

To: Evan Shulman, CMS Division of Nursing Homes

From: Justice in Aging, National Consumer Voice for Quality Long-Term Care, Long Term Care Community Coalition, Center for Medicare Advocacy, California Advocates for Nursing Home Reform

Re: Initial Recommendations to Address Resident Isolation and Decline by Allowing Residents to Have Increased In-Person Contact with Family Members and Friends

Date: August 20, 2020

We recommend that CMS's current policy be changed in three principal ways: 1) *requiring* facilities to allow and facilitate appropriate access, rather than describing such access as a best practice; 2) authorizing visits by essential support persons, and 3) setting stronger standards regarding end-of-life visits.

We emphasize that access should be understood as a health and safety issue. We understand the risk of COVID-19, but we also see the enforced isolation of residents leading to decline and death, across the country.

We also emphasize that these recommendations should be understood as transitional, as CMS and nursing facilities continue to adapt to the ongoing COVID-19 pandemic. As months go on, it becomes more and more important that residents be able to be together in person with their family members and friends. We expect in the future to make more expansive recommendations, as warranted by the passage of time and changes in circumstances.

Finally, we point out that these recommendations are being assembled in some haste, due to your request for an immediate response. We expect next week to submit expanded and modified recommendations.

1. CMS Should Require Facilities to Allow and Facilitate Appropriate Access, Rather than Describing Such Access as a Best Practice.

In March 2020, CMS waived the visitation rights within the resident rights regulation, and replaced those rights with guidance. Since then CMS has released additional guidance on this topic, including a guidance document entitled Frequently Asked Questions (FAQs) on Nursing Home Visitation.

Because visitation is currently defined by guidance, and because of the language of that guidance, many nursing facilities are falling far short in allowing access. From our conversations with residents and advocates from across the country, we know that facilities — and sometimes entire chains of facilities — are following hard-and-fast procedures that deny access. Residents are suffering as a direct result of such overly restrictive policies.

We recommend that CMS re-work its waivers and guidance to establish that residents have a continued *right* to access and visitation under section 483.10, as modified by a partial waiver of the regulatory requirements. Absent a requirement, many facilities will not provide the access that is necessary for residents' health and well-being.

2. CMS Should Require Facilities to Allow Visits By Essential Support Persons.

The current restrictions on visitation should *not* be seen as the obvious “pro-safety” option. The current restrictions harm residents’ health in multiple ways. Due to isolation, many residents are deprived of the in-person assistance that they previously received from family members or friends. In other cases, the isolation causes residents to sink into emotional and physical decline. Staying alive and healthy is more than receiving a certain amount of calories daily – because of an interminable isolation, too many residents are suffering from measurable injuries, which in some cases are leading to death. Many residents now are slipping past a point of no return.

We propose that residents who meet certain criteria (see below) be allowed to designate an essential support person (ESP). The ESP would be able to visit the resident inside the facility, in the resident’s room, or in a particular room prepared and designated for visitation, as appropriate. The ESP would not interact with other residents. The ESP would be subject to the same screening and testing as staff, based on the availability and response time of testing in that locality.

The ESP would wear the same PPE as staff who are caring for residents who do not have COVID, and would be required to follow appropriate procedures.

Criteria for ESP Visits

ESP visits would be authorized for residents experiencing declines or significant change in their physical or mental conditions. This includes, but is not limited to, any of the following situations:

- Family members or friends previously had been providing in-person support; or
- Due to staffing shortages or other reasons, the resident is not receiving adequate attention in the facility, and a family member or friend is willing to provide the necessary physical or emotional support; or
- In-person support is necessary to allow the resident to communicate with facility staff.

To determine when an ESP is appropriate, we recommend use of a preexisting standard: the discussion of “significant change” in the nursing facility regulations and the accompanying surveyor guidelines. *See, e.g.,* 42 C.F.R. § 483.20(b)(2)(ii). If the resident meets the criteria, the decision to designate an essential support person should lie with the resident and family.

3. CMS Should Set Stronger Standards Regarding End-Of-Life Visits.

Under CMS guidance, visitation is allowed under “compassionate care” situations, which are defined to include but not be limited to end-of-life situations. By all accounts, this is being implemented stingily, across the country. Many facilities are defining “end of life” as being limited to the resident’s very last hours, or being reserved only for those residents enrolled in hospice services. Other facilities will “grant” only one end-of-life visit, or limit the visit to a relatively small sliver of time.

We recommend that CMS specify the following:

- End-of-life visitation cannot be limited to persons enrolled in hospice, or to a resident’s last days or hours.
- When a resident is at his/her end of life or is receiving hospice services, the facility must permit family members and/or friends to be at the resident’s bedside.

- Families must be notified when a substantial change in condition occurs that indicates that a resident's end of life is approaching.
- Facility policies must not restrict the number or length of visits or visitors; however, the facility may limit the number of visitors present at any one time.

Consistent with our first recommendation, these standards should be enforceable. The relevant provisions of section 483.10 would be waived only partially, which would allow for enforcement of the relevant non-waived aspects.