

April 15, 2024

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

RE: Comments on the Strengthening Oversight of Accrediting Organizations (AOs) and Preventing AO Conflict of Interest, and Related Provisions Proposed Rule [CMS-3367-P]

Dear Administrator Brooks-LaSure,

The National Partnership for Healthcare and Hospice Innovation (NPHI) is pleased to submit the following comments on the U.S. Department of Health and Human Services (HHS) Strengthening Oversight of Accrediting Organizations (AOs) and Preventing AO Conflict of Interest, and Related Provisions Proposed Rule [CMS-3367-P].

NPHI is a collaborative of 100+ not-for-profit, community-integrated hospice and palliative care providers dedicated to ensuring patients and their families have access to care that reflects their individual goals, values, and preferences. Representing providers from 37 states and the District of Columbia, NPHI and its members help design innovative and effective models of care, advocate for comprehensive and community-integrated care customized to meet each person's unique needs and build collaboration between national thought leaders and policymakers.

The proposed rule, issued by the Centers for Medicare and Medicaid Services (CMS) on February 15, contains a number of provisions to strengthen the oversight of AOs by addressing conflicts of interest, establishing consistent standards, processes, and definitions, and updating the validation and performance standards systems. The proposed changes affect all three AOs relevant to Medicare-certified hospice providers. NPHI supports efforts by CMS to ensure that any AO deeming a new hospice will have conducted a sufficiently thorough survey of their operations and are able to render an independent judgment of the capabilities and resources of the hospice.

We are concerned, though, that in multiple states there have been excessively large numbers of new hospices deemed eligible for Medicare certification in recent years. In many of these cases, there appears to have been insufficient attention paid to the hospice's operations and its capacity to serve Medicare beneficiaries adequately. While we largely support CMS's proposals to strengthen the oversight of the AOs, we do not believe these provisions go far enough to ensure that every AO is adequately surveying and independently determining the qualifications of the hospices that are ultimately eligible for Medicare certification. NPHI strongly supports a more aggressive effort by CMS to strengthen the requirements and process for deeming hospices eligible for Medicare certification given the ongoing challenges related to hospice fraud, waste, and abuse.

NPHI recognizes the important and timely changes made in the proposed rule and values the opportunity to offer the unique perspective of not-for-profit providers concerning these specific proposed changes. We offer additional details and comments on specific policies below.

Unannounced Surveys

NPHI supports the proposal to add a definition of “Unannounced Survey” thus preventing the provider from making any unusual preparations for the survey that would be inconsistent with the typical nature and operational performance. To ensure the unannounced process works effectively and thwarts the efforts of ill-intentioned providers to artificially manipulate the survey, we ask CMS to consider requiring providers to ensure that a duly authorized W-2 employee member of management or designated alternate be onsite at the facility at all times the office/facility is open. This individual must be functionally knowledgeable of company operations and able to provide access to the materials the surveyors need at the time of the survey. This recommendation is based on reports we have heard from providers and other stakeholders where surveyors were delayed from starting their survey activities because a duly authorized person was not yet onsite at the facility to provide the necessary information to proceed with the survey. In some cases, this practice is used by bad actors to delay the start of the survey activity thus limiting the time the surveyors have onsite to conduct survey activities and/or provide an opportunity for independent ‘consultants’ to appear and act as the representative of the owner. In other cases, a minor delay may be entirely appropriate as it allows the designated survey lead to pass off tasks and prepare the necessary materials.

We also urge CMS to include the “authorized W-2 employee” on the 855A as another category of managing employees. This would enable the State Agencies (SAs) and CMS to identify and monitor those individuals who appear as managing employees for multiple facilities. This change would ensure that individuals appearing as managing employees for an unusually high number of providers in regional geographic areas of concern can be assessed for involvement in potentially fraudulent operations. Finally, we urge CMS to consider notifying AOs that surveyors must start their review process upon their arrival at a facility and cannot be delayed by more than 30 minutes of the reported opening time in which case the survey should be rescheduled. To preserve the integrity of an “unannounced survey”, the SA/AO cannot keep that facility at the top of the scheduling list but must place them back in the queue to be surveyed on a random future date.

Conflict of Interest Policies – Fee-Based Consulting

NPHI supports the efforts of CMS to add specificity to the Conflict of Interest (COI) policies for AOs beyond what currently exists to ensure the integrity of the survey process. However, we wish to clarify the applicability of this provision to different types of AO employees. To that end, we also urge CMS to consider to what extent available data indicates that the consulting services of the AOs are a key contributor or facilitator of abusive practices as opposed to legitimate educational offerings. In the home health and hospice industry there is only one AO with a fee-for-service consulting company and their services are largely cost-prohibitive for all but the largest not-for-profit providers.

Based on our understanding of current consulting practices in the market, the other two hospice AOs provide educational programs that instruct individuals on best practices for achieving accreditation standards. The individuals who conduct these educational offerings may work independent of the AO as free-standing consultants, as staff members of an accredited facility or as employees of larger consulting organizations. These educational programs can provide value for provider organizations, and we ask that CMS clarify that educational programs will be allowed to continue. Additionally, many of the AOs employ these staff on a part-time or per-project basis sufficient to satisfy their survey requisite volume. When not actively employed by the AO, these individuals are free to seek employment elsewhere to supplement their income and/or maintain a contemporary knowledge of practice. We ask that CMS clarify that part-time surveyors can continue pursuing employment with provider organizations when not actively employed by the AO as long as they are not later involved in any survey activity for those organizations.

NPHI supports the efforts of CMS as proposed in §488.8 (j) to restrict AO fee-based consulting that promotes the use of just-in-time certification/recertification preparation rather than facilitating a continuous state of compliance. However, we urge caution and reflection to identify the potential unintended consequences of restricting AO fee-based consulting during the initial preparation for certification and the 12 months prior to recertification. It is possible that prohibiting this activity among AO fee-based consultant groups creates greater opportunities for those bad actors who operate in the shadows forming the illusion of a well-run operation and placing more patients at risk for abuse and neglect. CMS should instead go forth with the activities that provide oversight on the frequency and types of consulting provided by the AOs which will serve as additional information allowing CMS to monitor AO performance.

Survey Process Comparability

We support the efforts of CMS to require a crosswalk between the CoPs and AO standards and urge CMS to make these crosswalks public to ensure providers have complete and accurate information related to the CoPs when choosing between using an SA or AO to meet their certification needs. We are generally supportive of the proposal to strengthen the Survey Process Comparability as outlined in §488.4 and §488.5. Based on our experiences with providers that operate in more than one state and their experiences with their SAs, we respectfully ask that CMS consider proposals to strengthen the comparability of the survey process between SAs as well.

Reflecting historically on previous rules, we recall that initial surveys were de-prioritized in importance allowing the SAs to pursue complaints and allegations of abusive or fraudulent behavior in addition to the recertification of active providers. To that end, we suggest that CMS consider proposing that all complaints related to a certified provider, including those accredited by an AO, be followed up on by the SAs. Given the concern about AO variances in response time and follow-up, the SAs should be relied upon to respond quickly and provide a robust evaluation of the complaint. This would ensure a uniform follow-up as well as provide data that would identify potential vulnerabilities with one or more SAs/AOs related to the complaint process.

Conclusion

Thank you again for the opportunity to provide comments on CMS's proposed regulation regarding the AOs. As always, NPHI appreciates the opportunity to provide insight and commentary into how various proposed regulatory, compliance, and quality reporting changes may impact the not-for-profit hospice and palliative care provider community. If you have any questions concerning these comments or would like to discuss these issues further, please contact NPHI's Policy Director, Ethan McChesney, at emcchesney@hospiceinnovations.org and NPHI's Regulatory and Compliance Director, Margherita Labson, at mlabson@hospiceinnovations.org.

Sincerely,

A handwritten signature in black ink that reads "Tom Koutsoumpas". The signature is fluid and cursive, with a long horizontal stroke at the top.

Tom Koutsoumpas
Founder and CEO
NPHI