July/August 2008

Strategies to Defend Against Quality of Care Allegations

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Appeared in *Geriatric Nursing*
July/August 2008

Health care providers face scrutiny from various governmental entities, including state and federal surveyors, that access and analyze publicly available data. The Internet provides easy access to quality of care and staffing data allowing a government investigator to perform a comparative analysis of a health care provider's performance without leaving the office. Individuals working for federal or state agencies, such as the federal Department of Health and Human Services Office of the Inspector General or a state's Medicaid Fraud Control Unit, may form an initial impression about the provider's quality of care without ever interviewing staff or visiting the facility. This initial first impression may be costly and difficult to change.

This article provides examples based on the data for nursing facilities available on the Centers for Medicare and Medicaid Services (CMS) Nursing Home Compare Web site, although the concepts are similar for other types of report cards maintained at both the federal and state level. Nursing facilities should be even more concerned about initial impressions in light of recent CMS initiatives, including prominently identifying special focus facilities and the newly announce five-star rating system, which could result in an even quicker negative opinion regarding a facility's quality of care.

It is important to understand the theories related to quality of care by which governmental agencies attempt to bring criminal or civil charges against a health care provider. The federal government may allege that because it only pays for appropriate care, by providing poor care (as evidenced by the facility's data), the facility fraudulently billed Medicare or Medicaid for the services it provided. Or there may be an allegation that the facility staffing was so low, appropriate care could not have been provided, and therefore claims were falsely submitted. In addition to the federal False Claims Act, many states have similar laws that permit civil penalties to be imposed against health care facilities under these theories.

Although governmental agents may initially focus on the

information that is maintained by CMS on its Nursing Home Compare Web site (i.e., Quality Measures [QM] derived from reported MDS assessments and nursing staffing data), once an investigation is underway, it will likely include an analysis of other facility records including the MDS Quality Indicator (QI) data. Those working in nursing facilities understand, however, that QM/QI data do not necessarily correlate to quality of care. The case mix of the residents, for example, may affect the scoring. Furthermore, even CMS has repeatedly acknowledged the inaccuracy of both MDS and staffing data from which these comparative statistics are derived. CMS is continuing its efforts to improve the MDS data integrity, although the DAVE (Data Assessment and Verification) project[1], although there is still significant work to be done in this area.

Health care providers should implement procedures to ensure that all reported data are both accurate and can be explained in the event that there is an allegation related to quality of care or staffing levels. As a preliminary matter, it is important to be sure that staff members who are responsible to report the data are properly trained. For the nursing facility, this may require ongoing, periodic training especially for the professional staff members that participate in the assessment and MDS scoring.

With regard to staffing data, it is important to review the data that actually appears on the Internet Web site. For example, after a nursing facility submits its staffing data, a government staff person enters the data into the Nursing Home Compare database, providing an opportunity for human error in data entry. Unfortunately, staffing data on Nursing Home Compare that used to be easy to review for inaccuracies is now more difficult to review because it is no longer reported using per patient day ratios.

After determining that your staffing data are accurate, compare it to the staffing levels of similar health care providers. Identify factors that may account for differences between your staffing and state or national averages, especially when your staffing levels are lower in any skill mix category. Document how each of these factors resulted in the need for a certain level of nursing staffing or a particular skill mix.

Factors to consider in this analysis include the case mix of the residents, special expertise of the nursing staff, specific job duties for nursing and nonnursing staff, facility programs, and the physical structure of the facility. The following paragraph provides an illustration of how each of these factors may have an effect on the level of nursing staffing required to provide appropriate care and achieve good outcomes. Even CMS has acknowledged that a number of variables exist that affect a facility's nursing staffing level. When CMS performed its two-phase staffing study to identify a minimum per-patient-day

nursing staffing standard, it was unable to do so because of the number of variables that affect the staffing level needed to avoid negative care outcomes.

Facilities with a case mix that includes more independent residents may require less registered nurse and licensed practical nurse staffing, as well as less total certified nursing assistant (CAN) staff, than facilities serving a more dependent resident population. Likewise, nursing facilities that use certified rehabilitation nurses might need less licensed nursing staff due to the expertise of the rehabilitation nurses in implementing restorative nursing programs that are successful in assisting residents in maintaining independence. Some nursing facilities use nonnursing staff to assist in meeting resident needs, such as having the activities staff help transport residents to the dining room for meals, thus reducing the nursing staffing needs. A nursing facility with an active therapy program may have occupational therapy performing morning activities of daily living and afternoon bathing training, reducing the CNA staffing needs. Having a circular nursing unit with a centrally located nursing station enhances staff efficiency compared with an L-shaped unit where staff must cover longer distances to provide care.

A similar process should be used to assess the facility's QM/QI scoring. Again, it is important to ensure that the reported data are accurate. As a starting point, CMS has published "Tips on Checking the Accuracy" of QM data. After the data is found to be accurate, or after necessary corrections are made, a similar analysis should be conducted to explain variations in QI/QM data, that is, variations at the facility level and variations in comparisons to state and national averages.

The resident case mix could likewise have a significant effect on a facility's QMs. For example, caring for a greater number of residents with progressive neurological diseases may account for higher scores in QMs such as the percentage of residents needing help with activities of daily living, the percentage of residents who have lost control of bowel or bladder, or the percentage of residents whose ability to move about in their room has declined.

Other factors that might affect a nursing facility's QM/QI data include changes in the criteria used for MDS coding or changes in the skill level of the staff performing the MDS assessments. An example of such a factor is an MDS coordinator who, after reviewing the instructions regarding what constitutes a "fall," begins to report incidents when residents are lowered to the floor in addition to incidents when patients were observed to fall or found on the floor following a fall. The nursing facility's next report may reflect a significant increase in falls. Although care remained constant and the incidents did not increase, the incident of falls

changed because the facility was now reporting falls in accordance with MDS instructions.

The nursing facility, in this illustration, should document that it implemented a change in the evaluation and reporting of falls. This type of analysis and explanation is fairly easy to perform when it is occurring but often difficult to remember and explain at some later date when a governmental agent questions why falls were on the increase during a certain period of time.

Taking the time to provide an analysis of the data accuracy and the factors affecting data variations when it is occurring not only may save significant time in responding to a subsequent false claims act investigation but also will provide a more reliable and credible response to allegations. Additionally, performing this type of data analysis demonstrates a facility's commitment to quality of care.

NOTES

[1] For more information on the DAVE project, which is now in the second phase as DAVE II, visit the CMS Website at: www.cms.hhs.gov/NursingHomeQualityInits/20_NHQIMDS20.asp

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