



Center for Clinical Standards and Quality/Quality, Safety & Oversight Group

Ref: QSO-22-19-NH

DATE: June 29, 2022

TO: State Survey Agency Directors

FROM: Director
Quality, Safety & Oversight Group

SUBJECT: Revised Long-Term Care Surveyor Guidance:
Revisions to Surveyor Guidance for Phases 2 & 3, Arbitration Agreement
Requirements, Investigating Complaints & Facility Reported Incidents, and the
Psychosocial Outcome Severity Guide

Memorandum Summary

- **Revised Surveyor Guidance:** CMS is releasing the following guidance and associated training for nursing home surveyors:
 - Phase 2 and 3 Requirements: Clarifications and technical corrections of Phase 2 guidance issued in 2017, and new guidance for Phase 3 requirements which went into effect in November 28, 2019.
 - Arbitration Requirements: Guidance on the new requirements which became effective September 16, 2019.
- **Effective Date:** Surveyors will begin using this guidance to identify noncompliance on October 24, 2022. This will allow for ample time for surveyors and facilities to be trained on this new information.
- **Training Resources:** Training on guidance for surveyors and providers will be available upon release of this memorandum.
- **Complaint and Facility Reported Incidents (FRIs):** CMS revised the guidance in Chapter 5 and related exhibits of the State Operations Manual (SOM) to strengthen the oversight of nursing home complaints and FRIs. CMS also revised its guidance for all Medicare-certified provider/supplier types to improve consistency across the State agencies in their communication to complainants.
- **Psychosocial Outcome Severity Guide:** CMS revised guidance to clarify the reasonable person concept and examples across the different severity levels.

I. Background

In 2016, CMS overhauled the [Requirements for Participation](#) for Long-Term Care (LTC) facilities (i.e., nursing homes), which was implemented in three phases: Phase 1- November of 2016, Phase 2 - November of 2017, and Phase 3 – November 28, 2019.

With this memorandum, CMS is revising the Phase 2 guidance to enhance quality and oversight in certain areas, such as abuse and neglect, admission, transfer, and discharge, and improving care for individuals with mental health or substance use disorder needs. Guidance was added to incorporate the use of Payroll Based Journal (PBJ) staffing data submitted by providers to help inform surveyors of potential staffing concerns. Revisions also were made to clarify expectations for ensuring visitation can occur while preventing community-associated infection or the spread of communicable disease; as well as to assist in the investigation of situations where practitioners or facilities may have inaccurately diagnosed and/or coded a resident with schizophrenia. Additional clarifications are incorporated into the regulatory groups of Quality of Life and Quality of Care, Food and Nutrition Services, and Physical Environment. Lastly, CMS has made minor technical corrections, and changes, such as updated references and web links.

In addition to the changes to Phase 2, CMS is providing guidance to implement the requirements for Phase 3, including guidance related to the requirement for all facilities to have an Infection Preventionist, which has been highlighted by the COVID-19 pandemic. Furthermore, we are providing guidance related to arbitration agreements, which prohibits facilities from requiring residents to sign binding arbitration agreements as a condition of admission to the facility, or as a requirement to continue to receive care at that facility. CMS will publish these updates in Appendix PP of the State Operations Manual (SOM) for State Survey Agencies (SAs), long-term care facilities, and the public to understand how compliance will be assessed. This guidance will also be available to surveyors in the Automated Survey Process Environment (ASPEN) system starting October 24, 2022. Surveyors will begin using the guidance to determine compliance at that time.

CMS is also revising Chapter 5 of the SOM related to investigating complaints and facility reported incidents (FRIs). The [Government Accountability Office \(GAO\) has reported variation among States](#) in processing and tracking reports of abuse and neglect, and issues investigating complaints or FRIs timely or consistently. Therefore, we are clarifying CMS' expectations for ensuring timely investigations. For all provider/supplier types, CMS is also clarifying its expectations on how the SAs communicate to complainants.

Lastly, CMS is revising the Psychosocial Outcome Severity Guide to assist surveyors in applying the guidance and categorizing a deficiency at the appropriate severity level.

Recommendations for Resident Rooms: Regulations at §483.90(e) state resident rooms must be designed and equipped for adequate nursing care, comfort, and privacy of residents. Currently, CMS allows for up to 4 residents to occupy one living space provided the room allows for a minimum of 80 square feet per resident (§483.90(e)(1)(ii)). With the overhaul of the nursing home requirements for participation in October of 2016, CMS added requirements that, “facilities that receive approval of construction or reconstruction plans by State and local authorities or are newly certified after November 28, 2016, bedrooms must accommodate no more than two residents.”

On February 28, 2022, the White House Briefing Room released a [Fact Sheet](#) titled, Protecting Seniors by Improving Safety and Quality of Care in the Nation’s Nursing Homes. Among the initiatives highlighted by this document, the Administration announced an effort to reduce resident room crowding, which is consistent with the intent of the revisions to the Requirements for Participation released in 2016. This also builds on the lessons learned through the COVID-19 pandemic, where having more residents in a room can make it more challenging to prevent the transmission of infectious diseases.

Therefore, CMS is urging providers to consider making changes to their physical environment to allow for a maximum of double occupancy in each room. Additionally, we encourage facilities to explore ways in which they can allow for more single occupancy rooms for residents. There are several advantages to limiting rooms to double or single occupancy, including:

1. Allowing for more resident privacy for daily activities such as dressing and visiting with friends and family (§483.10(h)).
2. Encourages a homelike environment (§483.10(i)).
3. Improving infection control and prevention by reducing the risks associated with multiple residents in the same room, and making it easier to isolate or quarantine residents who are infectious.

II. Guidance

Significant revisions to the SOM are described below:

Abuse and Neglect: CMS has made significant revisions to the guidance for Abuse/Neglect in Appendix PP. CMS is providing clarifications to surveyors about facility reported incidents, including examples of cases and what information should be reported.

Admission, Transfer, and Discharge: CMS clarified that when a facility initiates a discharge while the resident is in the hospital following an emergency transfer (i.e., does not allow the resident to return to the nursing home), the facility must have evidence that the resident’s status at the time the resident seeks to return to the facility (not at the time the resident was transferred for acute care) meets one of the discharge criteria at §483.15(c)(i). We also clarified guidance related to the requirement to provide notice of a transfer or discharge to ensure residents and their representatives receive complete and accurate information in the notice of transfer and discharge.

Mental Health/Substance Use Disorder (SUD): CMS has identified a need to improve guidance related to meeting the unique health needs of residents with mental health needs and SUD. We clarified that when facilities care for residents with these conditions, policies and practices must not conflict with resident rights or other requirements of participation.

We further clarified that facility staff should have knowledge of signs and symptoms of possible substance use, and be prepared to address emergencies (e.g., an overdose) by increasing monitoring, administering naloxone, initiating cardiopulmonary resuscitation (CPR) as appropriate, and contacting emergency medical services. We also provided resources and non-pharmacological interventions, specific to residents living with mental disorders or substance use disorders, to assist providers in identifying alternative approaches to care to support this population.

Payroll Based Journal/Nurse Staffing: We are adding guidance that incorporates the use of Payroll Based Journal (PBJ) staffing data to direct surveyors to investigate potential noncompliance with CMS' nurse staffing requirements, such as insufficient staffing, lack of a registered nurse for eight hours each day, or lack of licensed nursing for 24 hours a day. We also clarified the intent of the requirements for F-tags at §483.35, Nursing Services, by adding examples for deficiency categorization. Additionally, we added guidance at §483.70(q), F-tag 851 to provide guidance to surveyors to cite noncompliance with the Payroll Based Journal reporting requirements.

Resident Rights: We revised guidance related to visitation restrictions by importing parts of our recent COVID-19 guidance to prevent community-associated infection or the spread of communicable disease in response to the current PHE. The revised guidance stresses the importance of adhering to the core principles of infection prevention to reduce the risk of infectious disease transmission during visits.

Potential Inaccurate Diagnosis and/or Assessment: We revised guidance to investigate situations where practitioners or facilities may have potentially inaccurately diagnosed and/or coded a resident with schizophrenia in the resident assessment instrument. An inaccurate diagnosis of schizophrenia has been identified as an issue related to the unnecessary prescribing of antipsychotic medications and artificially improving a facility's performance on the long-stay antipsychotic quality measure. Guidance was revised for multiple F-tags, including requirements in §483.20(g), F-tag 641, §483.21(b)(3)(i), F-tag 658, and §483.45(e)(1), F-tag 758.

Pharmacy Services: CMS revised guidance addressing medications not defined as psychotropic medications, but that affect brain activity and can also have adverse consequences. The use of these "other medications," is subject to the psychotropic medication requirements if the documented use appears to be a substitution for another psychotropic medication rather than for the original or approved indication. CMS also revised guidance for the psychotropic medication gradual dose reduction (GDR).

Infection Control: Revisions include guidance for implementing Phase 3 regulations which require nursing homes to have an Infection Preventionist (IP) who has specialized training onsite at least part-time to effectively oversee the facility's infection prevention and control program (IPCP). This revision will strengthen our general infection control guidance to address frequently cited issues such as hand hygiene, transmission-based precautions, and surveillance of infectious diseases. While the requirement is to have an IP at least part-time, facilities are responsible for an effective IPCP and should ensure the role of the IP is tailored to meet the facility's needs. With emerging infectious disease such as COVID-19, CMS believes the role of the IP is critical in the facility's efforts to mitigate the onset and spread of infections. Additionally, CDC and CMS developed specialized IP training to include topics such as Transmission Based Precautions and Antibiotic Stewardship programs (ASP).

Lastly, to increase survey efficiency, we incorporated the review of COVID-19 requirements to the survey software for the following deficiencies: F-tag 885 (Reporting Coronavirus Disease 2019 (COVID-19) data to residents, their representatives, and families), F-tag 886 (COVID-19 testing of residents, and staff), F-tag 887 (offer/educate

on COVID-19 immunization) and F-tag 888 (Health Care Staff Vaccination Requirements).

Arbitration Requirements: On July 18, 2019, CMS finalized [new requirements related to binding arbitration agreements](#) that went into effect on September 16, 2019. The new requirements prohibit LTC facilities from requiring residents to sign binding arbitration agreements as a condition of admission to the facility, or as a requirement to continue to receive care at that facility. The arbitration guidance also addresses other requirements, such as allowing residents to choose a neutral arbitrator, and that facilities must make the final arbitrator's decision available for review by CMS or its designee.

Psychosocial Outcome Severity Guide: CMS also revised the Psychosocial Outcome Severity Guide and F-tag 600 to enhance oversight of compliance related to ensuring a resident's right to be free from abuse. These revisions include:

- Clarifying how to apply the reasonable person concept,
- Clarifying examples under each severity level, and
- Listing certain instances of abuse where, because of the action itself, the deficiency would be assigned to certain severity levels.

The Psychosocial Outcome Severity Guide is located in the [Nursing Home Survey Resources Folder](#).

Chapter 5: State Investigations of Complaint Allegations: The revised guidance in Chapter 5 strengthens the oversight of nursing home complaints and FRIs, and aims to improve consistency across the State agencies in their communication to complainants. The revised guidance includes the following:

- Ensures that SAs have policies and procedures that are consistent with Federal requirements;
- Revises timeframes for investigation, to ensure that serious threats to residents' health and safety are investigated immediately;
- Requires that allegations of abuse, neglect, and exploitation are tracked in CMS' system;
- Requires that the SA report all suspected crimes to law enforcement if it has not yet been reported; and
- Removes the term "substantiate" from the SOM and instructs surveyors to specify whether non-compliance was identified during a complaint investigation.

Exhibit 23 of the SOM was revised to conform to the changes in Chapter 5. In addition, Exhibits 358 and 359 provide sample templates that may be used for FRIs. These templates ensure SAs have the information needed to review and prioritize the incident for investigation.

We note that due to suspending survey activities during the COVID-19 PHE, SAs are experiencing a backlog of surveys that need to be conducted. Therefore, CMS will assess the SA's backlog and establish a target implementation date for meeting the new investigation timelines as established with this revision of Chapter 5 of the SOM at a later

date, depending on the status of the PHE, and/or unique circumstances occurring in the SAs.

Other revisions: CMS is providing guidance for other Phase 3 requirements, such as Trauma Informed Care, Compliance and Ethics, and Quality Assurance Performance Improvement (QAPI). These revisions can all be found in [Appendix PP](#) of the SOM.

III. Survey Process

CMS is incorporating the revised guidance into the Long-Term Care Survey Process (LTCSP) software application, and surveyors will use the new version of the software for surveys beginning on October 24, 2022. CMS is also updating other survey documents, including the Critical Element (CE) Pathways, which are used for investigating potential care areas of concern. CMS will update these documents in the [Nursing Home Survey Resources Folder](#), by October 24, 2022. Lastly, the LTCSP will assist the survey team in the identification of low staffing concerns by utilizing PBJ data.

IV. Training Resources

Immediately following release of this memorandum, CMS will post publicly available guidance training for nursing home surveyors and providers in the Quality, Safety, and Education Portal (QSEP) (<https://qsep.cms.gov/welcome.aspx>) that will explain the updates and changes of the regulations and guidance. Surveyor training on the updated LTCSP software is forthcoming in QSEP in September, 2022.

Contact: For survey process questions, contact CMS at NHSurveyDevelopment@cms.hhs.gov. For questions on regulations and interpretive guidance contact CMS at DNH_TriageTeam@cms.hhs.gov.

Effective Date: Revisions to the State Operations Manual-Appendix PP and Psychosocial Outcome Severity Guide- October 24, 2022.

CMS will establish a target implementation date for SA's to meet the new investigation timelines, as established with this revision of Chapter 5 of the SOM at a later date, depending on the status of the PHE, and/or unique circumstances occurring in the SAs.

This policy should be communicated with all survey and certification staff, their managers, and the State/Regional Office training coordinators immediately.

/s/

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Attachments

- Appendix PP, Guidance to Surveyor for Long Term Care Facilities.
- SOM Chapter 5- Complaint Procedures
- SOM Exhibit 23- ACTS Required Fields
- SOM Exhibit 358- Sample Form for Facility Reported Incidents
- SOM Exhibit 359- Follow-up Investigation Report
- Psychosocial Outcome Severity Guide

cc: Survey and Operations Group Management