

September 13, 2019

Seema Verma
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-3347-P
P.O. Box 8010
Baltimore, MD 21244

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

Re: Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities (CMS-3347-P)

Dear Administrator Verma:

On behalf of the National Association of Social Workers (NASW), I am submitting comments on the proposed rule, “Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities,” 84 Fed. Reg. 34737 (proposed July 18, 2019). NASW appreciates the opportunity to provide input on this important topic.

As the largest membership organization of professional social workers in the United States, NASW works to enhance the professional growth and development of its 120,000 members, to create and maintain professional social work standards, and to advance sound social policies. Thus, NASW advocates both for people who use long-term care (LTC) facility services and for social workers who serve LTC facility residents.

The 2016 final rule reforming requirements for LTC facilities introduced numerous changes to improve the quality of care and quality of life for LTC facility residents.¹ Unfortunately, the proposed rule rolls back some of those improvements at a time when regulatory oversight is increasingly important. The acuity of residents’ physical and cognitive conditions has increased. At the same time, the Government Accountability Office (GAO) recently found increases in the rate of LTC facility deficiencies for abuse of residents.² Moreover, the Office of the Inspector General (OIG) recently documented four disturbing findings:

- (1) Twenty percent (20%) of Medicare claims for high-risk hospital emergency department treatment resulted from potential abuse or neglect of skilled nursing facility (SNF) beneficiaries.
- (2) SNFs did not report many of these incidents to state survey agencies.
- (3) Several survey agencies did not report some findings of substantiated abuse to local law enforcement.
- (4) CMS does not require all incidents of potential abuse or neglect and related referrals made to law enforcement and other agencies to be recorded and tracked in the Automated Survey Processing Environment Complaints/Incidents Tracking System.³

¹ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,792 (Oct. 4, 2016).

² U.S. Government Accountability Office. (2019). *Nursing homes: Improved oversight needed to better protect residents from abuse* (Report GAO-19-433). Retrieved from <https://www.gao.gov/products/GAO-19-433>

³ U.S. Department of Health and Human Services, Office of Inspector General. (2019). *Incidents of potential abuse and neglect at skilled nursing facilities were not always reported and investigated* (A-01-16-00509). Retrieved from <https://oig.hhs.gov/oas/reports/region1/11600509.asp>

The GAO and OIG findings were the focus of a high-profile Senate Finance Committee hearing in July⁴ and, from NASW's perspective, underscore that revisions to the regulations should be made only if they improve protections for LTC facility residents. The association's detailed recommendations follow.

§ 483.10(d), Choice of attending physician

NASW concurs with CMS that the phrase "remains informed" is ambiguous. The association also agrees with CMS's proposal to specify that contact information for the attending (primary care) physician be provided at admission, when the information changes, or in response to a resident's request. However, NASW encourages CMS to substitute the conjunction "and" for "or" in the preceding line to ensure that the facility has an obligation in each of these situations. Thus, the regulation would read: "Specifically, we propose to reduce burden by revising the provision to require facilities to provide residents with their primary care physician's name and contact information upon admission, with any change, **and** upon a resident's request."

NASW respectfully disagrees with CMS's proposal to remove a resident's right to contact information for other health care professionals (such as hospice and palliative care teams, psychiatrists, psychologists, and clinical social workers) involved in care. Maintenance of the current requirement would enable residents to contact their practitioners when they wish, enhancing resident self-efficacy and preventing delays in care.

§ 483.10(j), Grievances

NASW is concerned that implementation of CMS's proposed changes to the grievance process would weaken the ability of residents and resident representatives to have concerns addressed fairly. Specific comments follow.

- § 483.10(j)(1), Treating unresolved complaints as grievances and preventing retaliation. NASW understands that not every complaint expressed by a resident should be subject to a full grievance process. Yet, under CMS's proposal, many significant resident concerns could be classified improperly as "general feedback." Thus, NASW recommends that instead of implementing the proposed language, CMS incorporate in the LTC facility regulations comparable standards from its own guidance for hospitals. Under that guidance, a complaint is classified as a *grievance* if it "cannot be resolved at the time of the complaint by staff present, is postponed for later resolution, requires investigation, and/or requires further actions for resolution."⁵ Implementation of this standard would be consistent with the preamble to the LTC facility proposed regulations, in which CMS has noted that "general feedback or complaints stem from general issues that can typically be resolved by staff present at the time a concern is voiced, while grievances are more serious and generally require investigation into allegations regarding the quality of care."⁶ Furthermore, CMS's proposed change to § 483.10(j)(1) would prohibit a facility from retaliating against a resident who expresses a grievance but would not prohibit retaliation against a resident expressing "general feedback." NASW urges CMS to rewrite the regulation to prohibit retaliation when a resident expresses any concern, regardless of whether that complaint is treated as a grievance or general feedback.
- § 483.10(j)(4)(ii), Contact information for accessing grievance process and specific duties of grievance process. CMS has proposed elimination of the "Grievance Official" requirement and allowing multiple facility staff to share grievance-related duties, with one individual responsible for overseeing the grievance

⁴ U.S. Senate Committee on Finance. (2019, July 23). *Promoting elder justice: A call for reform* [Full committee hearing]. Materials available at <https://www.finance.senate.gov/hearings/promoting-elder-justice-a-call-for-reform>

⁵ Centers for Medicare & Medicaid Services. (2018, October). *State operations manual, Appendix A—Survey protocol, regulations and interpretive guidelines for hospitals* (Interpretive Guidance for 42 C.F.R. § 482.13(a)(2)). Retrieved from https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf

⁶ Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities, 84 Fed. Reg. at page 34,741 (proposed July 18, 2019).

process. NASW recommends that, if such a change were implemented, CMS revise the regulations to require a facility to notify residents of how to contact the facility employees responsible for the grievance process. (Although the current regulations include a comparable requirement, the requirement is not clear in the proposed revisions to this section.) Moreover, NASW respectfully opposes CMS's proposal to eliminate the specified duties of the staff members handling grievances. Even if a facility were not to have a specified Grievance Official, the duties associated with responding to grievances would not change. These duties, as specified in the current regulation, are reasonable, necessary components of complaint investigation and resolution. The current requirements are also broad, allowing adequate flexibility for facilities.

- § 483.10(j)(4)(v), Written grievance decisions. NASW concurs with CMS that the requirement to provide each resident with a written decision regarding the grievance should be maintained. Yet, the association objects to CMS's proposal to remove most of the language detailing the information that must be included in the written decision. NASW is concerned that if the specific contents of the notice were not mandated, many facilities would provide only the minimum information specified in the proposed regulations. Thus, the association urges CMS to maintain the current regulation regarding written grievance decisions.
- § 483.10(j)(4)(vii), Retaining evidence of grievance results. NASW respectfully disagrees with CMS's position that maintaining evidence related to grievances for three years (versus the proposed 18 months) is burdensome. Documents concerning grievances would likely be in an electronic format; handwritten documents could be scanned. Retaining such electronic records for an additional 18 months (for a total of three years) would require little to no effort or cost. Grievance results can indicate the types of problems the facility has had in the past, what was done to address those problems, and if those efforts were successful. This information can be used by facilities and surveyors to proactively identify problems or potential problems.

§ 483.15(c)(3)(i), Admission, transfer, and discharge rights

NASW agrees with CMS that notices to ombudsman programs of transfer or discharge related to hospitalization (or other temporary absence) should focus on situations in which the facility is not allowing a resident to return, rather than on all instances when a resident is hospitalized. However, the association discourages CMS from using the terms "involuntary" or "facility-initiated" in the regulation. Incorporation of these terms would raise questions about how to interpret "transfer" or "discharge" in other sections of the regulations, in which transfer or discharge are not described as "involuntary" or "facility-initiated."

§ 483.35(g)(4), Nursing services

Under the current regulations, LTC facilities must retain daily nurse staffing data for at least 18 months. NASW recommends that CMS retain the current 18-month minimum rather than reducing the minimum to 15 months, as proposed. Because surveys are sometimes separated by as much as 15 months, the 18-month period provides leeway if a survey is late. Moreover, LTC facilities face no significant difficulty in retaining information for an additional three months, particularly because the information likely is maintained electronically.

§ 483.40, Behavioral health

NASW urges CMS to retain the current regulatory language in §§ 483.40(a), 483.40(c), and 483.40(d). Behavioral health intersects with other aspects of resident health and well-being, and the importance of staffing in all related areas cannot be overemphasized.

§ 483.45(e), Pharmacy services

Current regulations allow antipsychotic medications to be prescribed on an as-needed (PRN) basis for only 14 days unless the physician “evaluates the resident for the appropriateness of that medication.” Stating that this requirement is too limiting for facilities, CMS has proposed allowing antipsychotics to be prescribed for an indefinite time period under two conditions: (1) The physician documents the rationale for a specified extended duration and (2) the extended time is consistent both with facility policy and with new regulations that set standards for such facility policies.

NASW respectfully disagrees with CMS’s proposed changes and urges CMS to withdraw this section of the proposed rule. Antipsychotic medications generally include “black box” warnings stating that they increase the risk of death in older adults with dementia. Notwithstanding the efforts of the CMS-led National Partnership to Improve Dementia Care in Nursing Homes (<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/National-Partnership-to-Improve-Dementia-Care-in-Nursing-Homes.html>), inappropriate use of these drugs as chemical restraints continues to be widespread and serious—especially, as Human Rights Watch has documented and CMS has noted in the proposed rule, in LTC facilities.⁷ To mitigate the consistent overuse of antipsychotics in facilities, NASW recommends that CMS add a regulation requiring informed consent by a resident or resident representative prior to administration of any psychotropic medication (including antipsychotics). Such a requirement would be consistent with the well-recognized legal principle that any health care requires consent from the person being treated or that person’s representative.

§ 483.60(a)(2), Food and nutrition

NASW supports the current staffing requirements for directors of food and nutrition services and is concerned that CMS’s proposed standards for these positions are too weak. The association is particularly concerned about CMS’s proposal to require no more than a vaguely described “course of study.” NASW recommends that the current standards be retained, with an added provision that would allow “grandmothering” of current directors of food and nutrition services who do not meet the 2016 standards.

§ 483.70(e), Administration

CMS has proposed reducing the frequency of facility assessments from annual to biannual. NASW urges CMS to withdraw this proposal. Facility assessments include a formal process to determine staffing needs. Thus, assessments play a critical role in addressing the primary concern of residents and resident representatives: insufficient numbers well-trained, competent staff, particularly nursing staff. Furthermore, because the resident population of most facilities is not static and staff turnover is high, reviewing and updating the facility assessment at least once a year is essential. Otherwise, too much time would elapse between reviews and the staffing levels might not reflect changes in the conditions and acuity level of each facility’s residents.

§ 483.75, Quality assurance and performance improvement (QAPI) program

The current regulations require that each facility’s QAPI program address the full range of services at the facility. In contrast, the proposed rule has eliminated references to care and management practices, clinical care, quality of life, and resident choice. NASW encourages CMS to retain these important topics within QAPI requirements (§ 483.75(b)). The association also urges CMS to retain regulatory language addressing feedback and monitoring on the following topics addressed in § 483.75(c): input from facility staff and residents on frequent problems, systems to collect information from all facility departments, and adverse event monitoring.

⁷ Human Rights Watch. (2018). *“They want docile”: How nursing homes in the United States overmedicate people with dementia.* Retrieved from https://www.hrw.org/sites/default/files/report_pdf/us_nursinghomes0218_web.pdf

§ 483.80(b)(3), Infection control

As CMS has acknowledged in the proposed rule, infections and infection-caused deaths are rampant among LTC facility residents. Given this reality, the creation of the infection preventionist (IP) role in the 2016 final rule constituted an important step toward improved quality of care. Thus, NASW discourages CMS from replacing the current requirement that the IP be present part-time in the facility with a requirement that the IP spend “sufficient time.”

§ 483.85, Compliance and ethics program

NASW offers comments on several aspects of this section of the proposed rule.

- § 483.85(c)(2), Program oversight. The association urges CMS to retain examples of the operating organization’s high-level personnel with the overall responsibility to oversee compliance with the operating organization’s compliance and ethics program’s standards, policies, and procedures. These examples illustrate the critical nature of the program and the executive leadership needed for success.
- § 483.85(d)(2), Requirements for entities with five or more facilities. NASW encourages CMS to retain the requirement of a compliance officer and designated compliance liaison.
- § 483.85(d)(3), Contact person. NASW encourages CMS to retain the requirement for a compliance and ethics program contact person. Such a role is essential for residents, resident representatives, and staff who wish to submit concerns.
- § 483.85(e), Annual review. The association urges CMS to retain annual review of each facility’s compliance program rather than implementing the proposed “periodic assessment.”

§ 483.95(f)(2), Training in compliance and ethics

NASW encourages CMS to retain the current requirement of annual training in compliance and ethics for entities with five or more LTC facilities.

Thank you for your consideration of NASW’s comments. Should you need additional information, please contact me at naswceo@socialworkers.org or (202) 336-8200 or Chris Herman (cherman.nasw@socialworkers.org).

Sincerely,



Angelo McClain, PhD, LICSW
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