

# *The Deregulation of Nursing Homes in CMS' "Regulatory Provisions to Promote Efficiency and Transparency"*

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## *Introduction*

Prior to the nursing home regulations set forth in the Federal Nursing Home Reform Act or the Omnibus Budget Reconciliation Act (OBRA) of 1987, many institutionalized Elders had little protection in nursing homes. Elders in pre-OBRA nursing homes "...receive very inadequate— sometimes shockingly deficient—care that is likely to hasten the deterioration of their physical, mental, and emotional health" and "...are likely to have their rights ignored or violated, and may even be subject to physical abuse" (IOM 1986, pg 5). Although OBRA brought significant change to the nursing home industry and its residents, advocates argued that it wasn't enough. Indeed, a study conducted by KFF (2007) almost 20 years later found that although significant improvements had been made with regard to quality of care, there remained several areas for improvement. It wasn't, however, until 2016 when significant protections were added to nursing home regulation. The powerful nursing home industry is declaring that these new regulations are too "burdensome" to comply. The Centers for Medicare and Medicare Services' (CMS) response was to propose attenuated regulation. The following issue brief highlights key areas where Elders will lose ground if the 2019 regulations are passed.

## *Background*

It took over 2 decades of advocacy, a lawsuit, congressional hearings, and an Institute of Medicine study that revealed the substandard quality of care that many institutional Elders received (National Consumer Voice for Quality Long-Term Care, 2012). OBRA brought quality of life into regulation (not just quality of care) in that residents can "attain and maintain her highest practicable physical, mental, and psycho-social well-being" (42 CFR § 483.70). OBRA maintained that Elders have the right to perform Activities of Daily Living to their ability and that they are to be maintained or improved. It also established minimum staff training, individualized care planning, care for those living with mental illness, freedom from unnecessary physical or chemical restraints, access to a personal attending physician, and access to the state Long-Term Care Ombudsman. OBRA established resident rights including the right to receive information regarding changes in care, to complain, to participate in the care planning process, to

privacy and confidentiality, rights relating to transfer and discharge, dignity, respect, and freedom, the right to visits, and the right to make autonomous choices (42 CFR § 483.10). OBRA also established a system for enforcement of the rules including Civil Money Penalties for non-compliance. Although these were significant improvements to the state of nursing home care, advocates and Elders argued that there were several areas for improvement including the need for explicit staffing ratios that take into account the size of the facility, and a minimum of 120 hours of training for nurse's aides (OBRA mandated 75 hours and there are no federal requirements with regard to staffing ratios; KFF, 2007).

Did OBRA improve nursing home quality? A 2007 KFF study found that physical restraints declined, RN staffing increased, and training among nurse's aides increased. The study also found a decline in the proportion of facilities putting residents in immediate jeopardy or causing harm. However, other quality of care outcomes had not improved with a large proportion of nursing homes cited for inadequate care, a lack of increased staffing levels despite a greater acuity and higher levels of disability among residents, underreporting of serious deficiencies, failure to impose sanctions, long delays between the initial citation and the imposition of sanctions, and poor quality facilities cycling in and out of compliance (KFF, 2007). In sum, the KFF study suggests that improvements were made in several areas of quality of care in nursing homes although additional regulation was needed.

### *Nursing Home Regulation in 2016*

It wasn't until 30 years after OBRA that updated nursing home regulations were passed under the Obama administration. The "Requirements of Participation for Long-Term Care Facilities" included several updates and modifications in the following areas: residents' rights, freedom from abuse, neglect, and exploitation, admission, transfer and discharge rights, resident assessment, care planning, quality of life, quality of care, services, administration, infection control, physical environment, training requirements, and quality assurance and performance improvement. The rule also banned pre-dispute, binding arbitration agreements in nursing home contracts. Comments received and posted by CMS indicated that advocates were generally supportive of the updated regulations, but also felt that more was needed (CMS, 2016). The nursing home industry, by contrast, largely responded to the new regulations as being too costly or overly burdensome and in 2019, CMS released attenuated, proposed regulation.

### *Proposed Nursing Home Regulation in 2019*

The 2019 regulations aim to "...reduce the frequency that LTC facilities are required to conduct a facility assessment, allow LTC facilities the flexibility to streamline their compliance and ethics programs, reduce the requirements for individuals responsible for the compliance and ethics program and reduce the frequency for the program's review, reducing additional certification requirements those who have performed as the director of food and nutrition services for a minimum of two years, allowing facilities greater flexibility in tailoring their Quality Assurance Program Improvement (QAPI) program to the specific needs of their individual facility by eliminating prescriptive requirements, and updating the informal dispute resolution process" (CMS, 2019). CMS has also made two other significant changes to nursing

home regulation under the Trump administration. These include weakening the enforcement of quality standards by placing an 18 month moratorium on Civil Money Penalties (one of the regulatory enforcement mechanisms put into place by OBRA 1987) for 8 new violations established under the 2016 rule, reducing Civil Money Penalties from per day to per instance which will significantly shelter nursing homes from penalties, and reversing the 2016 ban on requiring residents to enter into arbitration agreements to settle disputes (84 Fed. Reg. 34718, CMS 2017).

The following summarizes and compares the OBRA 1987 requirements to the 2016 rule and to the 2019 proposed rules. It also describes potential losses for several key regulatory areas including grievances, admission/transfer/discharge, quality of care, pharmacy services, administration, quality assurance, infection control, compliance and ethics, and physical environment.

### **Grievances**

- OBRA 1987 gives residents the right to
  - voice their grievances and
  - requires facilities to promptly respond to those grievances.
- The 2016 rule
  - details how all written grievance decisions will be documented and
  - requires a designated grievance official.
- The 2019 rule
  - eliminates the specific guidance on how to document grievances,
  - removes the designated grievance official requirement,
  - distinguishes between resident feedback and a grievance, and
  - reduces the timeframe that facilities must keep grievance documentation from 3 years to 18 months.

What will be lost if the 2019 rule is passed?

- Facilities (not Elders) will decide what is general feedback and what will rise to the level of a grievance effectively reducing Elders' ability to complain and be heard.
- Facilities will create their own grievance procedures, how grievances will be addressed, and how they're documented giving facilities great power and latitude in the grievance process, with little to no regulatory or Elder input on the matter.
- Documentation of grievances will be kept for less time (18 months) than most states' statute of limitations to bring to court a civil lawsuit against a nursing home for abuse or neglect cases.

### **Admission, Transfer, and Discharge Rights**

- OBRA 1987 gives residents the right to
  - appeal under their State's process a transfer or discharge decision,
  - requires facilities to promptly respond to those grievances, and
  - be given the contact information of their state's LTC Ombudsman.

- The 2016 rule
  - requires facilities to send a copy of the transfer or discharge notice to the state’s LTC Ombudsman’s office.
- The 2019 rule
  - requires facilities to send a copy of the transfer or discharge notice to the state’s LTC Ombudsman’s office only in the event of a facility initiated transfer or discharge.

What will be gained if the 2019 rule is passed?

- A 2017 Long-Term Care Ombudsman Program report showed that the most cited complaint from residents between 2011 and 2016 were related to discharges and evictions. There might be instances where Elders are coerced into transfers or discharges and the new requirement would not allow for a systematic analysis of such occurrences.

### **Quality of Care**

- OBRA 1987 gives residents the right to
  - be “... free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident’s medical symptoms.”
- The 2016 rule
  - adds a section specifically addressing bed rails and states that, “The facility must attempt to use appropriate alternatives prior to installing a side or bed rail.”
- The 2019 rule
  - will 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.

What will be lost if the 2019 rule is passed?

- A “pass” will be given to those facilities that purchase beds that already have bed rails installed. Bed rails are sometimes used in nursing homes to restrict movement and their use has been associated with falls and even death. There is a potential for beds with pre-installed rails to be misused.

### **Pharmacy Services**

- OBRA 1987 gives residents the right to
  - “...not receive unnecessary medications; patients cannot be prescribed antipsychotic drugs unless they are appropriate for a specific patient condition; patients prescribed antipsychotic drugs will receive gradual dose reductions, or behavioral programming in an effort to discontinue the drugs (unless clinically contraindicated).”
- The 2016 rule
  - limits PRN orders for psychotropic and anti-psychotic drugs to 14 days unless the physician or practitioner believes it should be extended beyond 14 days (in the

case of psychotropic drugs) or only after the physician or practitioner evaluates the resident (in the case of anti-psychotic drugs).

- The 2019 rule
  - will allow extensions for PRN psychotropic drug orders beyond 14 days in “accordance with the facility’s policy...”

What will be lost if the 2019 rule is passed?

- 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. If the rule is passed, facilities will be able to decide if psychotropic drugs should be continued past 14 days.

### **Administration**

- OBRA 1987
  - “A skilled nursing facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident” and
  - a quality assurance committee should meet quarterly to identify issues and develop plans of corrective action.
- The 2016 rule
  - Requires an annual facility evaluation of staffing/medical/resident needs
- The 2019 rule
  - Requires a facility evaluation of staffing/medical/resident needs every two years.

What will be lost if the 2019 rule is passed?

- Residents’ services needs change often as does the census of those in the facilities combined with high staff turnovers--which leads to the need to reassess staffing/medical/resident needs on a regular basis--but certainly more frequently than every two years.

### **Quality Assurance and Performance Improvement Program**

- OBRA 1987 N/A
- The 2016 rule
  - created QAPI program to, “...“develop, implement, and maintain an effective comprehensive, data-driven QAPI program that focuses on systems of care, outcomes of care, and quality of life” and
  - contained detailed information about how facilities should operate their QAPI programs.
- The 2019 rule
  - Removes detailed information about how facilities should operate their QAPI programs.

What will be lost if the 2019 rule is passed?

- This is a new requirement and facilities will have little guidance in how to operate their QAPI programs and there will be no streamlining in the process to allow quality comparisons across facilities.

### **Infection Control**

- OBRA 1987
  - established an infection control program.
- The 2016 rule
  - requires a designated infection preventionist who must work at least part time at the facility.
- The 2019 rule
  - removes the must work at least part time requirement.

What will be lost if the 2019 rule is passed?

- Millions of infections occur in facilities each year and they are difficult to manage as well as being a major cause of hospitalization and death. Experts who manage infections are necessary to the health of Elders and staff in facilities and the proposed rule would seriously reduce an already short amount of time that such an expert would spend at a facility.

### **Compliance and Ethics Program**

- OBRA 1987 N/A
- The 2016 rule
  - requires facilities to have a compliance and ethics program.
- The 2019 rule
  - changes the frequency of the evaluation from annually to periodic,
  - removes 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.
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What will be lost if the 2019 rule is passed?

- Compliance and ethics programs are necessary to detect and prevent violations whether they be criminal, civil, or administrative. The 2019 proposed rule will significantly weaken requirements for facilities' compliance and ethics programs.

### **Physical Environment**

- OBRA 1987 (Federal Register 1991)
  - bedrooms are required to have no more than four residents sharing a room.
- The 2016 rule
  - requires that newly constructed, re-constructed, or facilities first certified after November of 2016 to have bedrooms with no more than 2 residents per room and that,

- newly constructed facilities and those first certified after November 2016 to have bathrooms in each room.
- The 2019 rule
  - the 2016 rule will apply, “...only to newly constructed facilities and newly certified facilities that have never previously been a long-term care facility.”

What will be lost if the 2019 rule is passed?

- Privacy and dignity are key to Elders’ well-being, many of whom say that they’d prefer to have their own private bedrooms and bathrooms. Retaining the 2016 rule would still allow older facilities to have up to four Elders per bedroom and the 2019 proposed rule would give a pass to facilities that are undergoing renovations to still have more than 2 residents per bedroom.

### *Conclusion*

In sum, the resident rights and protections under OBRA 1987 were hard-fought. Although the 2016 rule represented the first major updates to OBRA, they were still a compromise between Elder advocates and the nursing home lobbyists. The 2019 proposed rules--including changes to arbitration agreements and Civil Money Penalties--will effectively remove several important protections, enforcement mechanisms, and quality improvement provisions. The cost of nursing home care to Medicare, Medicaid, and Elders is enormous and ensuring that the money is spent on quality care is imperative. Unfortunately, it appears that deregulation of LTC is a trend that will continue unless it’s made clear to the public and to policy makers that a pre-OBRA nursing home industry is not what Elders want or will tolerate and that even more regulation will be needed in the future to improve quality of care and the enforcement of Elders’ rights.

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