

Congress of the United States

Washington, D.C. 20515

April 22, 2021

Elizabeth Richter
Acting Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 1244

RE: Reinstate ban on pre-dispute binding arbitration agreements in nursing homes.

Dear Acting Administrator Richter:

We write as sponsors of the *Fairness in Nursing Home Arbitration Act*, which would prohibit long-term care facilities from requiring or soliciting residents, their families, or their guardians, to enter mandatory pre-dispute, binding arbitration agreements. The decision to transfer a parent or loved one to a long-term care facility is heart wrenching. Throughout the COVID-19 pandemic, we have seen firsthand that the focus of families with loved ones in these facilities is on the quality of care and range of services the facility will provide. In the midst of this life change, families may be under a great deal of stress and duress, with little ability to focus on the language in the agreements that limit their rights should something go wrong while their loved one resides in a nursing home.

In July 2019, the Trump Administration's Centers for Medicare & Medicaid Services (CMS) released their final rule, "Medicare and Medicaid Programs; Revision of Requirements for Long Term Care Facilities: Arbitration Agreements" (CMS-3342-F). The rule effectively repealed the Obama Administration's important and necessary ban on pre-dispute binding arbitration agreements in nursing homes.¹ This rule failed to acknowledge the detrimental impact of forced arbitration on nursing home residents. Rather, it allowed facilities to again use pre-dispute, binding arbitration to hide failures in care and deny families and patients their day in court.

The Obama Administration's final rule banned these "unconscionable" forced arbitration provisions because of the need for accountability for abuses within the industry. Prior to the Obama Administration's rule, long term care facilities used forced arbitration as a mechanism to obscure shortcomings and deny residents and their family members justice. As a part of that proceeding, CMS duly noted that patients and their families would feel obligated to sign

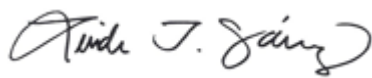
¹ Medicare and Medicaid Programs; Revision of Requirements for Long Term Care Facilities: Arbitration Agreements 84 Fed. Reg. 34718 (Sept. 16, 2019).

contracts for nursing home care, out of fear that if they did not, their loved ones would be denied care.

Pre-dispute, binding arbitration agreements are a violation of patient rights. As stated in 2015 by the Attorneys General of 16 states, “Pre-dispute binding arbitration agreements in general can be procedurally unfair to consumers, and can jeopardize one of the fundamental rights of Americans; the right to be heard and seek judicial redress for our claims. This is especially true when consumers are making the difficult decisions regarding the long-term care of loved ones.”² We urge you to immediately take action to curtail the use of pre-dispute, binding arbitration agreements in long term care facilities. As Ways and Means Committee Chairman Neal stated in his February 25th letter to CMS, the pandemic will continue to have detrimental effects on the health and safety of our most vulnerable residents for the foreseeable future.³ We must ensure nursing home residents and their families are empowered to exercise their legal rights and that long term care facilities are held accountable for their actions.

Thank you for your attention to this important matter.

Sincerely,



LINDA T. SÁNCHEZ
Member of Congress



JAN SCHAKOWSKY
Member of Congress

² Maryland Attorney General and 16 Other States, *Final Comments of State Attorneys General to CMS re Pre-dispute arbitration*, <https://www.regulations.gov/comment/CMS-2017-0076-0692> (Aug. 9, 2017).

³ Richard E. Neal, *Letter to CMS Acting Administrator Richter 'RE: Reinstatement of COVID-19 waivers and other pressing administrative changes in skilled nursing facilities,*” Committee on Ways and Means (Feb. 25, 2021).