Long Term Services and Supports Quality, Regulations, and Enforcement
Prepared By Charlene Harrington, Ph.D.
November 8, 2017

The 30th anniversary of the passage of the Nursing Home Reform Act provides an excellent opportunity to reflect on accomplishments, challenges and future directions to improve long-term services and supports. Today I would like to review some issues in quality, regulation and enforcement for nursing homes and home and community based services (HCBS).[1]

Nursing home regulations have improved the standards of care

The Affordable Care Act of 2010 included important new nursing home requirements.[2] In 2016, CMS implemented new regulations for conditions of participation that included: [3]

- Greater focus on person-center care and residents needs
- Improved infection control
- Improved staff training and competencies
- Improved protections against abuse, neglect and exploitation, and evictions
- Facility assessment of staffing needs to care for residents
- Banned forced arbitration agreements

The nursing home associations have written letters to the Director for Health and Human Services that strongly oppose to the new regulations [4]

They have asked the Centers for Medicare and Medicaid Services (CMS) and Congress to reduce the regulations that they claim are burdensome and costly.

CMS has already agreed to a reduction in enforcement of regulations

In response, CMS has recently:

- Developed new guidelines that seriously limit the enforcement of penalties for immediate jeopardy and the amount and type of civil money penalties. [5]
- Agreed to delay implementation and re-review the new regulations that took five years to develop. [6]
- Proposed a new rule to rescind the ban on forced arbitration in admission agreements. [7]

Consumer groups strongly oppose reductions in regulatory enforcement because poor quality a problem in many nursing homes

Nursing homes scandals continue to be frequently reported in the press all across the country. Numerous government reports and research studies show the problems of unnecessary deaths, including the recent 14 deaths in Hollywood FL, abuse and neglect (including sexual assaults), overmedication with psychoactive drugs, unmet resident needs, and low staffing levels.

- More than one in five nursing homes have serious quality violations jeopardizing the safety of residents each year. [1]
- 33% of Medicare residents experienced adverse events or harm during their short post-acute nursing stays. [8]
- 22% of all nursing home residents are readmitted to hospitals annually costing billions unnecessarily. [9]

- 42% of nursing homes have chronic deficiencies – those with 3 or more citations for the same issue over 3 years.[10]
- Complaints have increased by 33% increase in last 5 years and 60% were serious or could cause immediate jeopardy.[11]

CMS's enforcement of regulations has been weak for the past 30 years

Numerous investigations by the GAO and OIG have found that:

- Serious violations are under-identified and under-rated by state surveyors and CMS oversight has been inadequate. [12-14]
- 28% of incidents of potential abuse and neglect are not always reported to appropriate law enforcement and regulatory authorities.[15]
- Complaints are often not investigated in a timely manner and not substantiated.[11]
- Substandard nursing homes and those found by the US Department of Justice to have been involved with fraud are seldom terminated from the Medicare and Medicaid programs. [16]

While CMPs have increased in dollar amounts recently, the total CMPs are **less than 1% of total nursing home expenditures**. [17,18] Often the CMPs are reduced and delayed and are so low that nursing homes have no incentive to correct violation. [19]

Staffing levels are low in over half of US nursing homes

Overwhelming research evidence shows that higher nurse staffing levels are associated with better nursing home quality. [20-22] Research studies and experts show the need for a minimum of 4.1 total nursing hours per resident day, including 1 .3 hours of RN and LPN time to prevent harm or jeopardy to residents. [23] New research shows certified nursing assistant (CNA) hours should be 2.8 to 3.6 hours per resident day. depending on resident acuity[24] so the total minimum hours should range from 4.1 to 4.9 per resident day. **Over half of US nursing homes do not have staffing levels that meet the minimum recommended standards and these nursing homes have the poorest quality of nursing care.** [22]

Nursing homes often cut staffing to increase profits. In California, only 37% of revenues go to nursing and direct care while 25% go for administration and profits. [25]

The financial burden of new regulations is greatly overstated by the industry

The new costs to implement the 2016 CMS regulations are **less than one-half of one percent of annual nursing home expenditures.**[4,18] The benefits to residents far exceed the costs.

Nursing homes profits are very high

Medicare Payment Advisory Commission reports that Medicare profit margins averaged 15.6% over the past decade and overall margins are about 2%. 25% of nursing homes had over 21% Medicare profit margins. [27]

Nursing home financial reports do not show the hidden profits taken by owners to reduce taxes, including profits on leases to property companies owned separately by nursing home owners. [4] Nursing homes

often pay inflated administrative payments to management, pharmacy, staffing and therapy, and other companies owned separately by the owners and they may pay excessive interest rates on loans made to the owners. And owners can legally take direct withdrawals from nursing home funds to pay themselves at any time. [27]

In summary, this is not the time to reduce nursing home regulations and enforcement oversight when all evidence points to serious quality problems in so many nursing homes and the continued harm and jeopardy to residents in some homes.

Staffing standards need to be increased and regulations need to be strictly enforced for the health, safety, and welfare of nursing home residents.

Home and Community Based Services

Turning to the issues related to the quality of home and community based services, I want to say a few words about home health agencies, hospices, residential care, and personal care services.

Home health agency quality measures generally have improved over time although about a quarter of Medicare patients would not recommend the agency that they used. [1]

Over the past decade, more home health patients have reported less pain and improvements in taking medications and walking and moving. These self-reported quality measures, however, are not audited, and may be inaccurate or inflated and has been the case with self-reported nursing home quality measures. [1] New measures from more accurate claims data on hospital admissions and emergency room use have been added to the CMS Home Health Compare website. Unfortunately, home health agencies are only surveyed every 3 years and little is known about enforcement of federal standards. Federal deficiencies and sanctions of home health agencies are not made publicly available by CMS as part of Home Health Compare. [1]

Little is known about hospice care quality at least in part because federal surveys have been infrequent and quality reporting programs are new. Until the federal IMPACT Act of 2014 required surveys every three years, hospices were only surveyed every eight years. CMS has not made survey findings publicly available. [1]

Public reporting of 7 quality measures on the CMS Hospice Compare website began in 2017. Six of the seven hospice measures show little variation with scores about 90 percent. [1] CMS is developing new quality measures that focus on visits at the time or near the time of death. Because of the high number of voluntary discharges from hospice initiated by patients/families, new measures are being developed on potentially avoidable transitions. [1]

Little is known about residential care facility quality because quality standards vary by state and few data are publicly reported. The National Survey of Residential Care Facilities found that many residents are frail, with many chronic illnesses, impaired self-care and cognition, and unmet care needs. The survey found some quality problems.[28]

- 15% of residents fell and sustained a hip fracture or other injury during the year.

- 61 % of residents with cognitive impairment or dementia had been prescribed psychotropic medications.
- Only half of residents left the facility grounds at least twice per month
- Only 17% of residential care facilities reported having RNs or LVNs staff.

Little is known about the quality of personal care and other HCBS because these services are primarily regulated by the states and little information is collected and reported. Generally, surveys show that consumers who use personal care services and those who have family members as paid care providers report high satisfaction. States are required by CMS to identify, address and prevent instances of abuse, neglect, exploitation and unexplained deaths but information on these state systems are not available. [1]

The recent shift of state Medicaid programs to capitated managed care plans for long-term services and supports (LTSS) creates both potential benefits and risks for service quality. Delivery systems that integrate acute, primary care, behavioral health, institutional, and community-based long-term services and supports may improve quality through more holistic, coordinated care delivery. Managed care plans, however, may have adverse effects on care access and quality if plans limit spending by restricting services, reducing provider payments, or having provider networks with poor quality. [1]

The quality of LTSS provided in managed care organizations is unknown. States are required to identify standard quality measures for Medicaid managed LTSS plans but these vary widely, are not publicly reported, and cannot be compared across states.[1]

There are many future challenges for HCBS

The development of quality standards and public reporting for home health, hospice and HCBS need to be expanded and improved.

The enforcement of existing regulations is an on-going concern for nursing homes, home health, and hospice, residential care and HCBS. Quality standards and oversight are also needed for Medicaid managed LTSS programs.

Nursing home residents and those who use HCBS have a right:

- To dignity and respect
- To have high quality services
- To be free from abuse, neglect and harm

Policymakers, researchers, consumers, providers and other stakeholders must work together to ensure basic human and civil rights for those who need LTSS.

References

1. Harrington, C., Wiener, J.M., Ross, L., and Musumeci, M. (2017). Key issues in long-term services and supports quality. Issue Brief, October. Kaiser Family Foundation. http://files.kff.org/attachment/Issue-Brief-Key-Issues-in-Long-Term-Services-and-Supports-Quality
2. Wells, J., & Harrington, C. (2013). Implementation of Affordable Care Act provisions to improve nursing home transparency and quality. Kaiser Commission on Medicaid and the Uninsured: Washington, DC. http://www.kff.org/medicare/upload/8406.pdf
3. U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services. (2016). Medicare and Medicaid programs: Reform of requirements for long-term services and supports facilities. 42 CFR Parts 405, 431, 447, 482, 483,485, 488, and 489. Final Rule.

Federal Register, 81 (192). October 4. 68688-68872 https://www.federalregister.gov/documents/2016/10/04/2016-23503/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities
4. American Health Care Association and National Center for Assisted Living. (2017). Letter to Thomas E. Price, M.D. U.S. Department of Health & Human Services. http://www.ihca.com/Files/Comm-Pub/AHCA-Final-Price-Ltr-3.9.17.pdf
5. Centers for Medicare and Medicaid Services. (2017). Revised policies regarding the immediate imposition of federal remedies –For Action. https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-01.pdf; Medicare Advocacy. (2017). "As Sought by Nursing Home Industry, CMS Changes Guidance to Reduce Civil Money Penalties for Nursing Facility Deficiencies" Alert, Aug. 9. http://www.medicareadvocacy.org/cma-alert-snf-update-comments-on-reimbursement-civil-money-penalties-weakened/
6. Centers for Medicare and Medicaid Services. (2017). Phase 2 requirements of participation Federal Register on October 4, 2016. S&C 17-36-NH (June 30). https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Downloads/Advance-Appendix-PP-Including-Phase-2-.pdf
7. Centers for Medicare and Medicaid Services. (2017). Revision of requirements for long term care facilities arbitration agreements. *Federal Registrar*. 26649. Proposed Rule. June 8. CMS-2017-0076. https://www.federalregister.gov/documents/2017/06/08/2017-11883/medicare-and-medicaid-programs-revision-of-requirements-for-long-term-care-facilities-arbitration
8. U.S. Office of the Inspector General (US OIG). (2014). Adverse events in skilled nursing facilities: National incidence among Medicare beneficiaries. OEI-06-11-00370. February. https://oig.hhs.gov/oei/reports/oei-06-11-00370.asp.
9. U.S. Office of the Inspector General (US OIG). (2013). Medicare nursing home resident hospitalization rates merit additional monitoring. OEI-06-11-00040. November. https://oig.hhs.gov/oei/reports/oei-06-11-00040.pdf.
10. Long Term Care Community Coalition. (2017). Nursing homes with chronic deficiencies. New York. http://nursinghome411.org/nursing-homes-with-chronic-deficiencies/
11. U.S. Office of Inspector General. (2017). A few states fell short in timely investigation of the most serious nursing home complaints:2011-2015. https://oig.hhs.gov/oei/reports/oei-01-16-00330.pdf
12. U.S. Government Accountability Office (US GAO). (2007). Nursing home reform: Continued attention is needed to improve quality of care in small but significant share of homes. GAO-07-794T, Washington, DC: May 2, 2007 http://www.gao.gov/products/GAO-07-794T;
13. U.S. Government Accountability Office (US GAO). (2008). Nursing homes: Federal monitoring surveys demonstrate continued understatement of serious care problems and CMS oversight weakness. GAO-08-517, Washington, DC: May 9, 2008 http://www.gao.gov/products/GAO-08-517;
14. U.S. Government Accountability Office (US GAO). (2009). Nursing homes: Addressing the factors underlying understatement of serious care problems requires sustained CMS and state commitment. GAO-10-70. Washington, D.C. http://www.gao.gov/products/GAO-10-70.
15. U.S. Office of the Inspector General (US OIG). (2017). Early alert: The Centers for Medicare & Medicaid Services has inadequate procedures to ensure that incidents of potential abuse or neglect at skilled nursing facilities are identified and reports in accordance with applicable requirements. A-01-17-00504, August. https://oig.hhs.gov/oas/reports/region1/11700504.asp
16. Li, Y., Harrington, C., Spector, W.D., and Mukamel, D.B. (2010). State Regulatory Enforcement and Nursing Home Termination from the Medicare and Medicaid Programs. *Health Services Research.*. 45 (6):1796-1814. GAO
17. Centers for Medicare and Medicaid Services. (2017). CMS nursing home penalties. https://data.medicare.gov/Nursing-Home-Compare/Penalties/g6vv-u9sr https://qcor.cms.gov/main.jsp
18. Centers for Medicare and Medicaid Services. (2016). Personal health care expenditures, by source of funds and type of expenditure: United States, selected years 1960–2015. https://www.cdc.gov/nchs/data/hus/2016/095.pdf
19. Harrington, C., Stockton, J. and Hooper, S. (2014). The effects of regulation and litigation on a large for-profit nursing home chain. *J. of Health Politics, Policy and Law.* 39 (4):781-809.
20. Dellefield, M.E., Castle, N. G., McGilton, K.S., & Spilsbury, K. (2015). The relationship between registered nurses and nursing home quality: An integrative review (2008-2014). Nursing Economics, 33 (2):95-108 and 116;
21. Institute of Medicine (IOM), Committee on the Work Environment for Nurses and Patient Safety. (Page, A. [Ed.]). (2003). Keeping patients safe. Washington, DC: National Academies Press.
22. Harrington, C., Schnelle, J.F., McGregor, M., and Simmons, S.F. (2016). The need for higher minimum staffing standards in U.S. nursing homes. Health Services Insights. 9: 13-19;
23. Centers for Medicare & Medicaid Services (CMS). (2001). Appropriateness of minimum nurse staffing ratios in nursing homes. Report to Congress: Phase II Final. Volumes I to III. Baltimore: CMS (prepared by Abt Associates) http://theconsumervoice.org/uploads/files/issues/CMS-Staffing-Study-Phase-II.pdf
24. Schnelle, J.F., Schroyer, L.D., Saraf, A.A., and Simmons, S.F. (2016). Determining nurse aide staffing requirements to provide care based on resident workload: A discrete event simulation model. J. American Medical Directors Association. 17:970-977.
25. California Office of Statewide Health Planning and Development Office (2015). LTC facilities annual financial pivot profile. https://www.oshpd.ca.gov/HID/LTC-Financial.asp#Profile
26. Medicare Payment Advisory Commission. (2017). Report to Congress: Medicare Payment Policy. Chapter 8. March, 197-221. http://www.medpac.gov/docs/default-source/reports/mar17_entirereport224610adfa9c665e80adff00009edf9c.pdf?sfvrsn=0
27. Harrington, C, Ross, L. and Kang, T. (2015). Hidden ownership, hidden profits, and poor quality of nursing home care: A case study. *International Journal of Health Services.* 45 (4): 779-800.
28. Khatutsky G, Ormond C, Wiener JM, Greene AM, Johnson R, Jessup EA, Vreeland E, Sengupta M, Caffrey C, Harris-Kojetin L. (2016). *Residential care communities and their residents in 2010: A national portrait*. DHHS Publication No. 2016-1041. Hyattsville, MD: National Center for Health Statistics. Available at: https://www.cdc.gov/nchs/data/nsrcf/nsrcf_chartbook.pdf