

Center for Clinical Standards and Quality/Survey & Certification Group

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DATE: May 12, 2017

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Implementation Issues, Long-Term Care Regulatory Changes: Substandard Quality of Care (SQC) and Clarification of Notice before Transfer or Discharge Requirements

Memorandum Summary

- **New Definition for SQC:** A new regulatory definition was published in the Centers for Medicare & Medicaid Services (CMS) 2016 Final Long-term Care Rule and became effective on November 28, 2016.
- **Implementing SQC:** The new regulatory definition will affect which F-tags and regulatory groupings are considered to be SQC in both Phase 1 and Phase 2 of the Final Rule implementation process.
- **Notice Before Transfer or Discharge Requirements:** CMS is also providing clarification in advance of formal interpretive guidance of 42 CFR §483.15(c)(3)(i) which requires facilities to send a copy of the notice of transfer or discharge to the Office of the State Long-Term Care Ombudsman.

New Definition for SQC

A new definition of SQC was added to 42 CFR 488.301 by the Final Rule to reform the requirements for long-term care facilities that went into effect on November 28, 2016 (81 FR 68688). There were no substantial or substantive changes to the content of what types of deficient practices would result in SQC, however, the regulatory citations to the relevant requirements have changed. The new definition reflects this general reorganization of the regulations. Also, some regulations may have been moved from their previous regulatory grouping to a new regulatory group.

The new definition of SQC in §488.301 provides that substandard quality of care means one or more deficiencies which constitute either immediate jeopardy to resident health or safety; a

pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy, with no actual harm, related to participation requirements under:

- §483.10 “Resident rights,” paragraphs:
 - (a)(1) through (a)(2),
 - (b)(1) through (b)(2),
 - (e) (except for (e)(2), (e)(7), and (e)(8)),
 - (f)(1) through (f)(3) and (f)(5) through (f)(8), and
 - (i)
- §483.12 “Freedom from abuse, neglect, and exploitation;”
- §483.24 “Quality of life;”
- §483.25 “Quality of care;”
- §483.40 “Behavioral health services,” paragraphs (b) and (d);
- §483.45 “Pharmacy services,” paragraphs (d), (e), and (f);
- §483.70 “Administration,” paragraph (p), and
- §483.80 “Infection control,” paragraph (d).

Implementing SQC

The Final Rule specifies a staggered, three-phased implementation process for the regulatory provisions. As a result of that regulatory implementation schedule, the new definition of SQC and the associated participation requirements will also be implemented, as further described below. Phase 1 includes those regulatory requirements that were in existence and not changed in the Final Rule and those that were minimally amended so that they are relatively straightforward to implement. Phase 2 implementation are those changes that are significant, require additional guidance, and re-numbering of the F Tags. Phase 3 includes implementation of those elements that are more complex and may involve hiring or physical construction. The regulatory definition of SQC does not change; however it will be implemented slightly differently across the phases as described:

Phase 1- SQC

For those regulatory requirements that are being implemented in Phase 1 of the Final Rule process, the current F-tag numbering system found in Appendix PP of the State Operations Manual will be maintained and the new regulatory citations associated with SQC are being moved to be placed with the corresponding F-tags. For the purposes of SQC, this means that most of the F-tags that were identified as SQC prior to November 28, 2016, are considered to still be identified as SQC under the Final Rule. Those are tags F221-F226, F240-F258, and F309-F334.

However, there are five notable exceptions where there are F-tags which either 1) are now considered to be SQC, or 2) may now be considered as SQC because only a portion of the regulation within the F-tag falls under the definition of SQC. No changes will be made to the

ASPEN or QIS software to identify these tags for Phase 1. It will be the responsibility of the surveyor to determine which regulation they are citing under that F-tag.

There five F-tags exceptions are:

- F151: Contains §483.10(b)(1) through (b)(2).
- F155: Only consider SQC if the deficient practice is found at §483.24(a)(3).
- F175: Contains §483.10(e)(4) and (5).
- F252: Only consider SQC if the deficient practice is found at §483.10(i) and 483.10(i)(1)(i)-(ii).
- F461: Only consider SQC if the deficient practice is found at §483.10(i)(4) or 483.25(n)(4).

Phase 2 - SQC

Under Phase 2 of the implementation in the Final Rule, the affected regulatory requirements in the definition of SQC do not change. However, a new F-tag numbering system will be implemented in Phase 2, starting on November 28, 2017. The F-tags affected will be spread across different regulatory groups, but the problem of having certain F-tags with both SQC and non-SQC regulations associated within them should be resolved. The ASPEN and new survey process software will be updated to identify these new tags. It will continue to be the surveyors' responsibility to determine if the regulation they are citing meets the criteria for SQC.

Phase 3 – SQC

There are no anticipated changes to SQC for Phase 3 implementation of the requirements in the Final Rule, which will begin on November 28, 2019.

Revisions to the State Operations Manual and job aids are in progress to address the changes found in the Final Rule, which include changes to SQC.

Notice of Transfer or Discharge

The regulation at 42 CFR 483.15(c)(3)(i) requires, in part, that before a facility transfers or discharges a resident, the facility must “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...” The facility must also “...send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.” Sending a copy of the notice to a representative of the Office of the State Long-Term Care (LTC) Ombudsman provides added protection to residents and ensures the Office of the State LTC Ombudsman is aware of facility practices and activities related to transfers and discharges. Specific requirements for transfers and discharges are outlined below:

A. Facility-Initiated Transfers and Discharges

In situations where the facility has decided to discharge the resident while the resident is still hospitalized, the facility must send a notice of discharge to the resident and resident representative, and must also send a copy of the discharge notice to a representative of the Office of the State LTC Ombudsman. Notice to the Office of the State LTC Ombudsman must occur at the same time the notice of discharge is provided to the resident and resident representative, even though, at the time of initial emergency transfer, sending a copy of the **transfer** notice to the ombudsman only needed to occur as soon as practicable as described below.

For any other types of facility-initiated discharges, the facility must provide notice of discharge to the resident and resident representative along with a copy of the notice to the Office of the State LTC Ombudsman at least 30 days prior to the discharge or as soon as possible. The copy of the notice to the ombudsman must be sent at the same time notice is provided to the resident and resident representative.

Emergency Transfers

When a resident is temporarily transferred on an emergency basis to an acute care facility, notice of the transfer may be provided to the resident and resident representative as soon as practicable, according to 42 CFR 483.15(c)(4)(ii)(D). Copies of notices for emergency transfers must also still be sent to the ombudsman, but they may be sent when practicable, such as in a list of residents on a monthly basis.

B. Resident-Initiated Transfers and Discharges

A resident-initiated transfer or discharge means the resident or, if appropriate, the resident representative has provided verbal or written notice of intent to leave the facility. The medical record must contain documentation or evidence of the resident's or resident representative's verbal or written notice of intent to leave the facility. A resident's expression of a general desire or goal to return home or to the community or elopement of a resident who is cognitively impaired should not be taken as notice of intent to leave the facility. For resident-initiated transfers or discharges, sending a copy of the notice to the ombudsman is not required.

Additional information can be found at the CMS website:
<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Nursing-Homes.html>

Contact: Questions may be submitted to the NH Survey Development mailbox at NHSurveyDevelopment@cms.hhs.gov.

Effective Date: Immediately. This policy should be communicated with all survey and certification staff, their managers and the State/Regional Office training coordinators within 30 days of this memorandum.

/s/
David R. Wright

cc: Survey and Certification Regional Office Management