



# NEWS & VIEWS

A Complimentary Newsletter from Med-Net Concepts, LLC  
and its Network of Independent Affiliated Companies

Volume 5 Issue 9  
September 2019

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## Mitigating Allegations of Abuse, Neglect, and Exploitation of Skilled Nursing Home Residents Due to Failure to Adequately Investigate and Report Incidents

By:  
Louise Lindsey, Editor

Nursing home abuse continues to be a concern that garners news headlines and instills fear in families and individuals faced with placing or being placed in a skilled nursing facility. An example of that concern can be seen in the following news article published May 13, 2019:

### **SC Nursing Home for Veterans Repeatedly Failed to Investigate Claims of Abuse and Neglect**

Here are the story highlights:

- \$36.5 million paid by state for operation of the facilities may involve fraud, waste, and abuse due to provision of substandard quality of care.
- Inspectors found the administration repeatedly failed to adequately investigate injuries and claims of abuse and used misleading language in their documentation of incidents to minimize serious incidents.
- Inspectors found numerous examples of residents reporting pain and incidents of assaults by one resident on another and unexplained injuries to eyes along with fractures of the nose and hip.
- Inspectors found the conditions at the facilities to be so bad they designated the residents to be in "immediate jeopardy."

A recent report from the Health and Human Services' Office of Inspector General (OIG) issued on June 7, 2019, found that skilled nursing facilities were not always investigating and correctly reporting incidents involving residents in their facilities. The data analyzed by the OIG was collected from high-risk hospital emergency

room (ER) Medicare treatment of skilled nursing facility (SNF) residents who were transferred to the ER. (<https://oig.hhs.gov/oas/reports/region1/11600509.asp>)

The rationale behind the OIG report relates to the fact that a majority of SNF residents are elderly, and there continues to be a growing concern about elder abuse and neglect in general, but also considering the anticipated growth of this segment of the population to reach 84 million by the year 2050.

The OIG determined that SNFs failed to report many of these incidents to the Survey Agencies in accordance with applicable Federal requirements. Of the 256 sampled high-risk hospital ER Medicare claims, 51 resulted from incidents of potential abuse or neglect that were reportable to the Survey Agencies under Federal requirements. Based on the OIG's sample results, it was estimated that 7,831 of the 37,607 high-risk hospital ER Medicare claims were the result of incidents of potential abuse or neglect of Medicare beneficiaries residing in SNFs. Therefore, the OIG estimated that 6,608 high-risk hospital ER Medicare claims were associated with incidents of potential abuse or neglect that were not reported by the SNFs to Survey Agencies during calendar year 2016.

The review also included incidents that were not in the sampling to ascertain whether CMS and the Survey Agencies reported findings of substantiated abuse to local law enforcement.

Here are findings from the report:

- An estimated one-in-five high-risk hospital ER Medicare claims for treatment provided in calendar year 2016 to SNF beneficiaries were the result of potential abuse or neglect, including injury of unknown source.
- A majority of the ER Medicare claims were not reported to state agencies by SNFs (43 of 51 in the sample). Also, several state agencies did not report findings of substantiated abuse to law enforcement as required in 67 of 69 incidents.
- Centers for Medicare & Medicaid Services (CMS) did not ensure that potential abuse or neglect incidents were reported as required by Federal regulations. The report also indicated that the CMS guidance was unclear, which could lead to inconsistent interpretation by SNFs.
- CMS does not require all potential incidents of abuse or neglect to be entered into the Automated Survey Processing Environment Complaints/Incident Tracking System (ACTS).

The following was recommended by the OIG-all of which CMS agreed with:

- Improve training for SNF employees on identifying and reporting incidents of potential abuse or neglect.
- Clarify CMS guidance and provide examples to ensure incidents are identified and reported.
- CMS should require state agencies to record and track all incidents of potential abuse or neglect occurring in SNFs and all referrals to law enforcement and other agencies.

Certain types of environments within a nursing home may create a greater risk of elder abuse. One of the most common issues contributing to elder abuse in a SNF is thought to be continuous understaffing that causes employee stress, burnout, and resentment. Another issue that can allow abuses to go unreported is the ineffectiveness of implementation and enforcement of administration's policies and procedures. Negative employee attitudes also tend to promote unsympathetic environments between staff and residents.

According to the National Center for Victims of Crime, the breakdown of elder abuse complaints is as follows:

- 27.4% - Physical abuse
- 22.1.% - Resident-on-resident abuse (physical or sexual)
- 19.4% - Psychological abuse
- 15.3% - Gross neglect
- 7.9% - Sexual abuse
- 7.9% - Financial exploitation.

### **Adequate Investigation and Reporting Can Mitigate and Prevent Alleged Negligence Lawsuits Against a SNF**

Are there concrete and clear indicators regarding the likelihood that a nursing home is more likely to be sued for abuse and neglect? Are facilities that provide high-quality healthcare less likely to be sued for negligence than facilities providing substandard quality of care? Unfortunately, there does not seem to be a clear-cut answer to either question; however, it stands to reason that complying with regulatory requirements regarding investigating and reporting of incidents demonstrates that a nursing home is trying to fulfill its obligations regarding the care of its residents.

A certain level of care is mandated by state and federal regulations covering SNFs. However, when a resident is injured or dies while being cared for in a nursing home, the SNF may be found liable depending on the specifics of the case. A lawsuit may be filed alleging the SNF was negligent, or failed to provide reasonable care as

required by law or current healthcare standards of practice. When this occurs, there are five factors that a plaintiff must prove in order to prevail against the SNF. They are-

1. Establish the existence of the SNF's legal duty to exercise reasonable care.
2. Establish that the duty owed by the SNF was not provided or was provided in a substandard way.
3. Demonstrate a preponderance of evidence that the direct cause of injuries or harm experienced by the resident was due to the SNF's failure to provide a reasonable standard of care or meet the standard of care owed.
4. Provide documentation that damages sustained by the resident occurred as a result of the negligent actions by the SNF.
5. Show that the damages sustained by the resident are both financial and probably non-financial, and were not the fault of the plaintiff or other possibly liable parties.

To counter alleged abuse, negligence and exploitation accusations and lawsuits, a SNF must have evidence that all alleged violations are thoroughly investigated and must prevent further incidents while the investigation is in progress. The results of all investigations must be reported to the appropriate officials within five working days of the incident. If the alleged violation is verified, the SNF must take appropriate corrective action. Additionally, nursing homes must ensure that all employees, contractors, volunteers, and residents are knowledgeable about reporting procedures and requirements. Staff must be trained to immediately report to the administrator all incidents of misconduct, including abuse, exploitation, or neglect of a resident, misappropriation of a resident's property, or injuries to a resident of unknown source. Immediately upon learning of an incident, nursing homes must take the necessary steps to protect residents from possible further incidents of misconduct or injury.

It should also be kept in mind that abuse, neglect, and exploitation and failure to investigate and/or report may be considered provision of substandard quality of care and/or worthless services and might be deemed fraud, waste, and abuse in violation of state and federal regulations.

Based on CMS regulation F607 Develop/Implement Abuse/Neglect/Exploitation Policies, the State of Wisconsin's Department of Health Services, Division of Quality Assurance developed the following abbreviated reporting requirements to help nursing homes develop detailed, written policies and procedures:

- **Screening** potential employees to uncover any history of abuse, neglect, or mistreatment of residents by obtaining information from former or current employers and performing background checks with licensing boards and registries.
- **Training** employees through orientation and on-going sessions related to abuse, neglect, and misappropriation of resident property; the procedures involved with misconduct allegations; and how residents or their appointed guardians will be made aware of the procedures.
- Strategies for the **prevention** of incidents of abuse, neglect, or mistreatment including training in dementia management and resident abuse prevention.
- Approaches for **identifying** events, occurrences, patterns, and trends, such as suspicious bruising of residents, that may constitute abuse in order to determine the direction of the investigation.
- **Investigation** of different types of incidents, including the identification of the staff member responsible for the initial reporting, investigation of alleged violations, and reporting of results.
- Demonstration of how residents will be **protected** from harm and to prevent further potential abuse, neglect, exploitation, or mistreatment while an investigation is in progress.
- Process for how to whom staff is to **report** incidents and the **response** to alleged violations, such as an analysis to determine what changes are needed, if any, to policies and procedures to prevent further occurrences.

Although all 7 components of F607 are important, the requirement for Investigation says:

The facility must have written procedures for **investigating** abuse, neglect, misappropriation, and exploitation that include:

- Identifying staff responsible for the investigation;
- Exercising caution in handling evidence that could be used in a criminal investigation (e.g. not tampering or destroying evidence);
- Investigating different types of alleged violations;
- Identifying and interviewing all involved persons, including the resident/alleged victim, alleged perpetrator, witnesses, and others who might have knowledge of the allegations;
- Focusing the investigation on determining if abuse, neglect, exploitation, and/or mistreatment have occurred, the extent, and cause; and
- Providing complete and thorough documentation of the investigation.

It is not necessary to investigate every event to the same depth. However, it is necessary in each case to proceed logically and to be thorough in documenting the reason for the conclusion. The key is to understand the federal and state definitions of abuse, neglect, exploitation, and mistreatment and the interpretive guidelines in order to decide if an event relates to one of those definitions. If at any time during the review it appears that the facts could fit within one of the abuse definitions, **immediately** implement an abuse investigation protocol.

Interviews should be conducted in a private location. The interviewer should be trained in advance to be impartial, use discretion, and non-judgmental language and to the extent possible, ask open-ended, non-leading questions. Confidentiality must be maintained. Documentation of interviews, including dates, times, locations, and names of individuals interviewed should be complete. Include measures taken to protect residents from further occurrences and any immediate medical/nursing care provided. The conclusion must be supported by documented facts, not assumptions or biases. In the event that there is later litigation or questioning from the survey team, your complete record of reporting to appropriate agencies and investigation findings and conclusion will be invaluable.

## "Don't Let Fraud Allegations Upset You ... Learn How to Avoid Them Take Med-Net Compliance's NAB Approved Courses"

Jo Ann Halberstadter, Esq

### ADMINISTRATORS TAKE NOTE

Med-Net Compliance, LLC now offers two series of fraud modules with NAB/NCERS CEs on our website. Modules 1-8 offers 3 NAB CEs and modules 9-16 offer 3.75 CEs. All modules provide education on fraud, waste and abuse prevention and offer a combined total of 6.75 CEs for successful completion.

**To review the NAB Approved courses visit our website:**

**<https://www.mednetcompliance.com/med-net-academy/nab-approved-courses/>**

All 16 courses on fraud, waste and abuse were developed by Betty Frandsen,  
our Vice President of Professional Development and her staff.

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