Nursing Home Regulation During the COVID-19 Pandemic

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SARS-CoV-2 (COVID-19) was first detected in nursing homes in Washington state, and since then, infections have spread across U.S. nursing homes, resulting in over 260,000 resident infections and over 60,000 resident deaths as of mid-October (CMS, 2020). Additionally, there have been over 165,000 nursing home staff infections and 830 staff deaths (CMS, 2020). The pandemic revealed that nursing homes were woefully unprepared in terms of their physical plant design, supply of personal protective equipment (PPE), staffing, and infection control and prevention. Data show that 40 percent of nursing homes had at least 1 infection control and prevention deficiency in any given year, and that over 60 percent had at least 1 over a period of several years (GAO, 2020). The lack of preparedness at the federal level also likely contributed to the unnecessary suffering of those living and working in long-term care (LTC). Prior to the pandemic in 2019, the current, federal administration proposed significantly weakened nursing home regulation, including removing the requirement that nursing homes have a dedicated infection control preventionist who works on site at least part time (see the following for a review: https://claudepeppercenter.fsu.edu/research/policy-issue-briefs/the-deregulation-of-nursing-homes-in-cms-regulatory-provisions-to-promote-efficiency-and-transparency/). This issue brief summarizes changes in nursing home recommendations and regulation during the pandemic, provides perspectives from Certified Nursing Assistants working in LTC, and concludes with recommendations about how to best reduce the impact of future outbreaks.

**Federal Guidelines, Recommendations, and Changes**

The following provides a timeline summary of the major federal guidelines, recommendations, and changes to regulation during the COVID-19 outbreak.

-March 4, 2020. CMS suspends nursing home inspections with a few exceptions including nursing homes that have immediate jeopardy complains, reports of abuse or neglect, and infection control complaints.

-March 10, 2020. CMS makes recommendations based on CDC guidelines regarding PPE with the recognition that there is a nation-wide shortage of respirators. If there is a shortage of PPE in a nursing home, prioritization should be given to those caring for those infected with COVID-19 and for aerosol generating procedures.

-March 13, 2020. CMS issues a ban on visitors and any non-essential staff. CMS provides guidance for checking staff for symptoms, cancels group activities, provides guidance on when it's appropriate to transfer residents to the hospital and how to accept incoming residents. The guidelines also address a nursing home's supply of PPE and states that surveyors will not cite facilities for a lack of PPE if they've tried to obtain supplies as there is a shortage in some areas of the U.S.

-March 13, 2020. A national emergency due to COVID-19 is declared. The Health and Human Services Secretary is now able to authorize blanket 1135 waivers to ease the burden on providers. This allows nursing homes to waive the Pre-Admission Screening and Annual Resident Review and waive other requirements. CMS also responded to the emergency declaration by focusing on only certain types of surveys including immediate jeopardy complaints and targeted infection control surveys for three weeks.

-April 2, 2020. CMS and CDC released the "COVID-19 Long-Term Care Facility Guidance." The guidelines instruct nursing homes how to prevent the spread of COVID-19 including when to separate and transfer those who are suspected to have or already have COVID-19. CMS issued blanket waivers that relax regulation regarding physical environment requirements, allowing residents to be placed in rooms not normally designated for residents and allowing transfer or discharge to another facility for the purposes of cohorting.

April 19, 2020- CMS reminds nursing homes that they must report infections and possible outbreaks to state and local health departments or face enforcement actions.

April 24, 2020- CMS announces that they will hold the Nursing Home Five Star Quality Rating System's inspection domain constant, temporarily to allow the prioritization and suspension of certain surveys.

June 6, 2020. CMS implements a new COVID-19 reporting system and partners with the CDC to identify problem nursing homes. State Survey Agencies now have a performance-based supplemental grants funding requirement tied to the Coronavirus Aid, Relief and Economic Security (CARES) Act. Infection control noncompliance will be met with harsher penalties. Quality Improvement Organizations will refocus efforts on problem nursing homes and develop better infection control programs.

June 25, 2020. CMS announces that the 5-star staff rating and quality measure will be held constant and based on data submitted for the 4$^{th}$ quarter of 2019. Staffing data reporting to the Payroll Based Journal system is reinstated.

August 7, 2020. HHS announces $5 billion in provider relief funds to support increased testing, staffing, PPE, and for establishing COVID-19 isolation facilities. The funds are to be linked to nursing home performance regarding their ability to minimize the spread of COVID-19 infections and deaths.

August 17, 2020. CMS expands survey activities by allowing onsite revisits and other survey types. CMS is also following up on enforcement cases that were previously on hold.

August 25, 2020. CMS releases COVID-19 training for nursing home staff and management that focuses on how to prevent and reduce the spread of infections.

August 26, 2020. CMS announces that nursing homes are required to report COVID-19 related data to the CDC or face a Civil Money Penalty. Nursing homes are required to test staff routinely and to offer testing to all residents. If there is a positive test or someone presents with symptoms, all staff and residents must be tested.

August 26, 2020. The Department of Justice requests data on COVID-19 in nursing homes from 4 states—New York, New Jersey, Pennsylvania, and Michigan. The focus appears to be on state-run nursing homes that accepted recovering COVID-19 patients from hospitals: https://www.politico.com/states/new-york/albany/story/2020/08/26/doj-may-investigate-blue-states-over-covid-deaths-at-nursing-homes-1312658

September 17, 2020. CMS lifts some restrictions on nursing home visitations and communal dining and provides safety guidelines. Civil Money Penalties money may be used to aid visitation and communication with residents (e.g., for the purchase of tablets).

**Regulation at the State Level**

-Over half of states have enacted some level of civil immunity rules for nursing homes, assisted living facilities, and other LTC providers. These states are: Alaska, Alabama, Arkansas, Arizona, Connecticut, Georgia, Hawaii, Illinois, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Mississippi, Montana, North Carolina, New Jersey, Nevada, New York, Oklahoma, Pennsylvania, Rhode Island, Utah, Virginia, Vermont, and Wisconsin. Three states have civil and criminal immunity—North Carolina, New Jersey, and New York. Legislation has been introduced to limit nursing home liability at the federal level and one version ties it to relief packages. https://centerjd.org/content/fact-sheet-state-covid-19-health-care-immunity-laws

**Perspectives from Staff Working in LTC**

How well did nursing homes respond to the pandemic? In the absence of longitudinal data on nursing home COVID-19 outcomes, qualitative data from staff working (particularly Certified Nursing Assistants or CNAs) in LTC can provide some insight. The following quotes come from social media posts on, "Unbriefed: the life of a cna" which is self-described as "… a place where aides can get advice, talk or just be real. Not everyone understands the job but we can be there for each other!" Staff expressed their concerns regarding infection control and a lack of PPE.

*Fears of Exposure and Spreading Virus*

March 21, 2020

"...tonight I got to work and learned that we accepted a patient who they believe has COVID. We are a long term facility and many of our residents are already dealing with severe respiratory issues. I am in disbelief that they could even take a chance at exposing other residents, and employees. It is truly evil. I am also currently pregnant and I feel sick knowing they would be willing to put us at risk and to where we will be exposed to our families. I feel like calling and just quitting knowing that they willingly chose to expose multiple people just to make a dollar!"

April 5, 2020

"…i put in my two weeks 2 days before our behavioral hospital accidentally admitted a patient that had not had their vitals taken before admission found out 3 days later they were covid positive with a minor cough and fever. now we have two suspected cases in our hospital in isolation and they're asking all the workers that were exposed to still come into work until they have symptoms and not to self isolate. and they said eventually they would be obligated to accept covid positive patients. once they said they would have covid patients they would pass out "kits" with PPE to select staff who would be interacting with those patients. and the kit would only include a limited number of gowns and masks. it frustrates me that they want to accept covid patients when we already and scraping by with little supplies and gloves. we have no masks and have had people donate latex only gloves…"

August 20, 2020

"I was diagnosed with covid-19 the 10th and my work wants me to come in tomorrow even though I still feel like crap. Can they do this? I haven't ran a temperature at all so they said I wasn't contagious. I'm in SC if that helps…Can you add that I am still coughing, having body aches, headaches, and fatigue. DON said as long as my symptoms are improving* that I have to go in. Is that true?"

September 26, 2020

"I have a private duty patient who just recently tested positive for COVID-19 and then one of the other nurses tested positive. I have been taking my vitamins and medicine just in case something build in my immune system so far day three nothing. It scares me because I live with my family and my grandmother just recently moved back in and I'm potentially putting everyone at risk this is my worst nightmare."

*PPE*

April 1, 2020

"The nursing home i work for is saying it is uneccesary to wear masks since we at this time to do not have any patients with Covid 19 and it may scare the residents. We have been on lockdown so no outside visitors. Residents are being kept in their rooms. We have to have our temps checked before working the floor. However they are still taking new patients from hospitals that have positive cases…They also will not let us wear home made or anything… Some staff have even shown signs of being infected themselves and are told to still come to work. Some have said call state but if found out the facility will retaliate. Everyone is short on masks…"

July 13, 2020

"who says this is proper PPE or even acceptable PPE?! We have employees that have tested positive and now have possible covid patients, we are waiting on them to get tested tonight I come in to find.. these long sleeve button up OLD shirts on my isolation carts"

September 25, 2020

"I'm glad I'm at a facility that FINALLY has enough PPE"

**Discussion**

While CMS' efforts in mitigating the effects of COVID-19 on nursing home residents and staff are laudable, it's a case of too little, too late. The pandemic and the disproportionate effect that one could have in nursing homes was not unforeseeable. In fact, prior to the pandemic, a majority of nursing homes cycled in and out of compliance with infection control protocol. Moving forward, CMS should maintain its vigilance and focus on infection control surveys, training, and enforcement in nursing homes, including their inventory of PPE and its proper use. Many nursing homes were also unprepared to safely accept COVID-19 patients from hospitals, however, they were likely enticed by a higher Medicare reimbursement rate. In the future, the decision to accept such patients should be tightly controlled and used as a last resort because the risks to the medically vulnerable nursing home population are just too great. Nursing homes should be held accountable when residents in their care are placed into danger or harmed by means of regulatory action, Civil Money Penalties, and civil and criminal liability. Finally, guidelines, recommendations, and regulation can only go so far in preventing and responding to infection outbreaks like COVID-19—the nursing home itself must be reimagined—as has been the case with the Green House Project homes.