



September 10, 2018

The Honorable Gregg Harper  
Chair  
Subcommittee on Oversight and  
Investigations  
Energy and Commerce Committee  
U.S. House of Representatives

The Honorable Diana DeGette  
Ranking Member  
Subcommittee on Oversight and  
Investigations  
Energy and Commerce Committee  
U.S. House of Representatives

Dear Reps. Harper and DeGette:

On behalf of LeadingAge, which represents approximately two thousand not-for-profit nursing homes throughout the country, I would like to discuss the issues raised during the subcommittee's September 6 hearing on enforcement of federal nursing home standards.

Quality the public can trust is the fundamental mission of LeadingAge and its member nursing homes. Our members have pioneered innovations in care and services that have made a major difference in the lives of nursing home residents and their families. LeadingAge and its members have developed and pursued numerous initiatives that continue to move the field forward in quality of care and quality of life for residents.

We and our members have undertaken these initiatives because of our commitment to the highest quality of care and quality of life for nursing home residents. It is simply the right thing to do for our residents and clients, their families, and the staff who care for them.

We make no apology or excuses for poor quality nursing home care. However, before the subcommittee considers any new nursing home regulatory actions, we would urge your recognition of solutions that already have been put into place and progress that has taken place in our field.

#### 1. Disaster preparedness

The announcement of the September 6 hearing referred to the residents who died at the Hollywood Hills nursing home in Florida last year in the aftermath of Hurricane Irma. This was a preventable tragedy that never should have happened.

But please recognize that the Centers for Medicare and Medicaid Services (CMS) subsequently finalized a requirement that all nursing homes have disaster preparedness plans in place. The regulation is very detailed as to the contents of these plans, which must be prepared to address all hazards, and as to how staff at every level must be trained to carry out the plan in the event of an emergency. A nursing home's disaster preparedness plan is one of the items surveyors review on the home's annual survey and any deficiency in the plan is subject to the same fines and other remedies that federal law provides for other deficiencies.

This kind of disaster preparedness planning necessarily involves collaboration with public safety authorities in the area. In putting their plans into place, our nursing home members reported to us that it often was difficult to gain the cooperation of the state and local agencies a nursing home would need to work with to protect or transport residents in the event of a disaster. Nursing homes, and for that matter senior housing and assisted living facilities must be given the same priority in restoration of utility and other services that is given to hospitals in order to ensure the safety and security of the residents.

## 2. Reporting of staffing levels

The September 6 hearing also questioned alleged “discrepancies” between the way nursing homes reported staffing levels in the past and the way staffing levels now are reported under the payroll-based journal (PBJ) system CMS has implemented.

Prior to the PBJ roll-out, staffing data was self-reported by nursing homes. This process was routinely criticized as leading to inaccuracies, inflated numbers, and other gaming of the system.

Staffing is a key component of quality nursing home care and the public must have accurate information on which to base decisions about long-term care. LeadingAge advocated for years for a more accurate method of reporting staffing levels based on payroll data. Congress finally enacted this requirement as part of the Affordable Care Act. The PBJ system CMS has implemented carries out this requirement.

It was to be expected that staffing levels reported under the old and new systems would differ. PBJ was designed to provide a more accurate picture of a nursing home’s actual staffing. As with any new computer system, there have been glitches and errors as nursing home staff learn how to input data and agency staff to get it posted. Some of our member homes that are fully staffed have seen information on-line that they have no nurses, which is far from the actual case.

But we expect that as these technical issues are resolved, subsequent reporting periods under PBJ will show more continuity in the levels of staffing nursing homes report. PBJ is not the problem, it is the solution to the previous problems of inaccurate reporting. It should be allowed to continue in effect.

Our state partner, LeadingAge New York, has done a detailed analysis of the differences in the two systems of reporting staffing levels and why the data reported by the two systems are difficult to compare. I am attaching this document for your review and consideration.

## 3. Adequacy of state survey process

The Nursing Home Reform Act of 1987 established federal standards for nursing home care but gave states the primary responsibility for enforcing them. Each state has its own survey agency responsible for the annual inspection (survey) process, citation of deficiencies in care, imposition

of fines and other “remedies”, and oversight of nursing homes’ plans of correction. CMS, in turn, oversees the enforcement efforts of the states.

Subcommittee members have noted the longstanding criticism of this process by the Government Accountability Office (GAO), the Health and Human Services Office of Inspector General (OIG), and other watchdog agencies. Report after report has detailed the unevenness of survey findings and enforcement actions taken by states. In some states, relatively minor deficiencies in care result in heavy regulatory penalties against a nursing home, while nursing homes in other states may appear better in comparison, even though the actual quality of care may not be as good. We would just note that in our members’ experience, state and federal regulatory agencies seldom fail to require corrections of deficiencies in care.

We would recommend that your subcommittee consider that unevenness in state agencies’ performance reflects unevenness in the resources states are willing to commit to their survey programs. The abysmal inadequacy of Medicaid reimbursement for nursing home care in most states is probably a topic for another day. But the subcommittee needs to recognize that just as states for the most part are not willing to provide sufficient Medicaid reimbursement to cover the costs of high quality nursing home care, states also are reluctant to spend what is necessary for effective enforcement of quality standards.

State survey agencies generally are responsible for overseeing other healthcare sectors as well as nursing homes. With inadequate resources, they often cannot recruit and retain the most knowledgeable staff to survey nursing homes. Staff turnover at these agencies often is rampant, which means that state agencies may have inadequate staff at any one time to cover all of the oversight activities for which the agency is responsible. In addition, agency staff turnover means that those responsible for surveying nursing homes may have neither the training nor the experience to know what they are seeing and whether conditions comply with federal standards and requirements.

We urge the subcommittee and CMS to make a state’s nursing home Medicaid reimbursement levels and the funding of its survey agency part of the annual CMS approval process for state Medicaid plans. CMS should determine whether reimbursement rates are sufficient to cover staffing and other essential costs of complying with federal quality standards and whether the state is investing sufficient resources in its survey agency. Approval of a state’s Medicaid plan should be contingent on these factors.

#### 4. Requirements of participation Phase II

Shortly before President Obama left office, CMS issued a comprehensive overhaul of the requirements of participation in Medicare and Medicaid for nursing homes (ROPs). Recognizing that the new system would require substantial change in nursing home operations, the ROPs were scheduled to take effect in three phases, with the easiest ones being rolled out soon after the final rule was promulgated.

The second phase of the new system, ROPs II, went into effect November 28, 2017. This phase contained several new requirements, including a facility-wide assessment of a nursing home's ability to meet the care needs of each individual resident, infection control protocols, and staff training.

We at LeadingAge and our state partners put extensive efforts into helping our nursing home members prepare for ROPs II. However, as the effective date drew closer, it was apparent that not only nursing homes but also state survey agencies were still on a steep learning curve on the new requirements.

CMS therefore issued a moratorium on the imposition of civil monetary penalties for citations of deficiencies cited under ROPs II. The moratorium is temporary, lasting 18 months.

This moratorium has been misunderstood as a free pass for nursing homes to flout federal quality standards with impunity. This misconception has no basis in fact. Deficiencies cited under the hundreds of other requirements of participation to which nursing homes are subject are still fully punishable by civil monetary penalties. While nursing homes are not fined for deficiencies cited under ROPs II, these deficiencies are still subject to other remedies established by the Nursing Home Reform Act, including directed plans of correction and technical assistance with directed training.

## Conclusion

A comment by one of our nursing home members from Kansas best expresses the commitment our members generally make to the people they serve and the people who provide those services. Mike Smith, CEO of Wheat State Manor, writes:

I have two intentions with regard to our business, each of which supersedes any quality metrics that may be imposed as a way to demonstrate our worthiness to be fairly reimbursed with public funds.

1. I want our residents to experience love when they are with us. Love is taking people the way they are, and the way they aren't. Love is doing for others without expectation of payment [gratitude, thanks, recognition or other forms of emotional debt]. I want "Honor your father and mother" to be on the lips and hearts of our staff in such a way that the residents experience being honored. To be clear, all the things we do for them to support their condition and enable them to live with dignity until God calls them home.
2. I want the people who work here to know, at the end of every day, that their being here mattered. They matter to each other, the residents, the families and the community. I want them to experience their own power and self-worth in their conscious choices to set themselves aside for the sake of others.

We urge the subcommittee to recognize that nursing homes generally, not only LeadingAge's members, do their best to provide the highest quality of care and services to their residents. Recognize that new regulations beyond those already in place are not needed. Recognize that achieving high quality requires a commitment of federal and state resources into the provision of care and the agencies called upon to enforce standards. Recognize that substantial progress has been achieved in the decades since the Nursing Home Reform Act was enacted. Recognize that a continual drumbeat of negativity about nursing homes and the people who work in them makes it ever harder for nursing homes to attract and retain capable and talented people.

LeadingAge has collaborated with CMS and other agencies and policymakers on quality initiatives to move the nursing home field forward in quality. For example, in the last five years the inappropriate use of antipsychotic medications in nursing homes has fallen off dramatically. Use of physical restraints, formerly all too common, has become virtually a thing of the past.

The credit for these and other improvements should be given to nursing homes. They are the ones who have done the hard work of figuring out better ways to provide care, educating staff, and changing organizational operations. They have done it not out of fear of punishment but out of their commitment to the best possible quality of care and quality of life for the people they serve. Their efforts should be recognized and rewarded.

As always, LeadingAge appreciates your consideration and we look forward to working with you on these issues that matter so much to our nursing home members and the people they serve.

Sincerely,

A handwritten signature in black ink that reads "Katie Smith Sloan". The signature is written in a cursive, flowing style.

Katie Smith Sloan  
President and CEO  
LeadingAge