

June 11, 2018

Seema Verma
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
7500 Security Boulevard, Baltimore, MD 21244

Via Electronic Mail

Dear Administrator Verma:

Thank you for the opportunity to meet with you on June 25, 2018 to discuss the Requirements of Participation (RoPs). In response to your request to submit 1-2 recommendations regarding the requirements, please find our recommendation below.

Requirements of Participation should be retained as issued in 2016

After carefully considering your request, we recommend that the revised Requirements of Participation for Long-Term Care Facilities - the product of more than four years of work, extensive discussions with and input from all stakeholders, and notice and comment through the rulemaking process - be retained as issued in October 2016. While there are gaps in these requirements, notably the failure to require a minimum staffing standard, they contain important protections and provisions that better promote the quality of care, quality of life, and rights of residents.

We do not agree with the premise as stated in the Unified Regulatory Agenda that the Requirements of Participation need to be revised to reduce provider burden. The Nursing Home Reform Law and regulations were developed as a result of failures in the nursing home industry to adequately care for residents, protect their rights, and provide for quality of life. Revisions incorporated into the current rule clarify provider responsibilities, while new requirements reflect areas in which additional guidance is necessary to provide quality care and quality of life to residents.

RoPs are already flexible

Nursing home providers claim that the federal standards are excessive in their degree of detail and micromanage how nursing homes operate. They call for flexibility. The rules, however, already incorporate significant flexibility. They establish expected outcomes, but, often, direct health care professionals in the facility to determine how to reach those outcomes. For example, the quality of care requirements create a mandate that a resident not decline unless the decline was medically unavoidable for that resident. To reach quality of care outcomes, the rules recognize that facilities' health care professionals must assess each resident, develop a care plan to meet the resident's individual needs, and provide the care and services they identify as necessary and appropriate. Quality of care deficiencies are cited and sustained

when facilities fail to provide the care that they themselves have identified as necessary, and bad outcomes for residents result.

Far too often opportunity for flexibility has resulted in inaction by providers. This has been the case, for instance, with antibiotic stewardship. The misuse of antibiotics is a serious problem in nursing facilities, resulting in many thousands of avoidable deaths of nursing home residents each year, according to the Centers for Disease Control and Prevention (CDC). For many years, the federal government, including the Agency for Healthcare Research and Quality and the CDC, has provided comprehensive materials and training for providers to do a better job protecting residents from the misuse of antibiotics. Nevertheless, facilities have not implemented better practices to address antibiotic drug use on their own. The result was a new, more explicit requirement in the October 2016 rules for antibiotic stewardship.

Many “burdens” are protections

Issues that providers call burdens are very often resident protections. One of the best examples of such a protection is the requirement that notice of transfers/discharges be sent to the long-term care ombudsman. Involuntary, or facility-initiated discharges, are the most frequent complaint received by long-term care ombudsmen, who handled more than 9000 complaints on this issue in 2016. Many residents need assistance in responding to or appealing discharge notices. When ombudsmen learn a facility is proposing to transfer or discharge a resident, they can reach out to the resident to help the resident understand that he or she can challenge the proposed transfer/discharge and receive assistance in doing so. This can prevent the resident from being inappropriately evicted. If the resident does not wish to appeal the proposed transfer/discharge, the ombudsman can assist in making sure the resident’s rights and choices are honored during the discharge process.

Most of the RoPs are very similar to what had been in effect for 25 years

Despite nursing home providers’ assertions that the rules are onerous, the vast majority of the regulations became effective the month after publication because they are identical, or very closely similar, to the regulations that had been in place for 25 years. These rules were agreed upon by all stakeholders, including representatives of the nursing home industry, and they have been serving residents and their families for decades. It is equally important to remember that nursing home providers voluntarily choose to comply with the RoPs in exchange for taxpayer dollars.

Changing the requirements is premature

It is too soon to modify or eliminate the RoPs. Phase 2 requirements have only been in effect since November 2017, and of those, eight key requirements are significantly impacted by CMS’s moratorium on enforcement. Further, Phase 3 regulations will not go into effect until November 2019. Even though implementation of Phase 3 regulations is more than a year away, providers are already claiming that some of these requirements, such as the one mandating an infection preventionist, are burdensome.

Stronger regulations are critical

Residents need the protections in the current rules more than ever before. Since 1991 when

regulations were first promulgated to implement the 1987 Nursing Home Reform Law, residents have become more frail and dependent, and the majority have dementia. Increased physical and cognitive impairments mean residents need more care and are more vulnerable to abuse and neglect. Staff need additional training and support to meet the needs of residents, and policies need to be not only in place, but implemented effectively. In addition, a large segment of the nursing home industry is in an upheaval as chains are spinning off their operations to other companies that often have a history of poor compliance and nurse staffing records, and unknown financial and managerial capacity. Studies and reports continue to show the harm that nursing home residents experience, while the natural disasters that led to tragic, avoidable nursing home deaths last year provide compelling evidence of the urgent need for these stronger standards. So, too, does the Inspector General's report that one-third of Medicare beneficiaries were harmed by poor care in skilled nursing facilities during a two-week benefit period, with 22 percent experiencing adverse events.

Under the Nursing Home Reform Law, it is "the duty and responsibility of the Secretary to assure that requirements which govern the provision of care in skilled nursing facilities . . . , are adequate to protect the health, safety, welfare, and rights of residents" For that reason, any revisions to the rules should only be made if they improve resident protections, not reduce them. As the agency whose mission it is to serve Medicaid and Medicare beneficiaries, CMS must ensure the regulations serve residents' interests, not those of providers.

We look forward to our meeting on the 25th.

Sincerely,

California Advocates for Nursing Home Reform

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