



## THE CLAUDE PEPPER CENTER

at Florida State University  
636 West Call Street  
Tallahassee, FL 32306-1124

September 10, 2019

Ms. Seema Verma, Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-3347-P  
P.O. Box 8010  
Baltimore, MD 21244-1850

Re: Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities: Regulatory Provisions To Promote Efficiency, and Transparency  
Electronic Submittal: <http://www.regulations.gov>

Dear Administrator Verma,

The Claude Pepper Center at Florida State University is a public policy research and advocacy center continuing the work of Senator Pepper, a strong advocate for the elderly and persons with disabilities. The requirements revised in October 2016 provided long overdue protections for nursing home residents—the first in over 3 decades—since the Nursing Home Reform requirements in 1987. The new requirements, in our view, are not “excessively burdensome” for the nursing home industry. They are necessary to ensure the safety and quality of care of our nation’s most vulnerable population.

In fact, many advocates through the years have proposed minimum staffing standards for nursing homes to ensure a basic level of care, but have been unable to get CMS to include such standards. The October 2016 proposed requirements were carefully crafted after years of discussion and planning within CMS with representatives from the nursing home industry and with advocates. The resultant requirements represented compromises among the representatives. Now CMS is proposing to reduce the minimum requirements that were meant to protect the rights of nursing home residents because of industry concerns. Lobbying groups began a concerted attack in January 2017 against the added protections. CMS responded in May 2017 by asking for comments for the elimination or change of nursing home standards followed by a “Patients over Paperwork” effort to eliminate or reduce regulations.

CMS’ proposed changes are reflective of the provider organizations and their lobbying efforts to curtail the nursing homes’ accountability in key areas of concern. The following summarizes several key proposed rule changes and provides our recommendations as they relate to these changes and the quality of care and quality of life of Elders living in nursing homes.

## 1. Grievances

CMS is proposing to allow facilities to decide the difference between a resident's grievances and general feedback. It is also proposing to remove language from the 2016 rule requiring facilities to document the resident's grievance, the steps taken to investigate the grievance, a summary of the pertinent findings or conclusions regarding the resident's concern, a statement as to whether the grievance was confirmed or not confirmed, any corrective action taken or to be taken by the facility as a result of the grievance, and the date the written decision was issued. Instead, CMS will require facilities to "...ensure that any written grievance decisions include any pertinent information including but not limited to a summary of the findings or conclusions and any corrective actions." It is our view that residents, not facilities, should be the ones to decide the difference between a grievance and general feedback. We also recommend retaining the more prescriptive language indicating how facilities should document grievances.

## 2. Admission, Transfer, and Discharge Rights

LTC facilities are required to send transfer or discharge notices to the State LTC Ombudsman. CMS is proposing to "...send a copy of a transfer or discharge notice to a representative of the Office of the State Long-Term Care Ombudsman only in the event of facility-initiated involuntary transfers or discharges." We believe that all transfer or discharge notices should be submitted to the State LTC Ombudsman because there are Elders living in nursing homes who are unable to express that they do not wish to be transferred due to a disability or other condition, or who are scared or unwilling to fight such a decision. Family members or other representatives may not be readily available when a facility decides to transfer or discharge a resident. Submitting all transfer or discharge notices would also allow for an analysis of systematic discharge patterns which could reveal valuable information about unnecessary churning or shuffling of residents.

## 3. Quality of Care

CMS is proposing to remove references to the "installation" of bed rails and replace them with the "use" of bed rails to clarify when the use of bed rails is appropriate. CMS acknowledges comments received that some beds already come with bed rails, however, what the proposed rule misses is that if rails remain on the bed, how will the "use" language enforce the notion that even installed bed rails could be misused or dangerous? The proposed rule appears to give a pass to those facilities that purchase beds with installed rails without fully considering the consequences of leaving those rails on beds with no CMS guidance about what should be done.

## 6. Pharmacy Services

With regard to PRN psychotropic drug orders, CMS is proposing to rollback protections for residents against their overuse by allowing extensions beyond 14 days in "accordance with the facility's policy..." The 2016 rules were put in place to protect residents from the inappropriate and over use of psychotropic drugs because these drugs are often misused to control undesirable behavior (often in those who are living with dementia) and these drugs have serious side effects including delirium, falls, and even death. We recommend retaining the 2016 rule.

## 8. Administration

As of the 2016 final rule, CMS requires facilities to review and update annually their assessment of appropriate staffing levels, services, and emergency preparedness. The proposed rule would require an assessment every two years. This change is really not advisable. Given the high staff turnover in SNFs and taking into consideration that many residents' health status and service needs would likely change before the two year assessment takes place, we recommend retaining the annual assessment requirement.

## 9. Quality Assurance and Performance Improvement Program

CMS plans to retain QAPI introductory text that "requires that the QAPI program be ongoing, comprehensive, and address the full range of care and services provided by the facility" but CMS is proposing to rollback specific requirements and directives to SNFs and how their QAPI programs are implemented. Not having these specific requirements would leave SNFs without consistent guidance about how to implement their QAPI programs and therefore, we recommend retaining the 2016 rule language.

## 10. Infection Control

CMS intends to remove the requirement that a facility's infection preventionist be employed by the facility at least part time. Given the high rates of dangerous and difficult to manage infections in nursing facilities, it's necessary to have an infection preventionist employed at least part time, preferably full time. Therefore, we recommend retaining the part time requirement.

## 11. Compliance and Ethics Program

CMS is recommending several changes to this section including changing the frequency of the evaluation from annually to periodic, removing the requirement to have a compliance and ethics program contact person, removes the requirement for a compliance officer, and proposes that compliance and ethics programs at a minimum develop written standards and procedures for compliance and ethics. CMS references the Office of the Inspector General's industry specific guidance on ethics and compliance. We recommend that CMS follows the guidelines set out in the OIG document and at a minimum, require that facilities follow the "Seven Basic Compliance Elements" which would require a compliance officer who reports directly to upper management including the CEO. We also recommend retaining the annual review requirement rather than allowing facilities to decide when they will review their compliance and ethics program. This area of compliance is too important to make the compliance and ethics requirements so arbitrary.

## 12. Physical Environment

The 2016 rule required that newly constructed, re-constructed, or facilities first certified after November of 2016 to have bedrooms with no more than 2 residents per room. The rule also required newly constructed facilities and those first certified after November 2016 to have bathrooms in each room. Other facilities certified before November of 2016 and not undergoing re-construction are permitted to have up to four residents per bedroom. CMS is proposing to have the 2016 rule apply, "...only to newly constructed facilities and newly certified facilities that have never previously been a long-term care facility." Privacy, dignity, and infection control are paramount to residents' quality of care and quality of life and ideally, each resident would have their own bedroom and bathroom. Therefore, at a

minimum, we recommend retaining the 2016 rule and suggest that CMS add language to reduce the number of individuals sharing bedrooms in older facilities.

In sum, we hope that CMS will give consideration to our comments which are intended to help protect Elders from harm in SNFs. We appreciate the opportunity to comment and if you have any questions or would like to discuss these issues further, please contact us.

Sincerely,

A handwritten signature in black ink, appearing to read 'Larry Polivka', with a stylized flourish at the end.

Larry Polivka, Ph.D.  
Claude Pepper Center Executive Director