

PROMOTING ELDER JUSTICE: A CALL FOR REFORM
HEARING BEFORE THE U.S. SENATE COMMITTEE ON FINANCE

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Chairman Grassley, Ranking Member Wyden, and distinguished Members of the Committee, thank you for holding this important hearing. My name is Lori Smetanka, and I am the Executive Director of the National Consumer Voice for Quality Long-Term Care, a national advocacy organization representing individuals living in long-term care facilities and their families. I am testifying today on behalf of my own organization, the membership of which includes state and local advocacy organizations, ombudsmen, residents of nursing homes and their families; and also on behalf of partner advocacy organizations, the Long Term Care Community Coalition, and California Advocates for Nursing Home Reform.

Under federal law, every nursing home must provide residents with services that help attain and maintain their highest practicable physical, mental, and psychosocial well-being. However, with great dismay, reports continue to indicate that too many nursing homes fail to meet minimum standards of care that they voluntarily agreed to follow as a requirement of participating in the Medicare and Medicaid programs. Reports, such as the ones identified by the Office of the Inspector General and the Government Accountability Office in the first panel show us that all nursing home residents need greater protections to ensure their quality of care and quality of life.

Sadly, the failure to protect and expand residents' rights and protections means that the stories of Patricia Blank and Maya Fischer, who were the victims of abuse and neglect, are not unique. My colleagues and I communicate daily with residents, family members, citizen advocates, and long-term care ombudsmen who see and experience the failures of the systems designed to protect residents.

The National Consumer Voice for Quality Long-Term Care (formerly NCCNHR) is a 501(c)(3) nonprofit membership organization founded in 1975 by Elma L. Holder that advocates for quality care and quality of life for consumers in all long-term-care settings.

We need greater accountability for the billions of public dollars that annually go to nursing facilities and which are intended to provide care and services for some of our country's most vulnerable individuals.

We can do better, and today I offer recommendations in the following areas.

REQUIRE STANDARDS FOR A SUFFICIENT, WELL-TRAINED, WELL-SUPERVISED WORKFORCE

A primary factor for ensuring that residents receive good care, and that will go a long way in the prevention of abuse and neglect, is to ensure that nursing homes have adequate numbers of competent staff. Studies have established the relationship between staffing levels and quality of care. When there is not enough well-trained and well-supervised staff, residents suffer. They experience painful pressure ulcers, malnutrition, dehydration, infections, preventable hospitalization, injuries, and more. Severe lack of staff, when combined with stress and burnout, are factors that can lead to neglect and abuse.¹

Federal law requires nursing facilities to have a Registered Nurse on duty eight consecutive hours every day, licensed nurses 24 hours a day, and sufficient nursing staff.² "Sufficient staff," however, is vague and ambiguous. Without a specific definition of "sufficient," in terms of actual numbers of staff, the facility itself decides what is sufficient, without having to demonstrate any reason for that determination. Studies^{3 4} show that 4.1 hours per resident day of care is the minimum staffing ratio necessary to prevent common quality problems. Yet most facilities do not meet that standard.

The payroll-based staffing data which CMS collects, show that staffing levels are lower than previously self-reported by nursing facilities⁵, and an analysis of this data recently reported in *Health Affairs*, shows that "the majority of days, nursing home staffing levels are below what the CMS expects."⁶ The findings further indicated that nursing homes fail to properly staff registered nurses, as well as fail to maintain staffing levels on evenings and weekends. Additionally, the data showed what residents and families have been telling us for years, that staffing levels increased only in anticipation of the annual surveys.⁷

The 2016 Final Rule on Requirements of Participation for Long-Term Care Facilities, included provisions that took positive steps toward improving staffing. The 2016 Final Rule (1) required

¹ Catherine Hawes, Ph.D. Elder Abuse in Residential Long-Term Care Settings: What Is Known and What Information Is Needed? National Academy of Sciences 2003.

² 42 USC 1395i-3; 42 USC 1396r

³ Abt Associates for CMS, "Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes." December 2001

⁴ Edelman, T., Nurse Staffing Deficiencies in Nursing Facilities: Rarely Cited, Seldom Sanctioned, CMA Report, January 10, 2019

⁵ Jordan Rau, 'Like a Ghost Town': Erratic Nursing Home Staffing Revealed Through New Records, Kaiser Health News, July 13, 2018.

⁶ Fangli Geng, David G. Stevenson, and David C. Grabowski, "Daily Nursing Home Staffing Levels Highly Variable, Often Below CMS Expectations," *Health Affairs* 38, N. 7 (2019): 195-1100.

⁷ Id.

staff to have “appropriate competencies and skill sets” to care for the residents living in the facility; (2) required training around issues such as abuse prevention and dementia care; and (3) required an annual Facility Assessment which mandated nursing homes to assess necessary staffing needs for their facility by taking into consideration the number, acuity, and diagnoses of its resident population.⁸ Here, for the first time, would be a way to require providers to think about what would be “sufficient” and to have documentation and reasons that regulators could use to hold facilities accountable. Last week, however, in its effort to “reduce the burden on providers,”⁹ CMS issued a proposed rule to reduce the frequency of the Facility Assessment to every two years.¹⁰ Reducing the frequency of this assessment is dangerous.

We recommend that Congress establish and enforce minimum requirements for sufficient numbers of direct care nursing staff, including that a registered nurse be on-site 24 hours per day.

We are aware of the arguments providers present as reasons for not hiring more staff. They have been making these arguments for decades - that the pool of workers is shrinking, and they do not have the funds to hire. However, there are other reasons that we have not made more progress in improving staffing levels and nursing home quality. While trying to control costs, Medicare does not conduct financial audits and has no limit on administrative costs and profits. Consequently, the Medicare Payment Advisory Commission (MedPAC) reports that Medicare margins have exceeded 10% for 18 consecutive years.¹¹ Under current federal and state payment systems, nursing homes are able to make choices on how to allocate their resources with few regulatory restrictions. In 2010, for example, California nursing homes spent only 36% of total revenues (including Medicare and Medicaid) on staffing and over 20% on administration and profits.¹² Ultimately, without more information about where the public’s reimbursement dollars are going, we should not let providers off the hook.

ESTABLISH STANDARDS AND OVERSIGHT FOR FACILITY OWNERSHIP AND OPERATION, AND EXPAND ACCOUNTABILITY TO THE CORPORATE LEVEL

There have been significant changes in the ownership and management of nursing homes, with an increasing number of nursing facilities part of a multi-facility or corporate structure, and an increase in private equity ownership. Division of ownership and management is occurring among numerous affiliated entities that derive profits, but who are not responsible for the quality of care. Further, many of the decisions that affect care, including operational budgets

⁸ 42 CFR §483.70(e)

⁹ 84 Fed. Reg., 34737 (Jul. 18, 2019). The 32-page document in the Federal Register uses the word “burden” or “burdensome” 102 times, describing burdens on facilities

¹⁰ 84 Fed.Reg. 34737, 34745 (Jul.18, 2019)

¹¹ Medicare Payment Advisory Commission, *Report to the Congress: Medicare Payment Policy*, p. 193 (Mar. 2019), http://medpac.gov/docs/default-source/reports/mar19_medpac_entirereport_sec_rev.pdf?sfvrsn=0.

¹² Harrington, Charlene, John F. Schnelle, Margaret McGregor, and Sandra F. Simmons. The Need for Higher Minimum Staffing Standards in U.S. Nursing Homes, *Health Services Insights*. 2016; 9:13-19.

and staffing levels, are made at the corporate level, yet CMS oversight is limited to individual facilities.

Currently no meaningful federal criteria exist for determining who is eligible to receive Medicare and Medicaid certification, with CMS largely relying on state licensure processes. In many states, there is no evaluation of an entity's financial or management capacity to successfully operate these facilities and provide quality care.

The collapse of Skyline Healthcare in spring 2018 whereby the company became financially insolvent and essentially abandoned nursing homes it owned or managed across eight states, left states to step in and assume facility operations through receivership in order to make sure the residents received food and care. Thousands of residents and facility staff have been affected, suffering through poor living and working conditions, facing loss of home and jobs as many of the facilities are closing, some in communities where alternative options are limited or nonexistent. We are hearing of residents being moved hundreds of miles from their families and friends, some even to different states.

We recommend that (1) CMS be given explicit statutory authority to hold corporations accountable when patterns of poor care are identified across their facilities; (2) Congress hold hearings on these changing patterns of ownership and management and the implications for effective federal oversight; (3) Minimum criteria be established as a condition of Medicare and Medicaid certification for assuming ownership or management of a nursing home, including criteria for denying or revoking certification; and (4) Federal law explicitly require that owners/operators that fail to comply with nursing home closure requirements be excluded from participation in Medicare and Medicaid for a specified period of years.

We further recommend that Congress (1) improve financial accountability through auditing of Medicare cost reports; (2) require transparency through detailed financial reporting of related-party companies and owners; and (3) enact a medical loss ratio that limits administrative costs and profits.

IMPLEMENT, ENFORCE AND PREVENT THE ROLLBACK OF STANDARDS

Nearly three decades after passage of the Nursing Home Reform Act and implementation of corresponding regulations, there continues to be inadequate and uneven oversight and enforcement of standards. Maintaining a strong oversight and enforcement system is a key factor in preventing and addressing abuse and neglect in nursing facilities.

State Survey & Certification Agencies, responsible for conducting annual surveys, complaint investigations, and monitoring compliance, are under-staffed and under-funded. The lack of resources appears to hamper their ability do more timely complaint investigations and hire enough staff to carry out the necessary oversight and follow up.

Examples of inadequate nursing home oversight include low complaint substantiation rates¹³ ¹⁴ and findings of harm in less than 5% of deficiency citations.¹⁵ Enforcement has been further weakened by policy changes that CMS has implemented. One of the most significant examples is making per instance CMPs the recommended remedy rather than per day fines in all but a few limited circumstances. The result is generally lower penalties imposed for noncompliance. This change is counterproductive. The threat of fines, high enough to be more than the “cost of doing business,” is a critical deterrent to abuse and substandard care, particularly when they are large enough to impact a facility’s actions. Yet policy revisions are already having an effect: the average fine is now \$28,405 compared to \$41,260 in 2016.¹⁶

Further, the recent report on Special Focus Facilities released by Committee Members, Senators Casey and Toomey¹⁷, has drawn important attention to those nursing facilities with persistent care problems. Release of the list of candidates for the Special Focus Facility program is important for consumers seeking information about long-term care facilities, and CMS has agreed to release the candidate list moving forward.¹⁸ The list needs to be posted in a location, such as Nursing Home Compare, that is regularly visited by and easily accessible to consumers, and candidates should be designated with an icon on Nursing Home Compare. The Special Focus Facility program, however, has failed to live up to expectations that with intense monitoring and enforcement, the poorest performers would achieve and remain in compliance. Many facilities never “graduate” from the program, or they quickly fall back into non-compliance when they leave the program.¹⁹

Preventing persistent care problems and yo-yo compliance is a primary goal of the federal enforcement system. Increased efforts to implement the enforcement system are necessary, particularly related to accurately citing deficiencies and imposing appropriate penalties for noncompliance.

Strong, resident focused regulatory standards are critical to addressing and preventing poor care. The issuance last week by CMS of final rules allowing pre-dispute arbitration and

¹³ One-third of immediate jeopardy and high priority complaints are substantiated by state survey agencies. Office of Inspector General, *A Few States Fell Short in Timely Investigation of the Most Serious Nursing Home Complaints: 2011-2015*, HHS OIG Data Brief, September 2017, OEI-01-16-00330.

¹⁴ GAO, *Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, GAO-08-517 (May 9, 2008); GAO, *Addressing the Factors Underlying Understatement of Serious Care Problems Requires Sustained CMS and State Commitment*, GAO-10-70 (Nov. 24, 2009); GAO, *Some Improvements Seen in Understatement of Serious Deficiencies, but Implications for the Longer-Term Trend Are Unclear*, GAO-10-434R (Apr 10, 2010).

¹⁵ CMS, *Nursing Home Data Compendium 2015 Edition*, Figure 2.2.e. Percentage Distribution of Scope and Severity of Health Deficiencies: United States, 2014, p. 48 https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/nursinghomedatacompendium_508-2015.pdf.

¹⁶ Jordan Rau. Trump Administration Cuts the Size Of Fines For Health Violations In Nursing Homes. Kaiser Health News. March 15, 2019.

¹⁷ U.S. Senator Bob Casey, U.S. Senator Pat Toomey, *Families’ and Residents’ Right to Know: Uncovering Poor Care in America’s Nursing Homes*, June 2019

¹⁸ <https://www.cms.gov/newsroom/press-releases/cms-statement-quality-care-americas-nursing-home-facilities>

¹⁹ “Special Report – ‘Graduates’ from the Special Focus Facility Program Provide Poor Care” (CMA Alert, Jun 20, 2019), <https://www.medicareadvocacy.org/graduates-from-the-special-focus-facility-program-provided-poor-care/>

proposing rollbacks to the revised nursing home rules published in 2016 are steps in the wrong direction. These new rules provide less protections for residents and less accountability for nursing facilities by, among other things, weakening standards relating to infection prevention, use of antipsychotic medications, and responding to resident and family grievances.²⁰

We recommend that Congress take immediate action to improve the federal oversight and enforcement system, including (1) appropriating and allocating additional funding for the Survey & Certification system; (2) incorporating into statute important provisions from the 2016 nursing facility regulation, such as a requirement for an annual facility assessment; a ban on pre-dispute arbitration; time frames for reporting abuse or neglect to the state survey agency; and grievance protections; (3) expanding and strengthening the Special Focus Facility program by specifying graduation rules for SFFs, requiring CMS to identify SFF candidates each month on Nursing Home Compare, and requiring that CMS impose only per day, not per instance, CMPs for SFFs.

We additionally recommend that Congress enact legislation, similar to the bipartisan Improving Dementia Care Treatment in Older Adults Act proposed by Senator Grassley in 2012 in response to the OIG's findings of widespread off-label use of antipsychotic drugs in nursing homes; if enacted, the bill would have required residents and their designated agents to be informed of the possible risks and side effects of antipsychotics, as well as alternative treatments. Today, most residents and families are still unaware of the serious medical and social side effects and risk of death from psychotropic drugs, which have FDA Black Box warnings against use to treat elderly persons with dementia and were named in a Senate report more than 40 years ago as chemical restraints. Legislation should require facilities to secure informed consent that includes an explanation of the use of the drug; medical reason for which it is prescribed; non-pharmacologic alternatives; side effects and risks; whether the drug is prescribed for off-label purposes; proposed duration, dose and frequency, and potential interactions with other drugs.

INCREASE TRANSPARENCY OF INFORMATION

Choosing a long-term care facility is a decision that residents and families often make quickly and in a time of stress, such as when a family member is hospitalized but unable to go directly home. The rushed nature of the decision makes it especially important for the information on the federal website Nursing Home Compare to be reliable, accessible, as comprehensive as possible, and easily understandable. Families can return to Nursing Home Compare after their relative's admission to help them in monitoring and overseeing care. CMS has made gradual, important improvements in the information presented on Nursing Home Compare and used to determine a facility's star rating. An important example is the addition of staffing information from auditable data in the Payroll Based Journal. Additional steps can be taken to improve the reliability and usefulness of Nursing Home Compare and the Five Star Rating System.

We recommend that Congress direct CMS to: (1) Enhance the data used to determine the staffing star rating by including elements such as turnover of staff, and usage of agency staff; (2)

²⁰ 84 Fed.Reg. 34787-34768 (Jul 18, 2019)

eliminate the inclusion of self-reported Quality Measures in the star rating calculations; (3) Add an icon designating facilities with deficiencies for abuse deficiencies; and (4) Add an icon showing facilities that have a generator in case of natural disaster or emergency.

STRENGTHEN AND FUND ELDER JUSTICE PROVISIONS

Reauthorization and full implementation of the Elder Justice Act is an important and impactful step that Congress can take to address the abuse of elders in this country. Numerous GAO and OIG reports, including those highlighted today at this hearing, show the need for continued federal and state action to strengthen elder abuse reporting, prevention, and response. The failure of appropriate reporting of abuse or suspicions of abuse is unacceptable. Failures to report prolong the victimization and suffering of those being abused and put at significant risk other residents who are in contact with the abuser.

We recommend that Congress take the following actions: (1) add state surveyors to the list of covered individuals who are required to report suspicion of abuse or neglect to law enforcement; (2) direct CMS to fully enforce the Affordable Care Act's requirement for individuals to report possible criminal acts to law enforcement; (3) impose civil money penalties against the nursing home or other licensed entity for failure to report abuse or suspicions of a crime; (4) increase funding for the Long-Term Care Ombudsman Program to enhance the program's capacity to assist in abuse prevention and advocate for residents who have been victimized.

Additionally, better screening of individuals seeking to work in a long-term care facility through a federal background check system is necessary to screen out those individuals with criminal records that pose a danger to residents' person or property. The National Background Check Program (NBCP), which was established as a voluntary program to help states implement and improve employee background check systems, and has, to date, screened out nearly 80,000 individuals²¹ with a history of patient abuse or a violent criminal background has the framework that can be built upon if states were required to implement its provisions.

We recommend that Congress amend the National Background Check Program and direct CMS to provide funding to the remaining states that have not drawn down funds and implemented the system. All states, those newly receiving funding and those that have received funding but did not fully implement the program's requirements, must be held accountable for fulfilling the requirements in the Act. In addition, by 2022, Congress should require background checks to be done by all SNFs/NFs certified by Medicare and Medicaid as a Requirement of Participation.

CONCLUSION

²¹ OIG, National Background Check Program for Long-Term Care Providers: Assessment of State Programs Concluded Between 2013 and 2016, OIE-07-16-00160, Apr 22, 2019

As previously mentioned, just last week, CMS took steps to further weaken the oversight system and residents' rights with the publication of new final rules allowing pre-dispute arbitration²² and proposing ²³ rollbacks to the revised nursing home rules published in 2016.²⁴

The 2016 revised federal nursing home regulations, developed over a four-year process of listening to consumers, nursing home providers, health care experts, and the public through formal notice and comment,²⁵ included important new protections for vulnerable individuals and requirements to reduce the likelihood of resident harm, such as robust requirements for staff training and prevention; reporting and responding to abuse, neglect and exploitation; banning forced arbitration; protections for the use of antipsychotic and psychotropic drugs; and requiring an emphasis on person-centered care planning and provision of care.

In a time of increased attention on resident abuse and neglect, CMS's decision to rollback resident rights and protections in favor of reducing burdens is tone-deaf. These new final and proposed rules published last week are steps in the wrong direction. The needs of nursing home residents are significant. Residents' acuity level has increased, and the majority have some form of dementia. The increased prevalence of physical and cognitive impairments makes residents more at risk of abuse and neglect, as evidenced by the 2017 CNN investigative report that exposed widespread sexual assault in nursing homes across the country, including the rape of Maya Fischer's mother.²⁶ In addition, poor care, abuse, and neglect continue to be a problem nationwide as documented by studies and reports.²⁷

We can do better.

Thank you for holding this important hearing.

²² 84 Fed. Reg. 34718 (Jul. 18, 2019).

²³ 84 Fed. Reg. 34737 (Jul. 18, 2019).

²⁴ 81 Fed. Reg. 68688 (Oct. 4, 2016).

²⁵ Federal Register, Vol 81, No. 192, October 4, 2016, 42 CFR Parts 405, 431, 447, 482, 483, 485, 488, and 489

²⁶ Blake Ellis and Melanie Hicken. Sick, Dying and Raped in America's Nursing Homes. CNN Reports. February 22, 2017.

²⁷ *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries* (Feb. 2014) OEI-06-11-00370. *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 2009-2015*. Prepared by: Charlene Harrington, Ph.D. Helen Carrillo, M.S. University of California San Francisco and Rachel Garfield Kaiser Family Foundation