



*Improving the Lives of Older Adults and People with Disabilities
Through Services, Research, and Education*

March 16, 2020

Long-Term Care Ombudsman Program Frequently Asked Questions – COVID-19

Note: the word resident includes resident representative, unless otherwise indicated.

1. What should a program do when a Governor/director limits travel, etc.?

- a) Programs need to follow the declaration of the Governor and agency leadership.

2. Are we really a visitor since we are considered a health oversight entity under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy?

- a) Under CMS Guidance Memo Ref: QSO-20-14-NH, March 13, 2020, Ombudsman programs **are not** on the list of entities with an exception to visit.
- b) HIPAA addresses privacy around a resident's or patient's facility/clinical record. See AOA-IM-03-01 <https://acl.gov/sites/default/files/programs/2017-03/Info%20Memorandum,%20HIPAA.doc>
 - i. Under the Privacy Rule, the LTCOP is a "health oversight agency." Therefore, the Privacy Rule does not preclude release of residents' clinical records to the LTCOP, with or without authorization of the resident or resident's legal representative. Also, since the LTCOP is a "health oversight agency," nursing homes and other "covered entities" may, in response to appropriate Ombudsman inquiries, share other information without fear of violating the Privacy Rule.
 - ii. The Privacy Rule standards apply to nursing homes but not to board and care, assisted living and similar facilities unless they are health care providers who transmit information electronically in connection with certain financial and administrative transactions.

3. In light of the state survey agency guidance to prioritize complaints, with whom can we work with if our survey agency is not involved?

- a) Continue to refer complaints to your state survey agency in accordance with your programs' policies and procedures. The State Survey Agency may prioritize it as a complaint that will not receive immediate attention but they still need the information.

- As a reminder, CMS is prioritizing survey activity in this order:
 - a) All immediate jeopardy complaints (cases that represents a situation in which entity noncompliance has placed the health and safety of recipients in its care at risk for serious injury, serious harm, serious impairment or death or harm) and allegations of abuse and neglect;
 - b) Complaints alleging infection control concerns, including facilities with potential COVID-19 or other respiratory illnesses;
 - c) Statutorily required recertification surveys (Nursing Home, Home Health, Hospice, and ICF/IID facilities);
 - d) Re-visits necessary to resolve current enforcement actions;
 - e) Initial certifications;
 - f) Surveys of facilities/hospitals that have a history of infection control deficiencies at the immediate jeopardy level in the last three years;
 - g) Surveys of facilities/hospitals/dialysis centers that have a history of infection control deficiencies at lower levels than immediate jeopardy.
- See Ref: QSO-20-12-All - <https://www.cms.gov/files/document/qso-20-12-all.pdf>

4. How can we determine or verify if a resident has a decision maker when we cannot personally visit?

- a. As necessary, you will have to ask the facility staff if they can fax the document or accept the facility’s verbal verification until you can physically confirm. Note: the LTC Ombudsman program rule directs the program to “ascertain,” it does not say how.

45 CFR 1324.19 (b) (iv) In determining whether to rely upon a resident representative to communicate or make determinations on behalf of the resident related to complaint processing, the Ombudsman or representative of the Office shall ascertain the extent of the authority that has been granted to the resident representative under court order (in the case of a guardian or conservator), by power of attorney or other document by which the resident has granted authority to the representative, or under other applicable State or Federal law.

5. How shall we obtain written consent to access records?

- a. Follow your program’s policies and procedures; where the resident or resident representative communicates informed consent orally or by using other technology, document this consent as it occurs.
- b. Mail a consent form to the resident, with a pre-addressed, stamped envelope for return or;
- c. Ask staff if they have time to help by receiving a faxed form that they assist the resident to sign and then fax back.

6. What about disclosure of resident records or other information?

- a. Follow and reinforce your program’s policies and procedures regarding disclosure.
- b. Obtain verbal consent from the resident and document this consent as it occurs.

- c. Mail a consent to disclose form to the resident, with a pre-addressed, stamped envelope for return or;
- d. Ask staff if they have time to help by receiving a faxed form that they assist the resident to sign and then fax back.

All communications with residents, complainants, others, via e-mail or other methods are considered Ombudsman program information and disclosure provisions apply. Ensure that your program has technology in place to protect the privacy of e-mail and other correspondence

##End##