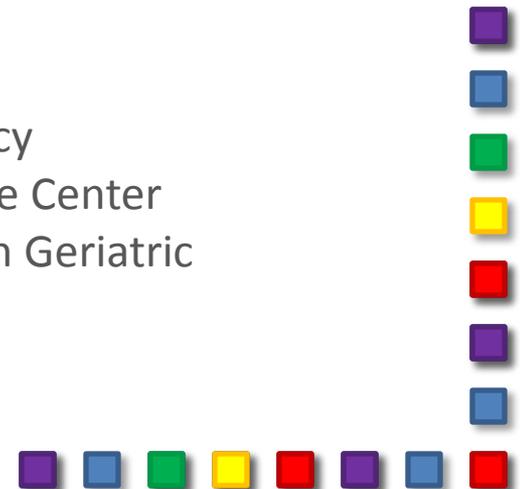


# ***Government Regulation and Oversight of Nursing Homes: Improving Quality of Care for Nursing Home Residents and Protecting Residents from Abuse and Neglect***

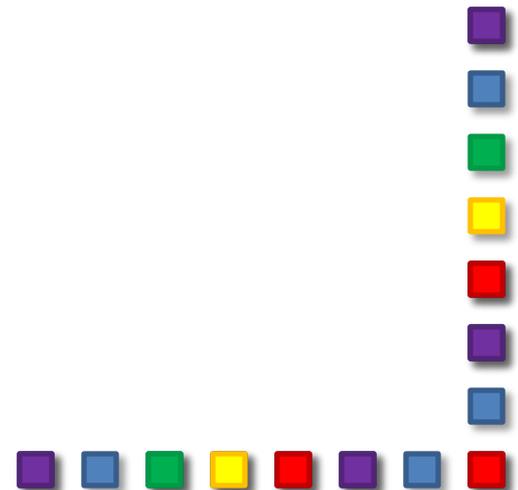
Geriatric Grand Rounds  
Institute on Aging  
Iowa Geriatric Education Center  
January 21, 2009

Josephine Gittler  
Wiley B. Rutledge Professor of Law  
Professor of Health Management and Policy  
Director, National Health Law and Policy Resource Center  
Director of Policy, Hartford Center on Excellence in Geriatric  
Nursing

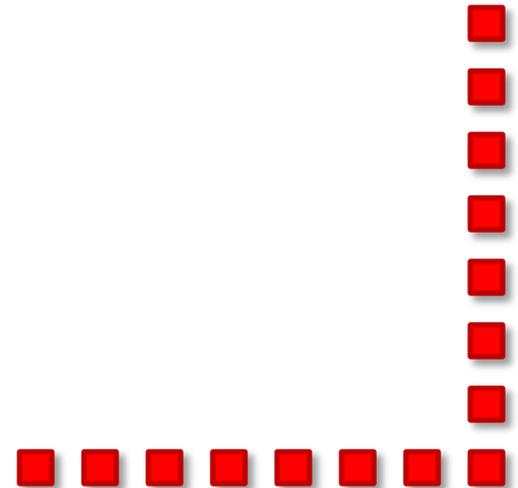


# *Roadmap*

- Background:  
Nursing Home Utilization and Vulnerability of Nursing Home Residents
- Types of Laws:
  - State Licensing Laws
  - Medicare/Medicaid Certification Laws
  - Elder Abuse Laws
  - Health Care Fraud and Abuse Laws
  - Long-term Care Ombudsman Laws
- Conclusion



# BACKGROUND



# Current Nursing Home Utilization

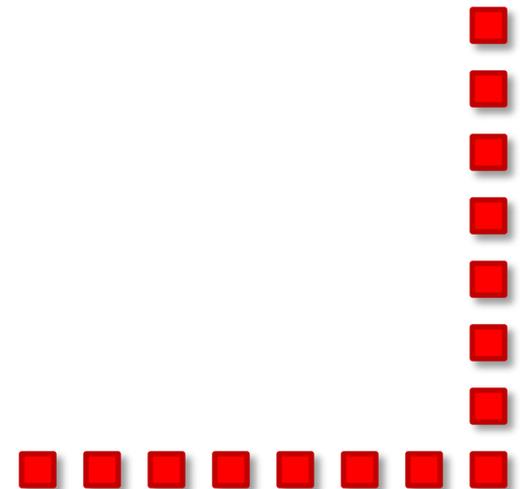
- An estimated 1,492,200 or 4.3% of adults 65 years of age and older live in a nursing home (2004).
- An estimated 674,500 or 14% of adults over 85 live in nursing homes (2004).

Source: Centers for Disease Control and Prevention, National Center for Health Statistics, National Nursing Home Survey, 2004



# Utilization of Nursing Homes: Future Trends

It is projected that nursing home population will increase in the next several decades.



# Aging of Baby Boomers

The population of those aged 65 and older is increasing at a faster rate than the total population as a result of the aging of baby boomers (those born post World War II, 1946-64)

- It is projected that between 2005 and 2030 population aged 65-74 years will increase from 6% to 10% of the total population.
- It is projected that by 2030 the population 75 years of age and over will increase from 6% to 9% of the total population and by 2050 it will increase to 12% of the total population.
- It is projected that by 2040 the population aged 75 years and older will exceed the population 65-74 years of age.



# Rise in Disability Among Older Adults

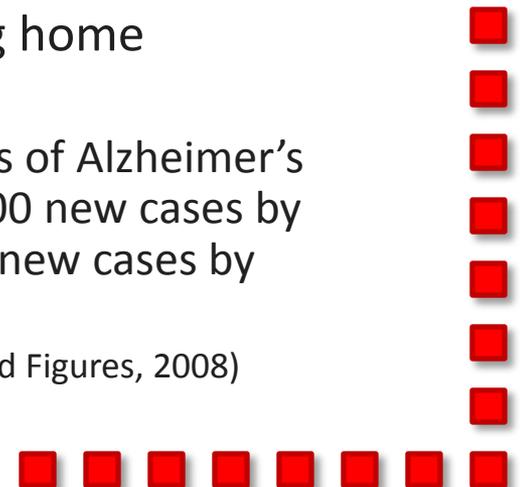
- It is predicted that by 2011 rates of disability among older adults will increase due in part to the growth in obesity and asthma among the young to middle-aged, and that this, in turn, will raise the nursing home population by 25%.

(Lakdawalla, D., et al., forecasting the nursing home population, Med. Care 4(1):8-20, 2003)

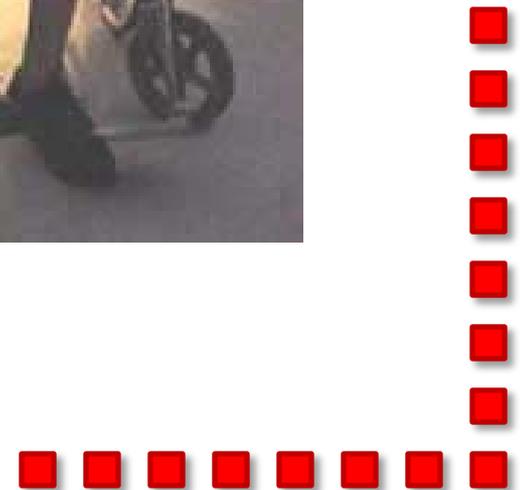
- As the population ages, the number of individuals with Alzheimer's Disease and other dementias is predicted to increase, which may lead to a rise in the nursing home population.

- In 2000, there were an estimated 411,000 cases of Alzheimer's disease. It is estimated that there will be 454,000 new cases by 2010; 615,000 new cases by 2030; and 959,000 new cases by 2050.

(Alzheimer's Disease Association, 2008 Alzheimer's Disease Facts and Figures, 2008)



*Elderly nursing home residents are a vulnerable population.*



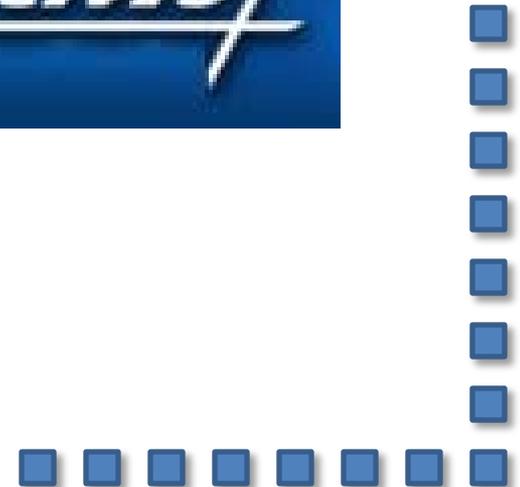
- Almost half of all nursing home residents are 85 years of age or older.
- Many nursing home residents have health problems and disabilities.
  - In 2004, 25% of all nursing home residents had diseases of the circulatory system, 21.9% had mental disorders, and 16.5% had diseases of the nervous systems and sense organs.
  - In 2006, 69% of all nursing home residents had some degree of cognitive impairment (27% had mild impairment, 42% had moderate to severe impairment).
- Many nursing home residents have no living close relatives, and many have no visitors.

Source: Centers for Disease Control and Prevention, National Center for Health Statistics, Nursing Home Current Residents, June 2008 & National Nursing Home Survey, 2004; National Alzheimer's Association, Alzheimer's Disease Facts and Figures, 2008.



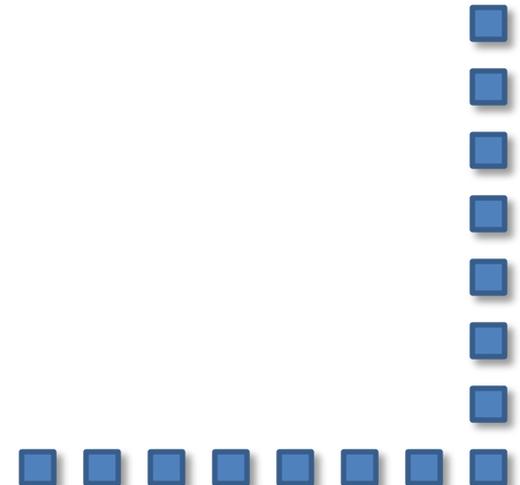


# State Licensing Laws and Medicare/Medicaid Certification Laws



# State Licensing Laws

- State licensing laws govern the licensing of nursing homes required for their legal operation.
- Historically, licensing of health facilities, including nursing homes, has been a state prerogative and matter of state law.



# Medicare/Medicaid Certification Laws:

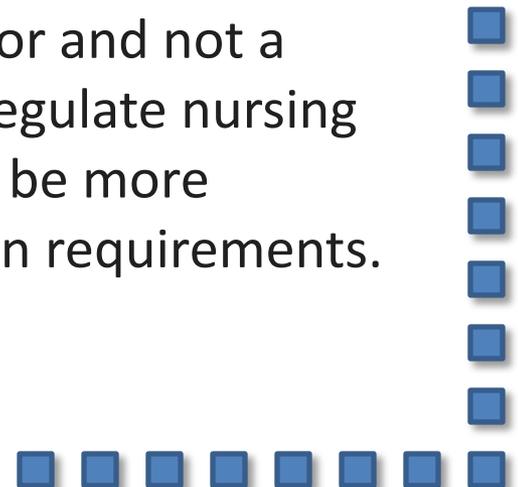
- Federal Medicare/Medicaid certification laws govern the certification of nursing homes required for participation in the Medicare program, Medicaid program, or both.
- In 2005, Medicaid, which pays for long-term care in Medicaid-certified facilities, accounted for about 40% of national nursing home expenditures.
- In 2005, Medicare, which pays for skilled nursing care for limited time, accounted for about 20% of such expenditures.
- An estimated 95% of all nursing homes participate in Medicaid, Medicare, or both.

Source: Fogge, 2007; Catlin et al., 2007



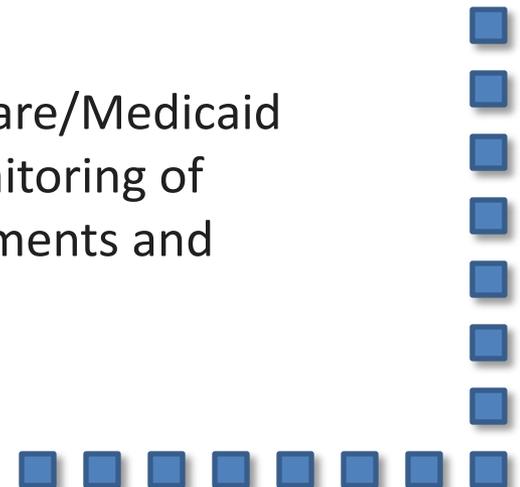
# Relationship Between State Licensing Laws and Medicare/Medicaid Certification Laws

- Federal government has assumed predominant role in *de facto* regulation of nursing homes by conditioning their Medicare/Medicaid participation on compliance with variety of requirements.
- Medicare/Medicaid requirements set the floor and not a ceiling. States retain independent power to regulate nursing homes, and state licensing requirements may be more stringent than Medicare/Medicaid certification requirements.



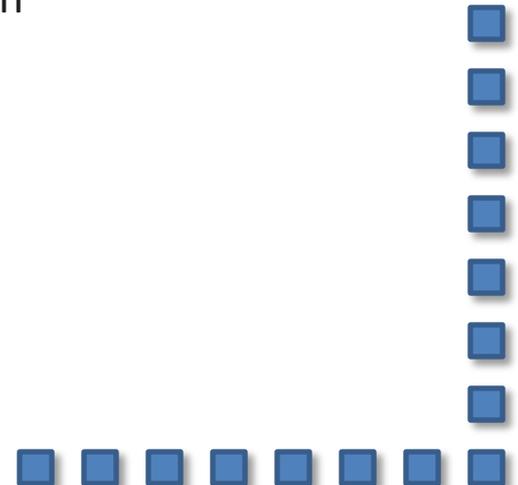
# Nursing Home Reform Act

- A 1986 Institute of Medicine (IOM) report declared that in many Medicare/Medicaid certified nursing homes, residents “receive very inadequate—sometimes shockingly deficient—care” and that “they also are likely to have their rights ignored or violated, and may be even subject to abuse.” (IOM, Committee on Nursing Home Regulation, Improving Quality of Care in Nursing Homes, p.3, 1986.)
- Recognition of the plight of nursing home residents led to the enactment of the (federal) Nursing Home Reform Act of 1987 (NHRA).
- NHRA brought about sweeping reforms in Medicare/Medicaid nursing home certification requirements, the monitoring of nursing homes for compliance with these requirements and enforcement of these requirements.



# Medicare/Medicaid Requirements

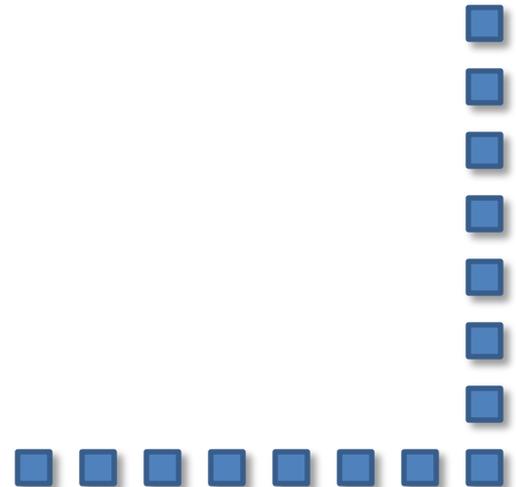
- Resident Rights
- Transfer & Discharge
- Resident Behavior & Facility Practices
- Quality of Life
- Resident Assessment
- Quality of Care
- Nursing Services
- Dietary Services
- Physician Services
- Specialized Rehabilitation Services
- Pharmacy Services
- Infection Control
- Physical Environment
- Administration



# Medicare/Medicaid Requirements: Quality of Care

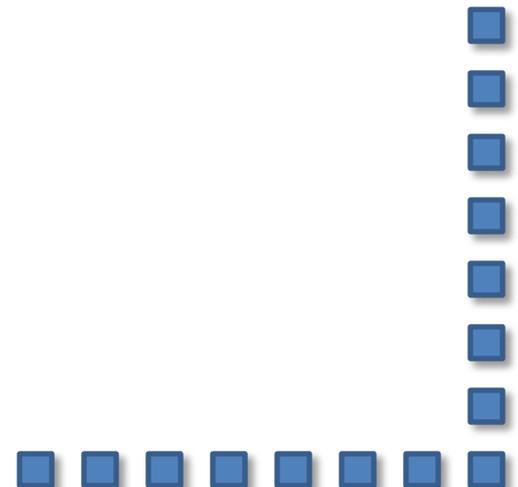
- Overall aim is to ensure each resident receives and each facility provides the necessary care and services “to attain or maintain the highest practicable physical, mental, and psychological well-being” of the resident in accordance with the resident’s assessment and plan of care.

(42 U.S.C. §1395i-3(b)(4); 42 U.S.C. §1396r (b)(4); 42 C.F.R. §48.25)



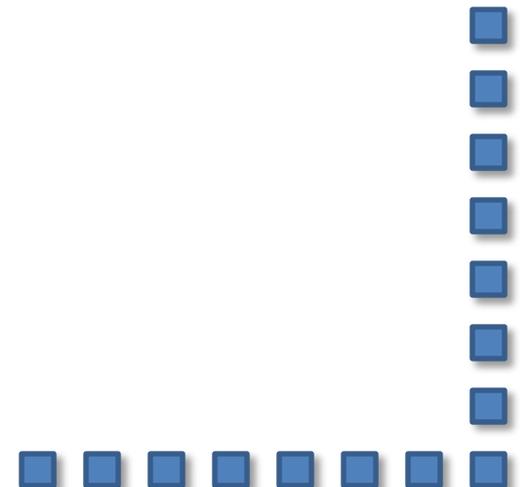
# Medicare/Medicaid Requirements: Quality of Care

- Quality of care requirements cover the following:
  - activities of daily living
  - vision and hearing
  - pressure sores
  - urinary incontinence
  - range of motion
  - mental and psychosocial functioning
  - nutrition
  - hydration
  - nasogastric tubes
  - special needs
  - unnecessary drugs and antipsychotic drugs
  - medication errors
  - accidents



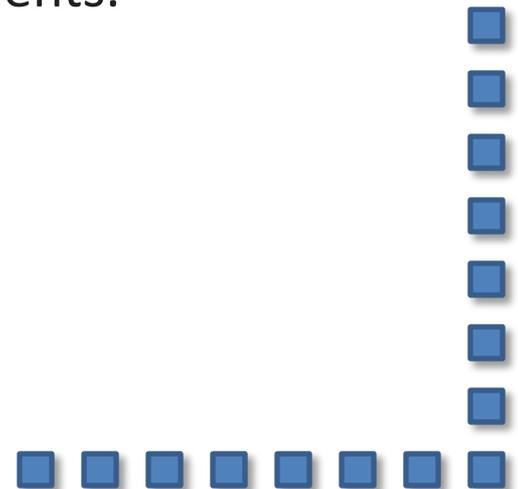
# State Licensing Requirements: Quality of Care

- Under state licensing laws, there may be quality of care requirements that exceed the Medicare/Medicaid requirements.
- Iowa regulations with respect to quality of care go beyond the federal regulations.



# Relationship Between Quality of Care Requirements and Nurse Staffing Requirements

- Insufficient nurse staffing levels, nursing staff without needed qualifications, and high nursing staff turnover rates contribute to inadequate care of residents.
- Staffing shortages, staff burnout, and lack of needed staff training contribute to mistreatment of residents.

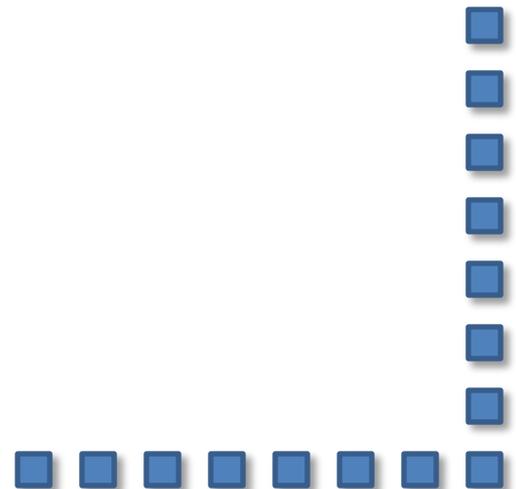


# Medicare/Medicaid Requirements: Nurse Staffing

General standard:

Nursing Homes must have “sufficient nursing staff to attain or maintain the highest practicable well-being of each resident as determined by resident assessments and plans of care.”

42 C.F.R. 483.30



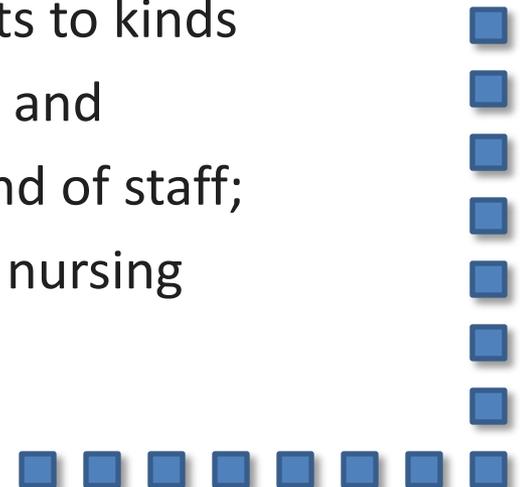
# Medicare/Medicaid Requirements: Nurse Staffing

- Statutory provisions and regulations include several specific staffing standards.
- Nursing homes must provide:
  - nursing services by an RN, LPN or LVN, to residents on 24 hr basis
  - designate an RN, LPN or LVN to serve as a charge nurse on each
  - tour of duty;
  - use services of an RN for 8 consecutive hours per day, 7 days a
  - week; and
  - designate a full-time director of nursing, who is an RN and is
  - prohibited from serving as a charge nurse subject to certain
  - exceptions.



# State Licensing Requirements: Staffing

- Most state licensing requirements, including Iowa's requirements, re staffing exceed Medicare/Medicaid requirements.
- The majority of states mandate minimum staff-to resident ratios; considerable variation exists as to the actual ratios required.
- Some states link staffing level requirements to kinds of nursing staff. (RNs, LPN/LVNs, and NAs) and specify the ratio of staff-to-residents by kind of staff; considerable variation exists as to kinds of nursing staff required.



# Iowa Licensing Requirements: Staffing

**SUFFICIENT STAFF:** No requirement.

**LICENSED STAFF:** (RN, LPN/LVN)

1 RN/LPN Health Service Supervisor and

For 1-74 beds: if supervisor is LPN, RN must be hired for 4 hrs/wk when LPN is on duty.

For 75+ beds: supervisor must be RN and add 1 RN/LPN 24 hrs/7 days/wk

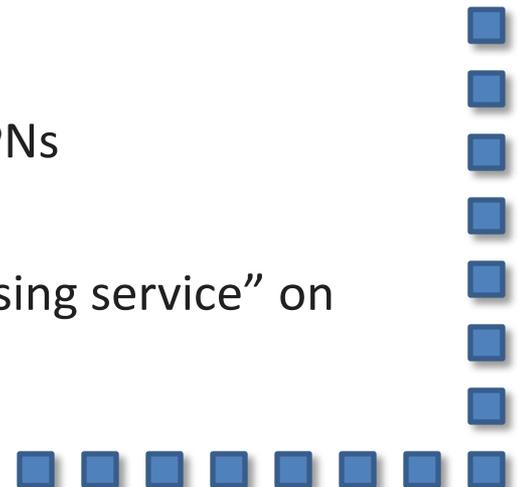
**DIRECT CARE STAFF:**

2.0 hprd (computed on 7-day week)

20% must be from “qualified nurses” RN/LPNs

including time of Health Service Supervisor

At least 2 people “capable of rendering nursing service” on duty at all times.

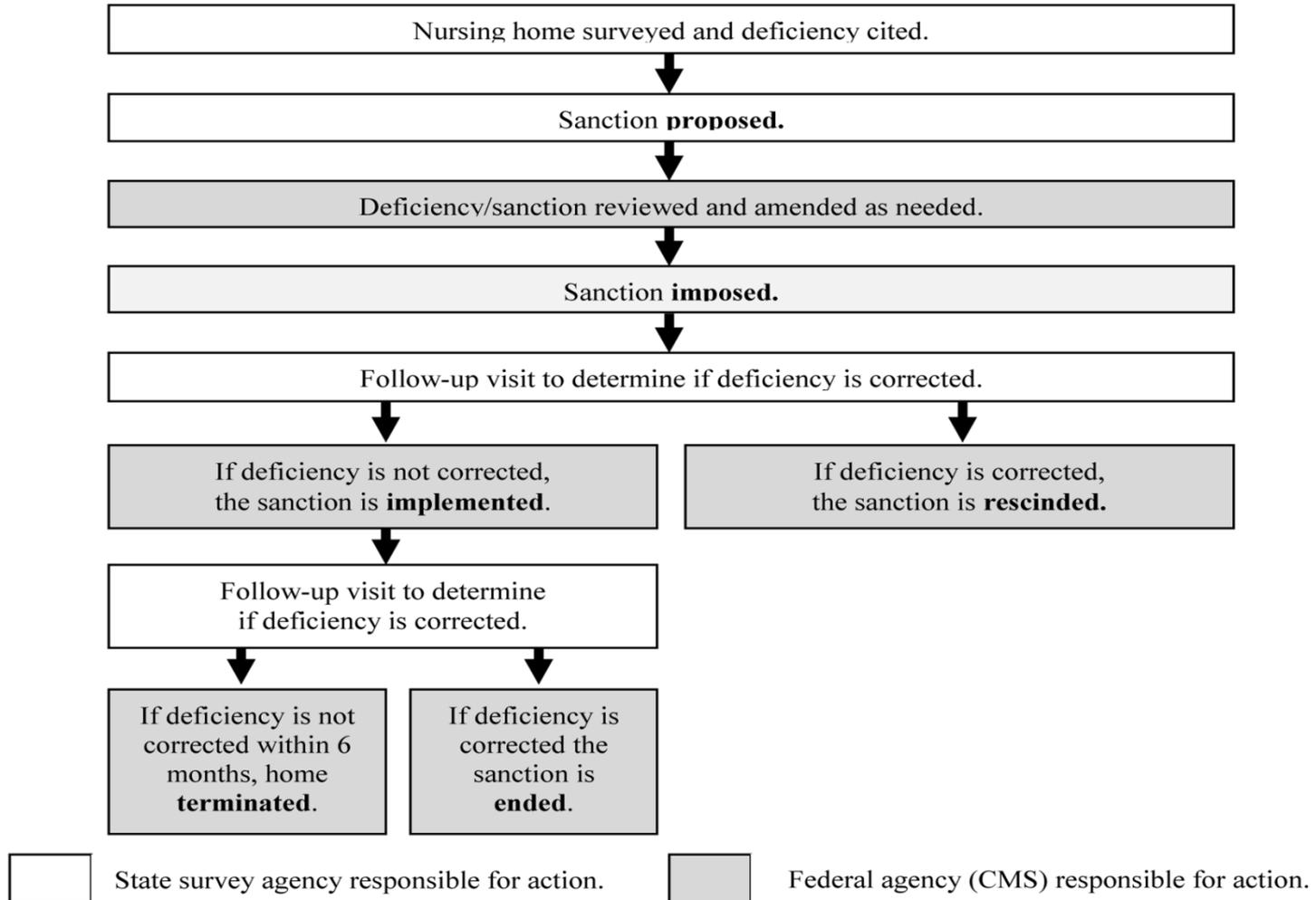


# Monitoring and Enforcement of Nursing Home Compliance With Medicare/Medicaid Requirements

- Survey process is used to determine compliance with requirements for Medicare/Medicaid compliance.
- Survey process is joint federal/state responsibility.
  - Centers for Medicare & Medicaid Services (CMS) issues regulations/guidance materials.
  - State agencies (survey agencies) implement process.
  - State survey agencies conduct
    - standard surveys, or inspection, of facilities participating in Medicare/Medicaid,
    - investigations of specific complaints.



# Monitoring and Enforcement of Nursing Home Compliance With Medicare/Medicaid Requirements



Source: U.S. GAO (2007a).



# Monitoring and Enforcement of Compliance With Medicare/Medicaid Requirements: Scope and severity grid and remedy categories used to rank nursing home deficiencies.

Deficiency Severity	Deficiency Scope		
	Isolated	Pattern	Widespread
Immediate jeopardy to resident health or safety	<b>J</b> POC Required: Cat. 3 Optional: Cat. 1 Cat. 2	<b>K</b> POC Required: Cat. 3 Optional: Cat. 1 Cat. 2	<b>L</b> POC Required: Cat. 3 Optional: Cat. 2 Cat. 1
Actual harm that is not immediate jeopardy	<b>G</b> POC Required:* Cat. 2 Optional: Cat. 1	<b>H</b> POC Required:* Cat. 2 Optional: Cat. 1	<b>I</b> POC Required:* Cat. 2 Optional: Cat. 1 Temporary Management
No actual harm with potential for more than minimal harm that is not immediate jeopardy	<b>D</b> POC Required:* Cat. 1 Optional: Cat. 2	<b>E</b> POC Required:* Cat. 1 Optional: Cat. 2	<b>F</b> POC Required:* Cat. 2 Optional: Cat. 1 Cat. 2
No actual harm with potential for minimal harm	<b>A</b> No POC No Remedies Commitment to Correct	<b>B</b> POC	<b>C</b> POC



Substantial compliance



Non-compliance that is not substandard care.



Substandard quality of care is any deficiency in 42 CFR § 483.13, Resident Behavior and Facility Practices, 42 CFR § 483.15 Quality of Life, or 42 CFR § 483.25, Quality of Care.

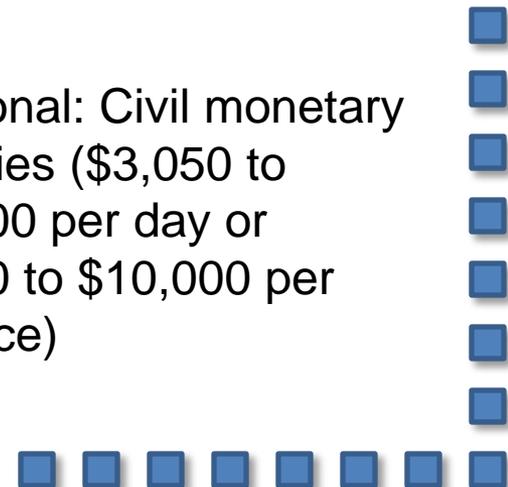
•These remedy categories are required only when a decision is made to impose alternative remedies in lieu of or in addition to termination.

# Monitoring and Enforcement of Nursing Home Compliance With Medicare/Medicaid Requirements

## Remedy Categories Used When Nursing Homes Are Cited for Deficiencies by State Survey Agencies

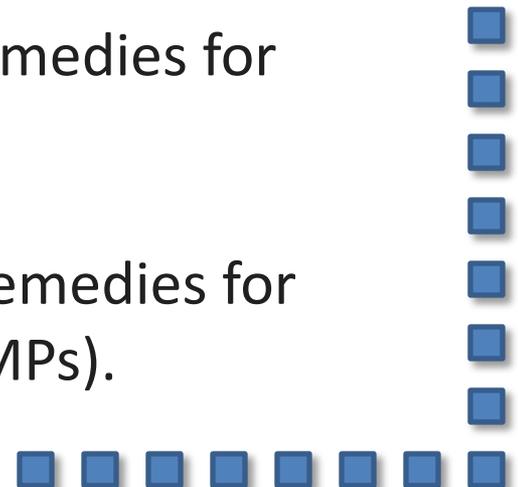
Category 1	Category 2	Category 3
<ul style="list-style-type: none"><li>• Directed plan of correction</li></ul>	<ul style="list-style-type: none"><li>• Denial of payment for new admissions</li></ul>	<ul style="list-style-type: none"><li>• Temporary management</li></ul>
<ul style="list-style-type: none"><li>• State monitor</li></ul>	<ul style="list-style-type: none"><li>• Denial of payment for all residents</li></ul>	<ul style="list-style-type: none"><li>• Termination</li></ul>
<ul style="list-style-type: none"><li>• Directed inservice training</li></ul>	<ul style="list-style-type: none"><li>• Civil monetary penalties (\$50 to \$3,000 per day or \$1,000 to \$10,000 per instance)</li></ul>	<ul style="list-style-type: none"><li>• Optional: Civil monetary penalties (\$3,050 to \$10,000 per day or \$1,000 to \$10,000 per instance)</li></ul>

Adapted from Centers for Medicare & Medicaid Services (2004)



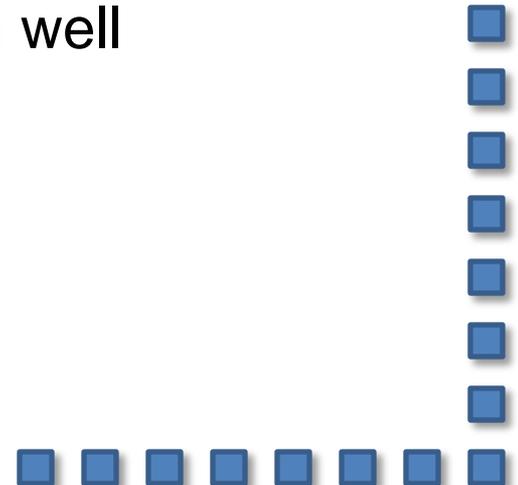
# Monitoring and Enforcement of State Licensing Requirements

- State licensing agencies can and do serve as state survey agencies.
- States usually follow the survey process, or some variety thereof, in licensing nursing homes.
- States have authority to establish own remedies for violations of state licensing laws.
- Under state licensing laws, the primary remedies for violations are civil monetary penalties (CMPs).

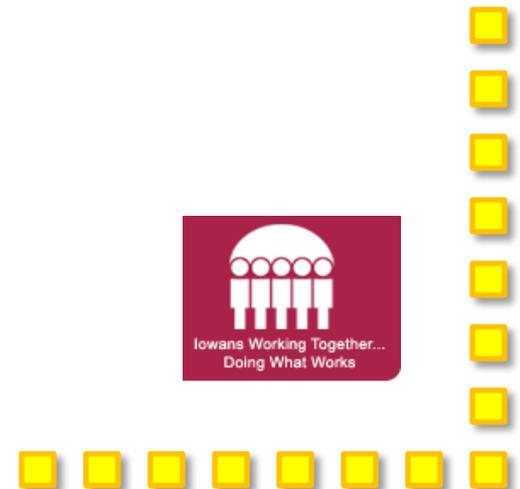


# Issues/Problems

- Persistent weaknesses in federal and state monitoring of the compliance of nursing homes with quality of care and other requirements have been well documented.
- Weaknesses in the enforcement of quality of care and other requirements likewise have been well documented.

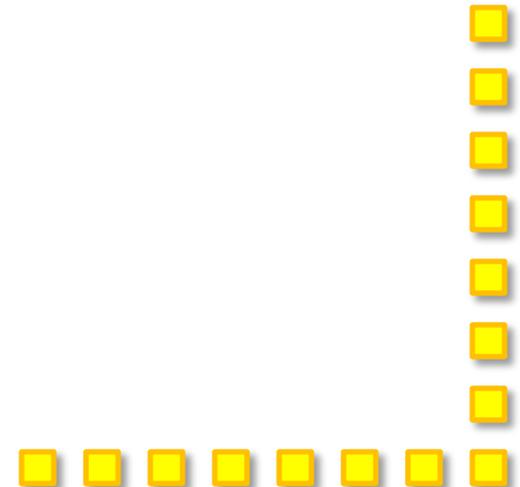


# Elder Abuse Laws



# Definitions

- Elder abuse laws are laws prohibiting mistreatment of the elderly, including nursing home residents.
- Elder abuse is generally defined as “any knowing, intentional, or negligent act by a caretaker or other person that causes harm or serious risk of harm to a vulnerable adult.” (National Center on Elder Abuse, Elder Abuse/Mistreatment Defined, [http://www.ncea.aoa.gov/NCEARoot/Main\\_Site/FAQ/Basics/Definition.aspx](http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Basics/Definition.aspx))
- The main types of elder abuse are:
  - Physical abuse
  - Sexual abuse
  - Emotional or psychological abuse
  - Neglect
  - Abandonment, and
  - Financial or material exploitation



# Elder Abuse Prevalence and Incidence

- The true prevalence and incidence of elder abuse is unknown.
- Available evidence indicates that elder abuse in nursing homes and other institutional settings, as well as domestic settings, is serious, widespread, and largely hidden.

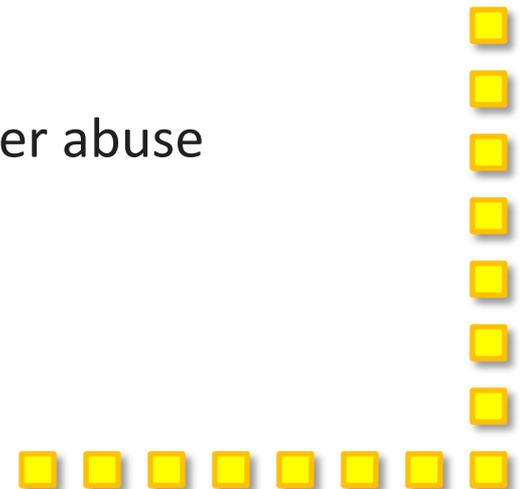


# State Adult Protective Services and Elder Abuse Reporting Statutes

- State Adult Protective Services (APS) are “services provided to older people... who are in danger of being mistreated or neglected, are unable to protect themselves, and have no one to protect them.”

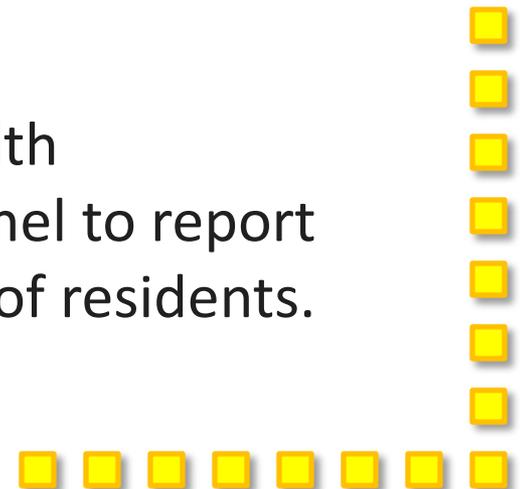
(Teaster, et al., The 2004 survey of State Adult Protective Services: Abuse of adults 60 years of age and older, 2006)

- A key element of APS approach is state elder abuse reporting statutes.



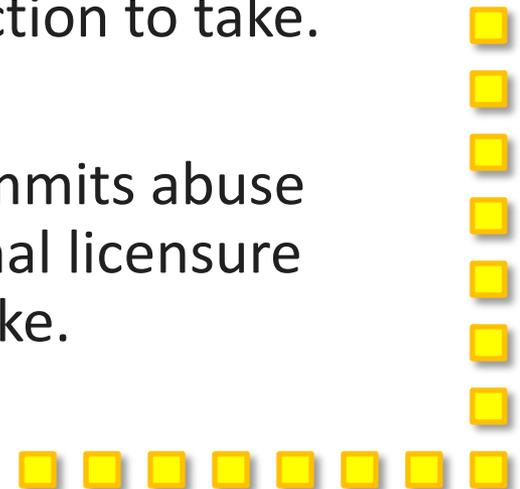
# Reporting Statutes

- Mandatory reporters must report known or suspected cases of elder abuse to the authorities.
- Reporting statutes typically designate physicians, nurses, other health professionals, and specified nursing home personnel as mandatory reporters.
- Iowa's reporting statute mandates health professionals and nursing home personnel to report known or suspected incidents of abuse of residents.



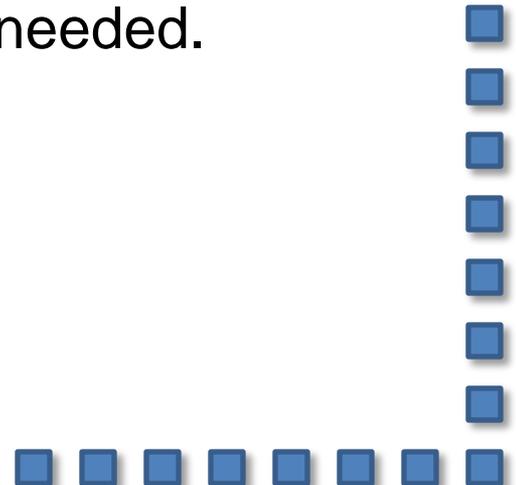
# Reporting Statutes, cont.

- Reporting statutes vary as to what agency receives and investigates reports, and as to how reports are investigated.
- In general, when a report of abuse in a nursing home is substantiated, the state survey and licensure agency will determine what action to take.
- If the nursing home employee who commits abuse is licensed, the relevant state professional licensure agency will determine what action to take.



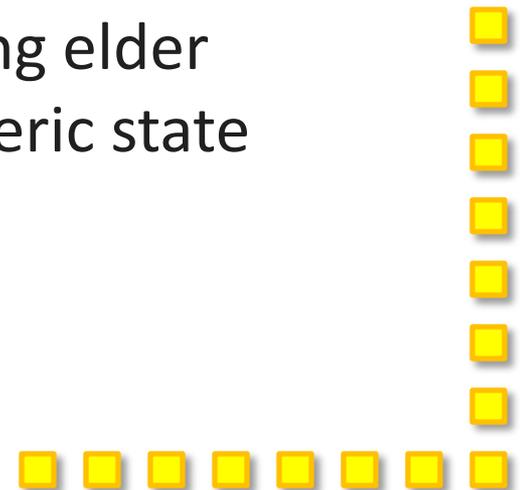
# Issues/Problems

- Disagreement exists about the effectiveness of mandatory reporting statutes as a case finding method.
- Progress has been made in developing elder abuse screening and assessment instruments and forensic markers, but more work in this area is needed.



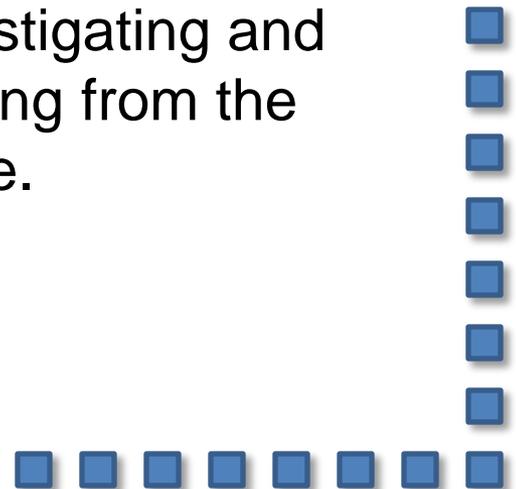
# State Criminal Laws

- Some states, such as Iowa, have statutes making elder abuse, including abuse in a nursing home, a specific crime.
- Even in the absence of specific elder abuse criminal statutes, conduct constituting elder abuse may be prosecuted under generic state criminal laws (e.g. assault, battery).



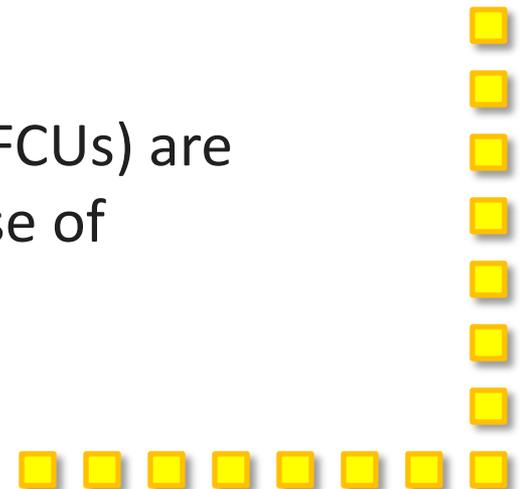
# Issues/Problems

- Investigation and prosecution of elder abuse cases generally has not been a high priority, at least until recently, among law enforcement and prosecutorial agencies.
- Law enforcement and prosecutorial agencies frequently encounter difficulties in investigating and prosecuting elder abuse cases stemming from the nature and extent of available evidence.



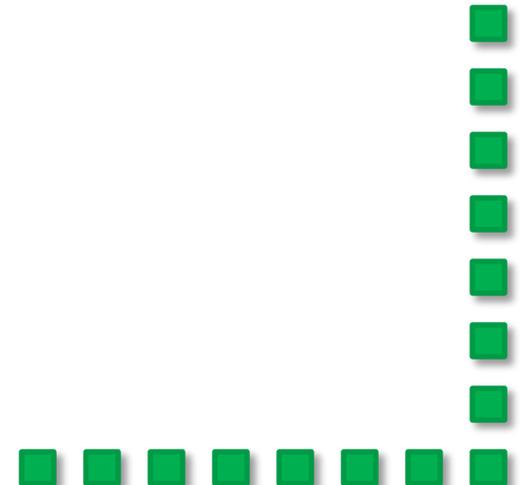
# Medicare/Medicaid Certification Laws

- Medicare/Medicaid certified nursing homes must develop policies to protect nursing home residents from abuses.
- State survey agencies must have processes for receipt, review, and investigation of resident abuse complaints.
- State Medicaid Fraud Control Units (MFCUs) are charged with investigating cases of abuse of Medicaid recipients in nursing homes.



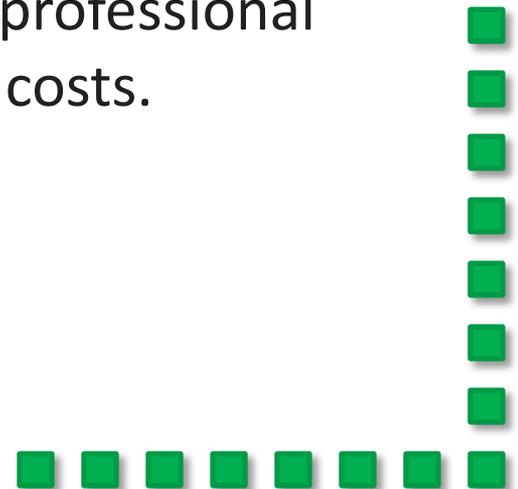


# Health Care Fraud and Abuse Laws



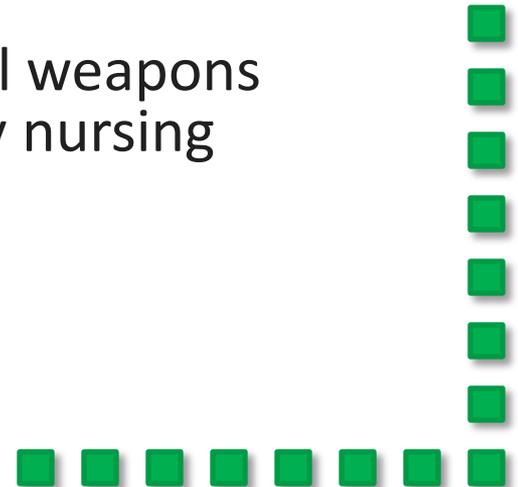
# Definitions

- Health care fraud is an intentional deception or misrepresentation leading to unauthorized reimbursement for health services.
- Health care abuse is billing for services that are not medically necessary, that do not reflect professional standards, or that result in unnecessary costs.



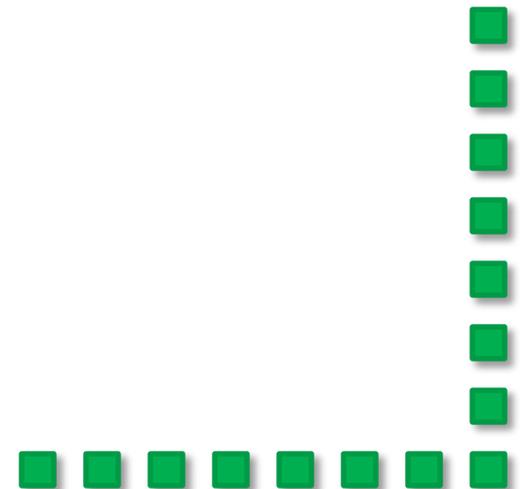
# Civil False Claims Act (FCA)

- FCA, a general federal fraud statute, prohibits knowingly presenting a false or fraudulent claim to the federal government.
- FCA violators are subject to heavy sanctions—fines and treble damages.
- FCA – one of the primary governmental weapons against Medicare and Medicaid fraud by nursing homes.



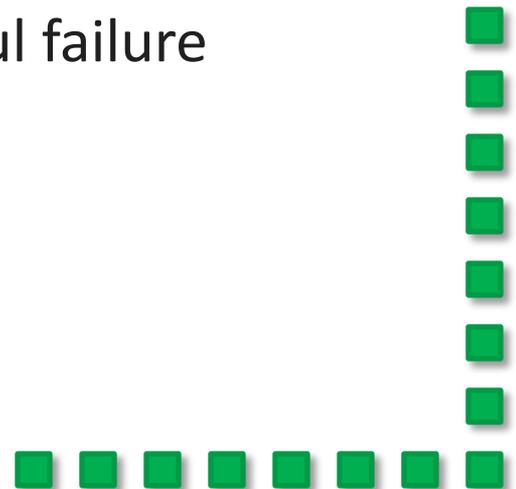
# FCA Qui Tam Relator/Whistleblower Provisions

- Under the FCA's qui tam relator/whistleblower provisions, a private citizen can bring suit on behalf of the U.S.
- Whistleblowers can retain 15% to 25% of any damages recovered.



# FCA Failure of Care Cases

- In FCA failure of care cases, the Government alleges that that billing Medicare/Medicaid for substandard care constitutes a false claim under the FCA.
- The Government has brought successful failure of care cases against nursing homes.

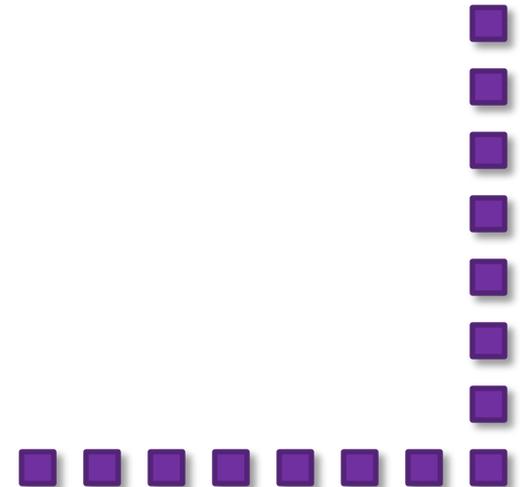


# FCA Failure of Care Cases, cont'd

- Failure of care cases have resulted in multiple and large sanctions against nursing homes
- In settlement of these cases, nursing homes must correct quality of care problems.
- Government-selected monitors sometimes appointed.

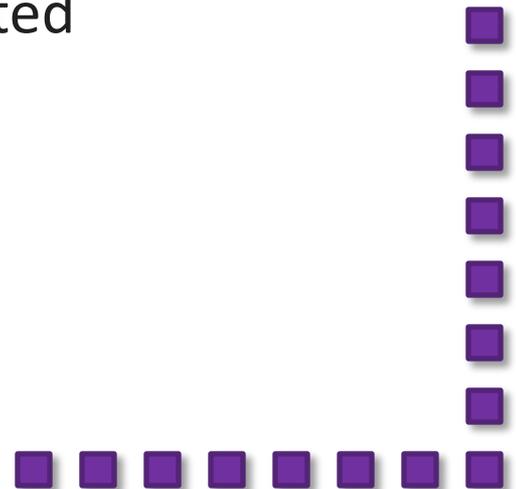


# Long Term Care Ombudsman Laws



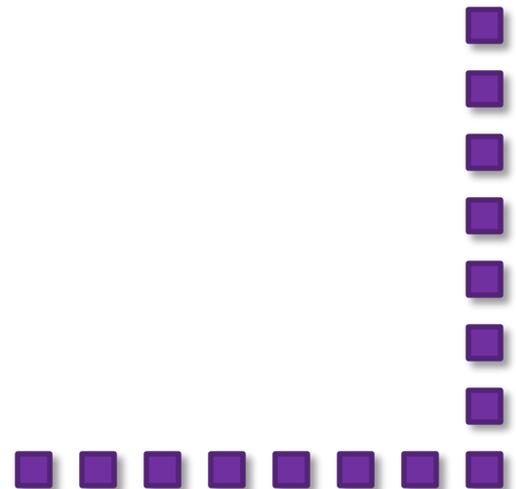
# Federal and State Laws

- Older Americans Act (OAA) makes federal assistance available to states for long-term care ombudsman programs (LTCOPs)
- Iowa and the other 49 states have enacted enabling statutes establishing LTCOPs.



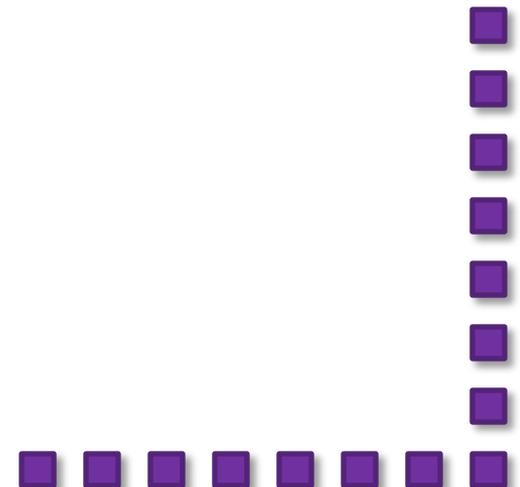
# Broad Mandate of LTCOPs

- Under OAA, state LTCOPs have broad mandate to promote the health, safety, well-being and rights of nursing home residents and other long-term care facilities.



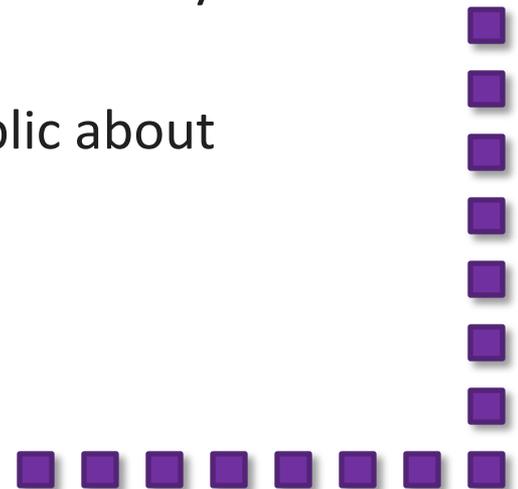
# Specific Responsibilities of LTCOPs

- OAA provides that LTCOPs are to act as advocates for individual nursing home residents
- One of their chief responsibilities is to investigate and resolve complaints brought on behalf of nursing home residents.

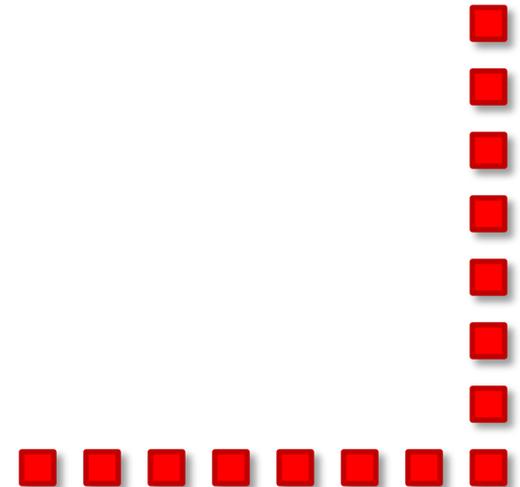


# Specific Responsibilities of LTCOPs, cont'd

- Under OAA, LTCOPs also are charged with
  - conducting systematic advocacy to improve long term care,
  - promoting the development of citizen's organizations to participate in program activities,
  - assisting in development of nursing home family and resident councils,
  - educating consumers, provider and public about long term care.



# Complexity of Statutory and Regulatory Scheme and Fragmentation of Implementation Efforts

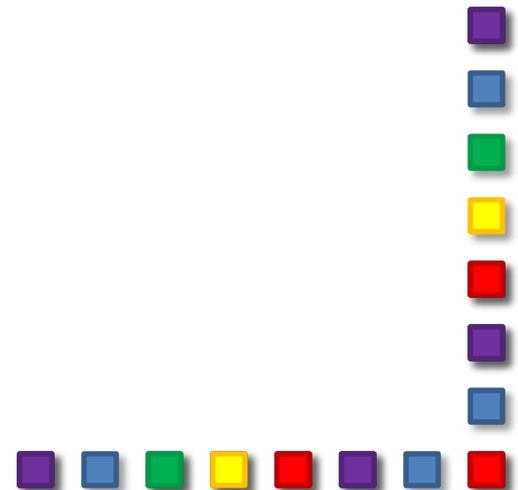


Statutes/ Regulations & Programs	Federal Medicare & Medicaid Certification Laws		State Licensing Laws	Elder Abuse Laws		
	Federal Agency	State Survey Agency	State Licensing Agency	State Adult Protective Service Laws	State Criminal Laws	Federal Medicare/Medicaid Certification Laws & State Licensing Laws
				Elder Abuse Reports & Investigations		
				State Agencies	State and Local Agencies	
<b>IA</b>	CMS/HHS  CMS Regional Offices	Dept. of Inspections and Appeals, Division of Health Facilities	Dept. of Inspections and Appeals, Division of Health Facilities	Dept. of Inspections and Appeals  See also Long- Term Care Ombudsman Laws	Local Law Enforcement Agencies (police, sheriffs)  State and County Medical Examiners  Local Prosecution Agencies (County Attorneys)	Dept. of Inspections and Appeals, Health Facilities Division and Investigations Division, MFCU

Statutes/ Regulations & Programs	Health Care Fraud and Abuse Laws				Long-Term Care (LTC) Ombudsman Laws		
	Federal False Claims Act & Federal Statutes		State Statutes		Federal Older Americans Act	State Enabling Statutes	
	Federal Agencies	State Agencies	State Agencies	Local Agencies	Federal Agencies	State Agencies	Local Agencies
<b>IA</b>	OIG/HHS  DOJ/ U.S. Attorney's Offices  Federal Investigative Agencies (Federal Bureau of Investigation, U.S. Postal Service, etc.)	Dept. of Inspections and Appeals/ MFCU	Attorney General's Office	Local Law Enforcement Agencies (police, sheriffs)  Local Prosecutors (County Attorneys)	AoA/HHS	Resident Advocates, Dept. of Elder Affairs	Resident advocate committees are appointed for each LTC facility

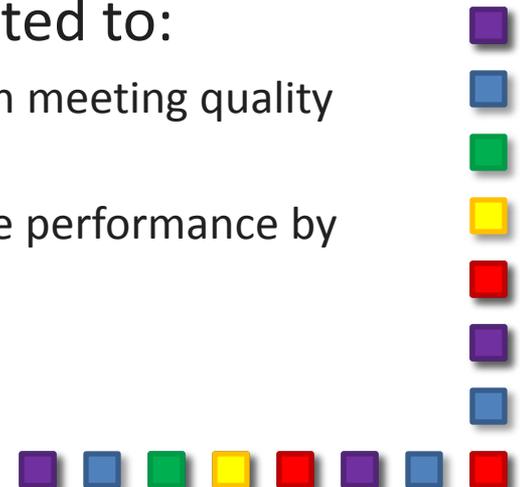
# Conclusion

- The National Nursing Home Reform Act and other federal and state legislation are widely credited with improving care and treatment of nursing home residents.
- Yet the provision of inadequate care to residents and mistreatment of residents remains a serious problem.



# Conclusion, cont.

- In response to this problem, CMS launched a Nursing Home Quality Initiative.
- In addition to regulatory strategies, other approaches to improve nursing home quality at the federal and state levels are being utilized or undertaken.
- These approaches include, but are not limited to:
  - Public reporting of performance of nursing homes in meeting quality standards.
  - Provision of assistance to nursing homes to promote performance by Quality Improvement Organizations (QIOs)
  - Changes in Medicare/Medicaid reimbursement



# For further information :

See

Gittler, J. (2008) The Legal Framework for Nursing Home Regulation *Research in Gerontological Nursing* 1(4):264-284

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