

August 2, 2017

Seema Verma
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Ave. S.W.
Washington, DC 20201

RE: Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements CMS–3342–P (FR document number 2017-1183; 82 FR 26,649)

Submitted electronically to <http://www.regulations.gov>

Dear Administrator Verma:

The National Association of Social Workers (NASW) appreciates the opportunity to comment on the proposed rule “Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements,” 82 Fed. Reg. 26,649 (June 8, 2017).

As the largest membership organization of professional social workers in the United States, with 130,000 members, NASW works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies. Social workers interact with Medicare and Medicaid beneficiaries across sectors and practice settings and, accordingly, play an integral role in helping Medicare and Medicaid beneficiaries to access services in long-term care (LTC) facilities. For social workers who serve beneficiaries within LTC facilities, advocacy for residents’ rights, health, safety, and well-being is of primary importance.¹

Thus, advocacy for Medicare and Medicaid beneficiaries who reside in LTC facilities is a high priority for NASW. In 2015, NASW urged CMS to adopt regulatory language that would prohibit LTC facilities from entering into predispute binding arbitration agreements with residents.^{2,3} NASW enthusiastically supports all of the provisions addressing binding arbitration within the October 2016 final rule (CMS–3260–P), including the following requirements:

¹ NASW. (2003). *NASW standards for social work services in long-term care facilities*. Retrieved from http://www.socialworkers.org/practice/standards/Long_Term_Care_Facilities.asp

² McClain, A. (2015, October 14). *NASW responds to proposed rule reforming requirements for long-term care facilities (CMS-3260-P)* [Letter]. Retrieved from http://www.socialworkers.org/advocacy/letters/2015/CMS_LTC_facilities_proposed_rule.pdf

³ ACCSES, AFSCME, Aging Life Care Association, Alliance for Retired Americans, Altarum Institute, American Association for Long Term Care Nursing, . . . United Spinal Association. (2015, Oct. 14). *Thirty-nine national advocacy organizations urge CMS to ban the use of pre-dispute binding arbitration agreements with residents of long-term care facilities* [Letter]. Retrieved from http://theconsumervoice.org/uploads/files/issues/CMS_Long_Term_Care_Comments_Oct14_.pdf

- the ban on predispute arbitration agreements and on requiring residents (or their representatives)⁴ to sign such agreements as a condition of admission, as specified in § 483.70(n)(1)
- the requirements associated with use of postdispute arbitration agreements, as delineated in § 483.70(n)(2), including the resident’s right to enter into an agreement voluntarily (subsection (n)(2)(ii)(A)); to participate in selecting an arbitrator (subsection (n)(2)(ii)(B)); to participate in selecting a venue for the arbitration (subsection (n)(2)(ii)(C)); and to remain in the facility without having signed a binding arbitration agreement (subsection (n)(2)(iii)).⁵

In contrast, NASW strongly opposes the administration’s June 2017 proposal (CMS–3342–P) to allow Medicare- and Medicaid-funded LTC facilities (a) to enter into predispute binding arbitration agreements with residents and (b) to require residents to sign such agreements as a condition of admission. The association is also concerned that CMS’s proposed regulation regarding use of arbitration agreements eliminates language ensuring the right of residents to participate in selection of both the arbitrator and the arbitration venue. Finally, NASW opposes the administration’s proposal to eliminate language protecting the right of existing residents who do *not* sign arbitration agreements to remain in the facility. Our detailed comments on the proposed rule follow.

The use of predispute arbitration agreements is incompatible with informed decision making by residents.

As articulated in the NASW *Code of Ethics*, promotion of client self-determination is a cornerstone of social work practice:

Social workers seek to enhance clients’ capacity and opportunity to change and to address their own needs. . . . Social workers respect and promote the right of clients to self-determination and assist clients in their efforts to identify and clarify their goals.⁶

Moreover, the *Code* prioritizes social workers’ responsibility to ensure that clients make informed decisions. Not only does the *Code* specify that “social workers should provide services to clients only in the context of a professional relationship based, when appropriate, on valid informed consent,” but it also specifies that “when social workers act on behalf of clients who lack the capacity to make informed decisions, social workers should take reasonable steps to safeguard the interests and rights of those clients.”⁷

LTC facilities are an essential component of the continuum of long-term services and supports, and many LTC facilities provide excellent care. Yet, numerous Medicare and Medicaid beneficiaries experience substandard care and other problems within LTC facilities; some even die as a result of actions taken—or not taken—by facilities. A recently updated Commonwealth Fund–supported report found the following problems (some prohibited by law or regulation) were common among nursing homes:

- discrimination against Medicaid-eligible residents and refusal to accept Medicaid
- disregard for resident preferences
- failure to take care planning seriously and to provide necessary services
- improper use of physical restraints and of behavior-modifying medication

⁴ For the sake of simplicity, NASW uses the term *residents* to refer to *residents (or, if appropriate, their representatives)* throughout this letter.

⁵ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 42 C.F.R. § 483.70(n) (2016).

⁶ NASW. (2015). *Code of ethics of the National Association of Social Workers*. Washington, DC: NASW Press. (The *Code* is available to the public at <http://www.socialworkers.org/pubs/code/code.asp>; in the online version, the first sentence of the quote appears under content addressing the value “dignity and worth of the person,” and the second sentence appears in section 1.02, “Self-Determination.”)

⁷ These quotes appear within the *Code* in section 1.03, “Informed Consent,” and section 1.14, “Clients Who Lack Decision-Making Capacity,” respectively.

- excessive use of artificial nutrition (feeding tubes)
- imposition of visiting hours on families and friends; refusal to support resident and family councils
- excessive charges; admission agreements that require family members and friends to assume financial liability for facility services
- refusal to bill Medicare; discontinuation of therapy for supposed failure to make progress or because Medicare coverage has ended; involuntary transfer within the facility after Medicare payment has ended
- refusal to readmit residents following hospitalization
- threats of eviction for being “difficult” or for declining medical treatment
- requirements for residents to give up legal rights and to commit to arbitration.⁸

Yet, most residents and families are not aware of such problems when they select a LTC facility.

In its October 2016 final rule, CMS noted accurately that “arbitration changes the manner in which a dispute will be resolved by, among other things, waiving the right to a jury trial, and providing only limited ground to appeal the arbitrator’s decision.”⁹ NASW’s position is congruent with CMS’s October 2016 statement:

Requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen. We believe that LTC residents should have a right to access the court system if a dispute with a facility arises, and that any agreement to arbitrate a claim should be knowing and voluntary.¹⁰

When potential residents forfeit this right at the time of admission, they have no way of anticipating the breadth and depth of potential disputes that could arise during the course of their stay in the facility. Even an existing resident who has received good care for an extended period of time might not realize how that the quality of that care could decrease, whether as a result of a change in the resident’s condition, facility staffing, facility ownership, or other factors. This lack of information and firsthand experience cannot be mitigated by any facility’s attempt to explain, however clearly, the terms of a predispute binding arbitration agreement. No binding arbitration agreement can be considered “knowing and voluntary” if it is signed by the resident before a dispute occurs.

The administration’s June 2017 proposal authorizing LTC facilities to require predispute binding arbitration agreements as a condition of admission is especially problematic. NASW agrees wholeheartedly with CMS’s statement from the October 2016 final rule:

Because of the wide array of services provided and the length of time the resident and his/her family may have interactions with the LTC facility, disputes over medical treatment, personal safety, treatment of residents, and quality of services provided are likely to occur. Given the unique circumstances of LTC facilities, we have concluded that it is unconscionable for LTC facilities to demand, as a condition of admission, that residents or their representative sign a pre-dispute agreement for binding arbitration that covers any type of dispute between the parties for the duration of the resident’s entire stay, which could be for many years.⁹

Thus, the most significant factor in ensuring that arbitration is voluntary is that the resident agrees to arbitration occurs *after* the dispute has arisen, with full knowledge of the legal consequences. The current regulation already

⁸ Carlson, E. (2015). *20 common nursing home problems—and how to resolve them* [Report published by Justice in Aging with support from the Commonwealth Fund]. Retrieved from <http://www.justiceinaging.org/20-common-nursing-home-problems/>

⁹ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,794 (Oct. 4, 2016).

¹⁰ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,792 (Oct. 4, 2016).

enables residents to make such a decision. (It's also worth noting that some state laws provide valuable consumer protections related to arbitration—protections that would be jeopardized by implementation of the proposed rule.)

Additionally, NASW is concerned that CMS's unacknowledged removal of § 483.70(n)(2)(v) erodes further the rights of Medicare and Medicaid beneficiaries. The subsection in question stipulates that a postdispute arbitration agreement may be signed by another individual only if the individual signing has no interest in the facility and if the person is allowed to sign such an agreement under state law. This language conveys critical protections for facility residents; many lack decision-making capacity, and some live in facilities with which a family member, friend, or other personal contact is affiliated.

Predispute arbitration agreements exacerbate power differentials between LTC facilities and residents.

The administration's proposal to authorize predispute binding arbitration agreements—including as a condition of admission to, or continued service within, a LTC facility—does not take into consideration the unequal balance of power between LTC facilities and LTC residents. This imbalance manifests in multiple ways.

Medicare and Medicaid beneficiaries who enter LTC facilities often do so during times of crisis, when health care services are needed immediately. Furthermore, potential residents often struggle to find facilities that are convenient geographically, that accept their form of payment, that provide the specific care they need, and that can accommodate a new resident. Under these stressful circumstances, beneficiaries are often not able to consider fully the implications of a predispute binding arbitration agreement, and they rarely have the time and energy to obtain legal consultation regarding such a matter. Therefore, beneficiaries often feel pressured to sign predispute binding arbitration agreements, even if admission is not contingent on such agreements. As CMS explained in its October 2016 final rule,

There is a significant differential in bargaining power between LTC facility residents and LTC facilities. LTC agreements are often made when the would-be resident is physically and possibly mentally impaired, and is encountering such a facility for the first time. In many cases, geographic and financial restrictions severely limit the choices available to a LTC resident and his/her family.¹¹

CMS went on to assert:

Would-be residents are often presented a “take-it-or-leave-it” contract under circumstances where meaningful or informed consent for pre-dispute arbitration is often lacking. . . . The resident's immediate need for nursing care and lack of experience with arbitration means that residents are unlikely to ask for time to seek legal advice concerning the agreement for binding arbitration. . . . After a dispute arises, residents or their representatives will have the time to seek legal advice, if they choose to, and evaluate the option to arbitrate the dispute with the facility.¹²

NASW concurs with these 2016 statements from CMS. Additionally, the association is concerned that if a facility were to ask *existing* residents to sign predispute binding arbitration agreements, those residents might also feel pressured to do so, for fear the quality of their care might decrease or the facility might refuse to serve them. In fact, NASW interprets the administration's proposal to eliminate § 483.70(n)(2)(iii)—“A resident's continuing right to remain in the facility must not be contingent upon the resident or the resident's representative signing a binding arbitration agreement”¹³—as authorization for facilities to evict existing residents who do not sign such agreements. Therefore, implementation of the proposed rule would require both potential residents and existing residents to

¹¹ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,792 (Oct. 4, 2016).

¹² Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,796–68,797 (Oct. 4, 2016).

¹³ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 42 C.F.R. § 483.70(n)(2)(iii) (2016).

choose between accessing needed care and waiving their right to sue the facility regarding any dispute—even disputes addressing egregious harm to or death of residents.

NASW is also concerned that arbitration process itself is heavily weighted toward facilities, which set the terms of arbitration agreements. The administration’s proposal to exclude residents from participating in selection of both an arbitrator and an arbitration venue¹⁴ exacerbates the power differential between facilities and residents. As CMS stated in the October 2016 final rule, “Since facilities will only be able to approach residents to request them to sign an agreement for binding arbitration after a dispute has arisen, residents and their representatives will have the information necessary to make an informed decision, *and should also be able to negotiate specific terms*” (emphasis added).¹⁵

Predispute arbitration agreements have a negative effect on the health, safety, and well-being of residents.

Within the June 2017 proposed rule, the administration states that its proposed revisions to the October 2016 regulations provide three benefits for residents: (1) retaining requirements that arbitration agreements must be communicated in a manner the resident understands; (2) allowing residents to communicate with specified government officials about arbitration cases; and (3) requiring facilities to “post a notice regarding its use of binding arbitration agreements in an area that is visible to residents and visitors.”¹⁶ Because the first two provisions (save a new subsection requiring plain language) already exist in the current regulation,¹⁷ the proposed rule provides little additional benefit to residents. Moreover, although the third provision may enhance transparency slightly, it does not eliminate the fundamental problem of the proposed regulation: that a resident’s decision to sign a predispute arbitration agreement can never be informed or voluntary without in-context knowledge of what is at stake. Thus, the proposed rule will not support meaningful decision making by residents. On the contrary, implementation of the rule would decrease beneficiaries’ health, safety, and well-being.

Furthermore, the proposed rule does nothing to alter the closed-door nature of the arbitration process. Although both the current and proposed regulations assure the resident’s right to communicate with specified government officials regarding the dispute, arbitration remains a secretive process in comparison with litigation. NASW is pleased that the administration has proposed to retain § 483.70(n)(2)(vi), which will enable residents, potential residents, and other stakeholders to access survey reports of substandard care through CMS’s Nursing Home Compare Web site. Yet, by the time that information is made public, many residents might have experienced similar problems—problems they could have avoided by transferring to or choosing another facility. As CMS noted in its October 2016 final rule, “We agree [with commenters] that the secrecy surrounding the arbitration process is a substantial concern. We are also concerned that the arbitration process, especially the secrecy it involves, could result in some facilities evading responsibility for substandard care.”¹⁸

Again, when a resident agrees to arbitration following a dispute, the individual does so with full knowledge of the consequences. In contrast, routine use of predispute arbitration agreements shields poorly performing facilities from the consequences of substandard care, thereby enabling such care to continue.

In the proposed rule, the administration asserts that “upon reconsideration, we believe that arbitration agreements are, in fact, advantageous to both providers and beneficiaries because they allow for the expeditious resolution of

¹⁴ Medicare and Medicaid programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements, 82 Fed. Reg. 26,650 (proposed June 8, 2017).

¹⁵ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,792 (Oct. 4, 2016).

¹⁶ Medicare and Medicaid programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements, 82 Fed. Reg. 26,653 (proposed June 8, 2017).

¹⁷ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 42 C.F.R. §§ 483.70(n)(2)(i), 483.70(n)(2)(iv) (2016).

¹⁸ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,797–68798 (Oct. 4, 2016).

claims without the costs and expense of litigation.”¹⁹ Yet, in its October 2016 final rule, CMS noted that “due to contingency agreements with attorneys and the public funding of the court system, residents have a possibility of litigating a dispute with the LTC facility for little or no money.”²⁰ NASW concurs with CMS’s October 2016 statement: “We also realize that settling disputes in court might take longer and result in more costs to facilities. However, a resident or their representative’s choice to engage in arbitration to settle a dispute should be informed and voluntary.”²¹

Similarly, in the proposed rule, the administration cites concerns about the negative impact judicial litigation could have on other residents in the facility and the high cost of litigation to facilities.²² NASW cannot emphasize strongly enough that informed decision making is integral to residents’ health, safety, and well-being—and, as such, should always take precedence. If a facility’s reputation is damaged or costs are incurred for providing substandard care, such damage should be a motivating factor in improving care delivery. As CMS stated in the October 2016 final rule, “indiscriminate use of arbitration agreements in LTC facility contracts can create a risk of improperly insulating facilities from liability or loss of property, and they, likewise, create a risk of residents unwittingly waiving their rights.”²³

Thus, NASW submits that the detrimental effects of the proposed rule on the health, safety, and well-being of LTC facility residents contradict the statutory authority the administration cites to promulgate its proposed changes:

- authority to promulgate regulations that are “adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys”
- authority to establish “such other requirements relating to the health, safety, and well-being of residents . . . as the Secretary may find necessary”
- authority to establish “other right[s]” for residents, in addition to those set forth in statute, to ‘protect and promote the rights of each resident.’”²⁴

The use of predispute binding arbitration agreements conflicts with reliable evidence.

In its October 2016 final rule, CMS noted that “the commenters from the LTC facility industry overwhelmingly wanted us to withdraw our proposal. Other commenters, including members of the public, advocates, and members of the legal community, predominantly wanted a prohibition on ‘pre-dispute’ arbitration agreements.”²⁵ Among those who urged CMS to prohibit predispute binding arbitration agreements were 35 senators and 16 state attorneys general.²⁵

Within the final rule the administration also emphasized, multiple times, that its decision to prohibit predispute arbitration agreements was informed not only by nearly 1,000 comments on the arbitration issue alone, but also by CMS’s own review of the literature and of court decisions involving arbitration in LTC facilities.²⁶ CMS summarized its findings in this manner:

¹⁹ Medicare and Medicaid programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements, 82 Fed. Reg. 26,651 (proposed June 8, 2017).

²⁰ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,794 (Oct. 4, 2016).

²¹ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,795 (Oct. 4, 2016).

²² Medicare and Medicaid programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements, 82 Fed. Reg. 26,650–26,651 (proposed June 8, 2017).

²³ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,798 (Oct. 4, 2016).

²⁴ Medicare and Medicaid programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements, 82 Fed. Reg. 26,651 (proposed June 8, 2017). [CMS has already provided specific references for each part of the statute.]

²⁵ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,790 (Oct. 4, 2016).

²⁶ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,793; 68,795; 68,799 (Oct. 4, 2016).

Many of the articles we reviewed provided evidence that pre-dispute arbitration agreements were detrimental to the health and safety of LTC facility residents. . . . These articles discuss, among other things, the unequal bargaining power between the resident and the LTC facilities; inadequate explanations of the arbitration agreement; the inappropriateness of presenting the agreement upon admission, an extremely stressful time for the residents and their families; negative incentives on staffing and care as a result of not having the threat of a substantial jury verdict for sub-standard care; and the unfairness of the arbitration process for the resident.²⁷

The final rule went on to cite policy statements issued by the American Arbitration Association²⁸ and the American Bar Association,²⁹ both of which opposed the use of predispute arbitration agreements in LTC facilities.³⁰ Moreover, CMS made clear its intent to evaluate carefully even the use of *postdispute* arbitration agreements:

Because we believe that further monitoring of the effects of this rule are necessary, we are requiring that LTC facilities retain a copy of the signed agreement for post-dispute binding arbitration and the arbitrator's final decision for 5 years to [*sic*] that it can be inspected by CMS or its designee upon request. This will enable us to gather information on arbitrations that have taken place in LTC facilities to determine if the requirements finalized in this rule are providing the protections residents need.³¹

In contrast, the administration has acknowledged that the motivation for the June 2017 proposed rule was a single lawsuit filed on behalf of LTC facility providers, concluding that “the 2016 final rule may have underestimated the financial burdens placed on providers who are forced to litigate claims in court” and that “further analysis is warranted before any rule takes effect.”³² Considered together, these data make clear that reversing the ban on predispute arbitration agreements would provide financial benefit to LTC facilities at the expense of residents’ health, safety, and well-being.

In some respects, however, the proposed rule would *not* benefit facilities. In the proposed rule, CMS emphasized the importance of “eliminating unnecessary burden on providers.”³³ Establishing predispute arbitration agreements for every resident is a time-consuming and unnecessary process. CMS could reduce the administrative burden on both facilities and residents by retaining the current regulation, which authorizes use of arbitration agreements only following a dispute.

Conclusion

When CMS released the LTC facilities final rule in October 2016, it noted that the arbitration provisions therein “are minimum requirements for ensuring fairness for LTC facility residents. . . . The requirements will provide residents with the minimum protections they need and we intend that these rules will allow residents to make an informed and voluntary choice.”³¹

²⁷ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,793 (Oct. 4, 2016).

²⁸ American Arbitration Association. (2003). AAA@ *healthcare policy statement*. Retrieved from https://www.adr.org/sites/default/files/document_repository/AAA_Healthcare_Policy_Statement.pdf

²⁹ American Bar Association, Commission on Law and Aging. (2009). *Position statement 111B, adopted by the House of Delegates February 16, 2009*. Retrieved from https://www.americanbar.org/content/dam/aba/directories/policy/2009_my_111b.authcheckdam.pdf

³⁰ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,797 (Oct. 4, 2016).

³¹ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,799 (Oct. 4, 2016).

³² Medicare and Medicaid programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements, 82 Fed. Reg. 26,650–26,651 (proposed June 8, 2017).

³³ Medicare and Medicaid programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements, 82 Fed. Reg. 26,649; 26,653 (proposed June 8, 2017).

NASW concurs with CMS's characterization of the 2016 arbitration regulation as "minimum protections" for residents. At the same time, then association is confident that the 2016 final rule constituted an important step forward for Medicare and Medicaid beneficiaries in LTC facilities. NASW disagrees strongly with CMS's current assertion that the June 2017 proposed rule "would support the resident's right to make informed choices about important aspects of his or her health care."³⁴ Rather, the proposed regulation would decrease each resident's right and ability to make informed decisions—and, in so doing, would jeopardize the health, safety, and well-being of beneficiaries.

Consequently, NASW urges CMS to withdraw its proposal to allow predispute binding arbitration agreements within LTC facilities. Instead, the association urges CMS to retain the ban on predispute arbitration agreements and all the existing regulatory language addressing this topic in Title 42, § 483.70(n).

Thank you for your consideration of NASW's comments. Should you have questions about these comments, please contact my office at naswceo@socialworkers.org or (202) 408-8200.

Sincerely,



Angelo McClain, PhD, LICSW
Chief Executive Officer

³⁴ Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements CMS-3342-P, 82 Fed. Reg. 26649 (proposed June 8, 2017).