

# Elder Justice: What “No Harm” Really Means for Residents

January 2018

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## **Background**

Nursing homes that participate in Medicare and/or Medicaid must always adhere to the Requirements of Participation, which specify the minimum standards for resident care and quality of life required under federal law. The Centers for Medicare & Medicaid Services (CMS), working with State Survey Agencies, is responsible for ensuring that those standards are realized for all residents. In order to carry out this oversight, state surveyors conduct inspections annually (on a 9 to 15 month cycle) and investigate when a complaint has been made against a nursing home.

When inspecting nursing homes, surveyors are required to determine whether a nursing home has met the standards of care. Nursing homes that have not met the required standards of care are cited with deficiencies. Deficiencies are identified using a standard’s corresponding F-tag. For instance, the standard of care for a pressure ulcer is cited as F-686;<sup>1</sup> a nursing home that is in violation of this requirement would be cited for an F-686 deficiency. All of a nursing home’s deficiencies are listed in the Statement of Deficiencies for that inspection, which the public can access by going to [Nursing Home Compare](#).

When a deficiency is cited, it is rated based on the scope and the severity of the problem. The scope of a deficiency can range from isolated (one or a very limited number of residents and/or locations are affected), pattern (more than a very limited number of residents and/or locations are affected), or widespread (pervasive, systemic failure affecting many residents and/or locations). The severity of a deficiency can range from “no actual harm with potential for minimal harm” (A-C) and “no actual harm with potential for more than minimal harm” (D-F) to “actual harm that is not immediate” (G-I) and “immediate jeopardy to resident health or safety” (L-J).

CMS may impose various remedies on nursing homes based on the scope and severity of a deficiency. These remedies include plans of correction, federal fines, payment denials, and no longer being able to participate in Medicare and Medicaid. In addition, states can impose a state fine when a violation of the minimum standards of care is identified. However, it is critical to note that fines or other penalties are rarely imposed unless a violation is identified by surveyors as having caused harm or immediate jeopardy to residents.

While it might seem obvious that a failure to meet minimum health or safety standards is harmful to residents, in practice, very few violations are identified as having caused resident harm. CMS’s [2015 Nursing Home Data Compendium](#) indicates that surveyors cite to “no harm” about 96 percent of the time in which a health violation is identified.<sup>2</sup> A report by the Long Term Care Community Coalition similarly indicates that states only identify resident harm about five percent of the time.<sup>3</sup> Nevertheless, CMS’s weak enforcement of the government’s standards of care puts residents at risk of real harm, regardless of any misleading “no harm” label.

The following is a selection of recent nursing home deficiencies taken from Nursing Home Compare. Surveyors classified all of them as “no harm.” However, our readers are encouraged to determine for themselves whether or not these residents were harmed or placed in an environment that posed immediate jeopardy to their health and safety.

## **Amberwood Gardens, CA**

### **Avoidable accident resulted in screaming, pain, and a broken shinbone**

Amberwood Garden’s complaint survey date was October 31, 2017. State surveyors cited the nursing home for an F-323 deficiency (42 C.F.R. § 483.23(d)(1)(2))—“[m]ake sure that the nursing home area is free from accident hazards and risks and provides supervision to prevent avoidable accidents.”<sup>4</sup>

The daily nurses’ notes for October 9<sup>th</sup> showed that the resident slid out of her wheelchair while being driven to the nursing home and that two certified nurse assistants (CNAs) had to help the driver reposition the resident.<sup>5</sup> The nurses’ notes indicated that the resident sustained a scratch on her left knee.<sup>6</sup>

On October 13<sup>th</sup>, the resident complained of pain around her left knee.<sup>7</sup> The licensed vocational nurse

(LVN) and the nursing home’s physician noted that there was “a bump with slight swelling, dry scab and bluish greenish skin discoloration” on the area next to the resident’s left knee.<sup>8</sup> An X-ray of the resident’s left leg showed that she was suffering from a “broken shinbone [near] the lower portion of the knee and soft tissue swelling.”<sup>9</sup>

The driver told surveyors that the resident started screaming after he made a turn near the facility.<sup>10</sup> When the driver looked in the rearview mirror, he saw the resident’s “hands in the air.”<sup>11</sup> The driver stated that he then pulled over the van and moved the resident to the passenger seat.<sup>12</sup> Another LVN told surveyors that she assessed the resident after the incident but acknowledged that she did not complete documentation for full body and neurological assessments.<sup>13</sup> The nursing home’s administrator told surveyors that that incident was “not investigated and reported on time . . . .”<sup>14</sup>

The surveyors cited the nursing home for the deficiency. In fact, the surveyors noted that “the facility failed to follow their fall policy . . . [and] that [t]his failure had the potential to compromise” the resident’s health and safety.<sup>15</sup> Despite the resident’s pain and broken shinbone, surveyors cited the deficiency as “no harm” (D) instead of actual harm or immediate jeopardy.

## **Alden Town Manor Rehab & HCC, IL**

### **Inadequate housekeeping and maintenance resulted in a maggot infestation on resident’s scrotum**

Alden Town Manor Rehabilitation and Health Care Center’s complaint inspection date was October 31, 2017.<sup>16</sup> State surveyors cited the nursing home for an F-253 deficiency (42 C.F.R. § 483.10(i)(1)-(7))—“[p]rovide housekeeping and maintenance services.”<sup>17</sup>

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When state surveyors inspected the resident’s record, they found that the nursing home staff recorded discovering three larvae on the resident’s scrotum.<sup>18</sup> The record further noted that the skin surrounding the area was intact and that the larvae were removed without difficulty.<sup>19</sup> According to one nurse, she provided wound care to the resident the day before and no larvae were discovered at that time.<sup>20</sup>

During staff interviews, one CNA stated that the resident had a large bowel movement on the day of the larvae discovery, which seeped onto the resident’s thighs and scrotum.<sup>21</sup> As the CNA was cleaning the area, he discovered three or four live larvae on the resident’s scrotum.<sup>22</sup> The CNA reported that he “didn’t recall seeing any flies in the room,” but that “it was hot outside and that the window was left open.”<sup>23</sup> The nursing home administrator told surveyors that, after the larvae were discovered, maintenance examined the building and “found that the window screen . . . [in the resident’s room] was damaged and ripped.”<sup>24</sup>

The surveyors cited the nursing home for the deficiency. According to the surveyors, the “facility failed to prevent/repair torn screens . . . for pest control.”<sup>25</sup> As a result of this failure, a fly entered the resident’s room through the torn window screen and was able to “lay eggs around [the resident’s] genital area subsequently hatching into live maggots.”<sup>26</sup> The surveyors determined the incident resulted in “no harm” (D).

### **Riverview Manor Healthcare, IA** **Resident left waiting, despite staff’s knowledge of resident’s call for help**

Riverview Manor Healthcare’s complaint inspection data was October 26, 2017.<sup>27</sup> State surveyors cited the nursing home for an F-353 deficiency (42 C.F.R. 483.35(a)(1)(2))—“[h]ave enough nurses to care for

every resident in a way that maximizes the resident’s well being.”<sup>28</sup>

During resident observations at 10:28 A.M., the state surveyors saw the resident sitting in a wheelchair in his/her room with the call light on.<sup>29</sup> At 10:31 A.M., the director of nursing (DON) asked two nurse aides to go to the resident’s room over the nursing home’s intercom system.<sup>30</sup>

At 10:45 A.M., the surveyors saw a nurse standing at the medication cart just outside of the resident’s room.<sup>31</sup> The resident’s call light was still on at this time and the nurse told the resident that s/he would send nursing home staff to the resident’s room.<sup>32</sup> The nurse then told a nurse aide that the resident needed assistance.<sup>33</sup> The nurse aide and another staff member finally entered the resident’s room at 10:48 A.M.<sup>34</sup>

When surveyors interviewed the resident later in the day, the resident stated that there is usually a 30 minute wait no matter the time of day and that it could be up to an hour at times.<sup>35</sup> The resident explained to the surveyors that s/he had an accident and had to sit in feces until the staff responded, which made the resident “feel awful.”<sup>36</sup>

The surveyors cited the nursing home for the deficiency. Surveyors noted that the “facility failed to respond to call lights in a timely manner . . . .”<sup>37</sup> Although the resident was forced to wait for the nursing home staff to respond to a call for help, surveyors found that the deficiency was “no harm” (D).

### **Excel Care Center, FL** **Records for heavily medicated resident, who saw cockroaches on the ceiling, showed no signs of monitoring for behavioral changes**

Excel Care Center’s survey date was October 13, 2017.<sup>38</sup> State surveyors cited the nursing home for an F-329 deficiency (42 C.F.R. § 483.45(d)(1)-(6))—

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“[m]ake sure that each resident’s drug regimen is free from unnecessary drugs; 2) [e]ach resident’s entire drug/medication is managed and monitored to achieve highest well being.”<sup>39</sup>

The resident told state surveyors that “last night there were cockroaches crawling all over the ceiling and down the walls.”<sup>40</sup> A nursing home staff member, who was present during the resident observation, told the resident that she did not see anything when she was in the resident’s room the previous night.<sup>41</sup>

In reviewing the resident’s medications, surveyors found that the resident was taking a host of psychotropic drugs every day.<sup>42</sup> Specifically, the resident was taking antipsychotic, antidepressant, hypnotic, and anti-anxiety drugs.<sup>43</sup> When surveyors asked the director of nursing (DON) if the nursing home was tracking the resident’s behavior while on these drugs, the DON told surveyors that the resident’s behaviors were being tracked on paper (as opposed to electronically).<sup>44</sup>

The DON, however, was unable to find any documentation to show the surveyors.<sup>45</sup> Apparently, the DON “looked back five months . . . and was not able to find any behavioral monitoring.”<sup>46</sup> The DON acknowledged that there should have been behavioral monitoring documentation.<sup>47</sup> The resident’s plan of care included monitoring for adverse side effects resulting from the resident’s medications and reporting changes in mood or behavior to the physician.<sup>48</sup>

The surveyors cited the nursing home for the deficiency. The surveyors noted that the nursing home “failed to ensure . . . unnecessary medication review were being monitored as evidenced by omitted data and incomplete documentation related to antipsychotic medication use.”<sup>49</sup> The surveyors determined that this failure was “no harm” (E).

## Meadow Brook Medical Care Facility, MI

### Staff intentionally chose not to assess resident’s sudden physical and emotional decline

Meadow Brook Medical Care Facility’s survey date was October 4, 2017.<sup>50</sup> State surveyors cited the nursing home for an F-274 deficiency (42 C.F.R. § 483.20(b)(2)(ii))—“[r]eview or revise the resident’s care plan after any major change in a resident’s physical or mental health.”<sup>51</sup>

An initial resident assessment showed that the resident suffered from severe cognitive impairment but that she was not at risk for depression.<sup>52</sup> The assessment further demonstrated that the resident was independent in the activities of daily living (ADLs).<sup>53</sup> When the nursing home conducted a subsequent assessment, the resident showed signs of “suffering from depression symptoms almost daily” and declined in all ADLs.<sup>54</sup>

While reviewing the resident’s records, state surveyors found that notes in the resident’s plan of care indicated that family members believed the resident was declining and had begun taking her belongings home.<sup>55</sup> The resident stated that she was depressed and lost interest in everything, including eating.<sup>56</sup> According to the resident, she was “just here to exist.”<sup>57</sup> The surveyors also noted that the resident lost 6.6 percent of her weight over the course of six months.<sup>58</sup> A registered nurse told the surveyors that the team decided as a group “not to consider her for a significant change in condition” because her change was the expected progression of her disease.<sup>59</sup>

The surveyors determined that the nursing home “failed to complete a significant change in condition assessment . . . .”<sup>60</sup> Specifically, the surveyors determined that the “deficient practice resulted in the potential for missing underlying causes of significant change in conditions, which could lead to missed opportunities in assisting the resident to reach her

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highest practicable level of function.”<sup>61</sup> Nevertheless, surveyors found this violation to be “no harm” (D).

## Conclusion

In December 2017, CMS began publication of a newsletter to draw attention to the agency’s new “[Patients over Paperwork](#)” initiative. The newsletter states that the goal is to put patients first.<sup>62</sup> Unfortunately, as detailed in the newsletter, CMS seems to believe that putting patients first means cutting basic protections that Medicare and Medicaid beneficiaries, including most nursing home residents, depend on for their quality of care and life.

CMS developed the initiative in response to the Trump Administration’s Executive Order directing federal agencies to cut regulations.<sup>63</sup> The December “Paperwork” newsletter clarifies that, based on the Executive Order, CMS has instituted internal processes to undo what it calls “burdensome regulations.”<sup>64</sup> CMS adds that it wants to have “satisfied customers.” Contrary to past policy, the newsletter indicates that CMS now considers providers and industry groups to be its customers, rather than patients.<sup>65</sup>

In the recently published January 2018 newsletter, CMS directly addressed the nursing home industry’s wish list (as evidenced by a March 2017 [industry letter](#) to then HHS Secretary Tom Price):

**You Said:** Some Long Term Care (LTC) Facilities were not prepared for the start of Phase 2 of the Long Term Care Requirements of Participation beginning in November of 2017.

**We Heard You:** CMS directed LTC Facility surveyors to focus on education rather than discretionary penalties related to the implementation of specific new

Requirements of Participation for 18 months. This gives facilities more time and support to comply while still supporting resident safety.<sup>66</sup>

The “Patients over Paperwork” initiative is a threat to an already poorly enforced oversight system. Under the guise of “putting patients first,”<sup>67</sup> CMS is actually indicating to the nursing home industry that deficiencies in certain minimum standards of care will largely go unchecked by the government—this is in addition to all of the other deficient practices already being cited as “no harm.” The requirements that CMS believes nursing homes need more time to be educated on include:

- Having a baseline plan of care for residents within a couple of days of their admission to the facility;
- Providing “necessary behavioral health care and services;” and
- Implementing “antibiotic use protocols and a system to monitor antibiotic use.”

“Burden” reduction for nursing home providers equates to *actual* burden increases for nursing home residents and families. The nursing home regulations were promulgated to ensure that residents are protected. However, as the examples discussed in this newsletter show, these regulations are already not being enforced in a way that ensures residents receive the care and services they need and deserve. Current efforts to reduce nursing home standards and reduce enforcement will likely put even more residents at risk of harm, injury, or death.

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<sup>1</sup> A new survey process was implemented on November 28, 2017. This resulted in a completely new F-tag scheme. All F-tags in the resident stories section of this newsletter refer to the previous system because the surveys were completed prior to the November 28<sup>th</sup> implementation date. A crosswalk that links the old F-tags to new the F-tags is available at, [http://theconsumervoic.org/uploads/files/issues/SC17-36.02.LTC\\_FTags\\_Phase\\_2\\_Crosswalk.pdf](http://theconsumervoic.org/uploads/files/issues/SC17-36.02.LTC_FTags_Phase_2_Crosswalk.pdf).

<sup>2</sup> *Nursing Home Data Compendium 2015 Edition*, CMS, [https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium\\_508-2015.pdf](https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf) (last visited 01/30/2018).

<sup>3</sup> Richard J. Mollot & Rediet Demissie, *The Identification of Resident Harm in Nursing Home Deficiencies: Observations & Insights*, NursingHome411.Org, <http://nursinghome411.org/identification-of-resident-harm-in-nursing-home-citations/>.

<sup>4</sup> Statement of Deficiencies for Amberwood Garden, CMS (Oct. 31, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=055750&SURVEYDATE=10/31/2017&INSPTYPE=CMPL&profTab=1&state=CA&lat=0&lng=0&name=AMBERWOOD%2520GARDENS&Distn=0.0>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Statement of Deficiencies for Alden Town Manor Rehab & HCC, CMS (Oct. 31, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=145736&SURVEYDATE=10/31/2017&INSPTYPE=CMPL&profTab=1&state=IL&lat=0&lng=0&name=ALDEN%2520TOWN%2520MANOR%2520REHAB%2520%2526%2520HCC&Distn=0.0>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Statement of Deficiencies for Riverview Manor Healthcare, CMS (Oct. 26, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=165376&SURVEYDATE=10/26/2017&INSPTYPE=CMPL&profTab=1&state=IA&lat=0&lng=0&name=RIVERVIEW%2520MANOR%2520HEALTHCARE%2520%2520LLC&Distn=0.0>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Statement of Deficiencies for Excel Care Center, CMS (Oct. 13, 2017),

<https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=105884&SURVEYDATE=10/13/2017&INSPTYPE=STD&profTab=1&state=FL&lat=0&lng=0&name=excel%2520care%2520center&Distn=0.0>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Statement of Deficiencies for Meadow Brook Medical Care Facility, CMS (Oct. 4, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=235025&SURVEYDATE=10/04/2017&INSPTYPE=STD&profTab=1&state=MI&lat=0&lng=0&name>

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[=MEADOW%2520BROOK%2520MEDICAL%2520CARE%2520FACILITY&Distn=0.0.](#)

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Patients over Paperwork Newsletter*, CMS (Dec. 2017), <https://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/PatientsOverPaperwork.html>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Patients over Paperwork Newsletter*, CMS (Jan. 2018), <https://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/Downloads/JanuaryPoPNewsletter011818.pdf> (emphasis in original).

<sup>67</sup> *Id.*

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