

Recommendations

Many of the problems facing North Carolina's nursing home industry are similar to those facing homes across the nation, including tight Medicaid budgets and difficulties in attracting and retaining workers. Burdensome regulations only add to the difficulties of nursing home operators trying to remain viable on limited resources. In some cases, the sheer volume of rules may even be counterproductive.

Clearly, with the depth and breadth of rules governing nursing home operations, there will be violations from time to time, particularly when homes have to serve two masters—the federal certification teams and the state's licensure inspectors and complaint investigators. The vast majority of nursing home operators are working hard every day to provide high quality care for residents. Indeed, more than 140 homes operated without a single penalty over the three-and-a-half years the Center studied, and seven homes accounted for nearly one-third of the total amount of fines. It is incumbent upon the state to make sure that the rules are followed, but the evidence suggests that more and higher fines won't solve the problems of most nursing homes.

In the face of public outcries about leniency, the state has toughened its enforcement of nursing home regulations in recent years. The dollar amount of fines imposed against nursing homes more than doubled in the three-and-a-half year period that was the focus of the Center's study. In 1988, fines levied against nursing homes totalled \$33,110, compared to \$67,070 in 1990. The trend was toward fewer but higher fines in 1991 as the state began focusing on the most serious offenders. This decision seems appropriate. With a limited number of inspectors, the wisest course is to focus on the worst cases—those representing serious risk to the life and health of patients.

Still, advocates argue convincingly that the state has been slow to act against problem homes—those that are cited repeatedly but never seem to straighten out their operations. This problem was pointed out by the state auditor in

1981 and remains a problem in 1992. During the period studied by the Center, the state initiated only two license revocation proceedings, one of them against a home neglecting patients while caught up in an unsuccessful fight against Medicaid fraud charges.

The state more recently moved to revoke the license of against another problem home, Americas Care of Cumberland County, when the federal government acted to cut off its Medicaid funds in February 1992. With such a high percentage of penalties being levied against only a handful of homes, it's clear that the state could move more aggressively against these problem homes.

But state enforcement officials say they are handcuffed by a serious dilemma. If they move to shut down a problem home, they must find something to do with the patients. Moving nursing home patients is traumatic, and a tight supply of beds means there may be no place to move them.

Clearly, the state needs another enforcement tool to complete a range of sanctions that serve notice on bad operators that cutting corners at the expense of residents' health will not be tolerated. To promote constructive dialogue between regulators and operators while providing a practical means of policing the worst providers, the Center offers the following four recommendations:

(1) Licensure officials should use the discretion afforded them under state statutes to avoid fining a home for a minor violation if the homes can show the violation did not have an impact on patient care. Many B-level penalties cover important areas of care, such as keeping patients clean and groomed. Others form the threads of a tightly woven regulatory straitjacket. These include rules about administration that require extensive documentation and paperwork. And they also include rules that touch on patient care, but in a minor way. For example, a home could be cited because an aide left a pile of dirty towels in the corner of a shower room to respond to a patient emer-

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gency, or for leaving certain documentation out of a personnel file.

Operators argue persuasively that some of the energy channeled into following the letter of the law might be more appropriately expended on patient care. According to state statutes, licensing officials *may* impose a \$500 penalty for each Type B violation.¹ Some state officials apparently have read *may* as *must* in the past. Lynda McDaniel, deputy director of the Division of Facility Services, says this runs counter to the current philosophy of the licensure office, which is to help homes work out their operating difficulties in the interest of providing better care. Still, it may be that some state officials need a reminder.

While no one would advocate leniency, licensure officials should exercise the discretion allowed them under the law. That means allowing nursing home operators the opportunity to make a good-faith effort to come into compliance before slapping them with a penalty.

The legislature may also want to consider implementing guidelines that would help licensure officials determine penalties more systematically. One such system is known as a *scope and severity matrix*. It would require inspectors to weigh both the magnitude of a violation and whether it represented a pattern or an isolated occurrence before recommending a fine. It might also bring a measure of consistency to what are now judgment calls on the part of state officials.

(2) *The legislature should allow nursing homes to apply fines for minor violations toward the cost of hiring independent consultants who would help them solve their operating problems.* Nursing home regulations are formulated with the highest and best intent—protecting the health and well-being of residents. But the complexities of these rules sometimes make them difficult to apply in practice. Homes sometimes are fined for minor breakdowns such as problems with paperwork or neatness. It may be that the state could serve a more constructive purpose by allowing homes to use penalty money to pay for a private consultant to help straighten out these problems.

Homes might need consultation in a wide range of areas—from meeting the dietary needs of patients, to sorting out complex drug regimens, to developing staffing patterns that will

help them to operate efficiently. Although the state already serves in a consulting role, its regulatory responsibilities absorb the bulk of staff time and resources. Using penalties for minor violations to pay for independent consultants may help homes provide better care, as opposed to the current approach, which is purely punitive.

(3) *The Division of Facility Services should use its existing licensing authority more aggressively to bring problem homes into compliance with regulations.* Problem homes are those that keep getting fined year after year and never seem to clean up their acts. They represent only a small percentage of the state's nursing homes, and yet they give the entire industry a bad name. The state already has the authority to issue provisional licenses and even suspend admissions "where the conditions of the nursing home or domiciliary home are detrimental to the health or safety of the patient or resident."² Licensure officials should be quick to use this authority when patients' health is at risk.

Of course regulators face a tricky balancing act. If a home's problems are caused by lack of money, issuing provisional licenses and suspending admissions will only make it worse. Still, patients deserve swift, strong action when their health and safety is at risk.

The law currently requires that a provisional license be posted in a prominent place to alert consumers and family members that the home is having problems. And by its very nature, a nursing home cannot stay in business long without admitting new patients.

How a home responds to these strong administrative actions will provide a quick indication to regulators as to whether it remains a viable operation. But one final enforcement tool is needed for homes which have proven they can no longer handle the responsibility of caring for the frailest and most vulnerable members of society.

(4) *The legislature should pass a law allowing the courts to appoint a temporary manager to operate homes which fail to correct their problems and represent a serious threat to residents.* The ability to deal adequately with failed nursing homes is the major missing piece in the regulatory puzzle. At least 16 states and the District of Columbia now have such authority.³

There is ample evidence that North Carolina should join these states and enact a law allowing temporary management of failed nursing homes.

The analysis by the North Carolina Center for Public Policy Research found seven homes accounted for nearly a third of total fines against nursing homes for the three-and-a-half years studied. And the top 10 violators accounted for nearly 40 percent of the fines assessed. In 1981, when the Department of State Auditor studied state administration and regulation of nursing homes, the report's authors came to a similar conclusion of "a definite pattern" in which a few nursing homes "would be cited for a deficiency during the annual survey; the deficiency would be noted as corrected on a follow-up visit, but in the next annual survey the same deficiency would be cited again."⁴

The auditors also offered a similar recommendation—that the state needed a way to assume temporary management of problem homes.⁵ Regulators, industry officials, and advocates alike agree that this is a problem that should be addressed. Indeed, this is one of the few areas for which all parties are in agreement.

A bill that would provide for temporary management was introduced in the Senate during the 1991 session of the General Assembly but stalled in committee. The bill (SB 731) should be resurrected and enacted by the 1993 General Assembly.

Seizing control of a problem home through a court order and appointing a temporary manager represents drastic action by the state. It should be undertaken only under the most serious of circumstances and only when other means have been tried and have failed. Still, it's clear that the state needs this enforcement tool to push a few bad actors into providing the quality of care that good conscience alone should dictate.

A temporary manager could assure the safety of residents until the home's problems were resolved or until it was sold to a responsible operator. By placing the appointment of a temporary manager under the jurisdiction of the courts, the bill assures that due process is observed. It is a carefully crafted compromise and represents an essential final step in the regulatory process.

By embracing these four recommendations, the state could take a major step toward improving the way nursing homes are regulated in North

Carolina. Still, it's clear that more avenues of reform should be explored. The state, for example, should examine whether it can do more to merge its own rules with those of the federal government to streamline the regulatory process. Steve White, Certification Section chief in the Division of Facility Services, says his surveyors have become much more "outcome oriented" in response to changes in federal law.

As opposed to state inspectors, who are inclined toward making sure that every "i" is dotted and every "t" crossed, White says the federal teams look much more to whether patients are as healthy and happy as they might be, whether the food tastes good and is prepared under sanitary conditions and so on.

The state also could work through vocational programs in the public schools and the community colleges to promote the nursing home industry as an attractive place to spend one's career. Still, much is incumbent on industry itself. To the extent that providing long-term care for the elderly is perceived as dirty work for low wages, the industry will have trouble attracting and retaining workers. And staff longevity is an important quality of care issue.

Operators must keep pressing to make their homes attractive work places and must push wages for nurses' aides well beyond those offered in the fast food industry if they expect their workers to remain on the job. Meanwhile, the state must make sure Medicaid reimbursements are sufficient to keep the industry healthy.

Residents' advocates also have a strong role to play in monitoring the regulatory process and assuring that standards are met. Nursing home residents are among the state's most vulnerable citizens, and they often are too infirm to look out for their own best interests. The least they deserve is a bath, clean bed linens, and a bit of human dignity. The unfortunate fact is that these basic needs have not always been met in some North Carolina nursing homes.

—Mike McLaughlin

FOOTNOTES

¹ G.S. 131E-129(a).

² G.S. 131E-109(c).

³ Legal Services of North Carolina Resource Center.

⁴ Ed Renfrow, "Operational Audit: State Administration and Regulation of Nursing Homes," Department of State Auditor, April 1981, p. 43.

⁵ *Ibid.*, p. 52.