

## Eli's Hospice Insider

### Surveys & Certification: Hospices Win Breathing Room on Special Focus Program

**Burdensome, legally mandated scrutiny program will get the TEP treatment.**

One of the most dreaded provisions of the survey revamp in the 2022 home health final rule is now on hold - at least for a little while.

The Consolidated Appropriations Act, 2021 enacted last December requires the Centers for Medicare & Medicaid Services to formulate a hit list of poor-performing hospices for special scrutiny under the Special Focus Program.

**How it would work:** CMS will use specific criteria to identify the poor-performing hospices and furnish a candidate list to the relevant CMS Quality, Safety & Oversight Group (SOG) and State Survey Agency (SA). The SOG and SA will work together to decide which hospices from the candidate list get placed on the SFP "based on State priorities," CMS explained in the home health proposed rule back in July. The SA would survey SFP hospices "at least once every 6 months ... and may include progressively stronger enforcement actions in the event of a hospice program's continued failure to meet the requirements for participation with the Medicare and Medicaid programs," the rule indicates.

Then, "once an SFP hospice program has completed 2 consecutive 6-month SFP surveys with no condition-level deficiencies cited, the facility would graduate from the SFP," CMS described. "If the hospice program did not meet the requirements to graduate, it would be placed on a termination track."

CMS already operates an SFP called the Special Focus Facilities for long-term care facility surveys, the agency noted.

The SFP program is a foregone conclusion, since it is required by law. But commenters had plenty of criticism, feedback and suggestions on the program specifics, including on these hot topics:

- **Inclusion criteria.** The criteria for hospices to land on the candidate list include "a history of condition-level deficiencies on two consecutive standard surveys, two consecutive substantiated complaint surveys, or two or more condition-level deficiencies on a single validation survey (the validation survey with condition-level deficiencies would be in addition to a previous recertification or complaint survey with condition-level deficiencies)," CMS specified in the rule.

The rule failed to include a time period for the "two consecutive substantiated complaint surveys" or an indication that the "nature of the complaint" will affect the hospice's inclusion, protested the National Association for Home Care & Hospice in its comment letter. "Depending on the nature and severity of the complaint, it could be some time before complaints are investigated. In fact, it could be years," NAHC maintained. "Survey entities may receive complaints that are not of an urgent nature and investigation of the complaint is held until the next scheduled survey," the grade group pointed out.

The rule also failed to include relevant details of the criteria including whether the deficiency was widespread or isolated and whether it resulted in patient harm and the level of harm, noted the Texas Association for Home Care & Hospice's **Rachel Hammon** in the group's comment letter.

And "should survey data be the only criteria for inclusion or should a combination of survey and program integrity data be utilized (i.e., Hospice Care Index performance, proportion of live discharges, etc.)?" Hammon asked.

"Multiple [condition-level deficiencies] may indicate a hospice in need of assistance to bring the program back into compliance," but "focusing solely on CLDs has the potential to inadvertently exclude truly poorly performing hospices

that would benefit from special attention," said the National Hospice and Palliative Care Organization's **Edo Banach** in the group's comment letter.

Using survey results isn't really fair anyway, argues insurer Humana, which purchased Kindred at Home. "Due to the lack of consistency between surveys, there is concern that results are too subjective," Humana noted in its comment letter.



**Instead:** NAHC, Humana, and others urged CMS to use a Technical Expert Panel to help hammer out more detailed and specific criteria used for SFP selection.

- **Graduation.** As with inclusion criteria, multiple commenters questioned the "2 consecutive 6-month SFP surveys with no condition-level deficiencies cited" criteria for graduating from the SFP. They urged CMS to utilize a TEP for that information as well.
- **Centralization.** CMS noted that "in the event that no hospice programs in a State meet the established criteria [for the SFP list], then the State SA would not have a hospice program in the SFP at that time," according to the proposed rule.

"We are pleased that the proposed SFP design does not utilize a quota system as is used in the Special Focus Facility (SFF) program for long term care and thank CMS for this," NAHC said.

However, "CMS does not comment on what type of State priorities may influence which hospices are chosen from the Candidate List for the SFP," NAHC noted. "Introducing factors at the State or local level defeats the goal of providing oversight and/or technical assistance to the poorest performing hospices," the trade group criticized.

Instead, "NAHC strongly supports a standardized, centralized approach, using objective criteria to determine which subset of hospices will be placed into the SFP," it said. "This builds an SFP that targets the poorest performing hospices."

- **Public reporting.** "Careful consideration should be given to the information publicly reported about a hospice provider in the SFP," NAHC urged. "Graphics and details about the special focus program should be carefully developed to convey information accurately and without undue alarm," it urges.

"It is crucial to be thoughtful about the creation of the SFP candidate list because inclusion on the candidate list has proved to create irreparable damage for nursing homes, as the list is made publicly available on Nursing Home Compare," Banach pointed out. "This lends even greater importance to the need to make careful and accurate decisions about the selection of facilities to include either on the candidate list or in the program itself."

Perhaps most importantly, "when a provider corrects the deficiencies that placed it in the SFP and meets any other criteria for moving out of the SFP, public reporting of this information should be timely," NAHC recommended.

- **Timeline.** The SFP program is complex, with many moving parts that need technical expert input, multiple commenters told CMS. The CAA required immediate implementation of the SFP process, which obviously hasn't taken place.

But CMS shouldn't rush it into use, multiple commenters cautioned. NHPCO "calls on CMS to convene a [TEP] to gather stakeholder feedback on the SFP prior to design and implementation of such program," Banach says in the group's comment letter. CMS should also work on its other proposals, such as improving consistency between surveys, before SFP implementation, it Banach adds.

"It is important for CMS not to implement SFP until surveyor training and surveyor consistency are addressed," offered **Douglas Irvin** and **Pam Cramer** of the Illinois Hospice & Palliative Care Organization. "We are also concerned about surveyor staffing to implement SFP, as new surveyor positions will be needed for implementation," Irvin and Cramer noted in IL-HPCO's comment letter.

"Once CMS has successfully standardized the survey process, we recommend employing a gradual implementation schedule to allow hospices time to adjust to the changes and allow for CMS to thoughtfully and effectively implement the

SFP," NHPCO recommended.

For once, CMS seems to have heeded commenters' warnings and pleas. "We are not finalizing our proposal for the Special Focus Program," CMS says in its fact sheet about the final rule published in the Nov. 9 Federal Register. "Numerous comments indicated CMS should not finalize the proposed provision until a Technical Expert Panel (TEP) is convened to further define the parameters and provide a targeted approach based on national measures. Therefore, we are establishing a TEP with stakeholder engagement that integrates the public comments and will finalize this program through future rulemaking."

That's great news, industry experts agree. NHPCO "was very concerned that the program would be designed and implemented without sufficient stakeholder input, so we were very pleased to see that the special focus program details were removed from the final rule and slated for rulemaking in FY 2024," its **Judi Lund Person** tells AAPC.

The SNF SFF system is extremely onerous, shares attorney **Robert Markette Jr.** with Hall Render in Indianapolis. "It's very resource-intensive, you get surveyed all the time," Markette tells AAPC. And "once you get on that list, it's really hard to get off," he relates.

Note: The 192-page rule is at [www.govinfo.gov/content/pkg/FR-2021-11-09/pdf/2021-23993.pdf](https://www.govinfo.gov/content/pkg/FR-2021-11-09/pdf/2021-23993.pdf).