

The National Senior Citizens Law Center thanks the Senate Special Committee on Aging for its sustained commitment to improving quality of care and quality of life for nursing home residents. The three hearings held by the Committee between July 1998 and June 1999 and the Committee's ongoing oversight have helped bring about important changes in the way nursing homes are surveyed and enforcement actions are taken.

We also thank the Health Care Financing Administration (HCFA) for its work over the past year. With insufficient resources, HCFA staff have worked extraordinarily hard to develop and implement President Clinton's Nursing Home Initiative and the recommendations of the General Accounting Office and this Committee.

We appreciate the invitation to address the impact of the Nursing Home initiative. I have four points to make this morning:

1. The Nursing Home Initiative is leading to some excellent revisions in the survey and enforcement processes that hold significant promise for improving the quality of care and quality of life for residents.
2. More action is still needed to implement components of the Nursing Home Initiative that have not yet been implemented and to establish additional necessary changes in federal survey and enforcement policy.
3. Full implementation of the Nursing Home Initiative and other needed changes are not possible without substantial increases in the federal and state survey budgets.
4. The positive changes envisioned by the Nursing Home Initiative are undermined and threatened by the nursing home industry's opposition to various aspects of the Nursing Home Initiative and renewed attempts to establish an alternative survey system.

Fourteen months have passed since the President announced the Nursing Home Initiative. There is both good news and bad news about what the 14-month period has brought.

First the good news. Many of the specific components of the Initiative represent constructive changes that have the potential to strengthen the federal survey and enforcement systems. Increasing the unpredictability of surveys, imposing stronger sanctions more quickly when noncompliance is first identified, improving public access to timely and accurate information about nursing homes, referring cases of egregious abuse and neglect to the Department of Justice for appropriate civil and criminal prosecution, and strengthening federal oversight of state survey agency performance, are just several of the components of the 22-point Initiative that hold considerable promise.

Some of these good proposals have begun to be implemented. We have heard, for example, that states are beginning to conduct surveys on nights and weekends and are identifying deficiencies in areas such as understaffing that residents and families have complained about for many years. The Health Care Financing Administration also published a rule earlier this year authorizing states to impose certain remedies without first giving facilities an opportunity to correct their deficiencies. States are cautiously beginning to use this new sanction authority.

Next, the bad news. Many parts of the Initiative have not been implemented by either states or the federal government. We heard in this Committee's June hearing that some states have been unable to implement the directive to investigate complaints alleging actual harm within 10 days, even though they support the principle, because they do not have sufficient staff or money to respond to complaints within

that time schedule. The federal government, for its part, has not implemented all parts of the Initiative. The proposal to impose remedies when state survey agencies cite deficiencies causing harm in two consecutive surveys remains a promise, not a reality.

Moreover, even if all parts of the Initiative were fully implemented, they would not be sufficient to bring about all the improvement that is needed in the survey and enforcement systems. Additional changes need to be made to these systems to assure that residents receive all the care and services that are mandated by the nursing home reform law. I offer two examples. The number of residents whose care is evaluated in some depth during the survey needs to be expanded, as the General Accounting Office has recommended. The care of too few residents is reviewed during the survey to enable surveyors to identify all the problems that residents experience. And the enforcement system needs to be refocused to make prompt imposition of remedies for deficiencies the rule, rather than the exception.

Two other points are critical as well. First, the federal and state survey and enforcement systems are seriously underfinanced. Good laws and good rules can never be fully implemented without adequate funding for the survey process. There is not enough money in the system at present to support all the work that needs to be done.

Second, the nursing home industry needs to join states and the federal government and consumers in working to improve and strengthen the survey and enforcement processes, instead of opposing enforcement and attempting to replace the public regulatory system with a collaborative system of its own creation.

1. The Nursing Home Initiative is leading to some excellent revisions in the survey and enforcement processes that hold significant promise for improving the quality of care and quality of life for residents.

The Initiative contains revisions to the survey and enforcement systems 90 beginning to make a difference for nursing home residents. For example:

A. Off-hour surveys

One of the changes made by the Nursing Home Initiative is the new direction to begin 10% of surveys on nights and weekends. Although federal law has called for unannounced surveys for many years, a common and frequent consumer complaint has been that surveys are predictable, even if they are not officially announced. The new HCFA direction to begin surveys at off-hours is being implemented and is making a difference in identifying serious care deficiencies that residents and their families have complained about for many years.

For example, in July 1999, a Nevada survey team began a survey at midnight on a Saturday night. The state had received nine complaints about nurse staffing in this facility.

During the midnight survey, the survey team found 209 residents in two buildings. In one building where 92 residents lived, only two licensed practical nurses and two certified nurse assistants (CNAs) were on duty. As reported in the deficiency statement, one CNA told the surveyors, "This happens all the time. I'm glad you all are here to see it... I'm always in charge of all the residents. They just had this agency CNA called in." The survey team identified eight residents whose bodies and clothing were saturated with urine and some with stool as well.

The state cited a deficiency in nursing services.

B. Use of quality indicators in the survey process

A major innovation of the survey process that was implemented on July 1, 1999 is the introduction of quality indicators (QIs) to identify potential quality of care concerns and to help select the sample of residents whose care is reviewed in some depth during the survey. While more comprehensive use should be made of the extensive information that is contained in the QIs, the new process is beginning to establish a more accurate, focused, and defensible survey process.

Creative survey agencies are also using the QI reports in additional ways. For example, we have heard that some states are using QI reports to help evaluate and substantiate consumer complaints that they receive.

C. Per instance civil money penalties

In March 1999, the Health Care Financing Administration (HCFA) published a final rule with comment period establishing authority to impose per instance civil money penalties (CMPs) as an additional enforcement remedy.

The rule authorizes states to impose per instance CMPs of \$1000 to \$10,000 for an instance of a nursing home's noncompliance, without regard to whether actual harm or immediate jeopardy has already occurred, without determining total number of days, or ending date, of noncompliance, and without first giving facilities an opportunity to correct.

In the preamble to the final rule, HCFA reports that, except in instances of immediate jeopardy or facilities identified as poor performers, CMPs "have not been imposed where facilities have been able to correct deficiencies before a predetermined date for the completion of correction." As a result, facilities have avoided the imposition of CMPs "although subsequent to achieving compliance these same facilities have failed to maintain substantial compliance. This pattern of "yo-yo" compliance was one of the problems with the federal enforcement system that Congress intended to correct when it enacted the 1987 nursing home reform law.

HCFA's new analysis of its authority under the 1987 reform legislation led the agency to conclude that "the statute offers greater flexibility" than HCFA had exercised and that states and the Secretary have authority to impose CMPs when they identify a deficiency, without first determining the total number of days of noncompliance.

HCFA gives two examples of per instance CMPs that could be imposed under the new rule: \$1000 for violation of a resident's privacy and \$4000 for an avoidable pressure sore. HCFA's example of a resident's rights violation as a sanctionable deficiency is especially welcome to consumers, who have been critical of the enforcement system's failure to treat residents' rights violations seriously.

In the preamble to the final rule, HCFA was responsive to the concerns raised by this Committee, the General Accounting Office, and consumers about the lax and overlytolerant enforcement system that has allowed most facilities an opportunity to correct deficiencies before remedies are considered for imposition. HCFA frankly acknowledged the need to strengthen its and states' ability to impose remedies more promptly. The changes are also responsive to the Institute of Medicine's 1986 . recommendation that the enforcement system impose remedies for the existence of deficiencies, not just for failure to correct deficiencies.

The March 1999 rule also authorizes states to impose certain remedies directly, rather than having to

make recommendations about remedies to HCFA's Regional Offices. This aspect of the final rule attempts to streamline and eliminate unnecessary delays in the enforcement system. It also establishes a different relationship between states and the federal government and respects the appropriate roles of both.

We have heard that state survey agencies are cautiously beginning to use the new CMP authority to impose sanctions against facilities with significant deficiencies.

2. More action is still needed to implement components of the Nursing Home Initiative that have not yet been implemented and to establish additional necessary changes in federal survey and enforcement policy.

The Initiative contains many provisions that have not yet been fully implemented, due to lack of staff and money. For example, in March, HCFA issued new directions to states to investigate complaints alleging actual harm within 10 days. This component of the Initiative has not been widely implemented due to states' lack of money to conduct complaint investigations within this time period. HCFA has not implemented the GAO's July 1998 recommendation to expand the size of the resident sample.

Additional changes to the survey and enforcement systems, beyond those set out in the Nursing Home Initiative, are also needed, however:

A. New enforcement draft

HCFA has now circulated a new draft of the enforcement provisions of the reform law.

We have not yet received a copy of the draft. However, we understand that the draft reverses prior HCFA policy and correctly implements the reform law's enforcement provisions by setting out a new presumption that enforcement agencies will impose remedies immediately when they identify deficiencies, rather than give facilities yet another opportunity to correct their deficiencies before facing the possibility of sanctions. If this draft becomes official HCFA policy and is fully implemented by HCFA and states, it will represent an enormous improvement in the federal enforcement system that will offer new protection to residents.

B. New survey tools and remedies are needed for deficiencies in residents' rights and quality of life

The Nursing Home Initiative has understandably focused on concerns about egregiously poor care. HCFA has awarded a contract to develop quality indicators for matters involving quality of life. The survey process and appropriate remedies for quality of life and residents' rights must receive priority attention in HCFA.

C. The survey and enforcement systems need to develop mechanisms to prevent poor outcomes that are avoidable

While the survey and enforcement systems have been focused on identifying poor care that exists and on imposing sanctions when poor outcomes occur, HCFA also needs to develop mechanisms that *prevent* poor outcomes that can be avoided when facilities provide residents with appropriate care and services. As the California Supreme Court recognized in a 1997 decision, public regulatory systems are intended to *prevent* poor outcomes, not merely to impose sanctions after the fact. *California Association of Health Facilities v. Department of Health Services*, 940 P.2d 323, 65 Cal.Rptr. 872, 885 (1997).

An enforcement system that promptly and reliably imposes sanctions when poor outcomes are cited would of course help deter poor outcomes in the future. The changes proposed by HCFA in the new enforcement draft are apparently moving in this direction.

Nevertheless, in addition, an enforcement system must intervene earlier in the care delivery process to impose remedies in instances where harm has not yet occurred but is likely to occur if the poor facility practices continue. There appears to be universal acceptance that a facility should be cited and sanctioned for failure to have an infection control system in place, even if no residents have yet developed avoidable infections. A similar intolerance of other poor practices that will inevitably lead to poor outcomes is also necessary and needs to be incorporated into the regulatory system.

Finally, the federal enforcement system must reflect facilities' compliance with all the standards of the reform law. Since the reform law's care standards became effective in 1990, federal law has mandated that residents receive appropriate care and services to *attain and maintain* their highest practicable functioning. The absence or prevention of avoidable decline is a necessary component of evaluating a facility's performance, but it is not sufficient. Some residents are expected to improve. The enforcement system must, ultimately, impose remedies if residents do not achieve expected improvement.

3. Full implementation of the Nursing Home Initiative and other needed changes are not possible without substantial increases in the federal and state survey budgets.

The federally-mandated survey and certification process is seriously underfinanced.

The federal survey budget has been virtually stagnant since 1992," although the scope of work for survey agencies has expanded enormously. At present, the amount of money spent by the federal government on survey and enforcement activities to assure that the care it paid for was properly provided to residents is considerably less than half of one percent of the federal cost of care -- an inadequate sum to determine whether appropriate care is provided to some of the most vulnerable members of our society.

The budget for HCFA is equally inadequate. There are too few staff people available in HCFA's Central Office to do all the work that is needed to develop the survey and enforcement systems, to train state and federal surveyors, to set policy, and to answer questions.

Appropriate enforcement is not possible without adequate resources. The lack of meaningful enforcement allows poor care to continue.

Other financial issues undermine the effectiveness of the survey and enforcement systems. For example, only a handful of Administrative Law Judges are assigned to hear nursing home appeals for the entire country. As a consequence, there is a multi-year backlog on administrative hearings for appeals of civil money penalties and other remedies."

4. The positive changes envisioned by the Nursing Home Initiative are undermined and threatened by the nursing home industry's opposition to various aspects of the Nursing Home Initiative and renewed attempts to establish an alternative survey system.

The nursing home industry opposes various aspects of the Initiative through litigation and administrative advocacy. An additional serious concern is that the industry is continuing to promote development of an alternative survey process that would undermine the progress that is being made through the Nursing Home Initiative.

A. Per instance CMP rule

The American Health Care Association (AHCA) has challenged the per instance CMP rule in federal court, arguing that HCFA did not have statutory authority to promulgate a rule authorizing per instance CMPs and that the agency did not provide the public with advance notice and an opportunity to comment, in violation of the Administrative Procedures Act. The case does not challenge the use of per instance CMPs in any particular instance. It challenges HCFA's authority to establish this additional remedy under any and all circumstances.

The National Citizens' Coalition for Nursing Home Reform, the national advocacy organization that represents residents and consumers, has intervened in the litigation as defendant in order to support the legality of the rule.

B. Immediate remedies for "double G" deficiencies

The Initiative called for the imposition of immediate remedies, without an opportunity to correct, for facilities that in two consecutive surveys were cited with deficiencies at a level causing actual harm to residents. While HCFA implemented this component of the Initiative for deficiencies at a pattern or widespread scope (boxes H and above on the federal enforcement grid), it has delayed implementation for isolated deficiencies at box G. HCFA contends that resource limitations have led to the delay. The nursing home industry's opposition may be another factor.

At the Committee's request, the General Accounting Office evaluated a random sample of 107 "G" deficiencies selected from 10 large states during fiscal year 1998.¹³ At the June 30, 1999 hearing, the GAO reported that it agreed with 98% of the G-level deficiencies cited by states. It also reported that the G-level deficiencies reflected serious care issues:

Survey reports depicted repeated examples of actual harm, including pressure sores, broken bones, severe weight loss, burns, and death. The five most commonly cited deficiencies involved

- failure to prevent or treat pressure sores (23 percent);
- failure to prevent accidents (14 percent);
- failure to ensure adequate nutrition (8 percent);
- failure to provide acceptable quality of care (6 percent); and
- failure to prevent mistreatment, neglect, or abuse (4 percent).

The GAO's extraordinary endorsement for states' G-level findings fully supports HCFA's policy decision to allow immediate imposition of remedies for double G deficiencies. Yet implementation of that policy has been delayed.

C. Education campaign on abuse and neglect

When HCFA announced a new education campaign to help nursing home residents and their families "identify and report incidents of abuse and neglect" and invited the nursing home industry's voluntary participation, both AHCA and the American Association of Homes and Services for the Aging (AAHSA) expressed disapproval of the poster that HCFA developed.

D. Alternative survey protocol

AHCA has announced plans to work with the health department in North Dakota to develop an alternative survey process as a "pilot" test."

Several years ago, AHCA developed a waiver proposal that would have allowed the survey agency in South Dakota to use an alternative collaborative survey process. HCFA eventually rejected the waiver proposal. Residents' advocates opposed the waiver as a matter of public policy and demonstrated that the nursing home reform law does not authorize states to use an alternative survey protocol under any circumstances.

We are concerned that a "pilot" will have much the same purpose as the waiver creating a collaborative project between the regulatory agency and the regulated industry that replaces the current system of public information and public accountability. While we have seen few details about the North Dakota pilot, we are concerned that the pilot would test a process that is both poor public policy and impermissible under the reform law.

CONCLUSION

The Nursing Home Initiative has the potential to make a difference in residents' quality of care and quality of life. Most of the components of the Initiative, if fully implemented, would improve the survey and enforcement systems in ways that would offer more protection to nursing home residents. Implementation of the Initiative is undermined by inadequate federal funding of survey agencies and by the nursing home industry's opposition.

The nursing home survey and enforcement systems also need to be strengthened in additional ways beyond the changes contained in the Initiative. The lax and overly tolerant enforcement system that the GAO described in July 1998 needs to be reoriented so that deficiencies, when cited, are sanctioned by appropriate enforcement consequences.

Consumers are heartened by the Nevada survey agency's midnight survey that documented inadequate staffing, among other deficiencies. But unless the findings are coupled with a strong enforcement response, residents will not be protected and the nursing home reform law's mandate - that each resident receive care and services to attain and maintain his or her highest practicable physical, mental, and psychosocial well-being -- will remain unfulfilled.