



National Association of State Long-Term Care Ombudsman Programs

August 4, 2017

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

RE: Comments from the National Association of State Long-Term Care Ombudsman Programs Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, CMS-3342-P, RIN 0938-AT18
Submitted electronically through <http://www.regulations.gov>

Dear Administrator Verma:

The National Association of State Long-Term Care Ombudsman Programs (NASOP) thanks the Centers for Medicare and Medicaid Services (CMS) for the opportunity to comment on this proposed revision to the final rule. In September 2015, NASOP submitted comments to CMS on the Proposed Rule for the Conditions of Participation for Skilled Nursing Facilities. In particular we offered comments on the use of arbitration agreements. At that time, we stated:

CMS requests comments on proposed rules that would restrict facilities from requiring a resident to sign an agreement as a condition of admission, and on binding arbitration agreements. While addressing this issue is needed, the proposed language would allow facilities to present such agreements at admission. The concept of a binding arbitration agreement is appropriate to introduce at the time of a dispute so the parties can consider the circumstances and weigh their options. Requesting a consumer to sign an arbitration agreement prior to any dispute arising is an action that unequally benefits the provider and limits options of the consumer. NASOP recommends that CMS restrict nursing facility providers from introducing such agreements at admission under any circumstances. Allowing such agreements to be offered to potential or new consumers of care is likely to create the impression that a consumer must sign in order to move into the facility, regardless of what is stated at that time by the provider. NASOP

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suggests that if the facility uses a binding arbitration agreement, a facility should be restricted from collecting such agreement at admission.

NASOP still holds firm to these beliefs and requests that CMS retain the position it stated in its preamble to the Final Rule for the Reform of Requirements for Long-Term Care Facilities, published on October 4, 2016:

The requirements in this final rule only ensure that the residents receive basic protections in signing an agreement for arbitration. 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...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 disputes between the parties for the duration of the resident's entire stay, which could be for many years...Many of the articles we reviewed provided evidence that pre-dispute arbitration agreements were detrimental to the health and safety of LTC residents. –*Federal Register/Vol. 81, No. 192/Tuesday, October 4, 2016/Rules and Regulations, pp. 68792-68793.*

NASOP is also concerned that this proposed revision to the final rule would authorize a facility to require a pre-dispute binding arbitration agreement as a condition of admission, for the reasons CMS outlined in the paragraph above. The existing regulation is designed to ensure that a resident enters into an arbitration agreement only if he or she knows what is at stake and has made a conscious decision to choose arbitration. The proposed regulation, on the other hand, would lead to the routine use and enforcement of pre-dispute binding arbitration agreements that were signed when the resident knew nothing of the dispute that ultimately is arbitrated, and signed only because the resident had to agree to arbitration in order to be admitted.

The use of pre-dispute binding arbitration agreements in the nursing facility setting is fundamentally unfair for residents and their loved ones. First and foremost, an essential component of any decision making process is gathering the information needed to make an informed judgment. Yet pre-dispute binding arbitration agreements force persons to make a decision without any information at all about the particulars of a dispute, even when severe neglect, serious injuries or death occurs. It is unreasonable to assume that residents or their loved ones are able to comprehend the likelihood of

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grievous harm or poor care occurring within a facility when these agreements are signed upon admission. No one should be expected to anticipate or contemplate the occurrence of such tragedies.

NASOP is also concerned that nursing facilities will be allowed to select the arbitrator, the state in which the arbitration will occur, and the rules for the arbitration process. Since the facility will likely be paying the arbitrator, there is a real conflict of interest for the arbitrator which puts residents at a disadvantage. There is a strong incentive for arbitrators to find in favor of the facility since this can assure them of repeat business.

In closing, NASOP notes that CMS asserts that that a ban on pre-dispute arbitration is not the appropriate policy for all residents. At the same time, CMS proposes a rule that allows all facilities to condition admission on the requirement that all residents agree to binding pre-dispute arbitration. Upon review of the proposed rule NASOP asserts that the new rule is not the appropriate policy for all residents because it:

1. Neither supports nor enables a resident's right to make informed choices about their well-being, but rather places individuals in the unenviable position of having to choose between signing agreements with binding arbitration clauses or forgoing the care they need;
2. Stacks the deck against residents by authorizing nursing facilities to require a resident to agree to arbitration as a condition of admission, while simultaneously removing the final rule's provisions concerning the terms of arbitration agreements;
3. Directly conflicts with person-centered care, which if adopted will allow residents to be subjected to forced choices without genuine consent that will undercut the very quality of care and quality of life requirements emphasized by the final federal nursing home rule;
4. Does not make up for taking away resident choice (or for not protecting the interests of residents) through the proposed transparency requirements, which serve only to show residents in plain language that they have no choice or voice, and must agree to binding arbitration; and
5. Fails to consider that arbitration is not less costly or more time efficient or less adversarial than litigation in all instances, including nursing home arbitration.

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Thank you for your consideration of our request. Please uphold the current regulations that are in place which protect the rights of residents.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joseph Rodrigues". The signature is stylized and written in a cursive-like font.

Joseph Rodrigues, Chair
NASOP Advocacy Committee

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