

OMBUDSMAN REFERENCES IN PROPOSED FEDERAL NURSING HOME REGULATIONS

[Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities \(PDF\)](#)

Published: July 15, 2015 Comments due: September 14, 2015

TOPIC	CURRENT	PROPOSED	PERTINENT PREAMBLE LANGUAGE
Access	483.10 (b) Notice of rights and services (j) Access and visitation rights (1) The resident has the right and the facility must provide immediate access to any resident by the following: (iv) The State long term care ombudsman (established under section 307(a)(12) of the Older Americans Act of 1965); [483.10 (b)(j)(1)(iv)]	483.11 Facility Responsibilities (d) Self-determination. The facility must promote and facilitate resident self-determination through support of resident choice as specified in §483.10(e) and as follows: (1) The facility must: (i) Provide immediate access to any resident by: (C) Any representative of the Office of the State long-term care ombudsman, (established under section 712 of the Older Americans Act of 1965, as amended 2006 (42 U.S.C. 3001 et seq); [483.11 (d)(1)(i)(C)]	We propose a new § 483.11(d) to address the facility’s responsibilities related to resident self-determination. We propose to re-designate § 483.10(j), regarding access to the resident, as § 483.11(d)(1), and revise it to include visitors as specified in our “Resident Rights” provision, including immediate access to the resident by the resident representative, and to update the languages and references for the Office of the State Long Term Care Ombudsman and the protection and advocacy system. This would be an addition to the current requirement which provides a right of access to any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident’s right to deny or withdraw consent at any time. This is consistent with our approach in other settings such as acute care hospitals, and in keeping with the person-centered focus of this proposed rule.
	483.10 (j) Access and visitation rights. (3) The facility must allow representatives of the State Ombudsman, described in paragraph (j)(1)(iv) of this section, to examine a resident's clinical records with the permission of the resident or the resident's legal representative, and consistent with State law. [483.10 (j)(3)]	483.11 Facility Responsibilities (f) Privacy and confidentiality (3) The facility must allow representatives of the Office of the State Long-Term Care Ombudsman to examine a resident’s medical, social, and administrative records in accordance with State law. [483.11 (f)(3)]	We propose a new § 483.11(f) to include provisions related to privacy and confidentiality. Proposed § 483.11(f)(1) would require that the facility respect the resident’s right to personal privacy. Proposed (f)(1)(ii) would incorporate the definition of personal privacy currently set out at § 483.10(e)(1). We propose to replace the requirements of existing § 483.10(e)(2) with new § 483.11(f)(2) which requires the facility to comply with the requirements of proposed § 483.10(g)(3). We propose to redesignate existing § 483.10(j)(3) as § 483.11(f)(3) and revise it to require that the facility allow representatives

			<p>of the Office of the State Long-Term Care Ombudsman to examine a resident’s medical, social, and administrative records in accordance with state law. This is consistent with the requirements of section 712(b)(1) of the Older Americans Act.</p>
<p>Information regarding residents’ rights and services</p>	<p>(iii) A posting of names, addresses, and telephone numbers of all pertinent State client advocacy groups such as the State survey and certification agency, the State licensure office, the State ombudsman program, the protection and advocacy network, and the Medicaid fraud control unit [483.10 (b)(7)(iii)]</p>	<p>483.11 Facility responsibilities. (e) Information and communication. (4) The facility must post, in a form and manner accessible and understandable to residents, resident representatives and support person: (i) A list of names, addresses (mailing and email), and telephone numbers of all pertinent State agencies and advocacy groups, such as the State survey and certification agency, the State licensure office, adult protective services where state law provides for jurisdiction in long-term care facilities, the Office of the State Long-Term Care Ombudsman program, the protection and advocacy network, home and community based service programs, and the Medicaid fraud control unit; and [483.11 (e)(4)(i)]</p>	<p>We propose to add a new § 483.11(e)(4)(i) and (ii) to require the facility to post, in a form and manner easily accessible and understandable to residents, resident representatives and support persons, information that would allow individuals to contact pertinent client advocacy groups, including the state survey and certification agency, the state licensure office, the State Long Term Care Ombudsman Program, the Protection and Advocacy Network, and the Medicaid Fraud Control Unit. We also propose to require that the facility post a statement that a resident may file a complaint with the state survey and certification agency. The facility is already required at existing § 483.10(b)(7), which would be redesignated at proposed § 483.11(e)(12), to provide this information in the written description of legal rights provided to the resident. However, we believe that posting this information will ensure that resident representatives as well as other support persons and residents continue to have access to updated and readily understandable information.</p>
		<p>(f) Access to information (2) The resident has the right to be informed of his or her rights and of all rules and regulations governing resident conduct and responsibilities during his or her stay in the facility. (ii) Information and contact information for State and local advocacy organizations, including but</p>	

<p>Information regarding residents' rights and services</p>		<p>not limited to the State Long-Term Care Ombudsman program (established under section 712 of the Older Americans Act of 1965, as amended 2006 (42 U.S.C. 3001 et seq) and the protection and advocacy system (as designated by the state, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 et seq.) [483.10 (f)(2)(ii)]</p>	
	<p>(iii) A posting of names, addresses, and telephone numbers of all pertinent State client advocacy groups such as the State survey and certification agency, the State licensure office, the State ombudsman program, the protection and advocacy network, and the Medicaid fraud control unit [483.10 (b)(7)(iii)]</p>	<p>(e) Information and communication (12) The facility must furnish to each resident a written description of legal rights which includes (iii) A list of names, addresses (mailing and email), and telephone numbers of all pertinent State regulatory and informational agencies, resident advocacy groups such as the State survey and certification agency, the State licensure office, the State Long-Term Care Ombudsman program, the protection and advocacy agency, adult protective services where state law provides for jurisdiction in long-term care facilities, the local contact agency for information about returning to the community and the Medicaid fraud control unit; [483.11 (e)(12)(iii)]</p>	<p>To improve clarity, we propose to redesignate § 483.10(b)(7) as new § 483.11(e)(12) and revise current paragraph (b)(7)(iii) to require that the facility provide the resident with “a list of names, addresses (mailing and email), and telephone numbers of all pertinent state regulatory and informational agencies, resident advocacy groups such as the state survey and certification agency, the state licensure office, the State Long-Term Care Ombudsman Program, the protection and advocacy agency, adult protective services, the state or local contact agencies for information about returning to the community and the Medicaid fraud control unit.” Additionally, we propose to revise current paragraph (b)(7)(iv) to require that the facility include in the written description of legal rights “a statement that the resident may file a complaint with the state survey and certification agency concerning any suspected violation of LTC requirements, including but not limited to resident abuse, neglect, misappropriation of resident property in the facility, non-compliance with the advance directives requirements, and requests for information regarding returning to the community.”</p>

Notice and disclosure to the LTCOP	<p>(c) Nursing facilities: Waiver of requirement to provide licensed nurses on a 24-hour basis. To the extent that a facility is unable to meet the requirements of paragraphs (a)(2) and (b)(1) of this section, a State may waive such requirements with respect to the facility if—(6) (6) The State agency granting a waiver of such requirements provides notice of the waiver to the State long term care ombudsman (established under section 307(a)(12) of the Older Americans Act of 1965) and the protection and advocacy system in the State for the mentally ill and mentally retarded; [483.30 (c)(6)]</p>	<p>(e) Nursing facilities: Waiver of requirement to provide licensed nurses on a 24-hour basis. To the extent that a facility is unable to meet the requirements of paragraphs (a)(2) and (b)(1) of this section, a State may waive such requirements with respect to the facility if— (6) The State agency granting a waiver of such requirements provides notice of the waiver to the Office of the State Long-Term Care Ombudsman (established under section 712 of the Older Americans Act of 1965) and the protection and advocacy system in the State for individuals with developmental disabilities or mental illnesses; and [483.35 (e)(6)]</p>	
	<p>(d) SNFs: Waiver of the requirement to provide services of a registered nurse for more than 40 hours a week. (1) The Secretary may waive the requirement that a SNF provide the services of a registered nurse for more than 40 hours a week, including a director of nursing specified in paragraph (b) of this section, if the Secretary finds that— (iv) The Secretary provides notice of the waiver to the State long term care ombudsman (established under section 307(a)(12) of the Older Americans Act of 1965) and the protection and advocacy system in the State for the mentally ill and mentally</p>	<p>(f) SNFs: Waiver of the requirement to provide services of a registered nurse for more than 40 hours a week. (iv) The Secretary provides notice of the waiver to the Office of the State Long-Term Care Ombudsman (established under section 712 of the Older Americans Act of 1965) and the protection and advocacy system in the State for individuals with developmental disabilities or mental illnesses; and [483.35 (f)(iv)]</p>	

<p>Transitions of Care (formerly Transfer, Discharge, Admission, Readmission of residents, and Facility Closure)</p>	<p>retarded; and [483.30 (d)(iv)]</p> <p>(6) Contents of the notice. The written notice specified in paragraph (a)(4) of this section must include the following: (v) The name, address and telephone number of the State long term care ombudsman; [483.12 (a)(6)(v)]</p>	<p>(b) Transfer and discharge— (3) Notice before transfer. Before a facility transfers or discharges a resident, the facility must. (i) Notify the resident and the resident’s representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. Subject to the resident’s agreement, the facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman. [483.15 (b)(3)(i)]</p>	<p>In proposed paragraph (b)(3)(i), we would update the language currently in § 483.12(a)(4)(i) to reflect our “resident representative” language and propose to require that the facility send a copy of the notice of transfer or discharge to the State Long-Term Care Ombudsman with the resident’s consent. If a resident does not agree to have the notice sent to the State Long-Term Care Ombudsman, we would expect the refusal to be documented in the resident’s medical record. The requirement to send this notice the State Long-Term Care Ombudsman is another provision related to concerns about inappropriate discharges and was suggested by stakeholders to allow timely assistance to the resident in cases where the discharge is involuntary. In proposed paragraph (b)(3)(ii), we propose a minor revision to the language currently in § 483.12(a)(4)(ii) to clarify that the facility records the reasons for the transfer or discharge, in accordance with proposed § 483.15(b)(2).</p> <p>SECTION- VI. Regulatory Impact Analysis (RIA). Transitions of Care (§ 483.15). Notice of Transfer (§ 483.15(b)(4)). Paragraph-17. Page- 42237.</p> <p>The notice is already created for the resident; this requirement poses an additional burden of printing a copy of the notice and sending it to the Office of the State Long-Term Care Ombudsman or, if a secure means of electronic transmission is available, sending a notice electronically. We estimate the burden of this requirement to be \$.10 per notice to make a copy, and \$.58 for a single pre-stamped first class envelope (USPS retail) plus 5 minutes for an office clerk to address and mail the notice. This will apply primarily to residents who</p>
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<p>Transitions of Care (formerly Transfer, Discharge, Admission, Readmission of residents, and Facility Closure)</p>			<p>are involuntarily discharged from the facility and does not include residents who request the transfer or who are transferred on an emergency basis to an acute care facility. We estimate this notice may need to be sent to the Office of the State Long-Term Care Ombudsman for one third of all nursing home residents, resulting in a cost of \$1,243,981 for all facilities. The per facility cost will vary significantly according to facility size and number of transfers out of each facility. $(\\$.10 + \\$.58 + (\\$29 \text{ hourly wage for an office clerk} \times .08 \text{ of an hour})) \times (.3 \text{ percentage of nursing home residents for whom a copy of a transfer notice needs sent to the Office of the State Long-Term Care Ombudsman} \times 1,382,201 \text{ nursing home residents}) = \\$1,243,981$.</p>
		<p>(b) Transfer and discharge (5) Contents of the notice. The written notice specified in paragraph (b)(3) of this section must include the following. (v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman; [483.15 (b)(5)]</p>	
	<p>(8) Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the Secretary, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents, as required at §483.75(r). [483.12</p>	<p>(b) Transfer and discharge. (8) Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the State Survey Agency, the Office of the State Long-Term Care Ombudsman, residents of the facility, and the resident representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the</p>	

	(a)(8)]	residents, as required at § 483.70(l) [483.15 (b)(8)]	
Grievances		(h) Grievances. (3) The facility must establish a grievance policy to ensure the prompt resolution of all grievances regarding the residents' rights contained in § 483.10. Upon request, the provider must give a copy of the grievance policy to the resident. The grievance policy must include: (i) Notifying resident individually or through postings in prominent locations throughout the facility of the right to file grievances verbally (meaning spoken) or in writing; the right to file grievances anonymously; the contact information of the grievance official with whom a grievance can be filed, that is, his or her name, business address (mailing and email) and business phone number; a reasonable expected time frame for completing the review of the grievance; the right to obtain a written decision regarding his or her grievance; and the contact information of independent entities with whom grievances may be filed, that is, the pertinent State agency, Quality Improvement Organization, State Survey Agency and State Long-Term Care Ombudsman program or protection and advocacy system [483.11]	
		(i) <i>Contact with external entities.</i> A facility must not prohibit or in any way discourage a resident from	Finally, we propose a new § 483.11(i) which would require that a facility not prevent or discourage a resident from communicating with Federal, State, or local officials,

<p>Grievances</p>		<p>communicating with Federal, State, or local officials, including, but not limited to, Federal and State surveyors, other Federal or State health department employees, including representatives of the Office of the State Long-Term Care Ombudsman and of the protection and advocacy system, regarding any matter, whether or not subject to arbitration or any other type of judicial or regulatory action. [483.11 (i)]</p>	<p>including but not limited to Federal and State surveyors, other Federal or State health department employees, including representatives of the Office of the State Long-Term Care Ombudsman and of the protection and advocacy system. Residents must have the ability to communicate freely with representatives of these entities when they have concerns about quality or care and quality of life.</p>
<p>Binding Arbitration Agreements</p>		<p>483.70 (n) Binding arbitration agreements. If the facility enters into an agreement for binding arbitration with its residents: (4) The agreement must not contain any language that prohibits or discourages the resident or anyone else from communicating with Federal, State, or local officials, including but not limited to, Federal and State surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.11(i). [483.70 (n)]</p>	<p>Administration (§ 483.70). Binding Arbitration Agreements: We propose specific requirements for the facility and the agreement itself to ensure that if a facility presents binding arbitration agreements to its residents that the agreements be explained to the residents and they acknowledge that they understand the agreement; the agreements be entered into voluntarily; and arbitration sessions be conducted by a neutral arbitrator in a location that is convenient to both parties. Admission to the facility could not be contingent upon the resident or the resident representative signing a binding arbitration agreement. Moreover, the agreement could not prohibit or discourage the resident or anyone else from communicating with federal, state, or local health care or health-related officials, including representatives of the Office of the State Long-Term Care Ombudsman.</p> <p>SECTION- S. Administration (§ 483.70). We propose in § 483.70(n) to require facilities that ask residents to accept binding arbitration to resolve disputes between the facility and the resident to meet certain criteria. Alternative dispute resolution (ADR), including binding</p>

<p style="text-align: center;">Binding Arbitration Agreements</p>			<p>arbitration, has become increasingly popular in recent years. However, unlike other forms of ADR, binding arbitration requires that both parties waive the right to any type of judicial review or relief. While this can be a valid agreement when entered into by individuals with equal bargaining power, we are concerned that the facilities' superior bargaining power could result in a resident feeling coerced into signing the agreement. Also, if the agreement is not explained to the resident, he or she may be waiving an important right, the right to judicial relief, without fully understanding what he or she is waiving. Also, the increasing prevalence of these agreements could be detrimental to residents' health and safety and may create barriers for surveyors and other responsible parties to obtain information related to serious quality of care issues. This results not only from the residents' waiver of judicial review, but also from the possible inclusion of confidentiality clauses that prohibit the resident and others from discussing any incidents with individuals outside the facility, such as surveyors and representatives of the Office of the State Long-Term Care Ombudsman.</p> <p>SECTION- S. Administration (§ 483.70) We propose that the facility be required to explain the agreement to the resident in a form, manner and language that he or she understands and have the resident acknowledge that he or she understands the agreement. The agreement must not contain any language that prohibits or discourages the resident or any other person from communicating with federal, state, or local officials, including, but not limited to, federal and state surveyors, other federal or state health department employees, or representatives of the Office of the State Long-Term Care Ombudsman,</p>
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<p style="text-align: center;">Binding Arbitration Agreements</p>			<p>regarding any matter, whether or not subject to arbitration or any other type of judicial or regulatory action, in accordance with proposed § 483.11(i). The explanation must state, at a minimum, that the resident is waiving his or her right to judicial relief for any potential cause of action covered by the agreement. The agreement must be entered into by the resident voluntarily and provide for the selection of a neutral arbitrator and a venue convenient to both parties, the resident and the facility. An agreement will not be considered to have been entered into voluntarily by the resident if the facility makes it a condition of admission, readmission, or the continuation of his or her residence at the facility. Thus, we believe that any agreement for binding arbitration should not be contained within any other agreement or paperwork addressing any other issues. It should be a separate agreement in which the resident must make an affirmative choice to either accept or reject binding arbitration for disputes between the resident and the facility. Finally, in order to address concerns about conflict of interest when the resident has a guardian that is affiliated with the facility, we propose to specify that the guardians or representatives cannot consent to an agreement for binding arbitration on the resident’s behalf unless that individual is allowed to do so under state law, all of the other requirements in this section is met, and the individual has no interest in the facility. We are also aware that there are concerns that these agreements should be prohibited in the case of nursing home residents. Therefore, we are also soliciting comments on whether binding arbitration agreements should be prohibited.</p> <p>SECTION- VI. Regulatory Impact Analysis (RIA). E.</p>
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<p style="text-align: center;">Binding Arbitration Agreements</p>			<p>Alternatives Considered. 3. Binding Arbitration. We considered not proposing any requirements concerning binding arbitration agreements. Taking this approach would certainly be less burdensome to the facilities. However, stakeholders raised specific concerns about nursing homes either requiring or pressuring nursing home residents to sign these agreements and, therefore, waiving the right to pursue resolution of a dispute with the nursing home in court. We share the stakeholders' concern that some nursing homes may be requiring residents to sign agreements for binding arbitration as a requirement for admission into the facility. In addition, if the nursing home is not requiring the agreement as a condition of admission, some facilities may be requesting the resident to sign the agreement without fully explaining the rights the resident is waiving and the consequences of that waiver. We believe that nursing home residents need to be fully aware of the right they are waiving (the right to seek relief in a court for a dispute between the resident and the facility) if a nursing home requests they sign an agreement for binding arbitration. Thus, we have proposed specific requirements if a nursing home chooses to request that a resident sign an agreement for binding arbitration. These requirements include, among other things, that the nursing home must explain the agreement to the resident in a form and manner that he or she understands, and that the resident acknowledge that they understand the agreement. We have also proposed specific requirements for the agreement, including that admission to the facility cannot be contingent upon the resident signing the agreement, the agreement must be entered into voluntarily, and the arbitration must be conducted by a neutral arbitrator in a venue convenient to both parties.</p>
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**Binding
Arbitration
Agreements**

In addition, we have also proposed that the agreement not contain any language that prohibits or discourages the resident or anyone else from communicating with Federal, State, or local officials, including but not limited to surveyors, health department employees, and representatives of the Office of the State Long-Term Care Ombudsman. We believe this requirement is essential so that residents and others who have knowledge of their care are not discouraged from speaking with surveyors and others from whom the resident can seek assistance. In addition, another individual can sign the agreement for the resident only if allowed by state law and the individual has no interest in the facility. Thus, we believe these comprehensive requirements are needed so that residents understand the right they are waiving by signing an agreement for binding arbitration and that the arbitration will be conducted in a neutral and fair manner.

ADDITIONAL REFERENCES TO THE LTCOP IN THE PREAMBLE

	<p>483.15(b)(1)(ii)(E), we would revise existing § 483.12(a)(2)(v) and clarify that provisions for discharge as a result of non-payment of facility charges would not apply unless the resident did not submit the necessary paperwork for third party payment or until the third party, including Medicare or Medicaid, denied the claim and the resident refused to pay for his or her stay. This is consistent with existing guidance and would help to clarify the meaning of failure to pay. Finally, we propose a new § 483.15(b)(1)(iii) to specify that the facility may not transfer or discharge the resident while the appeal is pending, pursuant to 42 CFR 431.230 when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to 42 CFR 431.220(a)(3). “Discharge/Eviction” was the most frequent nursing facility complaint category processed by the Long-Term Care Ombudsman Programs nationally in FY 2013 (8,478 complaints) and has been the first or second most frequent complaint category consistently since 2006. Involuntary discharges are often traumatic for residents. Transfer or discharge from a facility prior to an appeal determination can result in an unnecessary transfer out of and back to a facility.</p>
<p>483.15 Transitions of Care</p>	<p>Some states have requirements for facilities to reserve a resident’s bed when the resident is transferred to an acute care facility. These requirements and individual facility policies may vary widely and may impact the availability of the resident’s original bed or any bed when the resident is ready to return to the facility as well as have payment implications for the resident. In paragraph § 483.15(c) we propose to add language to require that the facility provide information to the resident that informs the resident of and distinguishes and explains the difference between the duration of the state bed-hold policy, if any, as well as the reserve bed payment policy in the state plan, required under 42 CFR 447.40, if any. In § 483.15(c)(1)(iv), we propose to add a new requirement that a facility’s notice of its bed-hold policy and readmission must also include information on the facility’s policy for readmission, as required under proposed § 483.15(c)(3), for a resident whose hospitalization or therapeutic leave exceeds the bed-hold period under the state plan. We are soliciting comments on state and facility bed-hold policies and state reserve bed payment policies, including whether the proposed notices have adequately differentiated these. Further, we are interested in the impact, if any, of reserve bed arrangements between some hospitals and some facilities. Finally, we propose to redesignate existing § 483.12(a)(3) as § 483.15(c)(3) and revise it to add a new requirement that a resident who is hospitalized or placed on therapeutic leave with an expectation of returning to the facility must be notified in writing by the facility when the facility determines that the resident cannot be readmitted to the facility, the reason the resident cannot be readmitted to the facility, and the appeal and contact information specified in § 483.15(b)(5)(iv) through (vii). As noted earlier, discharge/ eviction is the most common category of complaint processed by the Long-Term Care Ombudsman Program. Residents often do not realize that there are requirements allowing them to return to a facility after a hospitalization or that they may have appeal rights. This provision is intended to ensure that residents have an opportunity to exercise an appeal right if they choose to do so.</p>
<p>483.85(c) Compliance and ethics program</p>	<p>The “reasonable steps” that should be taken when a violation is detected should be clearly identified in the operating organization’s program. We expect that the steps would differ depending upon the size of the operating organization, the position of the individual reporting the violation, and possibly the type of violation. For example, an operating organization’s program may state that a staff member should immediately notify their immediate superior when he or she detects a violation. However, if it is the immediate superior or the operating organization’s management whom the staff member believes is committing the violation, the staff member should have an alternative process to report the violation, such as, the Office of the State Long-Term Care Ombudsman or other appropriate agency or law enforcement authority. In addition, the operating organization’s program should include those steps that are necessary to comply with any mandatory</p>

	<p>reporting requirements, such as those concerning suspected resident neglect or abuse. Under those circumstances, reporting to an immediate supervisor or manager may not be sufficient and the program should clearly indicate how any suspected neglect or abuse is to be reported. We also expect that ethics compliance would be a strong component of each operating organization's program</p>
<p>483.95 Required In- Service Training for Nurse Aides</p>	<p>Based on CASPER data for 2007– 2009, nursing homes received 3,124 citations for abuse and mistreatment of residents. In 2003, State Long-Term Care Ombudsman programs nationally investigated 20,673 complaints of abuse, gross neglect, and exploitation on behalf of nursing home and board and care residents. Among the types of abuse categories, physical abuse was the most common type reported.</p>