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# New CMS Nursing Facility Guidance Confirms Rights to Reject Medications and Avoid Improper Financial Liability

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The Centers for Medicare & Medicaid Services (CMS) recently issued revisions to nursing facility surveyor guidelines. The guidelines (approximately 900 pages long) explain and elaborate upon federal nursing facility regulations. As the name suggests, these guidelines are used by government surveyors when they inspect nursing facilities for potential violations; also, nursing facility operators themselves use the guidelines as a reference to federal nursing facility law. In short, the guidelines are accepted as an authoritative statement of nursing facility law, and, accordingly, residents and their advocates can use the guidelines to support their arguments for better care.

The newly-released revisions to those guidelines will become effective on February 24, 2025, and affect each of the following areas:

- Admission, Transfer & Discharge;
- Chemical Restraints/Unnecessary Psychotropic Medication;
- Resident Assessment, Quality of Life and Quality of Care; Administration;
- Quality Assurance Performance Improvement (QAPI); and
- Infection Prevention and Control.

This fact sheet addresses two of the revisions. These particular revisions confirm that: 1) a facility must obtain a resident's informed consent before administering medication (including antipsychotics); and 2) certain common admission agreement provisions violate the federal prohibition against financial guarantees.

## Nursing Facilities Must Obtain Residents' Informed Consent Before Administering Medication

### Antipsychotic use in nursing facilities

Nursing facilities have a long, sad history of overmedicating residents with antipsychotics and other psychotropic (mental-state-altering) medications. In general, facilities have used these medications to keep residents "manageable" rather than investing adequate resources in staffing and staff training.

Federal nursing facility surveyors have addressed these problems primarily through two separate regulations. The Pharmacy Services regulation prohibits "unnecessary" medication and specifies that residents not be given psychotropic medication "unless the medication is necessary to treat a specific condition as diagnosed and documented in the clinical record." The Freedom from Abuse regulation addresses medication use by prohibiting use of "chemical restraints imposed for purposes of discipline or convenience and that are not required to treat the resident's medical symptoms."

Overall, these two regulations set a relatively high bar for finding a violation of law. A government surveyor must be able to prove that a medication was unnecessary and/or used for discipline or convenience, based on the resident's medical history and recent actions. If a facility appeals, the administrative law judge likely will weigh competing expert testimony, along with consideration of the resident's condition and how the resident's actions affected other facility residents.

A recent Justice in Aging issue brief, Why Too Many Psychotropic Medications in Nursing Facilities, argues for increased focus on informed consent. Under standard legal principles, medication cannot be administered unless a resident affirmatively consents, after first receiving information on a medication's benefits and potential risks. An informed consent focus properly recognizes a resident's right to control their own lives and bodies, and also allows for violations to be proven more simply, without fact-specific determinations regarding the resident's medical condition and actions.

## Surveyor's guidelines emphasize informed consent requirements

The revised surveyor's guidelines confirm that a nursing facility violates federal law by administering medication without a resident's informed consent. New language in F-Tag F757 (relating to unnecessary medication) is titled "Resident's Right to Be Informed":

> [R]esidents have the right to be informed of and participate in their treatment. Prior to initiating or increasing a medication, the resident, family, and/or resident representative must be informed of the benefits, risks, and alternatives for the medication, in advance of such initiation or increase. The resident has the right to accept or decline the initiation or increase of a medication. To demonstrate compliance, the resident's medical record must include documentation that the resident or resident representative was informed in advance of the risks and benefits of the proposed care, the treatment alternatives or other options and was able to choose the option he or she preferred. A written consent form may serve as evidence of a resident's consent to medication, but other types of documentation are also acceptable. If a medication has been initiated or increased, and there is not documentation demonstrating compliance with the resident's right to be informed and participate in their treatment, noncompliance with [the resident's rights regulation] exists.

Informed consent also is emphasized in other portions of the revised guidelines. During a discussion of opioid use, for example, the guidelines cite residents' informed consent rights (see F-Tag F697). Also, the surveyors' Critical Element Pathway on unnecessary medication instructs a surveyor to ask: "Does the medical record show that the resident or resident representative was informed in advance of the risks and benefits of a medication, the treatment alternatives or other options and was able to choose the option he or she prefers?" If the answer is "no," the surveyor is instructed to cite for a violation.

Each of these revisions is a positive step for a resident's rights to be free of unwanted medications. From this point forward, nursing facilities are on clear notice that medication use requires informed consent, and that facilities violate the law when they fail to obtain informed consent.

## Federal Law Protects Residents' Family and Friends from Being Held Responsible for Facility Expenses

Under federal nursing facility law, a facility cannot use a guarantee agreement to make a resident's family member or friend liable for nursing facility expenses. Unfortunately, nursing facilities continue to try to evade this law, as shown by a recent report from Justice in Aging and the National Consumer Law Center. One important finding: almost three-quarters of survey respondents said they had seen facility admission agreements that make third-parties (generally family or friends) liable for nursing facility expenses.

The revised surveyor guidelines confirm that these practices violate the law. Discussion of guarantee agreements is found in F-Tag F620, which is the guidance to the no-guarantee regulation. This guidance starts with the basics of existing law: a nursing facility must not obtain a guarantee agreement from family or friends, but may require the signature of a resident's agent on the resident's behalf. Importantly, the agent commits the *resident* to paying facility charges but does not take on personal financial liability.

Revised language in the surveyor guidelines points out that admission agreement language

> "can be noncompliant even if it does not specifically reference a "guarantee" by a third party. Any language contained in an agreement that seeks to hold a third party personally responsible for paying the facility would violate this requirement."

The guidelines go on to list the following examples of noncompliant language:

- "Language that holds both (1) the resident and (2) the representative or other individual jointly responsible for any sums due to the facility."
- "Language that holds the representative or other third-party individual personally liable for breach of an obligation in the agreement, such as (1) failing to apply for Medicaid in a timely and complete manner or (2) allowing someone other than a signatory to the agreement to spend the resident's resources that would be used to pay the nursing home."
- "Language that does not specifically mention a third-party guarantee but that implies the resident could be discharged if the representative does not voluntarily agree to personally pay to prevent the discharge."
- "Language that holds the representative or other individual personally liable for any amounts not paid to the facility in a timely manner because the representative or other individual did not provide accurate financial information or notify the facility of changes in the resident's financial information."

### Why is this important?

The surveyor's guidelines influence surveyors, operators, and others. If the guidelines identify a facility practice as illegal, a surveyor may cite a facility for violating the law. Also, in a facility collection action, an attorney for a

resident's family member or friend can cite the guidelines as a reason why the judge should rule against the facility or, if the facility has not yet filed for lawsuit, why the facility should abandon its collection efforts.

The revised guidelines address a growing problem: facilities attempting to evade the law by using admission agreements that claim to not be financial guarantees, but that nonetheless purport to impose duties directly on family members and friends. Then, in the case of payment dispute, the facility sues the family member or friend by claiming that they have breached a contractual duty.

Most commonly, the agreement imposes a duty on the family member or friend to pay the facility with the resident's money, and, if appropriate, to file a Medicaid application. These types of agreements should be invalid under the no-guarantee regulation, but they don't look like a typical guarantee and are sometimes enforced by judges unfamiliar with federal nursing facility law.

Through the revised guidelines, CMS confirms that these types of agreements violate federal law. As quoted above, an admission agreement "can be noncompliant even if it does not specifically reference a 'guarantee' by a third party." And, as also quoted above, the no-guarantee regulation can be violated by "[l]anguage that holds the representative or other third-party individual personally liable for breach of an obligation in the agreement."

Family members and friends should be able to assist residents without fear of being sued directly for nursing facility expenses. Attorneys and other advocates should use the revised surveyor guidelines to push back against facilities' improper attempts to evade the no-guarantee regulation.

(And, of course, anyone handling a resident's finances should make their best effort to act in the resident's best interests, and should not misappropriate the resident's money for their own purposes. Both facilities and agents must honor the boundaries and rules of the resident/agent relationship.)

## Conclusion: Consumer Advocacy Advice

CMS's new guidance confirms important principles. Nursing facility residents should not receive psychotropic medication unless they affirmatively consent, after first receiving written notice of the medication's benefits and risks. And residents' family and friends should be able to sign an admission agreement as a resident's agent without becoming personally liable for nursing facility expenses.

Additional advocacy advice for each of these situations is available in Justice in Aging's guide 25 Common Nursing Home Problems – and How to Resolve Them. Problem #6 addresses improper medication use, and Problem #23 discusses how admission agreements should not impose financial liability on family and friends.