



## **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 XII

August 28, 2020

# Agenda

- I. Introduction and housekeeping
- II. Revised Guidance on Survey and Enforcement
- III. CMS Interim Rules on COVID Testing
- IV. Update on Visitation
- V. Q&A/Discussion

# Presenters

- Toby Edelman, Center for Medicare Advocacy
- Eric Carlson, Justice in Aging
- Robyn Grant, Consumer Voice



Center for  
**Medicare Advocacy**

MedicareAdvocacy.org

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# NEW SURVEY AND ENFORCEMENT GUIDANCE FROM CMS



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**Medicare Advocacy**

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- CMS issued new guidance on survey and enforcement on Aug. 17, 2020.

# GUIDANCE DOCUMENT

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- CMS, “Enforcement Cases Held during the Prioritization Period and Revised Survey Prioritization,” QSO-20-35-ALL (Aug. 17, 2020), <https://www.cms.gov/files/document/qso-20-35-all.pdf>

# CMS PRESS RELEASE

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- “CMS Announced Resumption of Routine Inspections of All Provider and Suppliers, Issues Updated Enforcement Guidance to States, and Posts Toolkit to Assist Nursing Homes” (Aug. 17, 2020), <https://www.cms.gov/newsroom/press-releases/cms-announces-resumption-routine-inspections-all-provider-and-suppliers-issues-updated-enforcement>

# BACKGROUND

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- March 2020:
  - CMS suspended standard and complaint surveys.
  - States conduct only focused infection control surveys and complaints/facility reported incidents that states triage as immediate jeopardy.
  - QSO-20-12-All; QSO-20-20-All



# BACKGROUND

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- June 2020, QSO-20-31-All
  - CMS revised guidance to transition states to more routine survey and oversight activities, once a state is in Phase 3 of Reopening guidance, or earlier, at state discretion
    - Complaints triaged as non-immediate jeopardy (IJ)-high
    - Revisit where IJ removed, but still noncompliance
    - Special Focus Facilities and candidate recertification

# NEW SURVEY GUIDANCE (AUGUST 17, 2020)

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- As soon as states have staff and personal protective equipment (PPE):
  - Onsite revisits as specified in State Operations Manual, Ch. 7, sec. 7317.1, for surveys with ends dates on or after June 1, 2020
  - Complaints triaged as non-IJ medium
  - Annual recertification surveys

# WHAT DOES THIS NEW GUIDANCE MEAN IN PRACTICE?

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- States should resume revisits, according to pre-COVID requirements, for surveys that ended on or after June 1 and should resume normal recertification surveys IF the state survey agency has enough survey staff and PPE for staff.
- So it's an important and positive change, but with a caveat.

# ENFORCEMENT

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- March 2020: CMS suspended all enforcement “with the exception of unremoved IJs” (QSO-20-20-All)
  - This suspension meant that CMS suspended revisits that would end ongoing enforcement cycles.
  - CMS also told facilities they did not need to submit plans of correction.

# ENFORCEMENT CYCLES

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- Usually, an enforcement cycle begins on completion of a survey, ends when facility returns to substantial compliance.
  - Subsequent surveys and deficiencies are in same cycle.
- However, surveys with an exit date after March 23 are in a new cycle.

# ENFORCEMENT CYCLES

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- Facilities have 3 months following survey to come into substantial compliance
  - If they do not, mandatory denial of payment for new admissions (DPNA) (42 C.F.R. §488.412(c)).
- Facilities have 6 months following survey to come into substantial compliance
  - If they do not, termination is required (42 C.F.R. §488.412(a), (d)).

# PLANS OF CORRECTION

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- Facilities cited with deficiencies must submit plans of correction, 42 C.F.R. §488.402(d).
- As noted, March 2020: CMS said facilities did not need to submit plans of correction.

# CMS'S GOALS WITH THE NEW ENFORCEMENT GUIDANCE

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- Resolve enforcement cases that were suspended
- Provide guidance on closing these cases out
- Provide guidance going forward



# 4 COMPONENTS OF ENFORCEMENT

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- Expanded desk review for plans of correction
- Processing enforcement cases
  - Cases started before March 23
  - Cases started between March 23 and May 31 (“prioritization period”)
  - Cases started on or after June 1

# PLANS OF CORRECTION

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- For all deficiencies cited in surveys that were conducted before June 1, facilities have 10 calendar days to submit a plan of correction.
  - Facilities may request an extension if they have a current COVID outbreak.

# EXPANDED DESK REVIEW

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- Desk review, with facilities’ “supporting evidence” accepted by the state, can clear ALL deficiencies cited before June 1, including actual harm deficiencies and “remaining noncompliance following removal of IJ without an onsite revisit.”
  - Supporting evidence may include documentation about training.

# STATE OPERATIONS MANUAL

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- State Operations Manual, Chapter 7, sec. 7317.2, requires revisits for actual harm, immediate jeopardy, and substandard quality of care, even when deficiencies are reduced to lower level of noncompliance.  
<https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107c07pdf.pdf>

# SUBSTANDARD QUALITY OF CARE

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- The federal regulations define **substandard quality of care**, at 42 C.F.R. §488.301, as one or more deficiencies cited at certain levels of scope and severity – specifically, certain **residents’ rights** (42 C.F.R. §§483.10(a)(1) through (a)(2), (b)(1) through (b)(2), (e) (except for (e)(2), (e)(7), and (e)(8)), and (f)(1) through (f)(3), (f)(5) through (f)(8), and (f)(i)); **freedom from abuse, neglect, and exploitation**; §483.12; **quality of life**; §483.24, **quality of care**, §483.25; **behavioral health services**, §483.40(b) and (d); **pharmacy services** §483.45(d), (e), and (f); **administration**, §483.70(p); and **infection control**, §483.80(d) – that are cited as immediate jeopardy (level J, K, or L) or pattern of or widespread actual harm (level H) or widespread potential for more than minimal harm (level F).

# WHAT DOES EXPANDED DESK REVIEW MEAN?

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- If the state accepts the “supporting evidence” that the facility submits with its Plan of Correction, the deficiency can be cleared by desk review (that is, without an on-site re-visit survey).
  - But often, training is not sufficient evidence of compliance; state wants to ensure staff actually learned and consistently apply information from training.

# ENFORCEMENT CYCLES STARTED BEFORE MARCH 23

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- If initial notice of remedies had been sent, but not finalized (because there had not been a revisit),
  - the CMPs and denials of payment for new admissions (DPNAs) will run through March 23 or the date of substantial compliance (as set out in plan of correction and verified at desk audit) – whichever is earlier.

# ENFORCEMENT CYCLES STARTED BEFORE MARCH 23

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- If the initial notice of remedies had not been sent,
  - Impose remedies according to State Operations Manual.
  - CMPs will accrue based on start date through March 23 or the date of alleged compliance per accepted Plan of Correction, whichever is earlier.



# ENFORCEMENT CYCLES STARTED MARCH 23-MAY 31 (“PRIORITIZATION PERIOD”)

- Desk review may close survey cycle.
- CMPs only for actual harm or IJ deficiencies.
  - Per instance CMPs for actual harm
    - Although CMS’s analytic tool sometimes requires per day CMPs.
  - For lower levels of deficiencies, no CMPs.

# REDUCTION OF CMP

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- Automatic 35% reduction if facility had been unable to file notice of appeal within 60 day timeframe during the prioritization period (March 23-May 31).
  - Rules reduce CMP only if facility informs CMS in writing that it is not appealing. 42 C.F.R. §488.436(b)(1).

# ENFORCEMENT CYCLES STARTED ON OR AFTER JUNE 1

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- Regular enforcement process (as set out in State Operations Manual)
  - But if per day CMPs are imposed, the CMP starts on the day the survey began.
  - 42 C.F.R. §488.440(a)(1) says CMP “may start accruing as early as the date that the facility was first out of compliance.”

# CONCERNS ABOUT NEW ENFORCEMENT GUIDANCE

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- Expanded desk review and limitations on and reductions of CMPs mean facilities may not be held accountable for poor care during the pandemic.

# GOOD NEWS ABOUT TARGETED INFECTION CONTROL SURVEYS

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- Revised protocol for targeted infection control surveys (QSO-20-38-NH (Aug. 26, 2020), <https://www.cms.gov/files/document/qso-20-38-nh.pdf>) requires surveyors to look at sample of residents and sample of staff.

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

## Nursing Facility Testing Requirements, and Enforcement of Reporting Requirements

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Eric Carlson, Directing Attorney

August 28, 2020



Testing

## Testing Requirement Added to Regulation

- Revision of infection control regulation (42 CFR § 483.80).
- “Interim Final Rule”
  - Regulation effective immediately, but with 60-day comment period.



# Who Must Be Tested?

- Must test
  - Residents.
  - Staff (including registry workers and volunteers).

# What About Others?

- Testing for surveyors is state's responsibility, according to Federal Register discussion.
- Re: visitors, guidance says: "While not required, facilities may test residents' visitors to help facilitate visitation while also preventing the spread of COVID-19."

# Must Follow CMS Guidance

- Guidance must include:
  - Testing frequency.
  - Identification of
    - COVID-positive persons.
    - Persons who have COVID symptoms.
    - Persons who had, or may have had, exposure to COVID-19.
  - Criteria for testing asymptomatic persons – for example, rate of COVID-19 in the community.
  - Response time for test results.
  - Other relevant factors.

# Documentation

- For staff, must document test and results.
- For residents, must document
  - That test was offered.
  - Whether the test was performed.
  - Test results.
- CMS guidance includes significant detail re: documenting dates, tests, symptoms, community prevalence, etc.

# Must Act on Test Results

- Take actions to prevent transmission when a person tests positive or has symptoms of COVID-19.
  - No access to facility by staff members who test positive or present with symptoms.
  - Transmission-based precautions, e.g., “cohorting,” for residents who test positive or have symptoms.
    - Precautions include staff dedicated to caring for COVID-positive residents.

# Lists Types of Tests

- Two types of tests to detect active virus:
  - Molecular tests, that detect virus's genetic material.
  - Antigen tests, that detect proteins on virus's surface.
- Antibody tests look for antibodies produced by immune system, and do NOT test for an active infection.

# Current Testing Requirements

- Testing may be done
  - Point-of-care (at facility) or
  - Off-site laboratory (if test results can be available within 48 hours).
- Testing does not limit obligation to screen staff, residents, and others who enter the facility.

# When to Test

- When resident or staff member has symptoms.
- Whenever a new case arises within the facility.
  - “New case” does not include admission of a COVID-positive resident.
  - For “new case,” test every staff member and resident every 3 to 7 days, until there is no positive test for at least 14 days.
  - Repeat testing not needed for person who tests positive – should follow a “symptom-based” strategy instead.



# When to Test in “Routine” Situations

- Depends on prevalence of COVID-19 in community.
  - At least monthly if county’s positivity rate is less than 5%.
  - At least weekly if county’s positivity rate is 5% to 10%.
  - At least twice weekly if county’s positivity rate is greater than 10%.
- Facility should review county’s positivity rate at least every other week.
- Facility should wait at least two weeks to implement lessened testing rate, when county’s positivity rate has declined.
- Positivity rate available at:  
<https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg>

# When Testing Is Refused

- Facility may wish to offer different mode of collecting sample.
- If resident refuses test:
  - Resident with symptoms must be under transmission-based precautions.
  - If there has been at least one new case in facility, and resident does not have symptoms, facility must be “extremely vigilant” to make sure that resident maintains distance, wears face covering, etc.

# If Staff Refuses Testing

- Staff member with symptoms is barred from facility until return-to-work criteria are met.
- If there is a new case in the facility, a staff member who refuses testing is barred until the “new case” (outbreak) procedures have concluded.
- In “routine” situations, facility “should follow its occupational health and local jurisdiction policies” re: asymptomatic staff members who refuse testing.

# Once Someone Tests Positive

- No need for retest within three months of first symptoms.



Enforcing Reporting Requirements

# Preexisting Reporting Requirement

- Since early May, facilities have been required to make weekly reports on COVID-19 status to the Centers for Disease Control and Prevention.
- Information is available through Nursing Home Compare website.

# Required Information to Report

- Suspect and confirmed infections, residents and staff.
- Total deaths and COVID-19 deaths, residents and staff.
- Access to testing, PPE, and ventilators.
- Staffing shortages.
- Facility capacity and census.

# Randomly Chosen Sample; Montrose Healthcare Center

- Note Evident Errors:
  - Residents Total Confirmed COVID-19 - 2
  - Residents Total Suspected COVID-19 - 12
  - Residents Total COVID-19 Deaths - 30
  - Total Resident Confirmed COVID-19 Cases Per 1,000 Residents - 52.6
  - Total Resident COVID-19 Deaths Per 1,000 Residents - 789.5
  - Total Residents COVID-19 Deaths as a Percentage of Confirmed COVID-19 Cases - 1,500.0
    - Week Ending 08/09/2020



# Civil Money Penalties for Failure to Report

- Previous guidance had announced Civil Money Penalties (CMPs) for failure to report. QSO-20-29-NH (May 6, 2020).
- Noncompliance cited at scope/severity of "F".
  - Widespread scope, and
  - Severity of: no actual harm with potential for more than minimal harm that is not immediate jeopardy.
- New regulation formalizes CMP procedures.

# Amount of CMPs

- \$1,000 for first occurrence.
- Penalty increased by \$500 for each subsequent occurrence.
  - \$1,500, \$2,000, \$2,500, etc.
  - Subsequent occurrences may be separated by weeks of compliance without affecting the CMPs in any way.
  - Maximum of \$6,500 per occurrence.
- Compliance assessed each week.
- No plan of correction required.

# Effective Dates for CMPs

- Effective immediately.
- Expires one year after the end of the declared public health emergency.
  - All other provisions, including the testing requirement, expire with the public health emergency.



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# VISITATION

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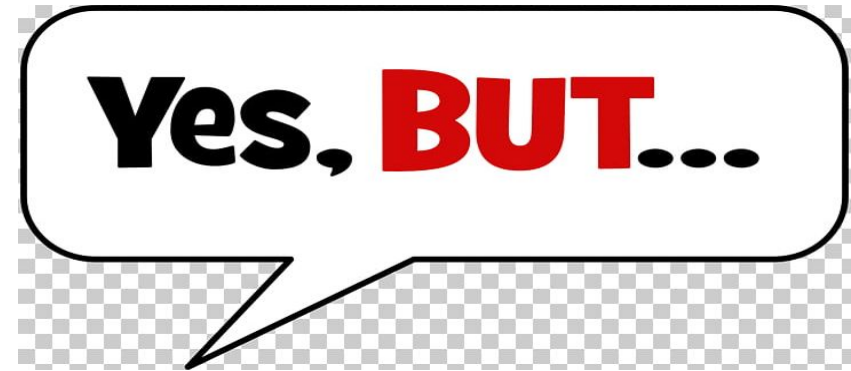
Robyn Grant  
Director of Public Policy & Advocacy

# At the State Level



# State Level

- Virtual visitation, window visits continue (mostly)
- Outdoor visits – 2/3 of states



**ALL UP TO  
THE FACILITY**

# Indiana

Outdoor visitation is now required in facilities

- In counties beyond Indiana's Stage 2 criteria
- Without a new facility-onset COVID-19 case within the last 14 days
  - If certain facility and community conditions exist
    - and as weather permits.
  - However: Any facilities that meet the above criteria would still retain the right to deny outdoor visitation if they believe, 1) circumstances pose a risk of transmitting COVID-19 to the facility, or 2) either the resident or visitors might be at risk of harm

# California

Facilities unable to meet the conditions specified above\* may not resume in room facility visitation, but they **shall provide outdoor** and other **visitation**

\*conditions for indoor visits



## State Level: Indoor Visits

States have taken different approaches:

- Adopted CMS recommendations
- Developed their own phases and criteria
- Established conditions to be met



**ALL UP TO  
THE  
FACILITY**

# State Level: Indoor Visits

## Tennessee

Facilities that choose to re-open to visitors must first meet the following prerequisites:

- Testing of all staff and residents at least once, and compliance with applicable regulations regarding weekly staff re-testing
- No new COVID-19 cases in residents or staff members in the previous 28 days
- Compliant with Board for Licensing Health Care Facilities regulations and infection control guidelines
- Overall stability of the disease burden present in the community where the facility is located

# State Level: Indoor Visits

States have taken different approaches:

- Allowed indoor visits
  - Rhode Island



**Essential** Family Caregiver

**Essential** Caregiver

**Essential** Support Visitor

- Indiana
- Minnesota
- New Hampshire
- New Jersey
- South Dakota

State	Phase	Resident Criteria to be Eligible	Up to Facility	Requirements of Caregiver/Support Person	Number of visits allowed each week	Length of visits limited
IN	---	<ul style="list-style-type: none"> <li>-High-risk residents who are missing care previously provided by a loved one or outside caregiver</li> <li>-COVID-19 negative</li> </ul>	Yes	<ul style="list-style-type: none"> <li>-A family member or other outside caregiver who provided regular (at least twice weekly) care and support to the resident before the pandemic</li> <li>-Negative COVID-19 test</li> </ul>	Daily	Yes – no more than 2 hours/day
MN	---	<ul style="list-style-type: none"> <li>-No specific criteria</li> <li>-COVID-19 negative</li> </ul>	Yes	<ul style="list-style-type: none"> <li>-To be determined by facility policies</li> <li>-Could be someone previously actively engaged with the resident or committed to providing companionship and/or assistance with activities of daily living</li> </ul>	Daily	Yes - up to 3 hours/day or until caregiving tasks completed

State	Phase	Resident Criteria to be Eligible	Up to Facility	Requirements of Caregiver/Support Person	Number of visits allowed each week	Length of visits limited
NH	2 (CMS)	-All residents are eligible -COVID-19 negative	Yes	Not specified	Not specified	Not specified
NJ	---	-All residents are eligible -COVID-19 negative	Yes	Administrator, Director of Nursing, Social Services Director, or other designated facility staff to help determine who meets the criteria of an Essential Caregiver	Number and length of visits depends on what phase facility is in. -Phase 0 - up to 2 hours per visit, 1 time per week. -Phases 1 or 2: 2 visits per week up to a total of 4 hours per week. -Phase 3: caregiving visitation under regular facility procedures and Directive	

State	Phase	Resident Criteria to be Eligible	Up to Facility	Requirements of Caregiver/Support Person	Number of visits allowed each week	Length of visits limited
SD	---	-Not specified -COVID-19 negative	Yes	Family or friend who previously was actively involved with the resident and/or was committed to providing companionship or assisting in the activities of daily living of the resident	Essential Caregiver may create a schedule by setting hours per day or until identified tasks are complete	



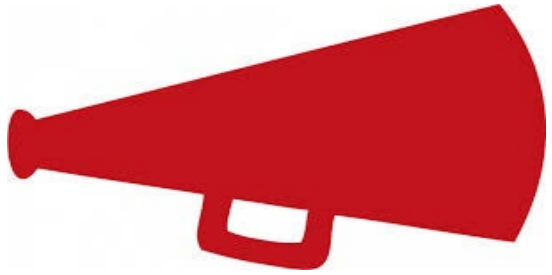


# National Advocacy

Advocacy groups submitted first set of recommendations for initial step toward restoration of full visitation

## **CMS should**

1. Require facilities to allow visits by essential support persons.
2. Set stronger standards regarding end-of-life visits.
3. Require facilities to allow and facilitate appropriate access.



## ADVOCATE

Contact  
policymakers  
at every level



# Resources

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

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Learn About Recent Guidance

**COVID-19:**  
**How to Protect Yourself and Your Loved Ones**

As the novel coronavirus 2019 (COVID-19) outbreak continues to evolve, it is important for long-term care consumers, family members, Ombudsman programs and other advocates to be informed and take precautions in order to prevent the spread.

[Learn More](#)





# Share Your Story

Tell us about your, or your loved one's,  
experiences with your long-term care facility  
during COVID-19.

[www.theconsumervoice.org](http://www.theconsumervoice.org)

QA

The image features a stylized logo consisting of the letters 'Q' and 'A' in a bold, sans-serif font. The 'Q' is blue and the 'A' is green. A blue ampersand (&) is positioned between the two letters, overlapping both. The entire logo is centered on a white background.



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## JUSTICE IN AGING

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## LONG TERM CARE COMMUNITY COALITION

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*Advancing Quality, Dignity & Justice*

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