

A Long Term Care and Senior Housing Law Update

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Feeding Assistant Regulations Upheld by Ninth Circuit Court of Appeals

On Friday, August 31, the Ninth Circuit Court of Appeals rejected a challenge to the CMS Feeding Assistant Regulations. The regulations allow States to permit skilled nursing facilities to use trained personnel to assist in feeding residents lacking complicated feeding needs. Read the decision [here](http://www.lanepowell.com/pdf/0536065.pdf) (<http://www.lanepowell.com/pdf/0536065.pdf>).

In 2005, plaintiffs, the Washington Ombudsman and others, filed a class action lawsuit in the United States District Court for the Western District of Washington, seeking to invalidate the Feeding Assistant Regulations. Plaintiffs argued that the regulations violated the Nursing Home Reform Law (“Reform Law”), 42 U.S.C. §§ 1395i-3, 1396r, by permitting “nursing or nursing-related services” to be performed by individuals not trained as nurses. As such, plaintiffs argued, the regulations were not entitled to deference under the Chevron, U.S.A., Inc v. Natural Res. Def. Council, Inc, 467 U.S. 837 (1984) and were invalid.

The District Court dismissed plaintiffs’ challenge and upheld the regulations, stating that “Plaintiffs have proffered no evidence that the proposed regulations will cause harm to nursing home residents beyond mere speculation and conjecture.” The court rejected plaintiffs’ characterization of the evidence supporting the regulations as “anecdotal,” pointing to “numerous positive comments received from residents.” Based on these findings, the court denied plaintiffs’ challenge and affirmed the validity of the Feeding Assistant Regulations. Plaintiffs appealed.

On Friday, the Ninth Circuit agreed with the District Court, stating: “Congress has not ‘spoken directly to the question at hand,’ insofar as the Reform Law neither defines ‘nursing or nursing-related services,’ nor specifically states that all feeding tasks (or all hands-on care) must be performed by certified nurse aides. Neither can such an intent be gleaned from the legislative history or the Reform Law’s general purpose or structure. Plaintiffs are unable to establish that the Secretary’s interpretation of the phrase to exclude the feeding of nursing home residents without complicated feeding problems will frustrate congressional intent or is otherwise inconsistent with the Reform Law. As such, the Secretary’s permissible construction of the statute is entitled to deference.”

Members of the Lane Powell Long Term Care & Senior Housing Client Service Team prepared an [Amicus Brief](http://www.lanepowell.com/pdf/AHCA%20Amicus%209th%20Cir.pdf) (<http://www.lanepowell.com/pdf/AHCA%20Amicus%209th%20Cir.pdf>) for the American Health Care Association in support of the regulations and the District Court’s Ruling.

For more information or for a copy of the decision, please contact the Long Term Care and Senior Housing Law Group at Lane Powell:

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