

A Closer Look at the Revised Nursing Facility Regulations

Visitation Rights

Executive Summary

The revised nursing facility regulations affirm the rights of residents to receive visitors of their choosing at the time of their choosing, and require the facility to provide immediate access to the resident in accordance with the regulations. Access to spouses and domestic partners now specifically includes same-sex spouses and domestic partners.

The Centers for Medicare and Medicaid Services maintained the resident's right to deny or withdraw consent for visitation of family members, other relatives, and other visitors at any time. The facility must ensure all visitors have full and equal visitation privileges (subject to resident preferences) and not discriminate against visitors based on race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.

The resident representative is added to the list of people and government representatives who have immediate and unrestricted access to the resident. However, visits from non-family visitors are now subject to "reasonable clinical and safety restrictions," which is a change from "reasonable restrictions."

Acknowledgements

Justice in Aging, National Consumer Voice for Quality Long-Term Care, and Center for Medicare Advocacy created this issue brief in collaboration. This brief is the sixth of a series explaining important provisions of the revised regulations.

The revised regulations require the facility to have a written visitation policy and inform residents of their visitation rights, the facility policy, any restrictions, the reasons for the restrictions, and to whom the restrictions apply.

Introduction

On September 28, 2016, the Centers for Medicare & Medicaid Services (CMS) released revised nursing facility regulations. These regulations govern most aspects of nursing facility operations, and apply nationwide to any nursing facility that accepts Medicare and/or Medicaid reimbursement.

Right to Receive Visitors

The revised nursing facility regulations state that the resident "has a right to receive visitors of his or her choosing at the time of his or her choosing, subject to the resident's right to deny visitation when applicable, and in a manner that does not impose on the rights of another resident."¹ In effect, nursing facilities are prohibited from imposing "visitation hours" on any residents.

The facility must provide the following visitors immediate access to the resident:²

- Any government surveyor/inspector (state or federal).
- Any representative of the State Long-Term

¹ 42 C.F.R. § 483.10(f)(4).

² 42 C.F.R. § 483.10(f)(i)-(iv).

Care Ombudsman program.

- The resident’s individual physician.
- Any representative from the state’s protection and advocacy system.
- The resident’s representative (newly added in the revised regulations).³

Immediate access must be provided to immediate family and other relatives, subject to the resident’s right to deny or withdraw consent at any time.⁴ Other visitors must be provided immediate access to a resident, subject to the resident’s right to deny or withdraw consent at any time, and also subject to reasonable restrictions that, according to newly added language, must be based on clinical and safety concerns.⁵ In the comments to the regulations, CMS gives some examples of clinical and safety restrictions. A clinical restriction could be limiting visitors to prevent the spread of communicable disease. Examples of safety restrictions provided by CMS include denying access or providing limited and supervised access to a visitor if he or she has been found to be abusing, exploiting, or coercing a resident; denying access to a visitor who has been found to have been committing criminal acts such as theft; or denying access to visitors who are inebriated and disruptive.⁶

Unchanged in the revised regulations, the requirements provide a right of “reasonable” access to any entity or individual that provides health, social, legal, or other services to the resident, also subject to the resident’s right to deny or withdraw consent at any time.⁷ The interpretation of

3 Resident representative is defined at 42 C.F.R. § 483.5 as an individual chosen by the resident to act on behalf of the resident, a person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident, a legal representative (as used in section 712 of the Older Americans Act), or the resident’s court-appointed guardian or conservator.

4 42 C.F.R. § 483.10(f)(4)(ii).

5 42 C.F.R. § 483.10(f)(4)(iii).

6 81 Federal Register 68,688, 68,716 (2016).

7 42 C.F.R. § 483.10(f)(4)(iv).

“reasonable” access is similar to the understanding of “reasonable restrictions”: CMS states that the only reasons for denying reasonable access would be based on clinical or safety reasons. If clinical or safety concerns do not exist, then visitors are to be provided access to the resident, as long as the resident consents.

The regulations make no provisions for restricting the resident’s ability to make his or her own decisions regarding visitors. Thus, to the extent that a resident can express a preference in whether he or she wants to see a potential visitor, that preference generally should be honored, even if the resident has an agent under power of attorney or a guardian.⁸ In these situations, the authority of the agent or the guardian is limited to the authority granted in the power of attorney or in the guardianship order, respectively. Because these documents generally do not grant authority to restrict visitation, the resident retains the authority to make those decisions himself or herself.

Written Policies and Procedures, and Other Facility Requirements

The revised regulations include new requirements for facilities to have written policies and procedures regarding residents’ visitation rights.⁹ These written policies must indicate what the facility considers to be reasonable health or safety restrictions that may be placed on visitation rights. The facility policies must also include the rationale for such restrictions.

CMS explains that these requirements — limiting the bases for restrictions to health and safety concerns, and requiring that the facility have written policies and procedures for the restrictions,

8 According to *Guardianship Standards of Practice*, a guardian should promote, and make an effort to maintain, the person’s social interactions and meaningful relationships with family and friends; and encourage the person to participate in all decisions that affect him or her. National Guardianship Association, *Standards of Practice*, Standards ## 4 & 9, pp. 6, 9 (4th ed. 2013), available at http://www.guardianship.org/documents/Standards_of_Practice.pdf.

9 42 C.F.R. § 483.10(f)(4)(v).

including the rationale for when they would be imposed — will be useful in identifying and preventing inappropriate restrictions on visitation.¹⁰

Notice Requirements

Facilities are now required to inform each resident (or resident representative, where appropriate) of the resident's visitation rights, including the right to visit with a spouse or a domestic partner. This includes same-sex spouses/domestic partners. In addition, the facility must inform the resident of its policies and procedures concerning visitation, along with any clinical or safety restrictions. Nursing facility staff must explain the reasoning for any restrictions on visitation rights and to whom these restrictions will apply.¹¹

Visitation privileges

The revised regulations prohibit discriminating against visitors on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.¹² All visitors must have equal visitation privileges, as long as the privileges are in accordance with resident wishes and preferences.¹³

Effective Dates

The revised regulations' visitation rights provisions were effective on November 28, 2016.

Finding the Regulations

Visitation rights are discussed in section 483.10(f) of Title 42 of the Code of Federal Regulations.

¹⁰ 81 Federal Register 68,688, 68,716(2016).

¹¹ 42 C.F.R. § 483.10(f)(4)(vi)(A).

¹² 42 C.F.R. § 483.10(f)(4)(vi)(C).

¹³ 42 C.F.R. § 483.10(f)(4)(vi)(D).

Tips for Residents and Advocates

Know Your Rights. If a facility establishes visiting hours, residents and advocates should point to the regulations stating that residents have the right to have visitors at any time as long as the visit does not impose on the rights of another resident. If the visit is at night, and the resident has a roommate, visiting in a private area of the facility is one way to uphold the rights of other residents while permitting nighttime visits.

Obtain a copy of the facility's visitation policies and procedures. The facility is required to have policies and procedures regarding visitation rights, and those policies must include any restrictions on visitation and the reasons for those restrictions. Ask for a copy of the facility's policies, and discuss them with the administration if you have questions.

Dispute inappropriate restrictions on visits. Limiting the bases for restrictions to reasons of health (clinical concerns) and safety narrows the way in which "reasonable" can be interpreted, which has been problematic in the past. However, "safety" is a broad term that can easily be misapplied. If someone the resident wishes to see is not permitted to visit for claimed "safety reasons," the resident and advocates should check the facility policies and procedures regarding the reasons for restrictions and to whom they apply. Point out if the facility's actions are contrary to facility policy and/or federal regulation.

Residents and advocates should also remember that restrictions do not apply to family members. Facilities sometimes refuse to permit a family member to visit for a variety of reasons; sometimes restrictions are imposed at the request of another family member or because the facility considers the family member to be too demanding. Such restrictions violate the regulations and should be challenged.

Contact Your Ombudsman for Assistance. If speaking with the facility does not resolve improper restrictions, residents should contact the local long-term care ombudsman for assistance. The resident can also file a complaint with the state survey agency. Contact information can be found at www.theconsumervoice.org.