

PADONA Journal

***An Affiliate of ASLTCN -
The American Society for Long Term Care Nurses***

September - December 2016

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Paula G. Sanders, Esquire

On August 5, 2016, the Centers for Medicare and Medicaid Services (CMS) issued a memorandum, “Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff,” (S&C: 16-33-NH, Aug. 5, 2016), that requires surveyors at the next standard survey to request and review facility policies and procedures that prohibit staff from taking, keeping and/or distributing photographs that demean or humiliate residents. The memorandum is effective for all standard surveys beginning September 5, 2016. In addition, the surveyor may request to see written policies during any survey, based upon concerns and/or complaints.

Facilities should act now to make sure they have appropriate policies and procedures in place.

What should a policy include?

Surveyors will be looking at facility policies and procedures that prohibit abuse, including mental abuse. Facilities should review and revise their abuse prevention policies to “include and ensure that nursing home staff are prohibited from taking or using photographs or recordings in any manner that would demean or humiliate a resident(s). This would include using any type of equipment (e.g., cameras, smart phones, and other electronic devices) to take, keep, or distribute photographs and recordings on social media.” (S&C: 16-33-NH at 3).

Specific issues that should be addressed in these policies and procedures include:

- Every resident has the right to personal privacy of not only his/her own physical body, but also of his/her personal space, including accommodations and personal care.

- Taking photographs or recordings of a resident and/or his/her private space without the resident’s, or designated representative’s, written consent, is a violation of the resident’s right to privacy and confidentiality. This includes, but is not limited to, taking unauthorized photographs of:

⇒ A resident’s room or furnishings (which may or may not include the resident), or

⇒ A resident eating in the dining room, or

⇒ A resident participating in an activity in the common area.

- Only authorized staff directly involved in providing care and services for the resident should be present when care is provided, unless the resident consents to other individuals being present during the delivery of care.

- During the delivery of personal care and services, staff must remove residents from public view and provide clothing or draping to prevent unnecessary exposure of body parts.

- Taking unauthorized photographs or recordings of residents in any state of dress or undress using any type of equipment (e.g., cameras, smart phones, and other electronic devices) and/or keeping or distributing them through multimedia messages or on social media networks is a violation of a resident’s right to privacy and confidentiality.

- Even if a resident consents, and regardless of the resident’s cognitive status, abuse will be presumed and investigated whenever there is a photograph or recording of a resident, or the manner that it is used, that demeans or humiliates the resident(s). This includes but is not limited to photographs and recordings of residents that contain nudity, sexual and intimate relations, bathing, showering, toileting, providing perineal care such as after an incontinence episode, agitating a resident to solicit a response, derogatory

statements directed to the resident, showing a body part without the resident’s face whether it is the chest, limbs, or back, labeling resident’s pictures and/or providing comments in a demeaning manner, directing a resident to use inappropriate language, and showing the resident in a compromised position.

- The taking of unauthorized photographs and video recordings may constitute mental, physical and/or sexual abuse, all of which are prohibited. Whether mental abuse has occurred is determined by a “reasonable person” standard, and does not require a specific response from the resident.

- All staff are required to report any instance of alleged abuse, including when they see a resident photograph on social media. The facility maintains and enforces a policy that prohibits retaliation, intimidation and recrimination.

- All allegations of abuse will be investigated and findings reported as required. The investigation process includes:

⇒ Allegation must be reported to the Administrator and other officials.

⇒ Investigation will be initiated immediately.

⇒ Steps will be taken to prevent further potential abuse, and may include:

○ Staffing changes,

○ Increased supervision,

○ Protection from retaliation, and

○ Follow-up counseling for the resident(s).

⇒ Corrective measures will be implemented to prevent recurrence.

⇒ If an individual has a reasonable suspicion that a crime has been committed against a resident, a

report must be submitted to law enforcement and the state survey agency in accordance with the Elder Justice Act.

Who is considered “nursing home staff”?

Facility abuse prevention policies and procedures must apply to all nursing home staff, defined by CMS to include employees, consultants, contractors, volunteers, and other caregivers who provide care and services to residents on behalf of the facility.

What training is required?

In addition to developing written policies and procedures specific to the taking of unauthorized photographs or video recordings, facilities must also provide in-service training on abuse prevention policies to *all staff*. The training must include a discussion of prohibiting staff from using any type of equipment (e.g., cameras, smart phones, and other electronic devices) to take, keep, or distribute photographs and recordings of residents that are demeaning or humiliating. CMS emphasizes that facilities must also “provide ongoing oversight and supervision of staff in order to assure that these policies are implemented as written.” *Id.* at 4.

What will the survey agency be looking for?

In addition to looking for evidence that a facility has implemented, trained and enforced the specific policies discussed above, surveyors are required to conduct an onsite investigation within 2 to 10 days, and may be required to refer the matter to law enforcement in the following circumstances:

- Unauthorized photographs or recordings of the resident(s) have been taken, kept, and/or distributed on social media or transmitted through multimedia messaging by staff; or
- A photograph or video itself, or the manner that it is used, humiliates or demeans the resident(s), including, but not limited to, distributing on social media.

Surveyors are required to interview the resident, and if that is not possible, they will try to conduct interviews with the

resident’s family, responsible parties or other individuals involved in the resident’s life to determine how the resident would react to the incident. If they are unable to do so, they will use the reasonable person approach. CMS describes the reasonable person approach as one that assesses how a reasonable person in the affected resident’s position would be impacted by the posting of photographs or videos, regardless of whether the resident consented to the pictures. This means that staff must be extremely careful of how they use any pictures of a resident, even when the resident and/or family has consented upon admission to allow photographs to be taken. Reminding surveyors that each case must be assessed on the individual facts presented, any instance of noncompliance should be cited. CMS provides surveyors with the following example of when a facility should be cited for immediate jeopardy (IJ) in the following circumstance:

- The facility failed to protect two residents from mental and sexual abuse perpetuated by two staff members, who posted unauthorized videos and photographs on social media of the residents during bathing, toileting and grooming, including nude photos and photos of genitalia. Both residents were cognitively impaired and unable to express themselves. As a result, the two residents suffered public humiliation and dehumanization.

Abusers will be reported:

If surveyors determine that an individual abused a resident, they are required to report their findings in writing within 10 working days to:

- The individual;
- The current administrator of the facility in which the incident occurred;
- The administrator of the facility that currently employs the individual, if different than the facility in which the incident occurred;
- The licensing authority for individuals used by the facility other than nurse aides, if applicable; and

- The nurse aide registry for nurse aides.

Suspected abusers may also face criminal prosecution.

Federal regulations related to this issue:

- 42 CFR §483.10(e) Privacy and Confidentiality (F164)
- 42 CFR §483.13 (b) Abuse (F223)
- 42 CFR §483.13(c) Staff Treatment of Residents (F223)
- 42 CFR §483.13(c)(2) - Response to Alleged Violations (F225)
- 42 CFR §483.13(c) Staff Treatment of Residents (F226)
- 42 CFR §483.75 Administration (F490)
- 42 CFR §483.75(d) Governing body (F493)
- 42 CFR §§483.75(e)(2) to (e)(4)–Nurse Aide Competency (F495)

¹*This article does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this article without first seeking the advice of counsel.*

²Ms. Sanders is a Principal and Co-Chair of the national health law practice of Post & Schell, P.C. She may be reached at psanders@postschell.com and 717-612-6027.

³CMS S&C:16-33-NH is available at <https://www.cms.gov/Medicare/ProviderEnrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter16-33.pdf>

STAY ALERT AND WATCH FOR CMS TO RELEASE THE FINAL REQUIREMENTS OF PARTICIPATION!