PLAN, PREPARE, PREVAIL: HOW NURSING HOMES MUST BETTER PROTECT THE MOST VULNERABLE WHEN DISASTER STRIKES

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Preparing for the worst is the only way to plan for the best. By creating a plan to protect the elderly in nursing homes and assisted living facilities, we can mitigate the effects of an unexpected natural disaster for our most vulnerable population. The elderly face greater challenges in helping themselves to safety when natural disasters, including hurricanes, floods, and wildfires, occur. This is why nursing homes and assisted living facilities need to create and implement effective disaster preparedness plans to ensure the elderly are not left behind. This Note evaluates the effectiveness of the current federal disaster preparedness regulations and highlights the gaps in protection for the elderly. It argues the current regulations are inadequately detailed and enforced, creating an increasingly alarming problem for the elderly as natural disasters become more frequent. This Note also recommends developing comprehensive federal and state emergency preparedness policies, along with a more stringent enforcement system.

I. Introduction

The rate of natural disasters, including catastrophic hurricanes, volcanic eruptions, floods, freezes, and wildfires continues to rise, leaving in their wake a host of problems for people all over the United States.[1] Although the alarming likelihood of disasters striking is frightening for everyone, one cohort of the population is especially

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1. Justin Joffe, *2018 Could See the Most Natural Disasters in History*, OUTER PLACES (Jan. 10, 2018, 3:44 PM), https://www.outerplaces.com/science/item/17485-2018-could-see-most-natural-disasters-history.

vulnerable when extreme events occur—the elderly.[2] This tragic reality is due in large part to where older people tend to live, which is along the beach or in flood zones, and they are less likely to evacuate.[3] Ensuring the elderly are getting the proper care in America's assisted living facilities should be a top priority today, given that the number of people older than sixty-five years old is projected to nearly double from 2010 to 2030 in the nation as a whole.[4] In particular, there is a pressing need for disaster planning.[5] This is especially true among the elderly who reside in nursing homes.[6] Creating a disaster preparedness plan must be a top priority for nursing homes because the residents cannot help themselves get to safety.[7]

Elderly adults are among the most vulnerable populations during and after disasters, because they experience increased mortality rates and care access issues.[8] This Note analyzes the need for dedicated resources and planning for older adults in nursing homes and long-term care facilities. It will describe how previous natural disasters have impacted elderly patients in nursing homes, illustrating the various challenges unique to nursing homes in the event of a natural disaster. Regulations enacted in response to catastrophes, such as Hurricane Katrina, have been largely ineffective.[9] Part II shows how emergency preparedness in nursing homes is a nationwide issue that is becoming increasingly critical to address and how federal and state regulators have inadequately responded to disasters. Part III discusses how the Centers for Medicare and Medicaid ("CMS") have responded to

2. Wynne Parry, *Why Disasters Like Sandy Hit the Elderly Hard*, LIVE SCI. (Mar. 8, 2013), https://www.livescience.com/27752-natural-disasters-hit-elderly-hard.html.

3. *Id.*

4. Associated Press, *Better oversight of elderly care essential as Americans age*, CHI. TRIB. (Oct. 3, 2019, 3:04 PM), https://www.chicagotribune.com/retirement-aging/sns-oversight-elderly-care-essential-american-aging-retirement-20191003-gtbud2k3g vha7nh5r2uggycnea-story.html.

5. Parry, *supra* note 2.

6. Gary Strauss, *Are Nursing Homes Ready for the Next Natural Disaster?*, AARP (Oct. 30, 2017), https://www.aarp.org/caregiving/local/info-2017/nursing-homes-natural-disasters.html.

7. Nancy Wagner, *A Disaster Plan for Nursing Homes*, CHRON https://small business.chron.com/disaster-plan-nursing-homes-71145.html (last visited Nov. 6, 2020).

8. Sidrah Malik et al., *Vulnerability of Older Adults in Disasters: Emergency Department Utilization by Geriatric Patients After Hurricane Sand*y, 12 CAMBRIDGE UNIV. PRESS 184, 184–85 (2017).

9. *See* Frances Fragos Townsend, The Federal Response to Hurricane Katrina: Lessons Learned, 17 (Feb. 2006), library.stmarytx.edu/acadlib/edocs/katrinawh.pdf.

violations of Emergency Preparedness requirements. This Part also addresses how CMS requirements lack detail and effective enforcement. Part IV argues for increased coordination among state and federal public health agencies, private health care providers, and first responders for more uniform emergency preparedness policies. This Note argues more resources need to be dedicated to helping nursing homes prepare for natural disasters, including federal funding, and for expanded regulations. Lastly, nursing homes need to be held liable for failing to safely protect their elderly and vulnerable patients.

II. Background

Elderly people are the most vulnerable in a natural disaster, exemplified by the fact that about half the people who died in Hurricane Katrina were seventy-five and older.[10] This Part first explains how elderly nursing home patients are particularly vulnerable during and after natural disasters. Next, it explains how CMS has responded to nursing homes' inadequate emergency preparation by imposing emergency preparedness requirements on all nursing home and long-term care facilities receiving Medicare or Medicaid. Lastly, this Part shows how despite federal and state regulations calling for emergency preparedness, nursing homes largely violate these requirements.

A. The Need for Protection in Nursing Homes

Many nursing home patients are particularly vulnerable when natural disasters strike because they have specialized food or equipment and medical regimes that need to be adhered to for their health and safety.[11] This is even more worrisome when nursing home facilities are not properly prepared for natural disasters or emergencies.[12] For example, nursing home facilities in California have adopted plans to shut off electricity when the threat of a wildfire is high, but this minimal emergency preparedness plan would be problematic for many nursing homes, which have backup power

10. Joseph Shapiro, *Nursing Homes and Emergency Preparedness,* NPR (Sept. 15, 2017, 5:06 AM), https://www.npr.org/2017/09/15/551163413/nursing-homes-and-emergency-preparedness.

11. Jim McKay, *Nursing Homes Facing Life-or-Death Decisions in Power Blackouts*, GOV'T TECH. (Sept. 20, 2019), https://www.govtech.com/em/preparedness/Nursing-Homes-Facing-Life-or-Death-Decisions-in-Power-Blackouts.html.

12. *See id.*

capacity of just six hours.[13] Their choice to shelter in place or evacuate is perilous.[14] When nursing homes try to shelter in place, facilities lose power; and when they try to evacuate, most are not equipped and do not receive the necessary assistance to do so safely.[15] Even homes that have paid for expensive generators in case they experience power outages are unable to connect to them because of noise ordinances or other local restrictions.[16]

Evacuating a nursing home or assisted-living facility requires a lot of preparation and planning—but many natural disasters, such as hurricanes, are unpredictable.[17] Nursing homes are even more challenging to evacuate than assisted living centers because nursing homes tend to be larger, with more beds.[18] Evacuating a nursing home with 120 residents takes anywhere from twenty-four to thirty-six hours.[19] During fall 2019's Hurricane Dorian, nineteen nursing homes were evacuated, resulting in a stressful experience for residents that had to evacuate with all of their medications and oxygen.[20]

When Hurricane Dorian began hitting the Florida coast, nearly 60 percent of Florida's nursing homes did not yet have enough backup power, despite Florida regulations requiring nursing homes to have backup generators and enough fuel to maintain comfortable temperatures.[21] Some nursing homes requested more time to meet the requirements by filing waivers, extensions, and variances, while some did not respond at all.[22] The law requires nursing homes to bring temporary generators on site within twenty-four hours of the governor

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Lisette Hilton, *Disaster nursing key to emergency care during and after hurricanes*, NURSE.COM (Sept. 23, 2019), https://www.nurse.com/blog/2019/09/23/disaster-nursing-emergency-care-during-after-hurricanes/.
18. Patricia Mazzei et al., *Hurricane Dorian Tests Florida's Ability to Move Older Adults Out of Harm's Way,* N.Y. TIMES, https://www.nytimes.com/2019/09/03/us/hurricane-dorian-florida-evacuation.html (last updated Sept. 4, 2019) [hereinafter Mazzei].
19. Hilton, *supra* note 17.
20. *Id.*
21. Mazzei, *supra* note 18; Cindy Krischer Goodman, *Florida's seniors left vulnerable to hurricanes because generator requirements were not enforced,* S. FLA. SUN SENTINEL (Sept. 9, 2019, 12:07 PM), https://www.sun-sentinel.com/news/florida/fl-ne-hurricane-nursing-home-rules-not-followed-20190909-ptrkusroevaopjp52sn2aohz6u-story.html.
22. Goodman, *supra* note 21.

declaring a state of emergency for counties in the storm's path.[23] But two days after the Florida governor declared a state of emergency for counties in Hurricane Dorian's path, one in five Florida nursing homes or assisted living facilities were still waiting for temporary generators to be delivered, and some had not communicated at all with the state about their generator status.[24] Luckily, the storm moved north toward the Carolinas, sparing most nursing homes—only four long-term care facilities had to be evacuated because they lacked the required emergency generators and access to backup power.[25] Some large centers for elderly residents did have complex emergency plans and chose to evacuate to sister or partner facilities because they were concerned with the size and strength of the hurricane.[26] One of these centers was the Samantha Wilson Care Center, which successfully evacuated its 126 residents.[27] This process took an entire day due to the residents' vulnerability and dependency, and because those in more delicate health required travel in specialty ambulances.[28] In total, ninety-five Florida nursing homes and assisted living facilities were evacuated because of Hurricane Dorian.[29] The Agency for Health Care Administration in Florida has not yet concluded how much trauma may have resulted from Hurricane Dorian; however, previous research shows evacuating residents exacerbates their existing physical and mental health conditions and could even increase their risk of death at thirty and ninety days post-move.[30]

Climate change means that hurricanes are intensifying and becoming more frequent,[31] and the effects of natural disasters are catastrophic for the many nursing home residents who are frail.[32] Frail individuals are more likely to have multiple medical problems, take multiple medications, and be limited in their ability to get around.[33] This poses even more of a problem when a nursing home's power goes

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Mazzei, *supra* note 18.
28. *Id.*
29. Goodman, *supra* note 21.
30. *Id.*
31. John Muscedere & George Heckman, *Climate change and older adults: Lessons from Canada,* MCKNIGHT'S LONG-TERM CARE NEWS (Sept. 13, 2019), https://www.mcknights.com/blogs/climate-change-and-older-adults-lessons-from-canada/.
32. *Id.*
33. *Id.*

out because many electrical medical devices that seniors rely on, including mobility scooters, CPAP machines, nebulizers, or dialysis machines will not work.[34]

Nursing home facilities are still failing to protect their vulnerable residents, despite the reoccurrence of natural disasters.[35] While massive fires plagued California in late 2019, federal health officials conducted surprise audits of nursing homes to determine whether facilities complied with federal safety and emergency requirements and whether they were prepared to protect their residents from fires, earthquakes, and other natural disasters.[36] The Office of the Inspector General of the U.S. Department of Health and Human Services' ("HHS") released a report in November 2019, concluding that nursing home residents "were at increased risk of injury or death during a fire or other emergency," after auditors found hundreds of potentially life-threatening violations of safety and emergency requirements.[37] These violations included blocked emergency exit doors, unsafe use of power strips and extension cords, and inadequate fuel for emergency generators.[38] The fact that one of the nursing homes that was inspected has subsequently burned down in a wildfire accentuates the disturbing and prominent risk nursing home residents face.[39] The report called for more frequent site surveys at nursing homes to follow up on previously-cited deficiencies; however, the state's public health department objected to the report's recommendation and replied in a letter that "federal rules do not require on-site visits to determine whether problems have been fixed and that the agency simply does not have enough inspectors."[40]

Moreover, natural disaster vulnerabilities have a disparate impact in counties nationwide.[41] The Center for Public Integrity, a nonprofit

34. *Id.*

35. *See* Barbara Feder Ostrov, *Federal Inspectors Find Serious Safety Violations at Many California Nursing Homes,* KQED (Nov. 14, 2019), https://www.kqed.org/news/11786617/federal-inspectors-find-serious-safety-violations-at-many-california-nursing-homes.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Matt Kempner, *County Highlights Georgia's Worrying Gaps in Storm Preparations,* CTR. FOR PUB. INTEGRITY (Nov. 1, 2019), https://publicintegrity.org/environment/one-disaster-away/county-highlights-georgias-worrying-gaps-in-storm-preparations/.

news organization, analyzed the vulnerabilities of major federal disaster declarations from 2009 through 2018, looking specifically at factors such as poverty and elderly residents, and found Georgia had more highly-vulnerable counties hit by disasters than any other state.[42] One of the most vulnerable Georgia counties, Randolph County, has been hit by five tornadoes and two hurricanes from 2016 through 2019, and this extreme weather is expected to continue and become more frequent as global temperatures rise.[43] These counties are particularly vulnerable because a third of their local residents fall below the poverty line and state government resources are thin.[44] When Hurricane Michael hit Georgia in 2019, nursing homes were ill prepared.[45] Due to rising temperatures and insufficient power for air conditioning, staff had to move nursing home residents into hallways, turn on fans, and drive in ice from Albany, a town nearly an hour away from Randolph, to attempt to keep patients cool.[46] There was also not enough power to handle the X-ray equipment or to perform CT-scans, leading the two generators to break down at night, causing the lights and fans to be cut off.[47] Just before Georgia power crews could reinstate the electricity, temperatures rose to eighty degrees, only two degrees away from necessitating evacuation.[48] John Carroll, the nursing home's coordinator for the emergency planning, noted "emergency preparedness tends to get on the back burning until something happens. Our public officials and leaders need to take a hard look at … how close we were to an even worse situation and try to prepare for the future."[49] Residents complain that federal aid has fallen short.[50] Hurricane Michael exemplifies the problem faced across the country—preparedness is low, and the majority of nursing homes do not have an incentive to care until it is too late.

42. *Id.*
43. *Id.*
44. *See id.* (discussing Randolph County, Georgia).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

B. CMS Emergency and Disaster Preparedness Plans

CMS is a sub-part of HHS.[51] CMS provides significant guidance to nursing homes, given that Medicare has expanded eligibility to people sixty-five or older who select Medicare coverage and Medicaid has similarly been expanded to cover much larger groups, including those who need long-term care.[52] Medicaid will almost always pay for the complete cost of nursing-home care in all fifty states and the District of Columbia for those who require that level of care and meet the program's financial eligibility requirements.[53] Meanwhile, Medicare will only partially cover the cost of nursing-home care and for a maximum of 100 days.[54] Approximately 80–90 percent of nursing homes, depending on the state, accept Medicaid.[55] To receive payment under Medicare or Medicaid programs, skilled nursing facilities ("SNFs") and nursing facilities ("NFs") must comply with federal requirements.[56] The federal government can influence the quality of care that nursing homes provide and push for change through its requirements because Medicare and Medicaid payments are important to nursing homes and receiving said payment is contingent on compliance with federal requirements.[57]

In response to the deaths of over 200 hospital and nursing home residents during Hurricane Katrina, CMS promulgated new rules requiring most long-term care facilities to have emergency and disaster preparedness plans in place.[58] If implemented earlier, better-organized evacuation plans would have saved hundreds of lives during Hurricane Katrina by avoiding organizational problems such as too many nursing homes contracting with the same bus company or waiting too long to evacuate.[59] State officials, responsible for evacuating

51. *About CMS*, CMS, https://www.cms.gov/About-CMS/About-CMS.html (last visited Nov. 6, 2020).

52. *See generally* CMS, https://www.cms.gov/ (last visited Nov. 6, 2020).

53. *Medicaid Coverage of Nursing Home Care: When, Where and How Much They Pay*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/medicaid-and-nursing-homes/ (last updated Jan. 7, 2020).

54. *Id.*

55. *Id.*

56. *Nursing Homes,* CMS, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/NHs.html (last updated Nov. 25, 2020, 6:28 AM).

57. *See id.*

58. Strauss, *supra* note 6.

59. David Rohde & Reed Abelson, *154 Patients Died, Many in Intense Heat, as Rescues Lagged*, N.Y. TIMES (Sept. 19, 2005), https://www.nytimes.com/2005/

patients if necessary, never anticipated the magnitude of Hurricane Katrina, thus, communication between state officials and nursing homes was so disorganized that it was unclear whether nursing homes were required to follow mandatory evacuation orders.[60] Ultimately, it was left up to each nursing home to decide what was best for its residents.[61] While nursing homes were required to have their own evacuation plans at the time, once the storm hit, those plans were quickly overmatched and neither state nor federal agencies came to the rescue.[62] CMS's stated purpose is "to establish national Emergency Preparedness requirements to ensure adequate planning for both natural and man-made disasters, and coordination with federal, state, tribal, regional and local emergency preparedness systems."[63]

CMS's website states that the final "Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers" went into effect on November 15, 2017.[64] The regulation outlines four core elements, which are applicable to all provider types receiving Medicare or Medicaid payments: (1) risk assessment and emergency planning; (2) communication plans; (3) policies and procedures; and (4) training and testing.[65] Aside from listing a few bullet points under each core goal, CMS's website provides links to downloadable documents that are "not intended to be full comprehensive plans, but rather serve as examples and guide providers."[66] CMS does not expect to develop any training specifically for providers and suppliers to prepare for implementation of the rule.[67] Nor does CMS require a specific format for the manner in which a facility documents their emergency plans; a facility must simply be able

09/19/us/nationalspecial/154-patients-died-many-inintense-heat-as-rescues-lagged.html.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Emergency Preparedness Rule*, CMS, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Emergency-Prep-Rule.html (last updated Nov. 4, 2019, 5:04 AM).

64. *Id.*

65. *Core EP Rule Elements,* CMS, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Core-EP-Rule-Elements.html (last updated Jan. 5, 2018, 3:30 AM).

66. *Id.*

67. *Survey & Certification Group Frequently Asked Questions (FAQs) Emergency Preparedness Regulation,* CMS, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/Frequently-Asked-Questions-FAQs.pdf (last updated Oct. 28, 2016).

to provide documentation of the policies and procedures upon survey.[68] CMS may not have specific requirements because facilities may choose to work with local health and emergency management officials, who are not regulated by CMS, to review the facility's plan to meet local requirements.[69] Even though CMS does not regulate these state and local emergency preparedness officials, they may approve facility plans.[70]

Emergency preparedness requirements are even more minimal this year, due to CMS's "Patients over Paperwork" initiative.[71] CMS recently proposed a new final rule, Omnibus Burden Reduction (Conditions of Participation) Final Rule ("Burden Reduction Rule"), on September 26, 2019.[72] The Rule is intended to remove Medicare regulations identified as "unnecessary, obsolete, or excessively burdensome on hospitals and other healthcare providers," pursuant to President Trump's direction to "cut the red tape."[73] The Rule weakens the previous requirement for facilities to conduct an annual review of their emergency program, and now only requires biennial reviews.[74] The cut back does not, however, apply to long-term care facilities, which will have to continue to review their emergency programs and provide training annually.[75] After receiving feedback from nursing home resident advocates, CMS Administrator Seema Verma said the agency decided to keep the requirements for long-term care providers because the requirements for nursing homes are necessary for their "unique patient and safety needs."[76] Healthcare experts in the field say despite easing several emergency-preparedness requirements, the intent of the Burden Reduction Rule, to better prepare and respond to disasters, remains the same. And, healthcare providers are now taking

68. *Id.*
69. *Id.*
70. *Id.*
71. Danielle Brown, *Feds keep the heat on nursing homes' emergency prep training*, MCKNIGHT'S LONG-TERM CARE NEWS (Sept. 26, 2019), https://www.mcknights.com/news/feds-keep-the-heat-on-nursing-homes-emergency-prep-training/.
72. Press Release, Omnibus Burden Reduction (Conditions of Participation) Final Rule CMS-3346-F, CMS (Sept. 26, 2019), https://www.cms.gov/newsroom/fact-sheets/
omnibus-burden-reduction-conditions-participation-final-rule-cms-3346-f.
73. *Id.*
74. *Id.*
75. *Id.*
76. Brown, *supra* note 71.

a more proactive approach to emergency preparedness to safeguard patients, given the increasing frequency and intensity of disasters.[77]

Long-term care requirements, as amended by the Burden Reduction Rule mandate that long-term care facilities: (1) develop and maintain an emergency preparedness plan based on facility and community assessments; (2) include strategies to address the identified risks, the resident population, and the types of services the facility can provide in an emergency; and (3) include a process for cooperation and collaboration with local, state, or federal emergency preparedness officials' efforts to maintain an integrated response during a disaster or emergency situation.[78] These requirements detail the minimum policies and procedures, the communication plan, and the training and testing that the emergency-preparedness plans must include.[79] Facilities must provide initial training in emergency preparedness policies and procedures to all new and existing staff, continue to do so annually, maintain documentation of all emergency preparedness training, and demonstrate staff knowledge of emergency procedures.[80] Long-term care facilities must also conduct exercises to test the emergency plan at least twice per year, including unannounced staff drills using the facilities' emergency procedures, participate in an annual full-scale, community-based exercise, conduct an additional exercise such as a mock disaster drill, analyze the facility's response, and maintain documentation of all exercises.[81] Lastly, the requirements detail the emergency and standby power systems that must be included within the emergency plan.[82]

77. *New CMS emergency preparedness requirements: Readiness matters*, HEALTHCARE DIVE (Nov. 5, 2019), https://www.healthcaredive.com/spons/new-cms-emergency-preparedness-requirements-readiness-matters/566456/.

78. *Long Term Care Requirements CMS Emergency Preparedness Final Rule: Updates Effective November 29, 2019*, TRACIE, https://files.asprtracie.hhs.gov/documents/aspr-tracie-cms-ep-rule-long-term-care.pdf (last visited Nov. 7, 2020).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

C. Violations of Emergency Planning Rules

Nursing home inspectors have cited thousands of facilities for violating emergency-planning rules in the last decade.[83] A 2018 Senate report notes that nearly all of the homes in Florida and Texas that received complaints following storms in 2017 were inspected and more than a quarter were deemed noncompliant with federal requirements.[84]

An audit conducted last year by HHS revealed at least twenty nursing homes in New York lack the required protections to keep residents safe in the event of an emergency—with issues stemming from inadequate management oversight and high staff turnover.[85] They also found 219 areas of noncompliance with emergency preparedness requirements related to written emergency plans, emergency supplies and power, evacuation plans, sheltering in place, tracking residents and staff, emergency communications, and emergency plan training.[86]

Nursing homes fail to prepare for potentially catastrophic emergencies, such as hurricanes, to far more mundane emergencies—even lacking plans for bringing wheelchair-dependent people down the stairs in the case of an evacuation.[87] Even if a nursing home does have a plan in place for certain emergencies, they often fail to implement them properly.[88] For example, during a fire in Chicago, the nursing home evacuated residents in the wrong order, starting with people farthest from the blaze.[89]

These homes rarely face severe reprimands, even when inspectors identify repeated lapses.[90] This may be in part because violations are rarely labeled as serious.[91] A third of all nursing homes in the United States have been cited for failing to inspect their generators each week

83. *See* Sheri Fink, *Poor Disaster Oversight Imperiled Nursing Homes, Senate Report Finds*, N.Y. TIMES (Nov. 2, 2018), https://www.nytimes.com/2018/11/02/us/nursing-homes-hurricanes.html.

84. *Id.*

85. Bethany Bump, *Feds: New York should improve nursing-home oversight*, TIMES UNION, https://www.timesunion.com/news/article/Feds-New-York-should-improve-nursing-home-14381906.php (last updated Aug. 28, 2019, 4:33 PM).

86. *Id.*

87. Jordan Rau, *Nursing Home Disaster Plans Often Faulted as 'Paper Tigers'*, KAISER HEATH NEWS (Sept. 19, 2017), https://khn.org/news/nursing-home-disaster-plans-often-faulted-as-paper-tigers/.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

or to test them monthly.[92] Yet, none of these violations were categorized as a major deficiency, even for nursing facilities that have been repeatedly cited for neglecting generator upkeep.[93] Although the regulatory system may be improving at identifying issues, it fails to treat them seriously enough, given that regulations are not sufficiently enforced.[94] The former director of the federal Emergency Care Coordination Center within HHS, Dr. David Marcozzi, calls for inspectors to actually observe nursing home staff demonstrating their emergency plans, rather than simply checking for a documented plan.[95] It is important to disseminate the plan to ensure nursing home staff and residents are aware of how they should respond when a natural disaster strikes.[96] Frequent drills to check that the system works will help ensure the facility is ready at all times, given that the possibility of certain threats may wax or wane over time.[97] The emphasis must shift toward implementation and exercise of the plans in order to ensure they are effective.[98]

Nursing home inspectors may be more lax or assertive in different states, resulting in survey inspection results varying widely by state.[99] For example, 53 percent of nursing facilities in California have been cited for emergency-planning deficiencies, while no nursing homes in Indiana, Mississippi, or Oregon have been cited for those violations in the past four years.[100] Some state departments of health are beginning to take a tougher stance on nursing home regulation.[101] For example, some Pennsylvania nursing homes were cited for lacking emergency preparedness plans and health officials hope increased oversight will ignite change.[102] Health officials are now increasing fines for citations and requiring facilities to submit plans detailing how they will fix the

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. Elaine Howley, *7 Steps to Better Disaster Preparedness in Your Long-Term Care Facility*, I ADVANCE SENIOR CARE (Oct. 22, 2019), https://www.iadvancesenior care.com/7-steps-to-better-disaster-preparedness-in-your-long-term-care-facility/.
97. *Id.*
98. Rau, *supra* note 87.
99. *Id.*
100. *Id.*
101. *See Health Department takes tough stance on nursing home regulation*, ABC NEWS, https://www.abc27.com/news/pa-health-department-takes-tougher-stance-on-nursing-home-regulation/ (last updated Sept. 23, 2019, 10:07 AM).
102. *Id.*

cited violation.[103] Moreover, Pennsylvania has started accepting anonymous complaints, which is leading to increased awareness and reporting.[104]

Florida regulators are surpassing the federal government in nursing home regulations.[105] After fourteen people died at the Rehabilitation Center at Hollywood Hills when it lost air conditioning during Hurricane Irma, Florida regulators moved to permanently revoke its operating license.[106] The state's Agency for Health Care Administration, which licenses and regulates long-term care facilities, is also seeking to impose $43,000 in fines for violations of health and safety standards.[107] Florida seeks to close the nursing home because just three days prior to the tragic incident, the nursing home had reported to Florida's health information database that everything was operational, including "heating and cooling."[108] Closing the nursing home may deter other nursing homes from improperly reporting and maintaining conditions; however, a proactive approach may be for the state or federal government to engage in more active oversight to enforce compliance before disasters occur. The federal government, through the U.S. Senate Finance Committee, similarly reacted by launching its own investigation into the circumstances surrounding the nursing home deaths to determine whether Florida properly certified that the nursing home met all the required emergency preparedness regulations to qualify for federal funding.[109]

III. Analysis

As a result of catastrophes such as Hurricane Katrina, state and federal public health agencies have enacted regulations requiring nursing homes and long-term care facilities to provide adequate emergency preparation, including having emergency plans in place, testing these plans, and regularly training for emergencies.[110] This Part first analyzes the lackluster consequences for non-compliant nursing

103. *Id.*
104. *Id.*
105. Megan O'Matz, *Florida moves to permanently shut down nursing home after 14 died without air conditioning*, SUN SENTINEL (Oct. 18, 2017, 6:30 PM), https://www.sun-sentinel.com/local/broward/fl-reg-nursing-home-fined-ahca-20171018-story.html.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *See* HEALTHCARE DIVE, *supra* note 77.

homes, and how the requirements lack enough detail to be meaningfully implemented. This Part will then discuss possible enforcement mechanisms for emergency preparedness requirements.

A. Consequences for Failure to Comply

There is very little enforcement of the emergency planning rule.[111] When CMS, which oversees inspections, was asked to explain the rarity of severe citations for failures to provide adequate emergency preparation, they simply referred the reporter to its emergency preparedness mission statement on its website.[112] Providers must be in compliance with emergency preparedness regulations to participate in the Medicare and Medicaid programs; however, no other consequences are noted for failure to comply.[113] CMS has different ways of applying penalties: it can impose a specific fine for a particular violation; it can impose a fine for each day that a nursing home is in violation; or it can deny new payments.[114] Under a policy that began near the end of President Obama's second term, however, CMS must impose at least some penalty on a facility every time one of its residents is harmed—instead of leaving the decision to CMS's discretion.[115] This has led to a 28 percent increase in the frequency of financial penalties.[116]

CMS is prepared to revoke funding and impose additional fines if a facility fails to meet Medicare's basic health and safety requirements, according to CMS's termination notice.[117] This was apparent when CMS terminated Medicare funding and imposed a $63,000 penalty to the Rehabilitation Center at Hollywood Hills in Hollywood, Florida, after

111. Jordan Rau, *Many Nursing Homes Aren't Prepared For Even Basic Emergencies,* NPR (Sept. 19, 2017, 11:12 AM), https://www.npr.org/sections/health-shots/2017/09/19/552042095/many-nursing-homes-arent-prepared-for-even-basic-emergencies [hereinafter *Nursing Homes Aren't Prepared*].

112. *Id.*

113. *See id.*

114. Jordan Rau, *Trump Administration Eases Nursing Home Fines in Victory for Industry,* N.Y. TIMES (Dec. 24, 2017), https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html. [hereinafter Rau 2017].

115. Jordan Rau, *Nursing Home Fines Drop As Trump Administration Heeds Industry Complaints,* KAISER HEALTH NEWS (Mar. 15, 2019), https://khn.org/news/nursing-home-fines-drop-as-trump-administration-heeds-industry-complaints/. [hereinafter *Nursing Home Fines Drop*].

116. *Id.*

117. Alia Paavola, *CMS revokes Medicare funding, imposes $63k penalty to nursing home where 14 residents died,* BECKER'S HOSP. CFO REP. (Oct. 13, 2017), https://www.beckershospitalreview.com/finance/cms-revokes-medicare-funding-imposes-63k-penalty-to-nursing-home-where-14-residents-died.html.

the facility lost power during Hurricane Irma, causing the death of fourteen residents.[118] In addition, when the nursing home failed to evacuate its patients while the air conditioning did not work for three days, CMS imposed a $20,965 penalty per day.[119]

Although CMS has previously used fines to enforce regulations, under President Trump, CMS has scaled back the use of penalties against nursing homes for patient safety errors.[120] Since 2013, nearly 6,500 nursing homes have been cited for various violations.[121] Of those, Medicare has fined two-thirds depending on the situation and seriousness of the citation.[122] Yet, the new guidelines discourage regulators from imposing fines, even when violations result in a resident's death, so long as the error was a "one-time mistake."[123] The Trump Administration's goal was to increase the quality time providers spend with their patients by reducing the amount of time providers have to spend complying with regulations; however, as nursing home advocates point out, these revised penalties are enervating the already-weak enforcement of valuable patient-safety regulations.[124] Daily fines are the recommended approach for major violations discovered during an inspection, but a July 2017 CMS memo discourages state agency directors who survey homes from issuing daily fines for violations occurring prior to inspection, preferring a one-time fine instead.[125] Although this prevents nursing homes from retroactively being fined for violations that have been corrected by the time inspectors discover them, it also means that some nursing homes can escape fines that would surpass the maximum per-instance fine ($20,965) for egregious mistakes.[126] Under the Trump administration, the average fine has dropped from $41,260 in 2016 (President Obama's last year in office) to $28,405.[127] Previously, nursing homes could

118. *Id.*
119. *Id.*
120. Rau 2017, *supra* note 114.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. Memorandum from Dir., Survey and Certification Group on Revision of Civil Money Penalty (CMP) Policies and CMP Analytic Tool to State Survey Agency Dirs. (July 7, 2017), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf.
126. Rau 2017, *supra* note 114.
127. *Nursing Home Fines Drop*, *supra* note 115.

accumulate massive fines that were retroactively applied to daily violations.[128] For example, in 2016, CMS fined an Illinois nursing home a total of $282,954, an accumulation of twenty-eight daily fines of $10,091 for each time the nursing home failed to monitor and treat a patient.[129] Now, under the Trump administration's guidelines, their one-time fine would have been less than $21,000.[130]

The change in CMS's penalty protocol may reflect a shift toward a proactive approach of helping nursing homes improve, rather than retroactively discovering wrongdoing and imposing subsequent and significant fines.[131] On the other hand, reducing penalties disincentivizes nursing homes from correcting dangerous practices before residents are harmed.[132] While CMS says revisions to the rules governing fines are intended to make punishments fairer and more consistent with improving care, the shift is broadly consistent with the Trump Administration's healthcare-industry-friendly policies.[133] Under President Trump, the average per-instance fine was under $9,000, which hardly impacts large, multimillion-dollar nursing home businesses.[134] Moreover, the frequency of fines may decrease, given that in June 2019, CMS told inspectors that they were no longer required to fine facilities unless the violations resulted in "serious injury, harm, impairment, or death."[135] Penalties may have reverted to a level that is too low to be effective because care generally does not improve when the fines are inconsequential to the nursing home.[136]

B. Lack of Detailed Requirements

CMS's emergency preparedness requirements will not protect the elderly from future catastrophes without rigorous enforcement and continuous testing, training, and live drills.[137] The former director of the federal government's National Healthcare Preparedness Program has pointed out that merely requiring elder-care operators to file

128. Rau 2017, *supra* note 114.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Nursing Home Fines Drop*, *supra* note 115.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *See Nursing Homes Aren't Prepared*, *supra* note 111.

emergency preparedness plans does not go far enough.[138] Rather, there needs to be stronger enforcement to make sure these plans will be properly executed.[139]

A November 2018 Senate report, released one year after the new preparedness requirements for health care providers went into effect, argues the regulations leave gaps that endanger lives.[140] This may be because CMS intentionally did not provide detailed requirements for emergency preparedness policies and procedures.[141] Instead, CMS relies on facilities to conduct their own thorough assessments to determine the most effective measures.[142] The Senate report points out that nursing home administrators need better guidance when deciding whether or not to evacuate before a predicted hurricane or flood event and also calls for regulators to require those decisions "be made by qualified personnel in a methodical way."[143]

During HHS's audit fieldwork conducted from January through April 2018, auditors suggested inadequate training and emergency-preparedness issues would have been identified or allayed if the state department of health had developed a standardized life-safety training program for nursing home staff or performed more frequent life-safety surveys.[144]

Case studies have found that nursing home state survey agencies lack formal enforcement procedures and guidelines, and importantly, they lack explicit criteria for making decisions in the regulatory enforcement process.[145] If a surveyor finds a deficiency, generally a qualified surveyor or agency consultant will revisit the nursing home.[146] States vary, however, in the immediacy and amount of onsite

138. *Id.*
139. *Id.*
140. Fink, *supra* note 83.
141. Terry Zysk, *CMS Emergency Preparedness Plan: Policies and Procedures for Continuity,* LIVEPROCESS (July 8, 2019), https://www.liveprocess.com/blog-cms-emergency-preparedness-policies-procedures-changes-for-continuity.
142. *Id.*
143. Fink, *supra* note 83.
144. Bump, *supra* note 85.
145. Stephanie Kissam et al., *Approaches to quality improvement in nursing homes: Lessons learned from the six-state pilot of CMS's Nursing Home Quality Initiative*, 3 BMC GERIATRICS 2, 2 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC166131/ [hereinafter Kissam].
146. INST. MED. (US) COMM. ON NURSING HOME REG., IMPROVING THE QUALITY OF CARE IN NURSING HOMES 153 (1986), available at https://www.ncbi.nlm.nih.gov/books/NBK217546/ [hereinafter INST. MED.].

follow-ups.[147] Federal regulations outline the procedures for following up on a survey, but they do not specify what constitutes a clear hazard to health or safety, nor do they specify when deficiencies must be corrected.[148] Thus, it is difficult for surveyors to determine when decertification from Medicaid is warranted.[149] In order to have more effective enforcement of regulations, such as those requiring emergency preparedness plans, surveyors need more specific guidelines on when further investigation is needed for deficiencies found in the standard survey, when violations should be cited, and when sanctions should apply.[150] More specific enforcement procedures would discourage states from tolerating substandard care and repeat violators while also putting nursing homes on notice of inadequate care by setting a precedent of consistent enforcement activity.[151] These procedures would also facilitate standardized documentation on the progress of corrections, which would allow for prompt penalization of facilities that do not correct deficiencies.[152] To develop these guidelines, states may consult legal and administrative staff, who specialize in nursing home enforcement issues.[153]

On the other hand, nursing home care is highly regulated by state and federal agencies.[154] Imposing more requirements, rules, or protocols for emergency preparedness plans may hinder the ability of a nursing home's internal quality-improvement teams to implement creative solutions, as they may conflict with established rules or protocols.[155] To assure both quality improvement and compliance with government regulations, especially if more specific emergency

147. *Id.* ("Some states have a practice of making more than one revisit to verify immediate correction of acute situations and later to verify correction of the remaining deficiencies. Thirty states believe that one onsite follow-up visit is adequate in most cases, 13 think there should be more than one visit if there are multiple deadlines for corrections, and 3 said none were needed in most cases because corrections could be adequately verified by telephone or mail.").

148. *Id.* at 154.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See id.*

155. *Id.* at 153 ("A major finding in the IOM case studies is that state survey agencies lack formal enforcement procedures and guidelines. They also lack explicit criteria for making decisions at important stages in the enforcement process. The survey of state agencies found that only 20 of the 47 states reporting have written guidelines for when and how to take formal enforcement actions.").

preparedness regulations are promulgated, nursing home providers need to frequently consult with state surveying agencies.[156] Nursing home staff may be more receptive to working with state survey agencies if government oversight is perceived as a voluntary and collaborative initiative to improve nursing home residents' safety, instead of punitive regulatory enforcement.[157] One way to facilitate collaboration with state survey agencies could be providing nursing homes with additional Medicaid funding to improve care, instead of retroactively fining nursing homes.[158] When Indiana's county-owned hospitals began to lease nursing homes, the complex Medicaid funding formula allowed nursing homes owned or leased by city or county governments to receive an additional 30 percent of Medicaid funding per Medicaid resident.[159] Since the leasing began, federal ratings of those same Indiana nursing homes have increased substantially.[160] Among the ways nursing homes have used the additional money to improve care was adding high-capacity emergency generators to provide power in a natural disaster.[161] Critics argue that the concern with providing nursing homes with extra funding is that there is little public accounting, resulting in little benefit to patients.[162] The federal government, however, could tighten the rules about additional payments to require it be spent on improvements in emergency planning.[163]

156. *Id.*

157. *Id.*

158. *See* Phil Galewitz, *Medicaid wrinkle gives hospitals, nursing homes funding: Chasing millions in Medicaid dollars, hospitals buy up nursing homes*, KAISER HEALTH NEWS, https://www.bendbulletin.com/health/5675710-151/medicaid-wrinkle-gives-hospitals-nursing-homes-funding (last updated Feb. 4, 2020).

159. *Id.*

160. *Id.*

161. *See id.* ("About 40 percent of the county hospital's nursing homes have five-star ratings from the federal government, up substantially from 10 years ago, Guenin said. Among the improvements at the nursing homes were the addition of electronic health records and of high-capacity emergency generators to provide power in a natural disaster.").

162. *Id.*

163. *See id.* ("And in a rule released last year, the federal Centers for Medicare and Medicaid Services announced that it would gradually force states to shift to payment systems that tie such reimbursements to quality of care.").

C. Enforcement Mechanisms

1. JUDICIAL REMEDIES

One possible way to hold nursing homes accountable for failure to implement disaster preparedness plans is through medical malpractice liability.[164] Although, state law governs medical malpractice claims.[165] Thus, plaintiffs' rights are typically subject to many constraints, including a required submission to a medical review panel, a cap on damage awards, and a relatively short statute of limitations (usually between one and three years).[166] Moreover, the current trend in state laws disallows recovery under medical malpractice theories for claims regarding a failure to implement an evacuation plan because a decision to evacuate is not directly connected to the care of the patient or medical expertise.[167]

Nursing homes could be held liable through general negligence tort theory for failing to safely protect or evacuate residents, but both the federal and state governments play large roles in regulating the health care industries, planning for emergencies, and responding to emergencies.[168] Thus, courts may find it unfair to hold nursing homes solely responsible because evacuation plans require significant administrative oversight and forethought, which are policy considerations best addressed by the legislature.[169] The issue with assigning liability to the nursing home facility is that the decision about whether to evacuate residents is not a common one, and thus a standard of care cannot be readily determined from any common occupational standards or practices.[170] Considering federal and state governments play a role in disaster preparedness through authorizing funding, granting licenses, and promulgating regulations, they should necessarily share liability.[171]

164. David H. Slade, *Who Is Liable for Disaster Planning? Malpractice Liability for Hospital Administrative Plans*, 29 J. LEGAL MED. 219, 220 (2008).
165. *Id.*
166. *Id.* at 222.
167. *Id.* at 225.
168. *Id.* at 227–28.
169. *Id.* at 231–32.
170. *See id.* at 234.
171. *Id*.

2. ADMINISTRATIVE REMEDIES

Threatening to terminate a facility's Medicaid contract, which would effectively put the provider out of business, may strongly encourage compliance with regulations.[172] However, states are reluctant to terminate contracts because of the hassle of closing facilities and relocating residents.[173] Moreover, nursing homes that have repeatedly failed to comply with emergency preparedness requirements may be able to escape termination of Medicaid contracts because federal survey and enforcement criteria do not take historical offenses into account.[174] Rather, facilities may be recertified if there is evidence of compliance by the time of the survey or follow-up visits.[175] This permits facilities to be repeatedly deficient because they can file and comply with correction plans and yet be out of compliance at the following survey, as the recertification of decertified facilities is done without regard to the subject facility's history of noncompliance.[176] Additional federal rules allowing the suspension of payments for new admissions are needed for effective enforcement.[177]

Another way to improve emergency preparedness for nursing facilities is through adopting the Incident Command System ("ICS") and requiring nursing facilities to make plans more specific, particularly regarding the training requirements for staff.[178] ICS is a part of the National Incident Management System used by federal, state, and local agencies when coordinating disaster planning and response.[179] Training nursing home administrators in ICS could enhance collaboration with government agencies by better integrating the facility's plan with existing emergency management systems.[180] CMS training requirements are vague and the substance of state

172. INST. MED., *supra* note 146, at 155.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 155–56 ("Each of the case study states reported that 10 to 15 percent of their providers are constantly found to be out of compliance; they file and comply with correction plans, then are found to be out of compliance at the following survey. Even facilities with repeated major deficiencies are recertified if they meet their correction plans within 60 to 90 days.").
177. *Id.* at 160.
178. NATIONAL INCIDENT MANAGEMENT SYSTEM, U.S. DEP'T OF HOMELAND SEC. 45 (2008) [hereinafter NATIONAL INCIDENT].
179. *Id.* at 3.
180. *See id.* at 45.

requirements varies widely.[181] Standardizing the elements of staff training through the ICS system may help limit training costs while improving emergency preparedness for nursing home management nationwide.[182] The Federal Emergency Management Agency's National Emergency Training Center offers training in ICS online, free of charge, and includes two courses on how to apply ICS to healthcare organizations.[183]

3. PUBLIC REPORTING

A further approach to improving emergency preparedness in nursing homes is to publicly report all violations.[184] In November 2002, CMS began publicly reporting a set of "Quality Measures" for all nursing homes across the country, as part of its "Nursing Home Quality Initiative."[185] The initiative helped leverage effective improvement in nursing homes' quality of care through public reporting.[186] Public reporting helped focus the attention of stakeholders in the nursing home industry on achieving greater quality care.[187] Nursing home stakeholders found it effective to work together to promote the availability of nursing home data both for consumers and to guide improvement in quality care.[188] Collaboration among nursing home stakeholders nationwide regarding emergency preparedness plans may help to facilitate updates, discuss issues facing nursing homes, and brainstorm possible solutions.[189] Moreover, collaboration results in the practical coordination of resources, which would be help reduce the disparity in natural disaster vulnerability among states.[190]

Public reporting of quality measures also motivated nursing homes to seek out new processes of care, such as engaging physicians

181. *See generally* CMS, *State Operations Manual Appendix M–Guidance to Surveyors: Hospice*, CMS, https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_m_hospice.pdf (last updated Feb. 21, 2020).

182. *See* NATIONAL INCIDENT, *supra* note 178.

183. FED. EMERGENCY MGMT. AGENCY, *IS-100.C: Introduction to the Incident Command System, ICS 100*, https://training.fema.gov/is/courseoverview.aspx?code=IS-100.c (last updated Oct. 8, 2020).

184. Kissam, *supra* note 145, at 2.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 3.

190. *Id.*

and medical directors more directly.[191] Teaching quality improvement to all nursing home staff, including direct care staff, is a common challenge to implementing improvement projects.[192] To overcome this, teleconferences and interactive sessions among nursing homes may provide an opportunity for nursing homes to share practical tips about the effective application of emergency preparedness guidelines and protocols.[193] Sharing of experiences may lead to more nursing homes developing effective emergency plans because it is useful in inspiring and guiding nursing home teams to make changes to improve their processes of care.[194]

IV. Recommendation

A. Comprehensive, Uniform Policies

In order to improve the nation's level of care in nursing homes, including emergency preparedness, people and organizations in the public and private sectors need to work collaboratively. Governmental public health agencies at the national, state, and local levels need to align their policies to provide effective guidance and enforcement of regulations.[195] A 2012 Institute of Medicine report emphasized the importance of an integrated approach to planning, stating "successful disaster response depends on coordination and integration across the full system of the key stakeholder groups: state and local governments, EMS, public health, emergency management, hospital facilities, and the outpatient sector."[196] A comprehensive national health policy to improve emergency preparedness could be used to align health-sector investment, improve governmental public health agency structure and

191. *Id.* at 4.
192. *Id.*
193. *Id.* at 4–5.
194. *Id.* at 5.
195. INST. MED., NAT'L ACADS. SCI., ENG'G., & MED., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 96 (2003), https://www.nap.edu/read/10548/chapter/5.
196. IOM COMM. POST-DISASTER RECOVERY CMTY.'S PUB. HEALTH, MED., & SOC. SERV. INST. MED., HEALTHY, RESILIENT, AND SUSTAINABLE COMMUNITIES AFTER DISASTERS: STRATEGIES, OPPORTUNITIES, AND PLANNING FOR RECOVERY 197, (Sept. 10, 2015), https://www.ncbi.nlm.nih.gov/books/NBK316524/#sec_000169 [hereinafter COMM. POST-DISASTER RECOVERY].

function, and incentivize the private sector to work more effectively with the broader public health system.[197]

At the public level, state and local governments are primarily responsible for ensuring the public's health under the U.S. Constitution.[198] This occurs through a variety of measures, including monitoring injuries, reporting, helping guarantee high-quality health care services to vulnerable populations, and providing prevention services such as counseling and education.[199] State and local governments engage in numerous regulatory activities, such as overseeing the quality of health care provided in the public and private sectors.[200] The federal government assures the public's health through policymaking, financing, collecting and disseminating information about national health, and directly managing services such as setting conditions on the expenditure of federal funds.[201] Given that CMS has already set some broad conditions for Medicare funding regarding emergency preparedness plans,[202] CMS should promulgate additional regulations to help shape state and local governments in improving emergency preparedness.

In the private sector, facilities could prepare for power shutdowns by entering into agreements with industrial contractors for generators or suppliers of temporary cooling.[203] They could also invest in evacuation training for care providers.[204] Because human capital is costly and capabilities are limited, a more cost-effective investment may be leveraging data and technology to improve the effectiveness of

197. *Id.*

198. *See* Lawrence O. Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 466 (1986), https://heinonline.org/HOL/P?h=hein.journals/amlmed12&i=474 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905), where the Supreme Court contextualized the role of state and local government's police power when it came to public health issues); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively").

199. COMM. POST-DISASTER RECOVERY, *supra* note 196, at 6.

200. *Id.*

201. *Id.* at 14.

202. *See* CTR.'S MEDICARE & MEDICAID SERV., *State Operations Manual Appendix Z—Emergency Preparedness for All Provider and Certified Supplier Types Interpretive Guidance*, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/QSO19-06-ALL.pdf (last updated Feb. 1, 2019).

203. *Id.*

204. McKay, *supra* note 11.

response and resiliency.[205] For example, in the wake of Hurricane Katrina, the New Orleans health commissioner led an effort to develop a tool called emPOWER, which allows the health care industry to focus on the most vulnerable seniors in the community who need special attention during a disaster.[206] The internet can also provide a better communication infrastructure.[207] One of the major challenges during Hurricane Katrina was a lack of communication.[208] Going forward, public safety agencies, volunteer organizations, and public and private health care systems need a better strategy for organizing disaster response.[209] One solution may be to use the internet to register their assets, including boats, food and water, temporary shelter, and first responders, and get applications on their phones so that they can communicate with regional response centers.[210] Using the internet as an organizational platform may mitigate the issue that arose during Hurricane Katrina—when multiple nursing homes contracted with the same ambulance company for evacuation capability and the capacity to meet evacuation requests did not exist when all the nursing homes requested evacuation simultaneously.[211] The internet is prone to risks and malfunction, however, so investments would also have to be made in safeguarding against risks, such as hackers, that could take down a whole communication system.[212]

205. NAT'L ACADS. SCI., ENG'G, & MED., ENGAGING THE PRIVATE-SECTOR HEALTH CARE SYSTEM IN BUILDING CAPACITY TO RESPOND TO THREATS TO THE PUBLIC'S HEALTH AND NATIONAL SECURITY: PROCEEDINGS OF A WORKSHOP 29 (Aug. 2, 2018), https://www.ncbi.nlm.nih.gov/books/NBK531831/.

206. *Id.*

207. *Id.* at 33.

208. *Id.*

209. *Id.* at 34.

210. *See id.* ("One recommendation he made based on his experience with Hurricane Harvey was that the federal government could do a better job of having assets such as food and water, temporary shelters, security, and sanitation available for first responders. Other recommendations were to improve the mental health capabilities of the 911 system—mental health has become a bigger issue than most people realize, he said—and to develop a better system for organizing the Cajun Navy so they can use the Internet to register their boats and get apps on their phones so they can communicate with regional response centers.").

211. *Id.* at 35.

212. *See id.* at 33 ("Though everybody tried to do the right thing during Hurricane Katrina, the bottom line, said Zuschlag, was that too many things happened in the wrong way, largely because of a lack of communications capability. His concern going forward, with so much of the communication infrastructure moving to the Internet, is that a hacker could take down a big piece of the region's emergency communication systems.").

B. More Funding for Implementation and Enforcement of Emergency Preparedness Requirements

One reason that CMS emergency preparedness requirements have been ineffectively enforced is that government actors believe it will be a while before the next catastrophe strikes.[213] Therefore, they focus their attention and resources on issues perceived to be more imminent.[214] This uncertainty often similarly prevents nursing homes from investing in construction, buildings, and infrastructure to minimize loss in the event of a disaster.[215] Instead, the federal government can encourage private investment through tax incentives, zoning regulations and building codes, and direct funding.[216]

Cost is often a major factor for nursing home delays in compliance with new emergency preparedness requirements.[217] For example, emergency power systems are expensive to implement and maintain.[218] Generators are a significant investment for nursing homes; the average cost ranges from $350,000 to $500,000 depending on the number of beds.[219]

Nursing homes could receive more federal funding for emergency preparedness under the Hospital Preparedness Program ("HPP"), which is the primary source of federal funding to support health care system preparedness.[220] HPP is administered by the Assistant Secretary for Preparedness and Response within HHS.[221] It was originally established in 2002 to prepare and respond to bioterrorism attacks on the United States and other public health emergencies, including natural disasters.[222] All fifty states receive HPP funding through state HPP grantees.[223] The HPP grantees are expected to disseminate funds

213. Robert H. Jerry, II, *Managing Hurricane (and Other Natural Disaster) Risk*, 6 TEX. A&M L. REV. 391, 420 (2019).

214. *Id.*

215. *Id.* at 425.

216. *Id.* at 425–26.

217. Goodman, *supra* note 21 ("Ralph Marrinson, who operates three nursing homes in South Florida, believes some facilities failed to comply with the new rules because of the cost. Generators, particularly those that can power air conditioning units for a nursing home, are expensive, he said. Marrinson paid as much as $350,000 for each one he installed.").

218. *Id.*

219. *Id.*

220. COMM. POST-DISASTER RECOVERY, *supra* note 196, at 198.

221. *Id.* at 152.

222. *Id.* at 198.

223. *Id.*

to health care coalitions, which are a collaborative network of health care organizations and their respective public and private sector response partners within a defined region.[224] Expanding this coordinated use of preparedness grant funds could strengthen the health care sector's planning and allow nursing homes to become more resilient and sustainable during natural disasters.[225]

Additionally, the federal government should allocate funds to federal and state enforcement activities.[226] Developing new guidelines, procedures, and sanctions for non-compliance with emergency preparedness plans will be of little use if federal oversight and support for federal and state enforcement activities and resources is not increased.[227] Survey agency staff should include specialists trained in investigation and enforcement, as well as attorneys specifically designated to deal with enforcement issues.[228] Otherwise, when states take court action, surveyors may not be effective witnesses because they may not document deficiencies in ways that will be useful in formal enforcement proceedings, and there may not be any departmental attorneys available.[229] Support for enhanced enforcement training and responses could come from federal agencies such as the Agency for Healthcare Research and Quality and the Health Services Administration, which provides support for federally qualified health centers.[230]

C. Holding Nursing Homes More Accountable

There needs to be more accountability for nursing homes' failure to meet emergency preparedness requirements. CMS provides that any nursing home that does not achieve "substantial compliance with the

224. *Id.*
225. *Id.*
226. *See id.* at 200 ("It is the committee's view that planning aimed only at achieving a preexisting and likely suboptimal state fails to exploit an opportunity to achieve more desirable longer-term goals of maximally healthy communities through improvements in care delivery and health care access. Thus, the committee strongly urges ASPR to take leadership in working with its fellow agency partners to expand the vision that informs its efforts. The HPP guidance would then be updated to articulate that the goal of health care sector recovery should not be simply to return to the pre-disaster state but to strengthen the sector so that the community will emerge from recovery healthier, more resilient, and sustainable.").
227. INST. MED., *supra* note 146, at 169.
228. *Id.*
229. *Id.* at 169–70.
230. COMM. POST-DISASTER RECOVERY, *supra* note 196, at 200.

Federal requirements within six months be terminated from participation in Medicare and/or Medicaid."[231] Emergency preparedness requirements should be met with strict compliance, rather than "substantial compliance" because too many nursing homes are inadequately prepared for the next inevitable natural disaster.

Moreover, plaintiffs should be able to hold nursing homes liable for their failure to safely evacuate patients. Currently, there is no readily determinable standard of care for the quality and mode of evacuation for a particular patient because the decision necessarily involves a unique and complex balancing of the patient's medical condition and predictions about the severity of the disaster.[232] Thus, any common occupational standards are not applicable.[233] HHS should promulgate a standard for the quality and mode of transportation so that liability can be assigned to nursing homes that breach that standard of care. Although emergency preparedness requirements are relatively new, they are critically important, and it is time for plaintiffs' rights to be expanded in this area.[234]

V. Conclusion

The need for effective emergency preparedness in nursing homes is becoming increasingly critical as the population ages and the incidences of natural disasters increase. National legislation, such as CMS's emergency preparedness requirements, is futile when nursing homes can get away with few to no consequences for ubiquitous violations. To meaningfully create change within nursing homes,

231. *Nursing Home Enforcement*, CMS, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationEnforcement/Nursing-Home-Enforcement (last modified Feb. 11, 2010, 06:24 PM) ("The SSA requires any nursing home that does not achieve substantial compliance with the Federal requirements within six months be terminated from participation in Medicare and/or Medicaid.").

232. *See* Slade, *supra* note 164, at 234.

233. *Id.* ("One issue in assigning liability to the health care provider may be that making a decision about whether a particular patient should be evacuated is not one that commonly needs to be made. Any sort of common occupational standards or practices, therefore, cannot readily determine the standard of care. Additionally, the decision about what is best for the patient may be an extremely difficult one to make because so many factors outside of the patient's health are implicated.").

234. *See id.* at 235 ("Emergency preparedness is a relatively new and emerging area of the law. Going forward, the question will be not only whether the evacuation of hospitals is properly classified as medical malpractice, but whether a substantial reason exists to limit plaintiffs' rights in this area.").

federal and state public health agencies need to work with facilities and local first responders to coordinate a uniform plan. Moreover, the federal government needs to take a proactive approach by providing federal funds for enforcing emergency preparedness requirements. Vulnerable, medically frail elderly and nursing home residents should not be left helpless by inadequate nursing home disaster plans, limited resources, and insufficient help from federal, state, and local emergency responders.[235] This major issue needs to be adequately addressed before the next catastrophe strikes.[236]

235. Kathryn Hyer et. al., *Helping Nursing Homes Prepare For Disasters*, 29 HEALTH AFF. 1961, 1962 (Oct. 2010).

236. *Id.*