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GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION

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GNYHCFA SEMINAR

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AGENDA

- Requirements for LTC facilities – Phase III
- LTC Compliance Hot Topic: Inadequate Staffing
- Hypothetical Incidents/Reporting and Investigation Requirements

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Compliance and Ethics Programs – Phase III Federal Requirements

Affordable Care Act

- Phase III requires the "operating organization" of each LTC facility to have a Compliance and Ethics Program by November 28, 2019.
  - "Operating organization" means the individual(s) or entity that operates a LTC facility.
    - Includes the owners.

New York Requirements

- NY has long mandated that nursing homes – not the operators – adopt and implement effective compliance programs pursuant to Social Services Law 363-d and related regulations (18 N.Y.C.R.R. **Part 521**).
  - Must include 8 specified elements and be applicable to billings and payments; medical necessity and quality of care; governance; mandatory reporting; credentialing; and other risk areas that are or should with due diligence be identified by the provider.

Phase III Definition of "Compliance and Ethics Program"

- A program of the LTC facility's operating organization that—
  - has been reasonably designed, implemented, and enforced so that it is likely to be effective in:
    - preventing and detecting criminal, civil, and administrative violations and
    - In promoting quality of care; and
  - meets specific regulatory requirements.

Phase III: Nine Specific Requirements

1. Establish written compliance and ethics standards, policies, and procedures, including, but not limited to those which designate:
   - An appropriate "contact" to which individuals may report suspected violations;
   - A method of reporting anonymously without fear of retribution;
   - Disciplinary standards/consequences for committing violations. Applicable to the operating organization's:
     - entire staff;
     - individuals providing services under a contractual arrangement; and
     - volunteers, consistent with the volunteers' expected roles.

Phase III: Nine Specific Requirements

2. Assign specific individuals within the "high-level personnel" of the operating organization with –
   - Overall responsibility to oversee the program's standards, policies, and procedures.
   - Such individual may be, but is not limited to:
     - the chief executive officer (CEO),
     - members of the board of directors, or
     - directors of major divisions in the operating organization; or an individual with substantial ownership interest in the operating organization.

Phase III: Nine Specific Requirements

3. Provide sufficient resources and authority to the assigned individuals to reasonably assure compliance.
   - CMS: operating organizations should use the facility assessment to determine the resources they need to devote to the compliance and ethics program to reasonably ensure compliance with all requirements.
   - The resources devoted should include both human and financial resources.
     - ***Recommendation:*** Have a budget for compliance.

Phase III: Nine Specific Requirements

4. Use due care not to delegate substantial discretionary authority to individuals who the operating organization knew, or should have known through the exercise of due diligence, had a propensity to engage in criminal, civil, and administrative violations under the Social Security Act.

Phase III: Nine Specific Requirements

5. Take steps to effectively communicate the standards, policies, and procedures to the operating organization's entire staff; individuals providing services under a contractual arrangement; and volunteers, consistent with the volunteers' expected roles. Includes, but is not limited to:
   - mandatory participation in training or orientation programs; or
   - disseminating information that explains in a practical manner what is required under the program.

Phase III: Nine Specific Requirements

6. Take reasonable steps to achieve compliance with the program's standards, policies, and procedures. Such steps to include, but are not limited to:
   - monitoring and auditing systems reasonably designed to detect criminal, civil, and administrative violations;
   - having in place and publicizing a reporting system whereby individuals could report violations anonymously without fear of retribution; and
   - having a process for ensuring the integrity of any reported data.

Phase III: Nine Specific Requirements

7. Consistent enforcement of the operating organization's standards, policies, and procedures through appropriate disciplinary mechanisms, including, as appropriate:
   - discipline of individuals responsible for the failure to detect and report a violation to the compliance and ethics program's designated contact.

Phase III: Nine Specific Requirements

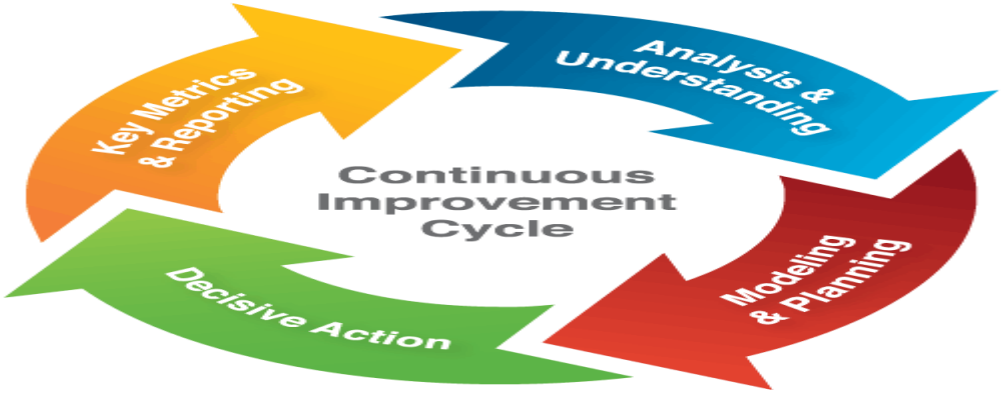
8. After a violation is detected, the operating organization must ensure that all reasonable steps identified in its program are taken to:
   - respond appropriately to the violation, and
   - prevent further similar violations,
     - ➢ including any necessary modification to the program to prevent and detect criminal, civil, and administrative violations.

Phase III: Nine Specific Requirements

9. The operating organization for each facility must review its compliance and ethics program annually and revise its program as needed to reflect changes in:
   - all applicable laws or regulations and
   - within the operating organization and its facilities,
   - to improve its performance in deterring, reducing, and detecting violations and in promoting quality of care.

Additional Requirements

- CMS noted in commentary accompanying the adoption of the regulations that LTC facilities should be integrating the information and data they collect or that arises out of the compliance and ethics programs into their QAPI programs.



Additional Requirements

- Applicable to operating organizations with five or more facilities – Must also have:
  - a mandatory annual training program on the operating organization's compliance and ethics program;
  - a designated compliance officer for whom the operating organization's compliance and ethics program is a major responsibility;
    - Reports directly to the governing body; must not be subordinate to the general counsel, chief financial officer or chief operating officer.
  - designated compliance liaisons located at each of the operating organization's facilities.

Additional Requirements

- Compliance liaisons (continued)
  - CMS believes each operating organization should have the flexibility to define the position and what will be the designated compliance liaisons:
    - qualifications,
    - duties
    - and responsibilities.

Surveys

- CMS expects to publish guidance, including interpretive guidelines (IGs) prior to surveyors reviewing facilities for compliance and ethics program requirements.

Other Phase III Requirements (QAPI)

- Governing body responsibility for QAPI program:
  - Can be executive leadership (or organized group or individual who assumes full legal authority and responsibility for operation of the facility).
  - Must be responsible and accountable for ensuring that—
    - An ongoing QAPI program is defined, implemented, and maintained and addresses identified priorities.
    - The QAPI program is sustained during transitions in leadership and staffing;
    - The QAPI program is adequately resourced, including ensuring staff time, equipment, and technical training as needed;

Other Phase III Requirements (QAPI continued)

- Governing body responsibility for QAPI program:
  - The QAPI program identifies and prioritizes problems and opportunities that reflect organizational process, functions, and services provided to resident based on performance indicator data, and resident and staff input, and other information.
  - Corrective actions address gaps in systems, and are evaluated for effectiveness; and
  - Clear expectations are set around safety, quality, rights, choice, and respect.

Other Phase III Requirements

- Coordination of residents' right to freedom from abuse, neglect, and exploitation with QAPI Plan;
- Comprehensive person-centered care (and treatment) to include trauma informed care;
- Designation of an Infection Preventionist (IP) responsible for the facility's Infection Prevention and Control Plan and who will participate on QAA committee;
- Call system from each resident's bedside (already a NY requirement).

Other Phase III Requirements (Training)

- Facilities must develop, implement and maintain an effective training program for:
  - New and existing staff
  - Individuals providing services under a contractual agreement
  - Volunteers, consistent with their expected roles
- Based on the facility assessment – the facility determines the amount and types of training necessary.
  - Many required topics were implemented in Phase I.

Other Phase III Requirements (Training continued)

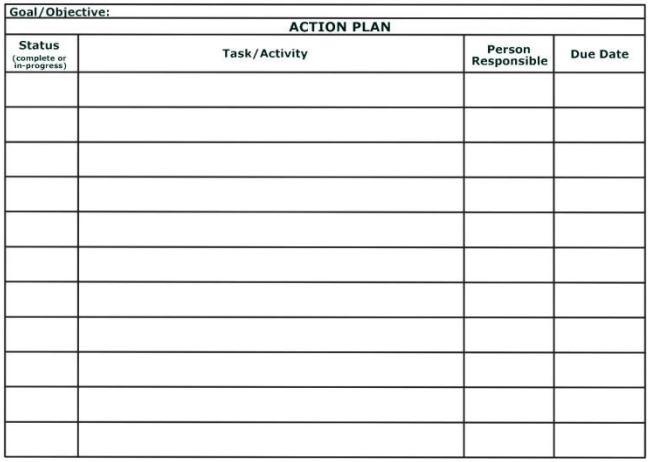
Phase III Required Topics	NY Requirement?
Effective Communications (mandatory for direct care staff)	
Resident Rights and Facility Responsibility to Properly Care for its Residents	Yes
QAPI	Yes
Infection Control	Yes
Compliance and Ethics	Yes (OMIG requirement)
In-Service Training for CNAs • to address areas of weakness as determined in performance reviews and facility assessment; • may also address the special needs of residents as determined by the facility staff.	
Behavioral Health (must be consistent with § 483.40 and as determined by the facility assessment).	

REMINDER

- The facility-wide assessment must be reviewed and updated at least annually (and more often as necessary) to determine what resources are necessary to care for residents competently during both day-to-day operations and emergencies. Must address/include:
  - The facility's resident population;
  - The facility's resources; and
  - A facility-based and community-based risk assessment, utilizing an all-hazards approach.

Facility Wide Assessment

- Important that the assessment be tailored specifically to each facility.
- Beware: Templates pose a risk!
  - ***Recommendation***: If you choose to use a template, make sure every item included in the template is applicable to your facility.



Goal/Objective:

ACTION PLAN

Status (complete or in-progress)	Task/Activity	Person Responsible	Due Date

Compliance Hot Topic

Staffing

- The ACA mandated auditable, payroll-based staff reporting.
  - In 2017, CMS released data based on payroll-based journal reporting.
  - In 2018, CMS incorporated this data on Nursing Home Compare.
- Findings:
  - One organization analyzed this data and concluded that insufficient staffing is wide-spread.

Source: Long Term Care Community Coalition Statement on Nursing Home Care, Quality and Staffing (June 4, 2018)
https://www.medicareadvocacy.org/wp-content/uploads/2018/06/Briefing-Materials-6-2018.pdf

Government Enforcement

- November 30, 2018: CMS memo to State Survey Agency Directors (QSO 19-02-NH) regarding PBJ Data:
  - Some facilities reporting several days in a quarter without a registered nurse onsite; and/or
  - significantly low nurse staffing levels on weekends.

"Nurse staffing is directly related to the quality of care that residents' experience."

Government Enforcement

- CMS will provide state surveyors with lists of such facilities.
  - Low staffing on weekends
    - Surveyors will now be required to conduct at least 50% of required off-hours surveys on weekends using the CMS list.
  - No onsite RN
    - When conducting a scheduled standard or complaint survey (regardless of the type of complaint), surveyors should investigate compliance with requirement that facilities have an RN present seven days a week, eight consecutive hours a day.

Staffing Data

- 30% of nursing homes report total direct care staffing of 3.0 hours per resident day or less.
- 70% of nursing homes report RN care staffing at 0.5 hours per resident day or less.
- Some nursing homes have reported zero (0) hours of RN care staff per resident day, every day.
  - Source: Long Term Care Community Coalition Statement on Nursing Home Care, Quality and Staffing (June 4, 2018)
    https://www.medicareadvocacy.org/wp-content/uploads/2018/06/Briefing-Materials-6-2018.pdf

Inadequate Staffing Issues

- A recent Kaiser Family Foundation report concludes that the benefits of higher staffing levels, especially RNs, include:
  - lower mortality rates;
  - Improved physical functioning;
  - less antibiotic use;
  - fewer pressure ulcers, catheterized residents, and urinary tract infections;
  - lower hospitalization rates; and
  - less weight loss and dehydration.

Source: Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2016, available at https://www.kff.org/medicaid/report/nursing-facilities-staffing-residents-and-facility-deficiencies-2009-through-2016

Inadequate Staffing Issues

- Inadequate staff or inadequately trained staff outcomes:
  - Emotional or social neglect
  - Personal hygiene neglect
  - Basic-needs neglect (e.g., lack of food and water)
  - Unclean, unsafe buildings (e.g., mobility hazards)
  - Medical neglect (e.g., medication errors, chemical restraints, bed sores, infections, etc.)

Government Enforcement

- *September 2018*: Two former NY nursing home operators agreed to pay $1 million to settle civil claims related to their criminal convictions for neglecting residents and knowingly endangering them by **understaffing**.
  - Prosecutors alleged the operators knew the staffing levels and payroll cuts were unsafe for the residents.
  - Warnings from administrators and DONs were ignored.
  - Also failed to act on arrests of staff for abusing/ neglecting staff and covering up multiple incidents.

Government Enforcement/ Settlements

- *September 2018*: (continued)
  - Prosecutors alleged that one incident involved a 94 year-old resident who was left in a recliner in the SNF's common area for approximately 41 hours.
    - During that time, no one provided the resident with food, water, medications or any services specified in her care plan.

Private Actions

- November 2018: A NY law firm reportedly filed two class-action lawsuits against two SNFs run by the same for-profit operator.
  - Allegations include that understaffing at the facilities led to inadequate care (e.g., infections, falls, etc.)
    - One resident claims that a wound to his foot became infected multiple times because of a lack of attention from staff .
      - The resident had to change his own bandages; and
      - He was left attached to an empty I-V on multiple occasions. When the resident tried to detach himself from it, he fell out of bed.

Private Actions

- December 2018: A NY Supreme Court judge approved a settlement in a lawsuit brought by families of two residents of an upstate facility.
  - New owners of the facility (who admit no wrong-doing) agreed to:
    - Pay approximately $500,000 to past and current residents;
    - Commit to hire more workers – specifically nurses.
    - Commit to improve performance on several key measures by December 2019 (progress will be overseen by the Court).

Hypothetical Situations – What Would You Do?

Hypothetical # 1

- SNF with 150 beds.
- 82 year-old female (Ms. Grandma):
  - High risk for falls;
  - Bi-polar;
  - On numerous medications;
  - High BP for last 4 days;
  - Care Plan –
    - hourly checks for wandering behavior;
    - Wanderguard.

Hypothetical # 1

- It's the weekend and several CNAs have called in sick.
  - There are only three LPNs and four CNAs on duty.
- Ms. Grandma is last seen at 10 pm in her bed.
- At 3:00 am, a CNA notices Ms. Grandma is not in her room.
- She is eventually found on the floor in an empty room;
- Wanderguard was not triggered/malfunctioned.

WHAT WOULD YOU DO?/WHAT SHOULD HAPPEN NEXT?

Hypothetical # 1

WHAT WILL YOU DO FIRST?

- ATTEND TO THE NEEDS OF THE RESIDENT.
  - RN assessment.
  - Contact resident's physician.
    - Follow physician instructions.
  - Contact designated family member or representative.

Hypothetical # 1

ONCE RESIDENT IS OK, WHAT'S NEXT?

- INITIAL INVESTIGATION
- IS THIS A REPORTABLE EVENT? Exploitation, Abuse, Mistreatment, Neglect, Injury of Unknown Origin, Quality of Care Issue, Misappropriation??
  - If the facility has "reasonable cause" to believe that an instance of mistreatment, exploitation, neglect and abuse, including injuries of unknown origin and misappropriation of resident property has occurred, it must be reported to DOH immediately.
- At what point should you call facility counsel?

Hypothetical # 1

- INVESTIGATION
  - Document event – may include drawing a sketch or photographing the room.
  - Reenactment if possible.
  - Video footage review if available.
  - Staff statements and interviews.
  - Document resident injuries.
  - Interview the resident (if possible), staff present, other residents.
  - Document what was seen and heard.
  - Document facts (Don't make assumptions).

Hypothetical # 1

CLINICAL REVIEW

- Was Ms Grandma's elevated B/P reported to MD/NP?
- Medication Review by MD, RN and Drug Regime Review by Pharmacy Consultant if indicated.
- PT/OT Evaluation.
- Care Plan Review by IDT team including CNA.
- Inservice and System Review for checking Wanderguard, Hourly Monitoring Policy/Procedure.

Hypothetical # 1

- Two days after the facility advises DOH, agents from the A.G.'s Medicaid Fraud Control Unit show up asking to interview the staff and administrator.

WHAT WOULD YOU DO?/WHAT SHOULD HAPPEN NEXT?

Hypothetical # 1

- Would anything be different if it was DOH that showed up at the facility (instead of the Medicaid Fraud Control Unit)?

WHAT WOULD YOU DO?/WHAT SHOULD HAPPEN NEXT?

Hypothetical # 2

- 80 year-old male (Mr. Grandpa):
  - Diagnosis = dementia, along with several co-morbidities.
  - He is in a wheelchair and has a history of wandering.
    - He also has a history of falling while getting up from the wheelchair.
  - A therapist sees Mr. Grandpa in a wheelchair near the nursing desk.
    - Mr. Grandpa has been placed facing the wall with a lap tray in order to prevent him from falling.
      - This is not in the care plan.
  - The therapist takes a picture.
    - One week later, the picture is texted to the DON.

Hypothetical # 1

WHAT WILL YOU DO FIRST?

- ATTEND TO THE NEEDS OF THE RESIDENT.
  - Medical assessment.
  - Contact resident's physician.
    - Follow physician instructions.
  - Contact designated family member or representative.

Hypothetical # 2

WHAT'S NEXT?

- IS THIS A REPORTABLE EVENT?
  - Exploitation, Abuse, Mistreatment, Neglect, Quality of Care issue??
  - At what point is the "reasonable cause" threshold met?
  - At what point do you contact legal counsel?

Hypothetical # 2

- INVESTIGATION
  - Document event.
  - Document resident injuries (if any).
  - Interview the resident (if possible), the therapist, staff present, other residents.
  - Document what was seen and heard.
  - Document facts (Don’t make assumptions).
  - Review video footage if available.

Hypothetical # 2

CLINICAL REVIEW

- The Interdisciplinary Team including direct care staff (CNA and Unit Nurse) should conduct a Restraint Reduction Assessment that includes a review of individual resident's Customary Routine.
- Education for all Nursing and Rehab Staff to review the Facility Philosophy and Policies regarding use of Restraints.
- Obtain a Facility list of any residents utilizing a restraint and conduct a Team review to determine indication for use and attempts at restraint reduction.

Hypothetical # 2

WHAT WOULD YOU DO?/ WHAT SHOULD HAPPEN NEXT?

Hypothetical # 2

- Two days after the facility advises DOH, agents from the A.G.'s Medicaid Fraud Control Unit show up asking to interview the staff and administrator.

WHAT WOULD YOU DO?/WHAT SHOULD HAPPEN NEXT?

Hypothetical # 2

- Would anything be different if it was DOH that showed up at the facility (instead of the Medicaid Fraud Control Unit)?

WHAT WOULD YOU DO?/WHAT SHOULD HAPPEN NEXT?

Summary of Reporting Requirements

- Investigate incident immediately upon discovery.
- Determine if reportable event occurred: abuse, neglect, mistreatment, exploitation, misappropriation, injury of unknown origin/other reportable incidents.
- Submit incident report via the Health Commerce System (HCS) immediately, once the reasonable cause threshold is met for abuse, neglect, and mistreatment.
  - Report all other incidents via the HCS within 24 hours.

Summary of Reporting Requirements

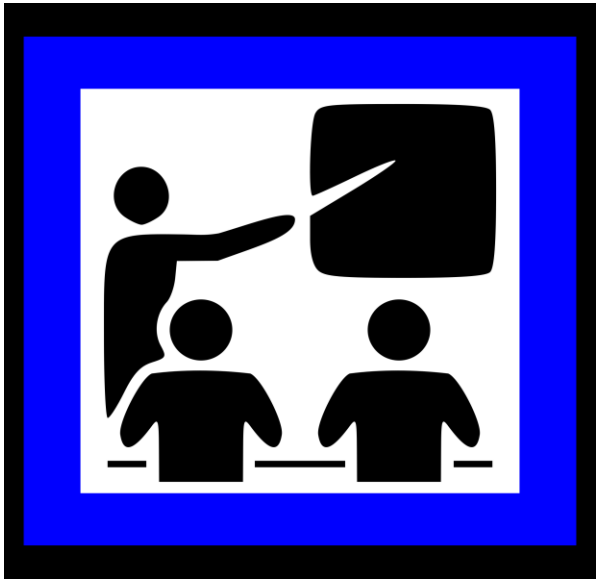
- Under the Elder Justice Act, each individual who is an owner, operator, employee, manager, agent or contractor of a long term facility must report any reasonable suspicion of a crime against the facility's residents or individuals receiving care at the facility.
  - Reports must be made to the state survey agency (DOH) and to one or more local law enforcement entities.
    - If the resident suffers serious bodily injury, it must be reported within 2 hours of the event.
    - If there is no serious bodily injury, it must be reported within 24 hours of the event.

Summary of Reporting Requirements

- After reporting through the HCS, facilities then have 5 working days to complete their investigation and submit investigative report to DOH.

Summary of Reporting Requirements

- If the alleged violation is verified, appropriate corrective action must be taken. May include, but not limited to:
  - Plan to prevent reoccurrence;
  - Staff discipline;
  - Education and training;
  - Adopt or revise relevant policies and procedures;
  - Follow-up reviews.



Questions

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