



CMA Weekly Alert – May 17, 2007

## **20<sup>TH</sup> ANNIVERSARY OF THE NURSING HOME REFORM LAW CELEBRATED: MANY CHALLENGES REMAIN**

The 20<sup>th</sup> anniversary of the Nursing Home Reform Law (the Reform Law) was celebrated in a May 2<sup>nd</sup> hearing before the Senate Special Committee on Aging. Witnesses testified that although the law changed public policy requirements for nursing facilities receiving reimbursement under the Medicare and Medicaid programs, many challenges remain, chiefly the inadequacy of efforts to enforce standards of care and the inadequacy of nurse staffing levels.

The hearing was entitled “The Nursing Home Reform Act Turns Twenty: What Has Been Accomplished, and What Challenges Remain?” It was convened by Senator Herb Kohl (D, WI) and featured a number of researchers and advocates who have studied the impact and effectiveness of the Reform Law over the years, including the Government Accountability Office (GAO) and Professor Charlene Harrington, a leading researcher in the field.

Of significance was the discussion of two recent studies that confirm that enforcement efforts have failed to assure that all certified facilities provide residents with care in compliance with federal law. The hearing featured a March 2007 report by the GAO and the written statement of Toby S. Edelman, Esq., Senior Policy Attorney for the Center for Medicare Advocacy, which brought to the Committee’s attention an observational study of the survey and enforcement system prepared by the University of Colorado for the Centers for Medicare & Medicaid Services (CMS).

### **Inadequate Enforcement**

Kathryn Allen, Director of Health Care at the GAO, testified that the GAO, in a series of reports over the past decade, has found that the severity of deficiencies cited in nursing facilities is understated, that the enforcement system is too complex, and that the deterrent effect of civil money penalties is diluted when most are imposed at the lower ranges. In her written testimony, she reported:

[D]espite the reforms of OBRA '87 [Omnibus Budget Reconciliation Act] and subsequent efforts by CMS and the nursing home industry to improve the quality of nursing home care, a small but significant share of nursing homes nationwide continues to experience quality-of-care problems. In 2006, one in five nursing homes was cited for serious deficiencies – those that caused actual harm or placed residents in immediate jeopardy.

The new GAO report on nursing home quality, like others before it, found fault with how deficiencies are identified and fines are set. The GAO found that both the number of serious deficiencies cited and the number of sanctions actually implemented declined between fiscal years 2002 and 2005; that CMS imposes civil money penalties at the lower end of the permissible range,

limiting their deterrent effect; that CMS does not use the full range of available sanctions; and that CMS infrequently imposes discretionary sanctions. Reexamining 63 nursing facilities that it had first discussed in its 1999 report, the GAO found that 31 facilities (49%) had “cycled in and out of compliance more than once, harming residents, even after sanctions had been implemented, including 8 homes that did so seven times or more.” The report is called *Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents*, GAO-07-241 (March 2007).

Charlene Harrington, RN, PhD, endorsed the GAO’s findings and recommendations to streamline the survey and enforcement system and to increase the size of penalties and testified that a large percentage of nursing homes provide care that cause harm, jeopardy, and death to residents. Dr. Harrington is a former director of licensing and certification in California (1976) and a member of the 1986 Institute of Medicine (IoM) committee that produced the study - *Improving the Quality of Care in America’s Nursing Homes* - that gave rise to the 1987 Nursing Home Reform Law.

The Center for Medicare Advocacy cited a qualitative observational study of nursing home survey and enforcement, written for CMS, that found multiple weaknesses in the system, including failure to detect deficiencies, deliberate decisions by surveyors not to cite deficiencies, downgrading of deficiencies, non-use of the full range of intermediate sanctions, and non-implementation of most enforcement remedies because of the opportunity to correct. The report was based on 26 case studies in 25 nursing facilities in four states and focused on five care areas (pressure ulcers, weight loss, abuse/neglect, physical restraints, and pain management). The report is entitled *Improving Nursing Home Enforcement: Findings from Enforcement Case Studies* (March 22, 2007) and its authors are Helena Louwe, Carla Perry, Andrew Kramer (Health Care Policy and Research, University of Colorado Health Sciences Center).

Despite shortcomings in the survey and enforcement system, the Colorado report also identified “important positive findings” about the survey and enforcement system:

- Deficiencies identified in the survey process were “real problems;” there were “essentially no false positives.”
- Surveyors acted fairly and professionally and were not “out to get” facilities, as providers claim.
- “Nursing home behavior changes seldom occurred without a formal citation.”
- State agency staff did the best they could with the limited staff and budgets available.

### **Inadequate Nurse Staffing Levels**

Dr. Harrington, Alice Hedt, Executive Director of NCCNHR (formerly, National Citizens’ Coalition for Nursing Home Reform), and Ms. Edelman described inadequate nurse staffing levels as the chief cause of poor outcomes for residents. Dr. Harrington described a report, written for CMS in 2001, (*Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes, Phase II Final Report*), which recommended a staffing ratio of 4.1 hours per resident day. This standard has not been met. She also reported that the Institute of Medicine has explicitly endorsed increased nurse staffing levels for nursing homes.

Dr. Harrington pointed out that despite the consistency of these recommendations, total nurse staffing levels have been flat for ten years and RN staffing has actually declined 25% since 2000.

While studies show that increasing Medicaid reimbursement can result in some increased staffing, the most effective way to increase nurse staffing comes from explicit state licensure requirements. Dr. Harrington also recommended that Medicare establish four cost centers – direct care, indirect care, capital, and administration – and that facilities not be permitted to shift costs from one cost center to another after Medicare reimbursement rates are determined. Retrospective audits and penalties for diverting reimbursement from direct care would introduce accountability for government funding.

Other witnesses at the hearing were

- James Randolph Farris, M.D., the Regional Administrator of the CMS Dallas office, who expressed concern about the survey budget, which has been flat for three years. Without appropriate funding, he said, CMS cannot sustain its current level of survey and certification activities, let alone expand its work.
- Mary Ousley, past Chair of the American Health Care Association (AHCA), who testified about tremendous progress made in nursing home quality over the past 20 years, pointing to data reported on CMS’s website *Nursing Home Compare* that show improvement in key quality measures. She described the oversight system today as unable to “distinguish between the failure to identify deficiencies and real quality improvement” and called for a “culture of cooperation” between providers and government.
- Orlene Christie, Director of the Legislative and Statutory Compliance Office, Michigan Department of Community Health, who described the state’s criminal background check program. As of April 1, 2006, 99,000 applicants had been screened and 3200 found unemployable.

The nursing home trade associations – the AHCA and the Association of Homes and Services for the Aging (AAHSA) (in its written statement) – endorsed legislation introduced in the 109<sup>th</sup> Congress to revise the survey and certification system. H.R. 3437, the Nursing Facility Quality Improvement Act, endorsed by AAHSA, would authorize waivers to “explore innovative approaches to measuring quality of care through demonstration projects,” allow facilities to appeal deficiencies even if no remedy was imposed, and permit states to use civil money penalty funds to provide technical assistance to facilities, among its provisions.

## **Conclusion**

The full promise of the Reform Law – that each resident receive care and services to attain and maintain his or her highest practicable physical, mental, and psychosocial well-being – will not be realized until all nursing facilities have sufficient numbers of well-trained and well-supervised staff and until the high standard of care is meaningfully enforced. CMS should devote more resources to assuring that the Reform Law achieves its promise. It should strengthen its enforcement activities by simplifying the enforcement process and imposing tougher, more meaningful sanctions against nursing facilities found to be out of compliance with the Reform Law. CMS should also support federal legislation to mandate appropriate nurse staffing ratios and, in the meantime, enforce existing staffing standards.

References:

The Nursing Home Reform Law, enacted in December 1987 as part of the Omnibus Budget Reconciliation Act of 1987 (and often called OBRA, as a result), is codified at 42 U.S.C. §§1395i-3(a)-(h), 1396r(a)-(h), Medicare and Medicaid, respectively.

The witnesses' written statements are available at  
[http://aging.senate.gov/hearing\\_detail.cfm?id=273465&](http://aging.senate.gov/hearing_detail.cfm?id=273465&).

GAO, *Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents*, GAO-07-241 (March 2007), <http://www.gao.gov/new.items/d07241.pdf>.

Helena Louwe, Carla Perry, Andrew Kramer (Health Care Policy and Research, University of Colorado Health Sciences Center), *Improving Nursing Home Enforcement: Findings from Enforcement Case Studies* (March 22, 2007),  
[http://www.medicareadvocacy.org/SNF\\_FinalEnforcementReport.03.07.pdf](http://www.medicareadvocacy.org/SNF_FinalEnforcementReport.03.07.pdf).

Statements for the record

AAHSA:

[http://www.aahsa.org/advocacy/advocacy\\_tools/legislation\\_analysis/testimony/documents/nh\\_qual\\_agingcomm.pdf](http://www.aahsa.org/advocacy/advocacy_tools/legislation_analysis/testimony/documents/nh_qual_agingcomm.pdf).

Center for Medicare Advocacy:

[http://www.medicareadvocacy.org/SNF\\_SenAgingComstatement050207.pdf](http://www.medicareadvocacy.org/SNF_SenAgingComstatement050207.pdf)