

Human Rights Watch Substantive Input on Access to Justice for Older Persons

Open Ended Working Group Toward Strengthening the Human Rights of Older Persons

November 2019 Submission

Human Rights Watch has repeatedly raised concerns about access to justice for nursing home residents in the United States.¹ In 2019, the government regulator for nursing facilities in the US, the Centers for Medicare and Medicaid Services (CMS), effectively replaced a 2016 rule that protected residents' right to access courts in the event of alleged abuse or mistreatment in a nursing home, with a rule allowing for arbitration as the only option.² Under the new rule, nursing homes can add pre-dispute arbitration clauses to their contracts for new residents to forgo the option of filing a case in court.

The 2016 rule banned the use of pre-dispute arbitration clauses, with CMS describing them as “fundamentally unfair” and having a “deleterious impact on the quality of care for Medicare and Medicaid patients” in nursing facilities, due to the bargaining power differential between residents and the facilities. CMS concluded that “residents should have a right to access the court system if a dispute with a facility arises.”³

The new rule is titled “Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements” (84 FR 34718), and took effect September 16, 2019.⁴ With this new rule, residents who accept these new conditions will only have access to an arbitration proceeding, despite serious concerns about whether arbitration offers a fair and impartial hearing and a realistic chance at a remedy.

Without access to the courts, there is a real potential for hundreds of thousands of older people across the US to face serious obstacles to justice in the event of harmful abuse. A 2018 Human Rights Watch report found that nursing homes across the US routinely give antipsychotic drugs to residents with dementia to control their behavior, despite rules against the misuse of drugs as “chemical restraints.”⁵

¹ Bethany Brown (Human Rights Watch), “US Rolls Back Protections for Nursing Home Residents” commentary, July 25, 2019, <https://www.hrw.org/news/2019/07/25/us-rolls-back-protections-nursing-home-residents>.

² “Section 483.70(n), Binding Arbitration Agreements,” in CMS, “Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities,” *Federal Register*, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf>

³ *Ibid.* p. 68792.

⁴ “Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements” *Federal Register*, (84 FR 34718), 2019, <https://www.federalregister.gov/documents/2019/07/18/2019-14945/medicare-and-medicaid-programs-revision-of-requirements-for-long-term-care-facilities-arbitration>

⁵ Human Rights Watch, “*They Want Docile: How Nursing Homes in the United States Overmedicate People with Dementia*,” February 2018, <https://www.hrw.org/report/2018/02/05/they-want-docile/how-nursing-homes-united-states-overmedicate-people-dementia>.

Limiting the right of nursing home residents to an effective remedy for alleged abuses introduces the possibility that they can be barred from bringing lawsuits for such abuse. Systemic problems or repeated offenses will go undetected. A resident signing away their right to sue not only hurts individuals, it also forecloses the efficiency of the courts to improve the system for everyone.