

Eli's Hospice Insider

Survey & Certification: Hospice Survey System Under Fire In 2 New OIG Reports

Two new **HHS Office of Inspector General** reports on hospice surveys and patient harm could paint the entire industry with a broad fraud brush - and bring even more scrutiny down upon legitimate providers.

One report focuses on hospice deficiencies (see statistics in story, p. 60), and the other on 12 individual cases of patient abuse, neglect, or other harm.

The "Hospice Deficiencies Pose Risks to Medicare Beneficiaries" report notes that more than 80 percent of the more than 4,500 hospices surveyed from 2012 to 2016 had at least one survey deficiency, and one-third had complaints filed against them. But the "Safeguards Must Be Strengthened To Protect Medicare Hospice Beneficiaries From Harm" report is the one catching the most media attention.

Why? Of the 12 case profiles included in the report, one details a patient whose feeding tube insertion site developed maggots, and another patient whose untreated pressure ulcers led to gangrene and a lower leg amputation. Still another cites a patient whose meds repeatedly were stolen by a "naked, high, and drunk" neighbor, with hospice employees' knowledge and no reporting to authorities. Another highlights missed signs of sexual assault. And multiple cases involve abuse by caregivers.

Stories such as these, and others reported by NPR and the Washington Post, "are difficult to read and reflect badly on hospice," acknowledges the **National Hospice and Palliative Care Organization** in a statement. And the horror stories probably aren't done. "It is likely that other media outlets will carry these articles or generate additional news coverage on this topic," NHPCO cautions.

But these "extreme patient stories highlighted by the media" are "outliers in the field [that] do not adequately reflect the vast majority of hospice care provision in the U.S.," NHPCO President **Edo Banach** stresses.

"The egregious examples of harm discovered by the OIG" are a "small number of providers," the **National Association for Home Care & Hospice** maintains in a statement.

Even the OIG recognizes that the cases aren't representative. "The 12 cases of harm featured in this report do not represent the majority of hospice beneficiaries or the majority of hospice providers," the report says. "Due to the purposive sampling of deficiencies, we cannot determine the prevalence of harm suffered by all hospice beneficiaries."

CMS underscores that point in its comments on the report. "While these cases ... are very serious, we want to reassure beneficiaries considering hospice care that these cases are not indicative of the type of care the majority of hospice beneficiaries receive," CMS Administrator **Seema Verma** says in the agency's letter accompanying the report.

Hospice Survey Crack Down Is Coming

Despite the fact that the cases aren't representative, you can expect to see some changes for hospices resulting from the reports and their widespread media coverage.

Chief among the reports' impact will be harsher hospice surveys, expects attorney **Robert Markette Jr.** with **Hall Render** in Indianapolis. "I don't know if survey frequency will increase, as that is dependent on staffing and other issues, but I would not be surprised to see an increase in survey intensity," Markette tells **Eli**. "If survey agencies are being told patients are at risk, I would expect them to survey much more intensely. They would be afraid to miss something."

Damaging findings such as those in these reports "don't typically result in less scrutiny," points out **Chris Acevedo** with **Hospice Fundamentals** in Delray Beach, Florida.

Banach hopes "government efforts" will focus "on abhorrent providers and spare compliant programs from needless and duplicative investigation," according to the NHPCO statement. "Rare incidents of deliberate fraud and abuse should be viewed separately from unintentional documentation or mathematical errors in an extraordinarily burdensome and complicated regulatory environment," he says.

"While a methodical and comprehensive approach to this issue is clearly warranted, corrective efforts should be tailored (and prioritized) based on the nature of a hospice's deficiency," NAHC urges.

The "OIG purposely selected 12 cases of patient harm out of the thousands of surveyed patients," Markette notes. "They recognize that this is not a fairly representative sample of hospice patients. I would like to think surveyors would note that as well, but the attention that this is drawing to some - likely extreme - outliers is problematic."

Attorneys at **Reinhart Boerner Van Deuren** hope the report can "rebalance" audit and investigative resources away from the typical "paperwork and prognostication" problems most hospices face and toward providers with real quality of care issues such as those outlined in the report, they say. "Hospices would welcome that," says Reinhart attorney **Bryan Nowicki** in the firm's Hospice Law and Beyond podcast.

Focusing on survey problems leading to actual patient harm would make sense under CMS's "patients over paperwork" initiative, added Reinhart attorney **Karla Hutton Pinkerton** in the podcast episode about the reports.

Will Alternative Sanctions Alleviate Potential IJ Spike?

A consequence of more intense hospice surveys is likely to be an increase in Immediate Jeopardy citations, Markette predicts. In the reports, the OIG is basically telling state survey agencies that they are "being too lenient," he worries. That message is likely to cause more surveyors to "err on the side of protecting the patients" by handing out IJ determinations.

That message may go double for private accrediting organizations. For them, "the see one, cite one approach will most likely intensify," Acevedo expects. "No surveying body appreciates being called out for lack of deficiency citations."

And in fact, the IJ increase has already begun, Markette believes. CMS's March 2019 revisions to Appendix Q of the Medicare State Operations Manual, which governs IJ rules, "appear to have already led to an increase in the frequency of IJs," Markette adds. (See more about the revisions in Eli's Hospice Insider, Vol. 12, No. 4.)

Verma cites the revisions in the comment letter on the draft report. The Appendix Q updates aim "to clarify what information is needed to identify immediate jeopardy cases across all healthcare provider types," according to the letter. "CMS believes that this will result in quickly identifying and ultimately responding to these situations."

One thing that may head off the IJ spike is one of the OIG's previous recommendations - imposing alternative sanctions. "CMS cannot impose penalties - other than terminating hospices - to hold hospices accountable for harming beneficiaries," the OIG criticizes in the deficiency report.

That's in contrast to other provider types, such as home health agencies and skilled nursing facilities, which can undergo sanctions ranging from education to civil money penalties.

"Hospices do not always face serious consequences for harming beneficiaries," the OIG blasts. "Specifically, surveyors do not always cite immediate jeopardy in cases of significant harm, hospices' plans of correction are not designed to address underlying issues, and, other than termination, CMS has no penalties to hold hospices accountable for harming beneficiaries."

Accordingly, "CMS should seek statutory authority to establish additional, intermediate remedies for poor hospice performance," the OIG says.

Alternative sanctions could impose additional burdens on hospices that otherwise would face no penalty other than having to complete an acceptable plan of correction and undergo repeated re-surveys. And CMP levels can be high enough to close providers' doors for good.

But: Alternative sanctions can also give surveyors another option, rather than imposing an IJ determination, which could save hospices from eventual termination, proponents argue.

Note: See links to the reports and more related materials at oig.hhs.gov/newsroom/media-materials/2019/hospice. Access the Reinhart podcast via a link at www.reinhartlaw.com/multimedia.