Nothing New: While the White House Plans Nursing Facility Reform, Medi-Cal Continues to Underpay for Nursing Services, Medical Supplies, and Quality Care Initiatives

Insights 04.06.22

PROFESSIONAL

STANTON J. STOCK
Partner
San Diego

Since February 2020, COVID-19 spread like wildfire in America's nursing facilities. Current estimates indicate over 200,000 residents and staff have died from COVID-19. As deaths mounted, the topic turned political. The White House now claims the Trump administration "provided insufficient testing," "called for the elimination of the requirement for infection control specialists to work in nursing homes," and "reduced training requirements for staff[.]" Government agencies pointed fingers at other government agencies, who in turn pointed fingers at nursing facilities. On February 28, 2022, the White House announced a number of proposed reforms for nursing homes, aiming to improve quality and transparency.

In California, however, nursing facilities have long struggled to receive equitable reimbursement for the costs of providing quality nursing care under Medi-Cal's unique reimbursement scheme. In fact, litigation has been pending for years on behalf of nursing facilities against the California Department of Health Care Services, which administers the Medi-Cal program. In lawsuits that were initiated *before* the pandemic, hundreds of nursing facilities are suing the Department for underpaying for the costs of experienced nurses, infection control specialists, and medical supplies.

The need to support skilled nursing facilities in rendering quality care is not new. The problem has only grown exponentially under the devastating effects of COVID-19 on nursing home residents and staff. Early in the pandemic, when little was known about the disease, and testing was unavailable, many nursing homes experienced mass-casualty incidents among their elderly resident populations. The disease ran rampant through nursing homes, which are congregate living environments that are populated with the frailest of Californians.

Staff were not immune to the disease, either. There were instantaneous and unprecedented staffing shortages. It was difficult to find *any* able-bodied nurses, especially experienced nurses. There was (and still is) a dire need for veteran nurses, who are capable of training and supervising infection control, medication administration, wound care, *etc*. Some nursing facility personnel became infected and died. Some feared for their lives and the lives of their loved ones. Still, many worked long, grueling hours, sweating in gowns, foggy visors, and latex gloves – truly heroes of the pandemic. Medical supplies were also scarce, hoarded, and subject to price manipulation.

It is easy to point fingers and attempt to shift blame. Implementing real solutions, however, is more difficult and costly. This article proposes some real solutions for California nursing facilities that can be implemented immediately under existing law. If California is serious about improving quality care in nursing homes, consistent with the White House's new reform proposals, this article discusses obvious solutions that can be implemented immediately under existing law.

Pay for Experienced Nurses to Provide Oversight, Training, and Consultations

Sounds like common sense, right? Not according the Department of Health Care Services. For at least a decade, the Department's auditors have been reclassifying the costs of veteran, experienced nurses as *administrative* costs, instead of

nursing costs. Under California's unique AB 1629 reimbursement scheme, administrative costs are limited to reimbursement under a 50% cap. Once facilities hit the administrative cap, which most do, they are not reimbursed for additional administrative costs. By reclassifying nurses as administrative costs, Medi-Cal is effectively *not paying* for these experienced nurses.

These are highly-qualified nurses, who provide oversight, training, and consultations to multiple skilled nursing facilities. They observe and mentor less experienced nurses on compliance, medication administration, wound care, *etc*. Some of these nurses serve as Infection Preventionists, who are responsible for overseeing infection control at a nursing facility. The role these veteran nurses play is critical for promoting quality care in skilled nursing facilities.

The Department's excuses for reclassifying these licensed nurses as *administrative* costs are many, constantly changing, but always erroneous. Hundreds of skilled nursing facilities have been fighting the Department for years, arguing these licensed, experienced nurses should be reimbursed like *nurses*. Lawsuits have been pending in Superior Court and at the administrative level for many years, before the pandemic. The Department should redirect its resources spent on auditors reclassifying these costs to pay for the nurses skilled nursing facilities and their residents desperately need.

Pay Facilities the Quality Assurance Awards They Rightfully Earned

California nursing facilities can earn quality assurance award monies for meeting certain metrics of quality care. These awards are well-earned by select facilities. If a facility earns a quality assurance award, the award amount is calculated, in part, by the number of days that Medi-Cal patients resided at the facility (*i.e*., Medi-Cal days). However, facilities can lose those awards if they receive certain citations or deficiencies for regulatory violations.

Sometimes, a facility successfully appeals the alleged violation that initially disqualified them from receiving a quality assurance award. When this happens, California is *supposed to* pay the facility the award that would have been paid but for the alleged violation. Sometimes, even though a facility earned an award, the number of Medi-Cal days is miscalculated. When the correction is made, California is *supposed to* pay the facility the additional award money that would have been paid if the days were calculated correctly in the first instance. These corrections are ministerial duties that the Department of Health Care Services is *supposed to* complete.

The Department, however, has grossly failed in effectively administering the quality assurance award program. Indeed, the quality assurance award system has been so unsuccessful, it will be replaced in 2023. But many facilities are still owed "straggler" quality assurance awards (*i.e*., awards that should be paid as a result of an appeal or recalculation). The Department is in such disarray on this issue, it often cannot answer simple questions about how much it owes and when it will pay a particular facility, if at all. Many facilities have found no recourse but to file litigation against the Department. Simply stated, the Department should accurately pay quality assurance awards to California nursing homes that indisputably earned the awards by providing quality care to Medi-Cal beneficiaries.

Stop Taking Medicare Payments for Medical Supplies

It is undisputed that Medicare pays more for medical supplies than Medi-Cal. Under Medi-Cal, skilled nursing facilities are paid a daily rate that is based on their cost reports. In other words, when facilities include medical supplies in their costs, their daily rate goes up to cover those costs. The Medi-Cal rate increase, however, is much less than the amount Medicare pays for the same services. Also, Medi-Cal is the payer of last resort, which means Medi-Cal may have to pay very little, if anything, when the same services are covered by Medicare.

Some California patients are covered by both Medicare and Medi-Cal. This often leads to confusion over coordinating benefits (e.g., whether costs should be reported in the cost report, billed to Medicare, or billed to Medi-Cal). Moreover, sometimes third parties bill for medical supplies, which leads to the risk of further confusion and double-payments. When mistakes occur, Medi-Cal is supposed to recover the amount Medi-Cal overpaid, if any, for the medical supplies. However, Medi-Cal routinely recovers the amount *Medicare* paid, regardless of whether Medi-Cal paid less or nothing at all for the same

services. Moreover, Medi-Cal recovers the amount Medicare paid from skilled nursing facilities, even if a third party billed Medicare, and the facility did not bill for the services at all.

This leads to a windfall for the Medi-Cal program, as it recovers more for the medical supplies than it would have ever paid. The losses are shifted to the skilled nursing facilities, who are routinely underpaid for the costs of medical supplies. California skilled nursing facilities have also been litigating this issue against the Department of Health Care Services for over a decade. Medi-Cal should stop taking Medicare payments from skilled nursing facilities, so facilities receive accurate reimbursement for the cost of medical supplies.

Conclusion

The COVID-19 pandemic has been catastrophic for the nursing facility industry. However, facilities and their hard-working personnel should not be villainized for government failures that have contributed to the problem. The Medi-Cal program has failed to pay nursing facilities for millions of dollars of costs that are indisputably intended to promote quality care. While the White House touts larger reforms, California should end these irrational disputes in an effort to immediately promote quality care in its own nursing homes.

***

For further information, please contact Stan Stock in San Diego, Sansan Lin in Los Angeles, or any other member of our Hooper, Lundy, and Bookman team.

RELATED CAPABILITIES

COVID-19 / Public Health Emergencies

Skilled Nursing Facilities (SNFs) and Long-Term Care Providers