independence County, AR	5063	AR	6	37,825	Micropolitan	1,935	5,116	5.2%	Yellow							
136	Izard County, AR	5065	AR	6	13,629	Non-core	392	2,876	26.5%	Red							
137	Jackson County, AR	5067	AR	6	16,719	Non-core	441	2,638	5.0%	Yellow							
138	Jefferson County, AR	5069	AR	6	66,824	Small metro	4,857	7,268	15.4%	Red							
139	Johnson County, AR	5071	AR	6	26,578	Non-core	512	1,926	4.9%	Green							
140	Lafayette County, AR	5073	AR	6	6,624	Non-core	100	1,510	8.0%	Yellow							
141	Lawrence County, AR	5075	AR	6	16,406	Non-core	995	6,065	10.7%	Red							
142	Lee County, AR	5077	AR	6	8,857	Non-core	572	6,458	3.1%	Green							
143	Lincoln County, AR	5079	AR	6	13,024	Small metro	816	6,265	17.5%	Red							
144	Little River County, AR	5081	AR	6	12,259	Small metro	179	1,460	9.5%	Yellow							
145	Logan County, AR	5083	AR	6	21,466	Non-core	639	2,977	3.9%	Green							
146	Lonoke County, AR	5085	AR	6	73,309	Medium metro	3,024	4,125	5.6%	Yellow							
147	Madison County, AR	5087	AR	6	16,576	Medium metro	276	1,665	6.9%	Yellow							
148	Marion County, AR	5089	AR	6	16,694	Non-core	367	2,198	10.1%	Red							
149	Miller County, AR	5091	AR	6	43,257	Small metro	464	1,073	13.6%	Yellow							
150	Mississippi County, AR	5093	AR	6	40,651	Micropolitan	1,121	2,758	10.9%	Red							
151	Monroe County, AR	5095	AR	6	6,701	Non-core	222	3,313	16.7%	Red							
152	Montgomery County, AR	5097	AR	6	8,986	Non-core	337	3,750	7.7%	Yellow							
153	Nevada County, AR	5099	AR	6	8,252	Non-core	563	6,823	9.6%	Yellow							
154	Newton County, AR	5101	AR	6	7,753	Micropolitan	314	4,050	14.6%	Red							
155	Ouachita County, AR	5103	AR	6	23,382	Micropolitan	612	2,617	8.0%	Yellow							
156	Perry County, AR	5105	AR	6	10,455	Medium metro	587	5,615	3.1%	Green							
157	Phillips County, AR	5107	AR	6	17,782	Micropolitan	1,326	7,457	5.1%	Yellow							
158	Pike County, AR	5109	AR	6	10,718	Non-core	232	2,165	4.7%	Green							
159	Poinsett County, AR	5111	AR	6	23,528	Small metro	949	4,033	9.4%	Yellow							
160	Polk County, AR	5113	AR	6	18,864	Non-core	350	1,300	3.4%	Green							

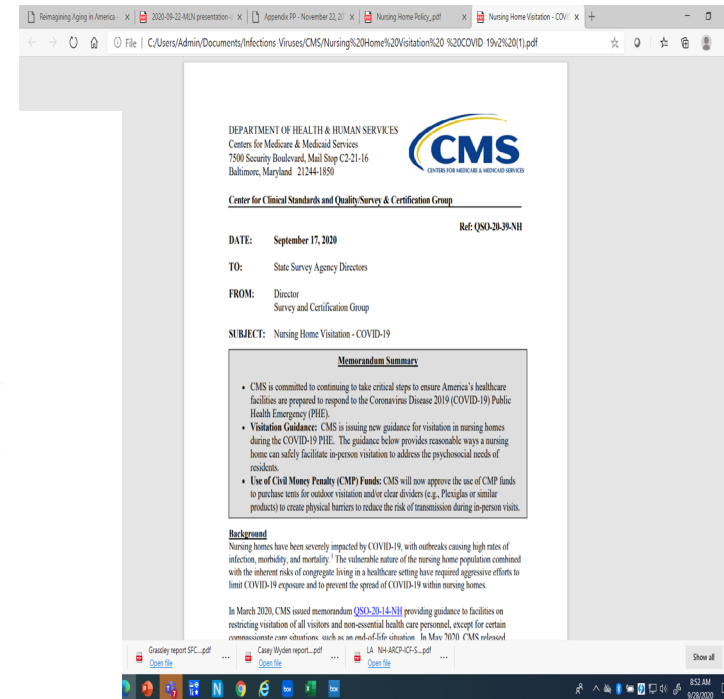
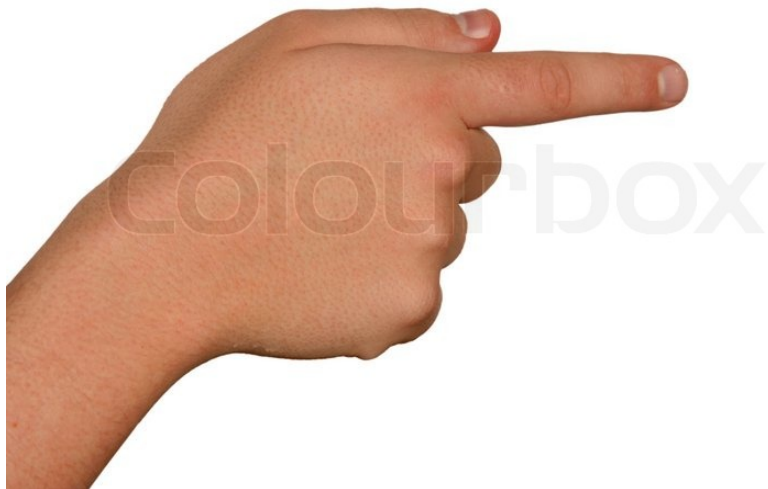
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At the Facility Level

#2 Required visitation argument

If a facility has had no COVID-19 cases in the last 14 days and its county positivity rate is low or medium, a nursing home **must** facilitate in-person visitation



At the Facility Level

#3 Eligibility Argument

- Compassionate care visits
- Disability-related in-person support visits

If you're **still** denied visitation, then what?



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Advocacy Steps

- Discuss the problem with nursing home staff and administration.
- Raise your concerns at the next care plan conference or request a special care plan conference.
- Use the facility grievance process.
- Raise your concern at the family council. If there isn't one – start one!
- Contact the Long-Term Care Ombudsman Program.
- File a complaint with the State Survey Agency (SSA).
- Share your story.
 - Share your story with Consumer Voice at <https://theconsumervoice.org/issues/other-issues-and-resources/covid19/residents-families/share-your-story>.
- Contact your elected officials.
- Reach out to the media.
- Sign up as a Consumer Voice member and with our Action Network.

Consumer Voice fact sheets

[Family Advocacy for Nursing Home Residents During COVID-19](#)

[Family Council Advocacy During COVID-19](#)

Office of Civil Rights

The screenshot shows a web browser window with the URL `hhs.gov/civil-rights/filing-a-complaint/index.html`. The page features a navigation bar with four main sections: 'Information for Individuals' (orange), 'Filing a Complaint' (pink), 'Information for Providers' (teal), and 'Newsroom' (brown). Below the navigation bar, a breadcrumb trail reads 'HHS > Civil Rights Home > Filing a Civil Rights Complaint'. On the left side, there is a sidebar titled 'Filing a Civil Rights Complaint' with a minus sign icon, containing three links: 'Complaint Process', 'File a Complaint Online', and 'What to Expect'. The main content area has a title 'Filing a Civil Rights Complaint' and a sub-header 'Text Resize A A A'. It includes a 'Print' button and a 'Share' button with social media icons for Facebook and Twitter. The text explains that if you believe you have been discriminated against because of your race, color, national origin, disability, age, sex, or religion in programs or activities that HHS directly operates or to which HHS provides federal financial assistance, you may file a complaint with OCR. You may file a complaint for yourself or for someone else. It also states that if you believe that you have been discriminated against because of your disability by a State or local government health care or social services agency, you may file a complaint with the OCR. You may file a complaint for yourself or for someone else. A note mentions that OCR does not generally investigate these types of complaints and provides a link to 'Find other Federal civil rights agencies that can help you.' A 'NOTE' section states that in accordance with the Office for Personnel Management's and CDC's guidelines on COVID 19, HHS personnel are teleworking. OCR is committed to handling your complaint as quickly as possible. However, for faster processing, we strongly encourage you to use the 'OCR online portal' to file complaints rather than filing via mail, as our personnel on site is limited. At the bottom, there are two boxes: 'Complaint Process' and 'File a Complaint Online'. The 'Complaint Process' box contains the text 'Learn about the process of submitting a civil rights complaint against a health care or social service provider.' The 'File a Complaint Online' box contains the text 'File your complaint electronically via the OCR Complaint Portal.'

Filing a Civil Rights Complaint | x +

hhs.gov/civil-rights/filing-a-complaint/index.html

Apps (1) Google+ Center on Budget a... Suggested Sites Favorites QCOR Reducing burden p... validation 42 U.S. Code § 1395... Nursing Homes - C... 42 CFR Subpart E -...

Information for Individuals Filing a Complaint Information for Providers Newsroom

HHS > Civil Rights Home > Filing a Civil Rights Complaint

Filing a Civil Rights Complaint -

Complaint Process

File a Complaint Online

What to Expect

Text Resize A A A Print Share Facebook Twitter +

Filing a Civil Rights Complaint

If you believe that you have been discriminated against because of your race, color, national origin, disability, age, sex, or religion in programs or activities that HHS directly operates or to which HHS provides federal financial assistance, you may file a complaint with OCR. You may file a complaint for yourself or for someone else.

If you believe that you have been discriminated against because of your disability by a State or local government health care or social services agency, you may file a complaint with the OCR. You may file a complaint for yourself or for someone else.

Do you have a complaint about housing, law enforcement, labor, education or employment discrimination? OCR does not generally investigate these types of complaints. [Find other Federal civil rights agencies that can help you.](#)

NOTE: In accordance with the Office for Personnel Management's and CDC's guidelines on COVID 19, HHS personnel are teleworking. OCR is committed to handling your complaint as quickly as possible. However, for faster processing, we strongly encourage you to use the [OCR online portal](#) to file complaints rather than filing via mail, as our personnel on site is limited.

Complaint Process

Learn about the process of submitting a civil rights complaint against a health care or social service provider.

File a Complaint Online

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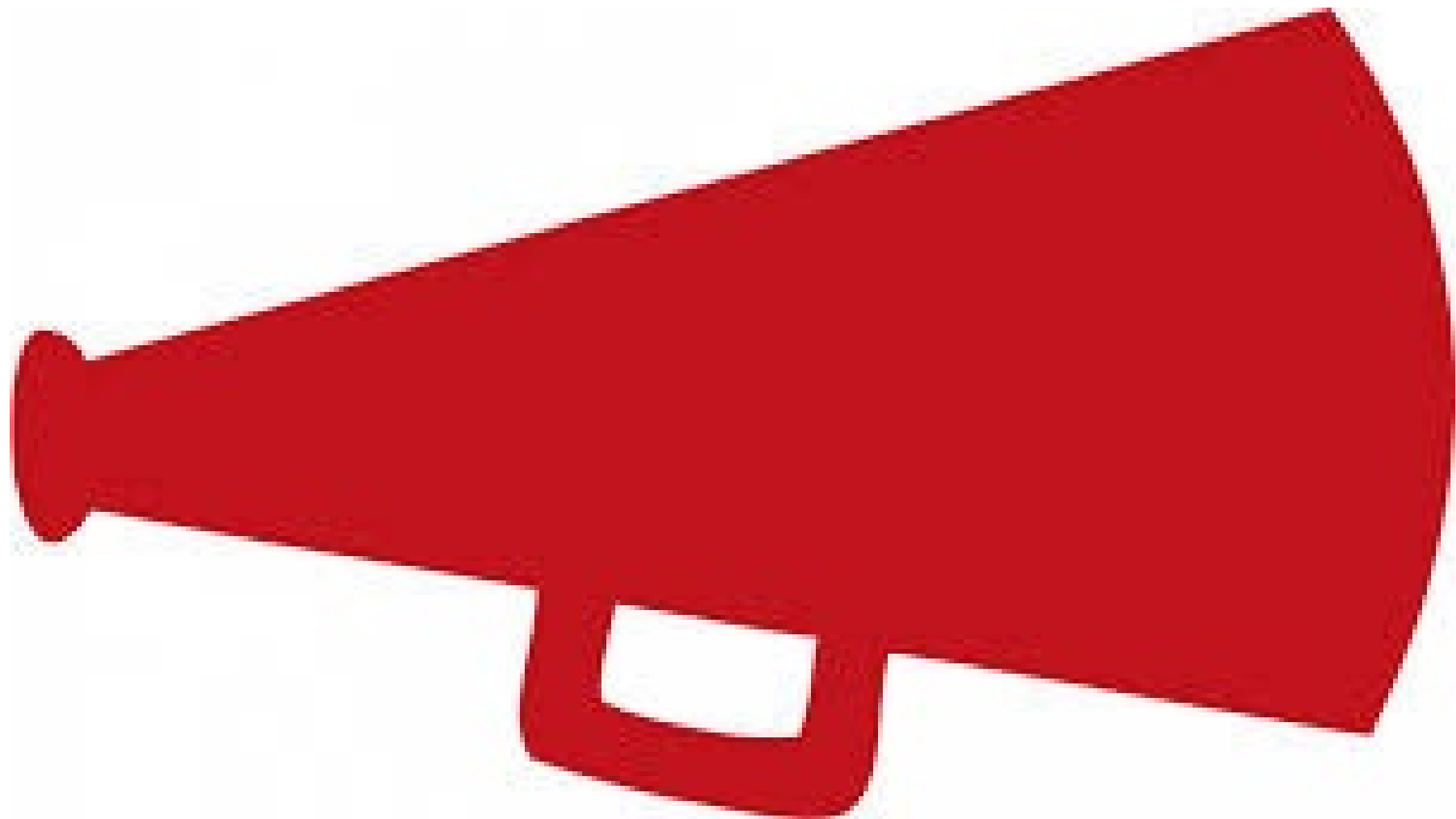
At the State Level

Goal: To ease visitation restrictions

- Advocacy depends on your state guidance on visitation
- Get ideas from others







Consumer Voice Resources

COVID-19 In Long-Term Care Facilities:

<https://theconsumervoice.org/issues/other-issues-and-resources/covid-19>

Visitation in Long-Term Care Facilities:

<https://theconsumervoice.org/issues/other-issues-and-resources/visitation>

Re-entry Survey

<https://theconsumervoice.org/issues/other-issues-and-resources/visitation/reentry-survey>

Consumer Voice Membership

<https://theconsumervoice.org/about/membership>

Join Our Network

act.theconsumervoice.org/sign-up

QA



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JUSTICE IN AGING

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Advancing Quality, Dignity & Justice

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