

**CENTER FOR MEDICARE ADVOCACY, INC.**  
1101 VERMONT AVENUE, N.W., SUITE 1001  
WASHINGTON, D.C. 20005  
(202) 216-0028 FAX (202) 216-0119  
www.medicareadvocacy.org

**ATTORNEYS**

Judith A. Stein\*  
Brad S. Plebani\*  
Pamela A. Meliso\*  
Gill Deford  
Alfred J. Chiplin, Jr.  
Toby Edelman  
Vicki Gottlich  
Patricia Nemore  
Lara K. Stauning\*  
Mary T. Berthelot\*  
Mary A. Ashkar\*  
Ted J. Bliman\*  
Abigail C. Goff\*

**ADMINISTRATOR**  
Carolyn S. Boyle

**DATA PROJECT DIRECTOR**  
Larry S. Glatz

**OF COUNSEL**

Sally Hart\*  
Wey-Wey Elaine Kwok\*

**SENATE SPECIAL COMMITTEE ON AGING**

**The Nursing Home Reform Act Turns Twenty:  
What Has Been Accomplished, and What Challenges Remain?**

**May 2, 2007**

**STATEMENT OF THE CENTER FOR MEDICARE ADVOCACY, INC.**

The Nursing Home Reform Law,<sup>1</sup> enacted by Congress in 1987, is a remarkable achievement. It set a high standard of care, entitling each resident to receive all the care and services he or she needs in order to achieve and maintain the highest possible level of functioning, with full enjoyment of rights and quality of life. It set in place a comprehensive framework for regulating the nursing home industry through a publicly-accountable survey process. And it required state and federal governments to take swift and meaningful action against facilities that fail to provide residents with appropriate high quality care or violate these rights. The law was ground-breaking and inspirational when it was enacted and it remains so today. The million and a half people who live in nursing homes deserve no less than our nation's commitment to full implementation of the Nursing Home Reform Law.

Despite the excellence of the Nursing Home Reform Law and its success in improving quality of care and quality of life for residents in some respects, three changes are needed to achieve the full promise of the law.

1. Meaningful staffing standards must be enacted.
2. The survey process must be adequately funded to assure facilities' compliance with standards of care and to respond in a timely and meaningful way to complaints.

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<sup>1</sup> 42 U.S.C. §§1395i-3(a)-(h), 1396r(a)-(h), Medicare and Medicaid, respectively.

3. The enforcement system needs to be revised to achieve the statutory mandate of swift and certain enforcement for all levels of noncompliance with standards of care.

## Staffing

The Nursing Home Reform Law requires that facilities have “sufficient” staff to meet residents’ needs.<sup>2</sup> This standard has not worked to assure that facilities have sufficient numbers of well-qualified and well-trained staff.

The nurse staffing study submitted to Congress by the Centers for Medicare & Medicaid Services in 2001 documented that more than 91% of facilities fail to have sufficient staff to prevent avoidable harm and that 97% of facilities do not have sufficient staff to meet the comprehensive requirements of the Reform Law.<sup>3</sup>

Raising reimbursement rates in the hope that facilities will increase their staffing levels as a result does not improve staffing. Congress increased Medicare reimbursement rates in 2000, specifically for nurse staffing.<sup>4</sup> The Government Accountability Office found that staffing levels remained stagnant and that staffing increased only when states mandated specific staffing ratios or made other policy changes directed specifically at increasing nurse staffing.<sup>5</sup> It is time to implement the staffing ratios that CMS identified nearly a decade ago.

The cost of adequate staffing is not prohibitive. The poor care that results from inadequate staffing takes a heavy financial toll. Poor care costs money that could be better spent on providing residents with good care from the outset and preventing avoidable bad outcomes for residents.<sup>6</sup>

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<sup>2</sup> 42 U.S.C. §§1395i-3(b)(4)(C)(i), 1396r(b)(4)(C)(i)(1), Medicare and Medicaid, respectively.

<sup>3</sup> CMS, *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes, Phase II Final Report*, pages 1-6, 1-7 (Dec. 2001), [http://www.cms.hhs.gov/CertificationandCompliance/12\\_NHs.asp](http://www.cms.hhs.gov/CertificationandCompliance/12_NHs.asp) (scroll down to Phase II report).

<sup>4</sup> Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub.L. 106-554, App. F, §312(a), 114 Stat. 2763, 2763A-498.

<sup>5</sup> GAO, *Available Data Show Average Nursing Staff Time Changes Little after Medicare Payment Increase*, GAO-03-176, page 3 (Nov. 2002), <http://www.gao.gov/new.items/d03176.pdf>. Nurse staffing time increased by 1.9 minutes per day; Registered nurse time decreased and licensed practical nurse and aide time increased.

<sup>6</sup> Charles D. Phillips documented that physically restraining residents is more expensive than not restraining them. Charles D. Phillips, et al, “Reducing the Use of Physical Restraints in Nursing Homes: Will It Increase Costs?” *American Journal of Public Health*, Vol. 83, No. 83 (March 1993). Avoidable pressure sores, avoidable incontinence, physical restraints, and other indicators of poor care cost billions of dollars each year. *Nursing Home Residents Rights: Has the Administration Set a Landmine for the Landmark OBRA 1987 Nursing Home Reform Law?* Hearing before the Subcommittee on Aging of the Senate Labor and Human Resources Committee, 102<sup>nd</sup> Congress, First Session (June 13, 1991) (A Majority Staff Briefing Memorandum, at 160, 175-177).

## Survey

The budget for survey and certification activities needs to be increased at the state and federal levels to allow for sufficient numbers of well-trained, multi-disciplinary staff to conduct annual, revisit, and complaint surveys. Limited survey budgets lead to insufficient numbers of survey staff. Without a strong survey system to detect deficiencies, and the enforcement actions that may be imposed for documented deficiencies, many facilities will not provide care to residents in compliance with federal standards.<sup>7</sup>

## Enforcement

The enforcement system has not assured compliance with federally-mandated standards of care. As the most recent GAO report<sup>8</sup> reiterates once again, the enforcement system is too lax and too tolerant of poor care for residents.

Deficiencies are undercited. The GAO<sup>9</sup> and State Auditors<sup>10</sup> repeatedly report that surveyors fail to identify and cite many deficiencies

Deficiencies are understated and undercoded. Deficiencies are described as less serious than they actually are. Many deficiencies are identified as causing no harm to residents when, in fact, they cause harm.<sup>11</sup>

Deficiencies are underenforced. The GAO has repeatedly shown that the Centers for Medicare & Medicaid Services and state agencies do not use the full range of sanctions

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<sup>7</sup> 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* page 44 (March 22, 2007) (“Although ‘the case studies revealed that enforcement actions, if executed, have only a limited positive effect . . . it must be recognized that nursing home behavior changes seldom occurred without a formal citation.” [hereafter University of Colorado, *Improving Nursing Home Enforcement*].

<sup>8</sup> 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> [hereafter GAO 2007 Report]. The GAO has issued more than a dozen reports on nursing home survey and certification issues since 1998. These reports are listed at pages 92-93 of the 2007 report.

<sup>9</sup> See, e.g., GAO, *Nursing Home Deaths: Arkansas Coroner Referrals Confirm Weaknesses in State and Federal Oversight of Quality of Care*, GAO-05-78 (Nov. 2004), <http://www.gao.gov/new.items/d07241.pdf>. See also University of Colorado, *Improving Nursing Home Enforcement*, *supra* note 7.

<sup>10</sup> See, e.g., California State Auditor, *Department of Health Services: Its Licensing and Certification Division Is Struggling to Meet State and Federal Oversight Requirements for Skilled Nursing Facilities*, 2006-106 (April 2007), <http://www.bsa.ca.gov/pdfs/reports/2006-106.pdf> [hereafter California Auditor 2007]; Colorado State Auditor, *Nursing Facility Quality of Care: Department of Public Health and Environment, Department of Health Care Policy and Financing (Performance Audit)* (Feb. 2007), [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/D2FC96140165870D8725728400745D8C/\\$FILE/1767%20NurseHomePerf%20Feb%202007.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/D2FC96140165870D8725728400745D8C/$FILE/1767%20NurseHomePerf%20Feb%202007.pdf) [hereafter Colorado Auditor 2007].

<sup>11</sup> GAO, *Nursing Home Quality: Prevalence of Serious Problems, While Declining, Reinforces Importance of Enhanced Oversight*, GAO-03-561 (2003), <http://www.gao.gov/new.items/d03561.pdf>; California Auditor, *supra* note 10; Colorado Auditor, *supra* note 10.

that are available. Remedies that are discretionary are imposed infrequently, per day and per instance civil money penalties are often imposed at the lower ends of the allowable ranges, and temporary management is almost unknown. The Secretary does not impose denial of payment for all Medicare and Medicaid beneficiaries, as authorized by law.<sup>12</sup>

Despite these serious shortcomings, recent research demonstrates that the survey and enforcement system is essential to securing compliance by nursing facilities. Without the system, facilities do not make necessary changes.<sup>13</sup>

The nursing home industry opposed the comprehensive enforcement provisions of the Nursing Home Reform Law as the law was being enacted in 1987 and it has continued its opposition ever since, often trying to weaken the law or undermine it, or both. For example, the American Health Care Association unsuccessfully challenged the per instance civil money penalty regulation that the Health Care Financing Administration promulgated in 1999.<sup>14</sup> Over the years, the industry has also developed a series of “quality initiatives” – *Quest for Quality*, *Quality First*, *Advancing Excellence in America’s Nursing Homes* – that promise a commitment to high quality care, but that undermine the regulatory system by establishing alternative criteria for evaluating nursing facilities. In contrast to the criteria established by the regulatory system, these criteria reflect secret goals and targets for improvement that are voluntary, self-reported and unaudited, and lack public accountability.<sup>15</sup>

The Center for Medicare Advocacy is a private, non-profit organization, founded in 1986, that provides education, analytical research, advocacy, and legal assistance to help older people and people with disabilities obtain necessary health care. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care. The Center provides training on Medicare and health care rights throughout the country and serves as legal counsel in litigation of importance to Medicare beneficiaries nationwide.

Toby S. Edelman  
Senior Policy Attorney  
Center for Medicare Advocacy, Inc.  
Washington, D.C.  
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<sup>12</sup> GAO, 2007, *supra* note 8.

<sup>13</sup> University of Colorado, *Improving Nursing Home Enforcement*, *supra* note 7.

<sup>14</sup> *American Health Care Association v. Shalala*, D.D.C., Civil No. 1:99CV01207 (GK) (case dismissed, March 6, 2000), unsuccessfully challenging final regulations published at 64 Fed. Reg. 13,354 (March 18, 1999), 42 C.F.R. §§488.430(a), 488.438(a)(2).

<sup>15</sup> Center for Medicare Advocacy, *The “New” Nursing Home Quality Campaign: Déjà vu All Over Again*, [http://medicareadvocacy.org/AlertPDFs/2006/06\\_09.21.SNFQualityCampaign.pdf](http://medicareadvocacy.org/AlertPDFs/2006/06_09.21.SNFQualityCampaign.pdf).