



Center for Medicaid and State Operations

Ref: S&C-03-10

DATE: January 9, 2003

FROM: Director
Survey and Certification Group

SUBJECT: Binding Arbitration in Nursing Homes

TO: Survey and Certification Group Regional Office Management (G-5)
State Survey Agency Directors

The purpose of this memorandum is to address the Centers for Medicare & Medicaid Services' (CMS) position regarding binding arbitration between nursing homes and prospective or current residents, in response to recent marketplace practices. Specifically, this memorandum addresses the use of an agreement that requires disputes between a prospective or current resident and the nursing home be resolved through binding arbitration either as a condition of admission or a condition of remaining in the nursing home. Under these agreements, the resident gives up his or her right to sue the nursing home through the judicial process.

CMS believes that its primary focus should be on the quality of care actually received by nursing home residents that may be compromised by such agreements, for the reasons set out below. Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home. Under Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted subject to the concerns we have where Federal regulations may be implicated. Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements.

Survey and Certification Guidance:

1. If a nursing home discharges a resident or retaliates due to an existing resident's failure to sign or comply with a binding arbitration agreement, the State and Region may initiate an enforcement action based on a violation of the rules governing resident discharge and transfer. A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. §483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident. None of the conditions specified in the regulation permit a facility to discharge or transfer a resident based on his or her failure to comply with the terms of a binding arbitration agreement. Additionally, a facility that retaliates against a resident who fails to sign or comply with the agreement is subject to an enforcement response based on its failure to comply with the obligation to furnish an abuse free environment under 42 C.F.R. §483.13(b) or other requirements bearing on the facility's obligation to provide quality care to all residents. The existence of a binding arbitration agreement does not in any way affect the ability of the State survey agency or CMS to assess citations for violations of certain regulatory requirements, including those for Quality of Care.
2. The Medicaid appeal procedures at 42 C.F.R. §431.200 et seq. apply to discharges or disputes of eligibility between the resident and the State Medicaid Agency and are not affected by a binding arbitration agreement.

Effective Date: This policy is in effect immediately.

Training: This policy should be shared with all appropriate survey and certification staff, their managers, and the state/regional office training coordinator.

/s/
Steven A. Pelovitz