

Congress of the United States

Washington, D.C. 20515

July 20, 2016

Andrew M. Slavitt
Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Ave., S.W.
Washington, D.C. 20201

Dear Acting Administrator Slavitt:

The Centers for Medicare and Medicaid Services' comprehensive proposal to revise the nursing home regulations, "Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities CMS-3260-P," will affect the quality of care and quality of life of more than a million nursing home residents in the years to come. These residents are dependent on others for their care and safety and are among our country's most vulnerable persons. Their protection should be a priority. We appreciate the Administration's focus on person-centered care and culture changes that are central principles of the proposed regulations, as well as the rule's prioritization of resident preferences, increased control, and choice. **While the rule includes many positive provisions, we wish to highlight critical issues that must be resolved in the final rule to truly ensure the care and safety of this vulnerable population.**

Staffing Requirements, Section 483.35

Inadequate staffing is one of the greatest impediments to nursing home quality. Numerous studies have identified the strong relationship between nurse staffing levels and patient outcomes in nursing homes. For instance, research shows that higher levels of Registered Nurse (RN) staffing result in better outcomes, including decreased hospitalizations.ⁱ However, the current Requirements of Participation only mandate that facilities have an RN for eight continuous hours each day, seven days a week. These eight hours can be used for any type of administrative tasks, and do not have to be spent providing care. **We urge CMS to mandate 24-hour RN coverage and require that a facility employ at least one RN 24 hours a day, seven days a week to provide direct care, assessment, and resident monitoring.**

We also regret that the proposed rule lacks a minimum nurse staffing standard. As history shows, without explicit standards, nursing homes too often fail to meet the increasing needs of residents or comply with many of the proposed provisions in the regulations. **As part of the final regulations, CMS should consider a minimum standard of at least 4.1 hours of direct care nursing time per resident day, based on a congressionally authorized U.S. Department of Health and Human Services study showing harm to residents is unavoidable below this level.**ⁱⁱ

Binding Arbitration Clauses, Section 483.70 (n)

While we commend CMS for recognizing the significant problems with pre-dispute arbitration agreements, we are concerned that the proposed language around procedural protections will make matters worse (rather than better) by tacitly legitimizing and institutionalizing a process which is heavily biased against nursing facility residents. Arbitration companies are chosen by nursing facilities, creating a financial incentive for them to side with facilities since they, not residents or their families, are likely to be repeat customers. Discovery in arbitration proceedings is often very limited, and proceedings are secret with no meaningful ability for residents or their families to appeal, even when a clear miscarriage of justice has occurred.

It is unreasonable to expect residents and their representatives to make decisions during their initial admission to a facility about the resolution of hypothetical legal disputes involving potential catastrophic events that have not occurred yet. Pre-dispute arbitration allows nursing facilities to prey upon vulnerable residents whom the Nursing Home Reform Law and regulations are intended to protect. **Therefore, we strongly recommend that pre-dispute agreements for binding arbitration be explicitly prohibited.**

Antipsychotic Drugs, Section 483.45

Chemical restraint and inappropriate administration of dangerous antipsychotic drugs are epidemic in nursing homes. Facilities report they are currently administering antipsychotics to over 281,000 residents.ⁱⁱⁱ An estimated 88% of these residents have dementia and face a significantly increased risk of death from taking these drugs, according to FDA warnings.^{iv}

The right to be free from chemical restraints is a fundamental tenet of the Reform Law, and the final nursing home regulations should meaningfully address the pervasive misuse of antipsychotics and other types of psychotropic drugs. It is essential that the regulations be comprehensive and include provisions for: written informed consent; physician examination of residents for underlying medical causes of their symptoms before prescribing antipsychotic drugs; participation of a pharmacist to advise the Interdisciplinary Team (IDT) about drug interactions and the inappropriateness of antipsychotic drugs for individuals who do not have a diagnosis of psychosis; and stronger requirements for gradual dose reduction. We also oppose the section of the rule which would reorganize regulations regarding psychotropic medications and unnecessary drugs in a manner that would create the impression that misuse of antipsychotic drugs is primarily a “pharmacy” problem.

Transitions of Care, Section 483.15

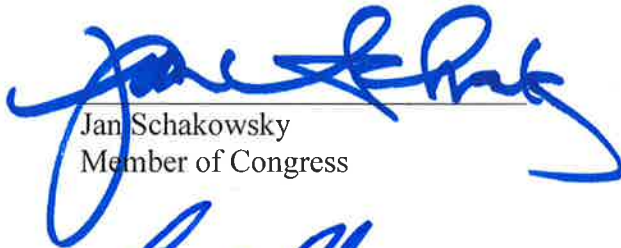
Recent media reports about nursing homes evicting residents whom they regard as requiring too much care or staff time highlight a problem that the Requirements of Participation must address through clearer discharge protections, including specific language to address the needs of residents with dementia and complex medical conditions. The proposed regulations fail to adequately address the problems faced by residents who are sent to the hospital by a nursing home that subsequently refuses to readmit them (a form of resident “dumping”).

Although we are glad to see that the rule would authorize administrative hearings for residents who have been denied readmission, the rule is not comprehensive or explicit enough to

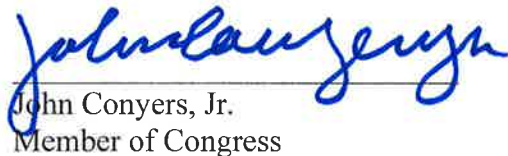
adequately protect consumers. **The regulations should clearly state that residents have: the right to appeal when they are not allowed to return to a facility after hospitalization or therapeutic leave; the right to return to the nursing home while the appeal is being considered; and the right to be readmitted if they win the appeal.** Without these protections, residents may be forced to remain in the hospital for months, move far from family and community, or even be discharged to a homeless shelter.

These are a few of the critical issues that we believe must be resolved as CMS promulgates changes that will have a significant and lasting effect on the safety and well-being of millions of current and future nursing home residents, as well as the integrity of the publicly funded programs that pay for a majority of nursing home care. Given the acknowledged need to improve both resident care and program integrity, we call on CMS to take concrete steps to ensure that resident safety and resident rights are safeguarded throughout the transition period. In particular, it is critical that the Regional Offices and State Agencies ensure compliance with the resident protections provided for in the Nursing Home Reform Law as any new standards are implemented.

Sincerely,



Jan Schakowsky
Member of Congress



John Conyers, Jr.
Member of Congress



Earl Blumenauer
Member of Congress



Jerrold Nadler
Member of Congress



Paul Tonko
Member of Congress



Jim McDermott
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Eleanor Holmes Norton
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Diana DeGette
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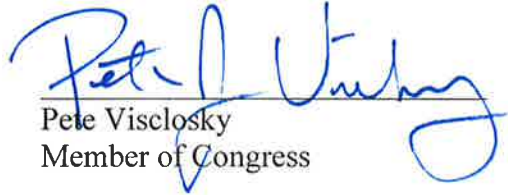
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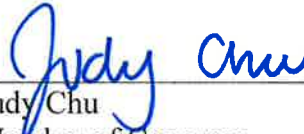
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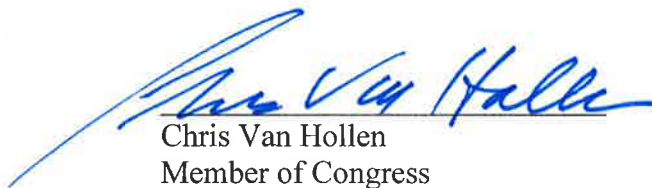
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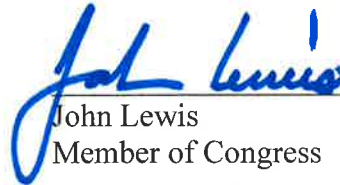
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Keith Ellison
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David Loebsack
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¹ Unnecessary hospitalizations: Of particular relevance to today's health care improvement initiatives is the positive effect of RNs in decreasing unnecessary hospitalizations of nursing home residents (Decker 2008), (O'Malley, Caudry & Brabowski 2011), (Dorr, Horn and Smout 2005), (Horn, Buerhaus, Bergstrom and Smout 2005). Most importantly, Dorr et al showed that the savings in hospitalizations paid for the increased RN time. Antipsychotics and other outcome measures: Higher RN levels significantly and positively affect quality resident outcomes including lower antipsychotic use, and fewer pressure ulcers, restraint use and cognitive decline (Meret Hanke, Neff, and Mor 2004); reduced incidences in four related conditions: catheterizations, urinary tract infections (UTIs), antibiotic use and pressure sore development (Cherry, 1991); decreased pressure ulcers and UTIs (Konetzka, Stearns, Park 2007); and less decrease in function and weight loss, and fewer urinary tract infections, catheterizations, and pressure ulcers (Horn et al).

² Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes. Report to Congress: Phase II Final. Volume I (March 2002).

³ <https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/Minimum-Data-Set-3-0-Public-Reports/Minimum-Data-Set-3-0-Frequency-Report.html>

⁴ OIG, Medicare Atypical Antipsychotic Drug Claims for Elderly Nursing Home Residents, OEI-07-08-00150 (May 2011).