

Media Advisory: Lawsuit Prompts CMS to Suspend Hospice Special Focus Program (SFP)

Updated March 2025

Case Name: *Texas Assoc. for Home Care & Hospice v. Xavier Becerra*, No. 25-CV-195 (S.D. Tex.).

Summary

On December 20, 2024, the Centers for Medicare & Medicaid Services' (CMS) published its initial selections of hospices for the Hospice Special Focus Program (SFP) List to implement its SFP Final Rule. In January 2025, a multi-state coalition of hospices filed suit to challenge the SFP Final Rule and the SFP List because, as implemented by CMS, the SFP undermined patient safety, misrepresented hospice compliance records, and jeopardized access to high-quality care. In response, CMS voluntarily withdrew the SFP List. In a joint motion to stay the SFP litigation, CMS pledged that it will not resume implementation of the SFP Final Rule in 2025 while it considers whether to resume implementing the SFP Final Rule in future years or take other action, such as undertaking a new rulemaking. On March 21, 2025, based on CMS's representations, the district court granted the motion to stay the litigation.

Rachel Hammon, Executive Director of the Texas Association for Home Care and Hospice, commented: "We are pleased that CMS has committed not to resume the Special Focus Program this year, such that the SFP litigation is paused for now. This is an important step forward in our ongoing efforts to work with CMS on developing a SFP that truly serves patients and fulfills Congress' intent to identify and improve poor-performing hospices."

Background

- In 2020, Congress directed CMS to establish the SFP to enhance enforcement for a subset of hospices that CMS "has identified as substantially failed to meet" Medicare requirements.
- Congress envisioned the SFP as a tool to protect patients by targeting and correcting serious compliance issues identified by surveyors, with the poorest performing hospices being placed on the public Hospice SFP List until their record of compliance with Medicare requirements improved.
- Despite that clear statutory mandate, HHS – acting through CMS – promulgated the SFP Final Rule which used an algorithm to select hospices for the SFP that included not only findings of noncompliance with Medicare requirements but also indicators unrelated to Medicare compliance.¹
- The SFP Final Rule relies heavily on the Hospice Care Index (HCI) and the Consumer Assessment of Healthcare Providers and Systems (CAHPS) hospice survey data, neither of which measure whether a hospice provider is in violation of a Medicare requirement.
- The SFP Final Rule distorts Congressional intent by using an algorithm that disadvantages large, established providers while advantaging smaller hospices and newly established hospices for multiple reasons: (1) The algorithm does not scale deficiencies to a hospice's size. It treats a hospice serving 2,000 beneficiaries with 3 substantiated complaints the same as a hospice serving 100 beneficiaries with 3 substantiated complaints. (2) The algorithm places heavy weight on CAHPS scores and HCI data, even though many smaller and newer providers do not report CAHPS data or have HCI data.

¹ See CMS, Final Rule, 88 Fed. Reg. 77,676, 77,879 (Nov. 13, 2023) (promulgating § 42 C.F.R. 488.1135).

- Members of Congress and stakeholders repeatedly warned CMS of the problems with the SFP Final Rule and that its implementation would erroneously result in some of the highest performing, mission-focused hospice programs being publicly listed as poor performers.
- Although Congress placed no deadline on CMS to issue the Special Focus Program List, CMS pressed forward and publicized the List on December 20, 2024. As predicted, CMS's unlawful and arbitrary approach led to high-quality hospice programs being on the List while allowing truly poor performing and fraudulent providers to evade scrutiny. Worse, CMS's underlying data are rife with errors, including listing complaints as "substantiated" when they were not.
- A multistate coalition of hospice associations and a provider filed suit against CMS seeking an order requiring CMS to withdraw the SFP List and vacate the Final Rule. In February 2025, CMS voluntarily withdrew the SFP List. In a joint motion to stay the case, CMS has stated that it will not resume implementation of the SFP Final Rule, including publication of an SFP List, during 2025. On March 21, 2025, based on CMS's representations, the district court granted the motion to stay the litigation.
- CMS has not determined yet, however, whether it will seek to implement the SFP Final Rule in future years or instead undertake a rulemaking or other process to reform the SFP Final Rule.

Key Concerns with the SFP Final Rule

- **Patient Harm:** Inclusion on the SFP List that the prior CMS leadership implemented falsely labeled quality providers as "poor performers," creating fear among patients and families during critical end-of-life care. Arbitrary criteria can drive patients away from reputable providers, complicating access to compassionate and trustworthy care and disproportionately harming vulnerable populations.
- **Flawed Data and Criteria:** CMS did not scale substantiated complaints to hospice size. CMS assigned average HCI scores to hospices with missing data, often overstating quality for some while unjustly penalizing others. Over 50% of hospices are exempt from reporting CAHPS data, skewing algorithm results and disproportionately targeting larger, reputable providers. And CMS's survey data on substantiated complaints are plagued with errors, counting complaints as substantiated that were not.
- **Failure to Address Growth of Low-Quality Providers:** Despite exponential growth in the number of hospices, CMS has failed to focus on oversight for new or smaller providers with higher risks of non-compliance. The SFP's emphasis on well-established providers distracts from addressing real issues in the rapidly expanding industry, such as potentially fraudulent and predatory actors.
- **Impact on Quality Hospice Care:** Increased survey frequency and loss of "deemed status" (i.e., the ability to rely on accreditation to establish Medicare program participation) for affected providers lead to heightened compliance costs, diverting resources from patient care. Providers may struggle to attract staff and volunteers essential to delivering compassionate care.

Call to Action

- While CMS has represented it will not implement the SFP Final Rule in 2025, CMS should also withdraw the SFP Final Rule and make clear that it will not implement it in future years.
- CMS should conduct a rulemaking to develop a Special Focus Program that fulfills Congressional intent, focusing on hospices with the worst record of substantial non-compliance with Medicare requirements.