

NHPCO Comments on CY 2022 Home Health...Proposed Rule: Hospice Survey Reform and Enforcement Remedies Provisions

To: NHPCO Provider and State Members

From: NHPCO Policy Team

Date: August 27, 2021

Summary at a Glance

Today, August 27, 2021, [NHPCO submitted comments](#) (PDF) on the hospice survey reform and enforcement remedies provisions in the CY 2022 Home Health ... proposed rule. The comment letter represents many hours of work by three NHPCO committees and their members working on specific components of the rule – Accreditation Organizations, Surveys, Special Focus Program and Enforcement Remedies. NHPCO thanks all who participated in those calls, thoughtful discussion and deliberations about the NHPCO positions for every part of the proposed rule. Thank you as well to all providers and state organizations that submitted comments on this proposed rule. It is the best way to make our voices heard!

In addition, [NHPCO prepared an Appendix](#) (PDF) with suggestions for modifications to the online [CMS Hospice Surveyor Training Modules](#). Thank you to the Survey Workgroup volunteers who watched/listened to hours of surveyor training and made suggestions about content. And special thanks to Regulatory Committee members Roseanne Berry and Cherry Meier, who collated all of the comments from the workgroup and prepared the Appendix.

A summary of our comments in each section of the proposed rule are outlined below.

1. NHPCO “Hills to Die On”

NHPCO identified five areas which we called “hills to die on” because of their serious implications for hospice providers or because the input needed to design and implement provisions in the proposed rule was so important. You will see further descriptions of these “hills to die on” below.

- Suspension of all payments
- TEP for Special Focus Program before design and implementation. Consider TEP for other components of rule, such as surveyor consistency, before implementation.

- Design of “user-friendly, understandable” CMS-2567 for public and consumer audience
- Improving surveyor competency and consistency
 - ❖ Between states
 - ❖ Between states and accreditation organizations
- Consistent application of deficiency findings and enforcement remedies

2. National Accrediting Organizations

- The national accrediting organizations, Accreditation Commission for Health Care (ACHC), Community Health Accreditation Partners (CHAP) and the Joint Commission, are required to submit the CMS-2567 (Survey Deficiency Report) for deficiency reporting and must use the CMS Hospice Surveyor Training modules for surveyor training. Survey deficiency findings on the CMS-2567 will be posted on Care Compare. CMS is considering a version of the CMS-2567 that is prominent, understandable and searchable for the public.
- NHPCO supported the proposed rule that requires accrediting organizations to file the 2567 and to participate in CMS surveyor training.
- In addition, NHPCO expressed concern about the “see one cite one” practice among surveyors and asked for clarification and consideration for how this practice will impact on survey deficiency reports.
- NHPCO questioned how the survey deficiency findings would be posted on Care Compare and the Accreditation Workgroup provided suggested data elements that would be important to consider in a public-facing survey deficiency report.

3. Survey and Certification of Hospice Programs

Summary of NHPCO Survey on Survey Experience: In NHPCO’s discussion on the survey process, a summary of the survey results from the NHPCO member survey on the hospice survey experience were shared. Here are some of the highlights:

- **Conflicting interpretations of regulations**
 - Reason for citation not clearly specified in regulations
 - Multiple conflicting interpretations of certain regulations
 - Surveyors kept citing home health regulations, asking why 485s weren't in the hospice charts
 - Surveyor had many questions regarding Hospice CoPs as she was used to surveying LTC.
 - Confusion about difference between initial and comprehensive assessment
 - The interpretation of the regulations seems to change each year. We get sign off one year; the next year they say we didn't complete the requirement in its entirety.
- **Overly prescriptive expectations/excessive documentation requirements**
 - Cited for medication instructions that had never been corrected or called out previously
 - Surveyor’s intense care plan scrutiny (ex. Noting areas that weren’t indicative of patient concerns)

- Wound care deficiency (extensive treatment to heal wound beyond what would be typically needed for a hospice patient)
- Cited for not having physician orders for every frequency change. Hospice appealed and won.
- **Review of employee records**
 - Staff licensure not obtained from primary licensure source
 - Request to produce all employee files

Surveyor Qualifications and Prohibition of Conflicts of Interest

NHPCO workgroup members discussed this issue in depth. Discussion included whether there should be an exclusion for surveyors who have worked for a competitor hospice in the service area within the last two years, whether there should be an exclusion if the surveyor had an immediate family member or friend who was served by the hospice.

NHPCO, in discussion with the other national hospice stakeholders, determined that there was no way to list all the possible conflicts of interest, so proposed a policy on conflict of interest, inclusion as a topic in surveyor training and an attestation or code of ethics for surveyors to ensure that conflicts of interest are addressed.

Multidisciplinary Survey Teams

NHPCO strongly supported the use of multidisciplinary teams if there was more than one surveyor and encouraged CMS to provide additional guidance on surveyor assignments that focused on the surveyor's scope of practice and knowledge base.

Disparity Ratings between AO and SA Surveys

NHPCO strongly supported the review and reduction of disparities between AO and SA surveys and between SA surveys in different states.

4. Special Focus Program (SFP)

The special focus program is proposed for poor performing hospices who may have multiple condition-level deficiencies that must be addressed. Hospice surveys will be conducted every 6 months and improvements in condition-level deficiencies are expected or the program will be placed on a termination track.

SFP Placement Decisions to be Decided at the Federal Level: NHPCO urged CMS to use a selection approach that allows placement in the SFP based on federal decision making, rather than only decisions at the State level. NHPCO strongly opposed any quota system or public SFP candidate list as is used in nursing homes.

Technical Expert Panel: NHPCO recommended the establishment of a Technical Expert Panel (TEP) for stakeholder involvement in the design and implementation of the SFP, including recommendations about how a hospice is selected for the SFP and what criteria are used. NHPCO said that CMS should consider:

- A hospice's trends in performance over time;
- The number, scope, and severity of a hospice's deficiencies; and
- Frequency of re-visits necessary to ensure a hospice's compliance

NHPCO urged CMS to offer technical assistance to SFP hospices first, and then employ more stringent enforcement remedies if no improvement was observed.

Graduation from the SFP: CMS proposed that a hospice could graduate from SFP after 2 surveys with no condition-level deficiencies.

Hospice SFP on Care Compare: NHPCO expressed serious concern about how the hospice SFP designation would be displayed on Care Compare and encouraged CMS to learn from the experience with the Special Focus Facility program in nursing homes.

5. Enforcement Remedies for Hospice Programs with Deficiencies

Five remedies in proposed rule – NHPCO suggested that they be imposed in this order:

- Directed POC
- Directed in-service education
- Temporary management
- Civil Monetary Penalties (CMPs)
- Suspension of all or part of payments

Temporary Management

CMS proposed the appointment of temporary management to oversee the operation of the hospice program and protect the health and safety of the individuals under the care of the program. The temporary manager would provide guidance while improvements are made to bring the program back into compliance.

NHPCO supports the use of temporary management and wants to ensure that the temporary manager has an appropriate background and expertise in hospice compliance to fulfill their duties, whether the individual is selected from within or outside the organization.

Civil Monetary Penalties (CMPs)

- Assessed by the day or by the incident
- Comparable to other Medicare provider types, but \$\$ range is different. NHPCO commented that the dollar range for CMPs should be comparable to other provider types.

(Civil Monetary Penalties, continued)

Range	Reason	\$\$ Range
Upper range	Deficiency that poses IJ to patient health and safety	\$8,500 to \$10,000 per day
Middle range	Repeat and/or a condition-level deficiency that did not pose IJ, but is directly related to poor quality patient care outcomes	\$1,500 up to \$8,500 per day
Lower range	Repeated and/or condition-level deficiencies that did not constitute IJ and were deficiencies in structures or processes that did not directly relate to poor quality patient care	\$500 to \$4,000 per day

Suspension of Payment for All or Part of the Payments (§ 488.1240)

CMS states that one enforcement remedy is to suspend all or part of the hospice’s payments until they are in compliance.

NHPCO strongly opposes this provision as it is more stringent than the home health regulation, which is suspension of payments for all new admissions. NHPCO goes on to say that if all payments were suspended, the hospice would be out of business very quickly and that suspension of payments should be limited to new admissions AND only in the case of immediate jeopardy.

Member Questions

For questions about this alert or about the NHPCO comment letter, please send your question or comment to regulatory@nhpc.org and put **Hospice Survey Reform Comments** in the subject line.

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