The Use of Electronic Benefit Transfer Systems to Deliver Federal and State Assistance Benefits

Evaluating Health Reform Proposals in the Interest of Children and Adolescents

OTHER TOPICS

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Nursing Home Reform

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The Nursing Home Reform Law: The Federal Response

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The Nursing Home Reform Law, /1/ enacted nearly six years ago, changed virtually all of the federal requirements for nursing facility care and state and federal oversight. /2/ The law revised the federal standards that facilities must meet in order to be eligible for reimbursement under Medicare and/or Medicaid; /3/ changed the survey protocol that state and federal agencies must use to determine compliance with federal standards; /4/ and required establishment of a new and comprehensive enforcement system, including enactment of a range of intermediate sanctions. /5/

Under the general pattern of the law, the Secretary of HHS was required to publish rules or to provide guidance to states and facilities during 1988. The law then required states, typically in 1989, to enact state laws or to promulgate state regulations that were consistent with the federal rules. However, in each instance in which the law required states to follow federal guidance in their own statutory or regulatory enactments, it required states to act even if the federal government failed to meet its own statutory obligations and failed to publish rules. /6/ Congress, with a Democratic majority, wanted the law to go into effect even if the Republican Executive Branch failed or refused to act. /7/

For all of the issues not otherwise specified by the statute, the effective date of the reform law was October 1, 1990.

The Secretary has now published rules, at least in proposed form, or has issued other informal guidance for virtually all of the areas of the reform law in which Congress mandated federal action. A large part of the federal activity occurred in the second half of calendar year 1992.

Requirements for Facilities

HHS issued "final final" Requirements of Participation setting forth the standards that skilled nursing facilities and nursing facilities must meet in order to be eligible for reimbursement under the Medicare and Medicaid programs. These rules, published on September 26, 1991, and effective April 1992, /8/ replaced "final rules with comment period" that were published on February 2, 1989, and became effective October 1, 1990.
In large part, the federal rules once again simply quoted verbatim or closely paraphrased the statutory language.

Additional regulatory language addressing use of physical and chemical restraints was included in the omnibus proposed rule that was published on February 5, 1992. Incorporating concepts from the September 1989 Interpretive Guidelines (used by surveyors) into the Requirements of Participation (implemented by facilities), HCFA proposed to prohibit restraint orders on a standing, blanket, or "as needed" basis.

**Preadmission Screening and Annual Resident Review**

In order to prevent people with mental illness and/or mental retardation from being inappropriately placed or retained in nursing facilities, the Medicaid portion of the reform law established a program of Preadmission Screening and Annual Resident Review (PASARR). Final rules, published on November 30, 1992, set out the requirements for the PASARR process and also reaffirmed that mental health services are a "mandatory component" of nursing facility care.

**Transfer and Discharge**

Part of the PASARR rules addresses the statutory requirement that states provide residents with a "fair mechanism" for hearing appeals of transfers and discharges. As promised in the proposed rules, the final rules, published on November 30, 1992, require states to use the Medicaid fair hearing process as the "fair mechanism" for these appeals effective October 1, 1989. Other than mandate use of the fair hearing process, the final rules are vague, advising the public to address any concerns to the states. HCFA declined to publish rules concerning transfers within the same certified entity--what advocates call intrafacility transfer. However, HCFA provided additional limited guidance on transfer and discharge in the Omnibus Proposed Rule published on February 5, 1992.

**Resident Assessment**

Uniform assessment of residents, to be used for individualized and comprehensive care planning, is a major innovation of the reform law. The reform law required the Secretary to specify the resident assessment data set by January 1, 1989, and instruments that are consistent with these specifications by April 1, 1990. HCFA contracted with the Research Triangle Institute in North Carolina, which developed and field tested the Minimum Data Set (MDS), Resident Assessment Protocols (RAPs), that trigger the federal assessment process. HCFA issued these documents as State Operations Manual...
All states have now adopted the federally developed MDS as their assessment instrument. Unique features of the MDS are its questions on residents' "customary routines" and personal strengths. Most other assessment instruments focus on individuals' disabilities and need for assistance in the activities of daily living.

Nursing Staff Waivers

The Nursing Home Reform Law establishes different standards for permitting waiver of nursing staffing requirements under Medicare and Medicaid. HCFA published proposed rules on waivers under Medicaid as part of the Omnibus Notice of Proposed Rulemaking published on February 5, 1992. The proposed rule prohibits granting a waiver unless the facility was in compliance with "quality of care" requirements, 42 C.F.R. Sec. 483.25, at its last survey and will be in compliance at the time the waiver is to be effective. Waivers, which may not be granted for more than one year, expire if the state determines either that the facility has ceased to be in compliance with section 483.25 or that the health and safety of residents are jeopardized.

Nurse Aide Training

A critical component of the reform law's mandate to improve quality of care for residents is the requirement that all nurse aides who are "used" in a facility for more than four months be trained and competent before they provide care. Proposed rules were published on March 23, 1990, and final rules were issued on September 26, 1991. The final rules, which became effective April 1, 1992, allowed states to make most decisions about whether and how to approve aide training programs.

External Consultants for Psychopharmacologic Drugs

The pervasive misuse of psychopharmacologic drugs in nursing facilities led Congress to require at least an annual independent external review of the "appropriateness of the drug plan" for each resident using psychopharmacologic drugs. Proposed rules, published on February 5, 1992, limited the qualifications of people who would be authorized to conduct such reviews.

Charges to Residents' Funds
Section 21(b) of the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977 required the Secretary to specify in regulations which items and services provided by a nursing home were covered by the daily rate and which could be charged to a resident's personal funds. HHS did not issue rules, believing that existing law and its rules and informal guidance were adequate. Congress disagreed and included a provision in the 1987 reform law directing the Secretary to promulgate rules in seven months.

On December 12, 1992, the Secretary published final rules, which are generally similar to proposed rules published in March 1990. HCFA, while continuing to decline to publish lists of covered and noncovered items and services, stressed throughout the preamble that facilities may not charge residents for services mandated by the reform law.

The final rules specify a number of routine personal hygiene items and services as covered services, including "basic personal laundry." They also clarify that facilities may not charge residents for any nursing services, dietary services, activities, room/bed maintenance services, and medically related social services mandated by the reform law.

The effective date of the rules is October 1, 1993.

Administrator Standards

Proposed rules on standards for nursing facility administrators were published in February 1992. While proposing education requirements, internships, and continuing education, HCFA also asked for public comment on whether use of a competency evaluation by itself would be sufficient.

Survey, Certification, and Enforcement

HCFA issued the new survey protocol to implement the "final final" Requirements of Participation in April 1992 as State Operations Manual 250. The protocol is composed of forms and procedures, whose use by survey agencies is mandatory, and the Interpretive Guidelines. The introduction explains that the Guidelines are the "authoritative interpretations and clarifications of statutory and regulatory requirements and are to be used to make determinations about a provider's compliance with requirements."

Since HCFA did not promulgate detailed rules to implement the reform law, the Guidelines provide HCFA's sole interpretation of many statutory requirements, such as transfer and discharge, equal access to quality care, and accommodation of residents' needs and preferences.

On August 28, 1992, HCFA published proposed rules, which had been due on October 1, 1988, on survey, certification, and enforcement. Although the preamble projects a
strong and aggressive enforcement orientation, the proposed regulatory language is somewhat weaker. HCFA continues to focus enforcement efforts on instances when physical harm to residents has already occurred, giving less attention to prevention of harm or to residents' rights and "quality of life" issues. HCFA rejected the industry's request for informal "conflict resolution" in addition to the formal appeals process, but requested public comment on whether such a mechanism should be mandated.

The Nursing Home Reform Law permits a state to use "alternative remedies," instead of the remedies established by the reform law if it "demonstrates to the Secretary's satisfaction that the alternative remedies are as effective in deterring noncompliance and correcting deficiencies as those described" in the statute. /46/ HCFA has not published any rules or given any guidance on the standards it will use to approve a state's request to use alternative remedies. HCFA's mechanism for implementing this provision of the law is the State Plan Amendment process; HCFA allows states to check off boxes on the Medicaid State Plan preprint, indicating whether they select the remedies specified by the law or alternative remedies.

HCFA's implementation of the federal Nursing Home Reform Law has been slow and tentative. In regulatory proposals in particular, HCFA has been cautious. Proposed rules have added little explanation to explicit statutory language and have given states considerable discretion.

Footnotes


/3/ 42 U.S.C. Secs. 1395i-3(b)-(d), 1396r(b)-(d).

/4/ Id. Secs. 1395i-3(g), 1396r(g).

/5/ Id. Secs. 1395i-3(h), 1396r(h).

/6/ For example, the law states that "[t]he Secretary shall provide, through regulations by not later than October 1, 1988, guidance to the States in establishing such remedies; but the failure of the Secretary to provide such guidance shall not relieve a state of the responsibility for establishing such remedies." 42 U.S.C. Sec. 1396r(h)(2)(A).
Deregulation of nursing homes began January 21, 1981, with the withdrawal of nursing home regulations concerning residents' rights that had been approved days earlier by the outgoing Carter Administration.


21 Fed. Reg. 4516, 4517-20 (Feb. 5, 1992). All of HCFA's recent statements about use of physical and chemical restraints are discussed in Physical and Chemical Restraints in Nursing Facilities: An Introduction for Residents' Advocates, 1 THE NURSING HOME L. LETTER (June 1, 1992) (available for $5 from the National Senior Citizens Law Center, 1815 H St. NW, Suite 700, Washington, DC 20008).

42 U.S.C. Secs. 1396r(b)(3)(F) (facility), 1396r(e)(7) (states), 1396r(f)(8) (Secretary).


Id. at 56478.

42 U.S.C. Secs. 1395i-3(e)(3), 1396r(e)(3).


Id. at 56500.

Id. at 56501.

57 Fed. Reg. 4516, 4524-25 (Feb. 5, 1992). HCFA proposed to require that facility notices concerning transfer include the name, address, and phone number of the state entity to which a transfer or discharge decision may be appealed. Proposed 42 C.F.R. Sec. 483.12(a)(6)(iv). For additional information about the proposed rules, see Transfer and Discharge, 4 THE NURSING HOME L. LETTER (Mar. 29, 1993) (available for $5 from NSCLC; see note 10 supra).


Id. Secs. 1395i-3(f)(6)(B), 1396r(f)(6)(B).
Congress deliberately used the word "used," rather than "employed," to assure that all persons working in facilities meet aide training requirements, whether they are permanently employed by the facility or temporarily assigned from a nursing pool agency.

Congress specified services that would be covered by the daily rate if HCFA did not publish rules. Congress deliberately used the word "used," rather than "employed," to assure that all persons working in facilities meet aide training requirements, whether they are permanently employed by the facility or temporarily assigned from a nursing pool agency.

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The delayed effective date is intended to assure that states calculate any increased costs to facilities in their annual reimbursement submissions to HCFA, which are due on April 1 and are effective on October 1.

/41/ Id. at 4523.

/42/ SOM 250 replaces SOM 232, which was issued in September 1989 and went into effect on October 1, 1990.

/43/ SOM 250, Sec. 2712, Rev. 250 at 2-137.

/44/ A detailed discussion of SOM 250 is provided in New Survey Procedures and Interpretive Guidelines, 2 THE NURSING HOME L. LETTER (Aug. 14, 1992) (available for $5 from NSCLC; see note 10, supra).
