

July 25, 2008

CMS Subcommittee July 14, 2008

Background

For more than 10 years, the VAA has required facilities to report within one day to the county's Common Entry Point, which may then refer the report to the appropriate lead agency. The law requires that referral to be made within two days. CMS recently took the position that the federal regulation requires the facility to report to the survey agency (OHFC in this case) within one day, despite the fact that the federal regulation specifically instructs the facility to report "in accordance with state law." MDH has established an electronic reporting system for certified nursing homes and certified boarding care homes. However, the state law still requires these facilities to make an oral report to the CEP.

Current Problems

Although there are some differences in what is reportable under the VAA and the federal regulations, most situations are reportable under both. Dual reporting required of facilities clearly wastes resources not only for facilities but also for counties and OHFC. Counties now are sending reports to OHFC regarding incidents that facilities have already reported. Also, the electronic reporting has negated the triaging historically done by some counties. In the two months after implementation of the electronic reporting, OHFC received 1919 incident reports, compared to 726 during the same period of time in 2007, an increase of 160 percent. The irony is that CMS, which was so concerned about possibly two extra days before OHFC received reports, only requires OHFC to investigate allegations of actual harm (of a high, rather than a medium, level) within 10 working days. Also, OHFC is closed on weekends.

Key Factors to Consider

1. The CEPs refer to law enforcement when a serious crime has been committed. Facilities often call law enforcement, frequently before calling the CEP.
2. The CEP notifies Adult Protective Services when there is a serious need to protect the resident, and this process often is faster than reporting to OHFC. However, OHFC and MDH hold the facility responsible for protecting the residents when there is suspected abuse or neglect, and it appears to be relatively rare for Adult Protective Services to remove a nursing home resident in order to protect the resident. (Removals are much more common for developmentally disabled individuals, who typically live in very small group homes that do not have a large number of employees who are mandated reporters.)
3. The electronic reporting to OHFC is working well, and conceivably MDH could expand the forms to include all items requested by CEPs. An expansion of the forms could lead to one of three situations:
 - a. OHFC could then notify the CEPs when appropriate—effectively reversing the flow of facility reports among agencies.
 - b. The report to OHFC could be sent by the facility to the CEP simultaneously.
 - c. The responsibility for protecting residents in certified facilities could be handed off from the CEP to OHFC.

July 25, 2008

4. The principal substantive differences between the VAA and the federal regulations are the following:
 - a. Financial exploitation is reportable under the VAA but not under the federal certification regulations, which concern only misappropriation of the resident's property within the facility.
 - b. The "error in therapeutic conduct" exception to reporting under the VAA does not appear in the federal regulations.
 - c. The VAA does not require reporting of resident-to-resident abuse, but the federal regulations do.
 - d. The VAA does not include a concept of intent or willfulness in its definition of "abuse," but the federal regulations do.
 - e. The federal regulations provide much clearer guidance for what are reportable "injuries of unknown source." It is not an injury of unknown source if either of the following apply:
 - i. The injury was observed, or the resident can explain what happened, or
 - ii. The extent or location of the injury is not suspicious, and the number of injuries at one time and the frequency of injuries over time are not suspicious.

The subcommittee has begun its exploration of solutions to the problem of dual reporting. The subcommittee spent time considering the second and third factors and briefly mentioned most of the others. The goals are to eliminate the dual reporting for facilities without significantly reducing the effective protection of residents. In future meetings the subcommittee will develop one or more specific recommendations and provide an assessment of the likely consequences.