December 6, 2019

The Honorable Charles Grassley, Chair
The Honorable Ron Wyden, Ranking Member
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Grassley and Wyden:

I know you are both deeply concerned about the 1.4 million Americans living in nursing homes. We have reached a confluence of public policies that threatens the survival of these important providers, truly the "safety net" for people who need long-term care. A radical change in direction is essential if nursing homes are to be able to carry out their mission of competent and compassionate care for a rapidly aging population.

LeadingAge represents approximately 2,000 non-profit nursing homes in 38 states. About 75% of our nursing home members had their origins in faith-based communities; others were established by fraternal or cultural organizations. Some have served their communities for over 100 years.

We and our members understand that no one aspires to live in a nursing home. All of us would prefer to live independently until we die. But with increasing longevity, changes in family dynamics, geographic mobility, and other factors, a good nursing home often becomes the best place for people to receive the care and services they need. A typical nursing home resident is aged 85 or over, unmarried, with dementia and/or other incapacitating chronic conditions. Half of nursing home residents have no children or other informal caregivers available, others have care needs that exceed their families' ability to provide for.

Nursing home closures

Nursing homes are essential, and their continued health and survival should concern us all. Our sector is struggling under current financing and regulatory systems. Without a public policy turnaround, these caregivers of last resort will no longer be able to provide a safety net for hundreds of thousands of older people and their families.

Since June 2015, over 549 nursing homes have closed. More than 40% of the nursing homes that closed since 2015 had four- or five-star ratings on the Centers for Medicare and Medicaid Services (CMS) Nursing Home Compare rating system. Many of the ones we are losing are the good ones.

Rural nursing homes are closing at about the same rate as urban and suburban nursing homes, but their closures have more impact in rural states where there are few alternative long-term care providers. For example, the *New York Times* reported earlier this year on the impact of closures of rural nursing homes in South Dakota. In addition to the impact on residents, who may have to find care in a nursing home much farther from their families and friends, closures of rural nursing homes can hurt communities where they were a large, stable employer.

CliftonLarsenAllen (CLA)'s *34th Skilled Nursing Facility Costs Comparison and Industry Trends Report*, issued on October 10, found that for the first time since CLA began collecting this data, "the median operating margin has dipped below zero (and currently sits at -0.1%)." According to the report, financial trends are leaving nursing homes struggling to generate enough cash flow to cover operations, forcing them to borrow more to meet basic expenses, and as a result having few resources to reinvest in their organizations. CLA noted the number of news reports during this past year on closures, receiverships, and bankruptcies, "particularly in states where Medicaid rates are among the lowest in the country."

Nursing home financing

The relationship between Medicaid payment rates and nursing homes' ability to continue providing high quality care is too often ignored. Medicare pays for less than a quarter of nursing home services, and private insurance covers about ten percent. Medicaid is the primary source of payment for nursing home care, covering 62% of services. In its March 2018 report, the Medicare Payment Advisory Commission (MedPAC) stated, "Medicare payments . . . effectively subsidize payments from other payers, most notably Medicaid." (page 228).

LeadingAge has non-profit member nursing homes that maintain high quality services despite the challenges of Medicaid under-reimbursement. But Medicaid shortfalls can leave nursing homes unable to offer the salaries and benefits available in other settings. Recruitment and retention of well-qualified staff are critical to nursing homes' ability to provide high-quality care.

LeadingAge would like to see more attention paid to this issue at the federal level, both by Congress and by CMS. Federal legislators and regulators cannot continue turning a blind eye to the dire payment shortfalls nursing homes experience under most states' Medicaid programs. We would like to see the Government Accountability Office (GAO) examine state and federal payment issues and make recommendations on better federal oversight of reimbursement rates to enable nursing homes to meet the actual costs of care.

Federal/state nursing home oversight under OBRA '87

A reexamination of the federal-state nursing home regulatory system is also in order. LeadingAge collaborated with other stakeholders in the development of the Nursing Home Reform Act when it was incorporated into the Omnibus Budget Reconciliation Act (OBRA) of 1987. Our members have led the nursing home field in innovations that have elevated standards of care. Much has been accomplished in our field since OBRA's enactment, including the virtual disappearance of physical restraints, substantial reduction in the inappropriate use of antipsychotic drugs, and growing adoption of person-centered care practices and culture change.

Yet these accomplishments seldom get any credit or recognition. The prevailing assumption seems to be that if nursing homes work hard to provide high quality care and follow all the rules, they will not have anything to fear from the oversight system. If only that were the case.

LeadingAge absolutely does not apologize for or defend bad care. However, the continued emphasis on punishment does not appear to be working to achieve the kind of nursing home care all of us want to see. OBRA '87 has been in effect for more than 30 years, and over those decades has been "strengthened" administratively a number of times. Yet many of the requirements can be subjective and survey agencies' evaluation of compliance varies from state to state and region to region, as reported by watchdog agencies like GAO and the Office of Inspector General.

On October 23, the Centers for Medicare and Medicaid Services (CMS) began attaching a red "stop" icon to the Nursing Home Compare profiles of homes cited for abuse or potential abuse on their annual surveys. We at LeadingAge urge CMS to discontinue it.

Abuse and neglect must never be tolerated in any setting. We support transparent information to help consumers make the best choice possible when selecting nursing home care for loved ones. LeadingAge has endorsed the Elder Justice Act, which addresses abuse and neglect of seniors wherever they call home, since it was first introduced in 2000.

But a LeadingAge Minnesota analysis of state (Minnesota) data over the past two years indicated that 12% of substantiated nursing home maltreatment reports fell into the abuse category. The vast majority of maltreatment instances were the result of unintentional harm, not deliberate actions intended to hurt or humiliate residents. While this should not minimize ***any*** instance of injury to a resident, the data demonstrate that we need a better way than the CMS icon to discern the difference.

Another counter-productive example is the certified nursing assistant (CNA) training lock-out that results when nursing homes are assessed civil monetary penalties (CMPs) exceeding a certain level, annually adjusted for inflation ($10,697 as of 2018), on their survey.

In addition to paying the fines imposed and fixing the deficiency, nursing homes in this situation automatically lose their authority to train new nursing assistants for two years, even if the deficiencies for which they are cited have nothing to do with their training programs or the nursing care they provide.

CNAs are the backbone of a nursing home's workforce. The loss of CNA training authority runs directly counter to a nursing home's ability to overcome problems with quality of care, and it exacerbates the steep workforce challenges the field faces. LeadingAge strongly supports S. 2993, the Ensuring Seniors Access to Quality Care Act. This measure, introduced by Sens. Warner and Scott, would restore a nursing home's training authority as soon as care deficiencies are corrected and other factors are met. In addition, the bill would allow nursing homes to access the National Practitioner Database, helping them to conduct effective background checks nationally on prospective employees.

More punishment undoubtedly creates the impression that something is being done about bad situations. The question, though, is whether more punishment, more requirements, more regulations, more fines will lead to further improvements in care, especially given the financial restrictions under which most nursing homes operate.

In our view, nursing homes already face sufficient regulation and punishment. Layering on more will not achieve what we all want to see; namely, every nursing home a suitable place for ourselves or our family members to live.

In the interest of the millions of Americans who need nursing home care now and those who will need it in the future, LeadingAge urges a review of the present oversight system and whether a change in approach might work better. Congress should obtain an evaluation of the current system's effectiveness and potential improvement by an objective, independent third party like the Health and Medicine Division of the National Academies of Science, formerly known as the Institutes of Medicine (IOM). Reports by the IOM on quality issues in nursing home care gave rise over 30 years ago to passage of the Nursing Home Reform Act/OBRA '87. While much as been accomplished in the decades since, quality issues remain at the same time that high-performing nursing homes are burdened by a highly prescriptive and antagonistic oversight system.

Congress should pass legislation to allow states to pursue alternative quality assurance measures on a demonstration basis to see if new approaches could be more effective than the current oversight system. Alternatives that could be tried:

- A collaborative, learning-oriented approach to oversight between regulatory agencies and providers. This approach has been followed in some states which have achieved high quality performance in some residential settings.

- Reduced penalties for self-reported deficiencies. Nowhere else in the health care field are providers punished for mistakes they themselves report to regulatory authorities. Punishment for self-reported deficiencies is a direct disincentive to bringing mistakes to light.

- Punishment should be reserved for nursing homes that consistently fail to achieve minimum standards of care. Penalties could be progressive and take into account not only the seriousness of a deficiency but also a nursing home's ability to pay.

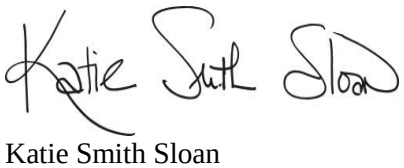
- Attention must be paid to the qualifications and expertise of surveyors. Many states underinvest in their survey agencies just as they under-reimburse their nursing homes. Survey agencies often have the same turnover challenges that nursing homes have, with more attractive job opportunities available elsewhere.

- States should be allowed to target oversight resources to nursing homes most in need of it. We do understand that over time, care could deteriorate in a nursing home that previously has performed well. However, a slightly longer survey cycle for high performers would incentivize compliance and enable state agencies to focus their attention on nursing homes that really need it. In fact, longer survey cycles now are effectively the case in some states because survey agencies cannot keep up with the cycle mandated by OBRA.

These and other alternatives could be considered by an objective third party and tried out on a limited basis in a few states, with evaluation as to whether new approaches might achieve better results.

Albert Einstein reportedly said, "The definition of insanity is doing the same thing over and over again and expecting a different result." This is where we are with the present nursing home oversight system. It is time for all of us – providers, consumers, policymakers, and other stakeholders – to break out of this cycle of blame and punishment and find alternative approaches that could actually result in high quality care in all of our nation's nursing homes. And to make sure that when we or a family member needs nursing home care, it will be available.

Sincerely,



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