



National Association of State Long-Term Care Ombudsman Programs

February 3, 2014

Ms. Lisa Parker, JD
Director, Division of Institutional Quality Standards
CMS Center for Clinical Standards and Quality
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

Dear Ms. Parker:

I am writing on behalf of the National Association of State Long-Term Care Ombudsman Programs (NASOP) and the undersigned organizations. As advocates for nursing home residents, long-term care ombudsmen have frequent contact with residents, family members, friends, facility staff, regulators, the public, and legislators, informing all parties about the conditions in nursing homes and working to resolve problems. Ombudsmen represent the interests of residents and identify the root cause of a problem to seek lasting change on behalf of residents. As advocates, we contribute to the long-term care system and are particularly interested in the systems change envisioned by the Affordable Care Act's Quality Assurance and Performance Improvement (QAPI) program.

The description of the Centers for Medicare and Medicaid Services (CMS) proposed rule CMS-3260-P, entitled "Reform of Requirements for Long-Term Care Facilities and QAPI Program," indicates rule changes are needed to reflect significant changes in the industry and expand the level and scope of QAPI activities. Indeed, the Centers for Disease Control projects that the number of people needing long-term care will grow to 27 million by 2050, up from 15 million in 2000.¹ In some states, such as Texas, the boomer generation has shifted demographics in nursing homes to a lower average age for residents, including a dramatic increase in residents aged 51-64 over the last 10 years. As more boomers grow older, the nursing home industry must respond to a new generation with different needs and expectations.

¹ Harris-Kojetin L, Sengupta M, Park-Lee E, Valverde R. Long-term care services in the United States: 2013 overview. Hyattsville, MD: National Center for Health Statistics. 2013.
http://www.cdc.gov/nchs/data/nsltcp/long_term_care_services_2013.pdf

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In our ongoing efforts to represent resident interests, we submit the following recommendations regarding CMS-3260-P:

- A. Revise access and visitation rights as they relate to access by a long-term care ombudsman.
- B. Include resident rights and admission, transfer, and discharge violations on the list of deficiencies indicating substandard quality of care.
- C. Update the CMS State Operations Manual, Appendix PP guidance related to:
 - 1. A resident's right to access an ombudsman; and
 - 2. Admission, transfer, and discharge.

A. Access and Visitation in 42 CFR 483.10

Facility administrators sometimes request to work with a different ombudsman than the one assigned, and may pursue legal action in an effort to remove an ombudsman from their facility. This disrupts the ombudsman's access to residents and impedes the ombudsman's efforts to identify complaints and seek resolution on behalf of residents. When a provider attempts to select their ombudsman, or otherwise interferes with program operations, swift resolution is needed to ensure residents have timely access to an ombudsman. Revisions to a resident's access and visitation rights would partially address these situations. In order to fully address the problem, additional recommendations are made in section B of this letter.

Currently, Title 42 CFR 483.10 Conditions of Participation refers to the ombudsman program in Section 483.10(j) Access and Visitation rights:

- iv. The state long-term care ombudsman (established under section 307(a)(12)) of the Older Americans Act of 1965).

First, we recommend revising the definition in 483.10(j)(iv) to state, "The state long-term care ombudsman, or a representative of the office, as assigned by the state long-term care ombudsman;..." This will specify the state long-term care ombudsman's authority and discretion to assign ombudsmen to facilities and clarify that a facility does not have the authority to choose which ombudsmen enter and perform official duties.

Second, the reference to the Older Americans Act in this definition requires a technical correction; Title 42 of the Older Americans Act Section 307(a)(12) does not define the ombudsman program. We suggest 483.10(j)(iv) refer to Section 711 Definitions of the Older Americans Act to define both the state long-term care ombudsman and representatives of the office of the state long-term care ombudsman.

B. Substandard Quality of Care Definition in 42 CFR 488.301

Current law sets violations of Resident Behavior and Facility Practices, Quality of Care and Quality of Life as markers for substandard quality of care. The impact this designation has on deterring violations cannot be overstated, as these groupings have the enforcement mechanisms necessary for influencing facility practices. However, absence of the equally important issues of resident rights violations from the list of substandard categories fails to ensure rights are protected.

Example 1 – Ombudsman Access

States such as California, New Mexico, and Ohio have effective laws to protect the long-term care ombudsman program from interference, but the majority of states do not. Therefore, while long-term care ombudsmen are charged to protect the health, safety, welfare, and rights of residents, they may face interference without the means to enforce the ombudsman's access to residents. In Texas, legal action by a facility has interfered with the long-term care ombudsman program's ability to provide residents with an advocate.

As states move to a Medicaid managed care model, and state laws are created to protect residents from unwanted marketing, the risk of state laws interfering with both surveyor and ombudsman access increases. In Illinois, current state law allows facility administrators to bar anyone whom they deem harmful from visiting residents. This law applies to surveyors and ombudsmen, and was used to bar an ombudsman from a facility.

Example 2 – Unnecessary Discharge

Residents encounter involuntary discharge on a frequent basis and the remedies are inadequate to avoid unnecessary discharge. This disrupts a person's continuity of care and in some instances creates a chain reaction of multiple placements in one facility after the next. As evidenced by national ombudsman complaint data, instances of involuntary discharge are a growing problem. Residents are often discharged by a facility stating the resident's needs can no longer be met, but the underlying reason may be improper, such as a resident's challenging behavior associated with dementia.

Current enforcement options for the examples above, and all resident rights, are insufficient deterrents for violations. We recommend CMS open the enforcement section 42 CFR 488.301 for revisions, and add 42 CFR 483.10 Resident Rights and 42 CFR 483.12 Admission, Transfer, and Discharge to the criteria used to determine Substandard Quality of Care. This action will elevate civil and healthcare rights as issues that warrant equal protection under the law.

C. Interpretive Guidance

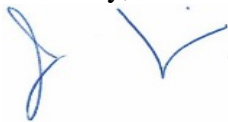
In addition to the recommendations above, access to an ombudsman and discharge rights will be clearer to providers and surveyors if interpretive guidance is added to Appendix PP of the State Operations Manual. Relevant F Tags include: F172 – Access and Visitation Rights; F177 – Admission, Transfer, and Discharge Rights; F203 – Notice Before Transfer; F283 – Discharge

Summary; and F284 – Post-Discharge Plan of Care. We recommend the addition of examples and procedures to clarify the issues surrounding a violation in each category. Further, the National Consumer Voice for Quality Long Term Care and the National Association of State Long-Term Care Ombudsman Programs are uniquely qualified to provide examples and interpretive language suggestions as Appendix PP is revised.

In conclusion, in the course of researching enforcement options for resident rights, we learned that they were initially included in the list of substandard categories, but were later removed. The absence of 42 CFR 483.10 and 483.12 from the list of substandard categories minimizes their importance and marginalizes the rights of nursing home residents. As boomers continue to grow older, and the numbers of people living in nursing homes increase, protecting rights deserves equal importance with quality of care and life. We know CMS stands with us for resident rights and we hope you will consider our recommendations.

Thank you for your efforts to solicit stakeholder input on issues impacting nursing home residents. NASOP would appreciate the opportunity to discuss these issues further with CMS. I will contact you in the month of February, and if I can be of assistance to you before then, please feel free to contact me.

Sincerely,



Joseph Rodrigues
President

cc: Becky Kurtz, Director of State Long-Term Care Ombudsman Programs, Administration on Aging

On Behalf of:

National Association of State Long-Term Care Ombudsman Programs
National Association of Local Long-Term Care Ombudsman Programs
The Consumer Voice for Quality Long Term Care

California Long-Term Care Ombudsman Association
Georgia Long-Term Care Ombudsman Program
Hawaii Long Term Care Ombudsman Program
Illinois Association of Long Term Care Ombudsmen
Illinois State Long Term Care Ombudsman
Indiana Office of the Long Term Care Ombudsman Program
Iowa Office of the State Long Term Care Ombudsman
Louisiana Governor's Office of Elderly Affairs State Ombudsman Program
Maine Long-Term Care Ombudsman Program
Massachusetts Long Term Care Ombudsman Program
Michigan Disability Rights Coalition

Minnesota Office of Ombudsman for Long-Term Care
New Mexico Long Term Care Ombudsman Program
New York State Office of the State Long Term Care Ombudsman
North Carolina Regional Long Term Care Ombudsman Association
North Dakota State Ombudsman Program
Office of Alabama State Long-Term Care Ombudsman Program.
Office of the Alaska State Long-Term Care Ombudsman Program
Office of the Arkansas State Long Term Care Ombudsman Program
Office of the California State Long-Term Care Ombudsman Program
Office of the Connecticut State Long Term Care Ombudsman Program.
Office of the Delaware State Long-Term Care Ombudsman Program
Office of the Florida State Long-Term Care Ombudsman
Office of the Maryland Long Term Care Ombudsman Program
Office of the Michigan State Long Term Care Ombudsman
Office of the North Carolina State Ombudsman Program
Office of the Ohio State Long-Term Care Ombudsman Program
Office of the Pennsylvania State Long-Term Care Ombudsman Program
Office of the Tennessee Long-Term Care Ombudsman Program
Office of the Texas Long-Term Care Ombudsman Program
Office of the Virginia State Long-Term Care Ombudsman Program
Oregon Office of the Long Term Care Ombudsman
Rhode Island Long Term Care State Ombudsman
State of Nevada Long Term Care Ombudsman Program
State of Wisconsin Board on Aging and Long Term Care Ombudsman Program
Vermont Long Term Care Ombudsman Project
Washington State Long-Term Care Ombudsman Program
West Virginia State Long-term Care Ombudsman Program

Alamo Area Agency on Aging - Long-Term Care Ombudsman Program
Area Agency on Aging of Central Texas Long-Term Care Ombudsman Program
Area Agency on Aging of Dallas County
Area Agency on Aging of East Texas
Area Agency on Aging of Heart of Texas – Long-Term Care Ombudsman Program
Area Agency on Aging of the Panhandle – Long-Term Care Ombudsman Program
Area Agency on Aging of Southeast Texas
Area Agency on Aging of Tarrant County Ombudsman Program
Area Agency on Aging IIIA Long Term Care Ombudsman Program, Nazareth, Michigan
Area 1 Agency on Aging Long-Term Care Ombudsman Program, Eureka, California
Ark-Tex Area Agency on Aging – Long-Term Care Ombudsman Program
Bexar Area Agency on Aging /Long-Term Care Ombudsman Program
Brazos Valley Long-Term Care Ombudsman Program
Catholic Charities, Stanislaus County, California Long-Term Care Ombudsman Program
County of San Diego, California Long-Term Care Ombudsman Program
Dallas County Long-Term Care Ombudsman Program at The Senior Source
Harris County Long-term Care Ombudsman Program
Lakeshore Legal Aid Long Term Care Ombudsman Program, Clinton Twp., Michigan

Long Term Care Ombudsman Services of San Luis Obispo County
Long Term Care Services of Ventura County, Inc., Ombudsman Program
Middle Rio Grande Area Agency on Aging Long-Term Care Ombudsman Program
Montgomery County, Maryland Long-Term Care Ombudsman Program
North Central Texas Council of Governments Long-Term Care Ombudsman Program
Ombudsman Services of San Mateo County, California
Rio Grande Area Agency on Aging – Long Term Care Ombudsman Program
South Plains Association of Governments – Lubbock, Texas
South Texas Long-Term Care Ombudsman Program
Southeast Texas Regional Planning Commission
Texoma Council of Government's Area Agency on Aging
WISE & Healthy Aging Long-Term Care Ombudsman Program, Los Angeles, California