

**Senate Finance Committee**

*Not Forgotten: Protecting Americans from Abuse and Neglect in Nursing Homes*

March 6, 2019

10:15 AM, 215 Dirksen

Purpose

*The purpose of this hearing was to shed light on systemic issues that allow substandard care and abuse in America's nursing home industry and help lead the way to reforms.*

Members Present

Chairman Grassley, Ranking Member Wyden, Scott, Stabenow, Hassan, Whitehouse, Lankford, Cardin, Casey, Daines, Warner, Portman, Cortez Masto, and Menendez

Witnesses

**Ms. Patricia Blank**, Daughter of Nursing Home Neglect Victim

**Ms. Maya Fischer**, Daughter of Nursing Home Abuse Victim

**Dr. David Grabowski**, Professor, Harvard Medical School

**Dr. David Gifford, MPH**, Senior Vice President, Quality and Regulatory Affairs, American Health Care Association

**Dr. Kate Goodrich**, Director and Chief Medical Officer, Center for Clinical Standards and Quality, Centers for Medicare & Medicaid Services

**Ms. Antoinette Bacon**, Associate Deputy General and National Elder Justice Coordinator United States Department of Justice

**Ms. Keesha Mitchell**, Section Chief, Health Care Fraud Section, Office of the Ohio Attorney General

Opening Statements

**Chairman Grassley** said that Congress has not taken action to protect elderly Americans. Nearly 1/3 of nursing home residents experience harm while under care, with over half of these instances being preventable. A significant portion of these cases involve sexual abuse, substandard care, and neglect. Congress must protect the most vulnerable citizens. He hopes to hear why some abuse and neglect cases are never reported even though it is required by law, to fix weaknesses in the 5 star rating system, and crack down on social media abuse.

**Ranking Member Wyden** said that this is an opportunity for the committee to find common ground. America's best nursing homes meet a high standard of care, but not all do. Seniors are among the most vulnerable populations. Seniors are exploited by nursing homes that are unsafe, understaffed, and uninterested in providing basic care. There are a few specific matters that need investigation. First, Medicaid cuts in the budget. Medicaid helps cover costs for 2 out of 3 seniors in nursing homes. Cuts will lead to nursing home closures, particularly in rural America. Second, the Administration and the Centers for Medicare and Medicaid Services (CMS) are moving backwards on regulations. In 2003, there were 20,000 complaints on nursing home neglect and abuse, but only a small fraction of cases are ever reported. 1/3 of Medicare beneficiaries are harmed within weeks of entering a nursing home. In 2016, basic safety rules were updated then rolled back by the

Trump Administration in 2017. No regulations exist to ensure nursing homes are prepared for natural disasters. Third, he shares Chairman Grassley's view that the rating system is flawed. The rating system is not reliable and needs accelerated fixes. This hearing is about senior's right to a dignified retirement.

**Chairman Grassley** reiterated this is a systemic problem unrelated to party politics.

### Testimony

**Ms. Blank** said her mother died of neglect in a nursing home. The family believed she was receiving good care. A report from the Department of Human Services revealed she drank very little, was fed every few weeks, and often cried out in pain. Ms. Blank thanked staff who do their job correctly and reporters who investigate abuse issues.

**Ms. Fischer** said her mother with Alzheimer's was raped in a nursing home. Residents previously complained of sexual misconduct by her mother's rapist. The Department of Health investigated the complaints, did nothing, and hid them.

**Mr. Grabowski** said a Senate Committee on Aging report from 1974 included similar issues currently being discussed. Nurses per residents are low, staff turnover is high, residents may develop new avoidable health issues, avoidable transfers of residents to emergency services is frequent, and the quality of life is inadequate. There are four reasons for persistent low quality. First, Medicaid reimbursement rates are lower than cost of care, which results in overall higher Medicaid spending when emergency services must step in. Second, existing regulations are not enforced. Current reports show gaps in oversight. Third, Certificate of Need regulations stifle innovation and modernization. Fourth, there is a lack of quality transparency. Tools from CMS lack important functions and are under-utilized. Overall, the Nursing Home sector is better but not well, and without action will be discussed for another 50 years.

**Dr. Gifford** said the quality of care in nursing homes has improved dramatically the past 7 years despite media coverage. Since 2012 HCA members have improved on many CMS standards, many related to neglect. There are three recommendations to improve care. First, recruiting and retaining staff via expanding federal loan forgiveness programs. Second, ensure that new hires have never engaged in abusive behavior by giving nursing homes easier access to the National Practitioner Data Bank maintained by the Health Resources and Services Administration (HRSA). Third, CMS should collect and post customer satisfaction ratings.

**Dr. Goodrich** said she appreciates the significant time and energy dedicated to this issue by the committee. Monitoring patient safety and quality of care requires coordinated effort between the government and states. A nursing home must be certified as meeting numerous requirements including those pertaining to health and safety to participate in Medicare and Medicaid. Compliance is verified through annual, unannounced, on-site surveys. To ensure greater consistency among state survey agencies, CMS recently implemented a computerized survey system. Swift action is taken when a serious violation

is found. In cases of serious injury, harm or death, that facility's participation agreement is terminated immediately. For deficiencies that do not constitute immediate jeopardy, they must be corrected within six months or they will be terminated from the program. Facilities are also required by law to report to adult protective services, law enforcement, and the state survey agencies. If a nursing home has failed to report or investigate abuse, CMS takes immediate action. In 2006, a nursing home was assessed a civil monetary penalty of almost \$800 million for placing residents in jeopardy by not investigating abuse. Nursing homes are expected to meet the basic standard of care at all times. To further protect residents, CMS updated the emergency preparedness requirements, including further staff training and emergency communication improvements. 98 percent of nursing homes have been surveyed under those new requirements, with all eventually meeting compliance. In 2016, CMS issued a final rule updating the requirements for nursing homes that reflected the advances in service delivery that have been made since 1991. Given the number of revisions, there is a phased-in approach for facilities to meet these requirements. Every nursing home is expected to keep its residents safe and provide high quality care. She is personally committed to elderly patients receiving safe and quality care.

**Ms. Bacon** said she has witnessed the outstanding work by agents and trial attorneys who investigated and prosecuted elder abuse. The Medicare Fraud Strike Force has charged nearly 4,000 defendants for over \$13 billion in fraud. Numerous cases have been brought against nursing homes under the False Claims Act for grossly substandard and medically unnecessary services. However, there is so much more work that needs to be done. The department is expanding its resources in every federal district to continue to meet challenges in multiple ways. First, experienced leadership, with senior department of justice officials assigned to lead elder justice effort. Second, increased internal collaboration to ensure all appropriate tools and paths are used to investigate, prosecute and prevent abuse. Third, expanding nationwide resources to work with state, local and tribal partners on the most pressing issues facing local communities. Fourth, supporting local law enforcement with free online training videos available to all law enforcement officers to identify and stop elder abuse. Five, expanding the DOJ's network by partnering with the FDA that culminated in the formation of an Elder Justice Coordinating Counsel working group to address rural issues. Sixth, assisting victims in a wider variety of issues than before. There is a disturbing trend in nursing home abuse that is exacerbated by the opioid crisis. Some nursing homes are abusing vulnerable patients by stealing residents' opioids or by overprescribing.

**Ms. Mitchell** said that all Medicaid Fraud Control Units (MFCUs) use a strike force team to investigate and prosecute jointly. This model is especially important in prosecuting neglect. She spoke of a case in Ohio, where seven facility employees and contractors were charged through the MFCU's investigation where it was discovered that a facility resident because employees falsified records and failed to provide adequate medical care. She spoke of another case where employees were convicted of neglect after a facility resident died after leaving the facility unsupervised. MFCUs' work is hampered by a number of factors. First, state surveyors must make timely referrals to the state's MFCU when abuse or neglect is suspected, and this must happen while they are touring the facility. Second, nursing homes

must generate and properly detail reports of patient abuse or neglect, or face meaningful penalties. Third, states must properly incentivize nursing homes to adequately staff their facilities to achieve quality care.

### Questions and Answers

**Chairman Grassley** asked Ms. Blank and Ms. Fischer what information was available to them at the time, and whether they would rely on the federal Nursing Home Compare or the five-star quality rating system. **Ms. Blank** said she did not. She chose a local nursing home with a highly-skilled administrator, but when he left, the quality went downhill. In her mother's case, the nursing home still has a five-star review, so she views it as inaccurate and untrustworthy. **Ms. Fischer** said she also did not use the Five-Star Quality Rating System; she was recommended the home by friends and family and did tours and talked to residents who lived there. She largely used word-of-mouth to make a decision. **Chairman Grassley** asked if the cases were reported to law enforcement and if so, what challenges, if any, did she face in the process. **Ms. Blank** did not report it to law enforcement, but she did talk to the Winnebago County Attorney and is in the process of pursuing criminal charges. **Ms. Fischer** said that in her case, one of the nurses reported it to the local police department, who came and arrested the perpetrator immediately. **Chairman Grassley** if they were contacted by the State Long Term Care Ombudsman. **Ms. Blank** and **Ms. Fischer** said no. **Chairman Grassley** asked for suggestions to families who are coping with rural nursing home closures, and the associated lengthy travel and potentially lower quality of care. **Mr. Grabowski** referred to a recent New York Times article that highlighted the importance of regulatory oversight, the importance of rural nursing homes and the prevalence of a substandard quality of care. He suggested thinking about additional regulatory oversight, with payment and regulations being ways to spur better innovations in that market. **Dr. Gifford** agreed with this assessment. Many people are moving from rural to urban areas so there aren't many people there, and incentives are needed to get qualified professionals to move to rural areas. Loan forgiveness for nursing school loans would rectify that situation.

**Ranking Member Wyden** noted that in Oregon, there are multiple homes working with unions to improve standards of care, but there have been horrendous stories emerging. He is troubled by a policy that Dr. Gifford advocates, one that would take away the option of those families and patients to secure justice in the legal system. It would require patients at some facilities to sign a pre-dispute arbitration agreement, effectively requiring families to waive their rights if something horrible happens. **Ranking Member Wyden** asked why people can't have both arbitration and the right to justice in the legal system. **Dr. Gifford** responded that there is no compensation that could rectify the situation that occurs. AHA's position is that arbitration is a legal remedy that allows compensation for any wrongs. **Ranking Member Wyden** reiterated that it is the only option for some people and it forces families to waive their rights, which is a situation that contradicts the public interest. He said that Medicaid cuts would reach 35% in the next two decades. With something like that and Medicaid paying much of the nursing home bill, there will be more nursing home closures in rural America. He asked Dr. Grabowski about the ramifications. **Dr. Grabowski** replied that it is very hard to continue to operate a high-quality nursing home with the Medicare rate. Another issue is finding workers. Medicaid is reimbursing care, so they cannot raise wages with low Medicaid payment rates. Medicaid is absolutely the way to encourage a healthier rural nursing home sector.

**Sen. Scott** said that the vast majority of South Carolina nursing homes have been providing quality care, with four- or five-star ratings. According to a 2017 OIG report, South Carolina was one of nine states to receive between zero and 15 complaints for every 1000 nursing home residents. He asked Dr. Gifford what changes are needed from CMS to improve the quality of nursing homes and patient outcomes. **Dr. Gifford** answered that improving Five Star through the increased monitoring of homes is necessary. Consumer satisfaction must be added as a quality measure. The other issue is that often citations are varied and difficult to understand. They tend to not focus on the broader systems. That is why at HCA, members are encouraged to adopt the Malcom-Baldrige framework, so when residents have a change in status or when employees are noticed to be not dealing well with residents, changes can take place before abuses occur. **Sen. Scott** asked how regulations can target bad actors and decreasing administrative burden on high-quality facilities. **Dr. Gifford** said that access needs to be granted to the National Practitioner Data Bank for HRSA. As employees move across state-lines, access to their information is lost.

**Sen. Stabenow** stressed that Medicare pays for two out of three nursing home patients. If there are cuts to Medicare, that will hurt quality nursing homes. She highlighted how in the CMS Nursing Home Compare database, the reviews for the nursing home that Ms. Blank's mother stayed in were confusing, and it received a rating of "minimal harm" to residents despite Ms. Blank's mother's death. She asked Ms. Blank what changes she would recommend to the information shared in the reports. **Ms. Blank** said that she advocates having the reports written in layman's terms, with the level of distress in nursing home residents noted. Fines, including amount, must also be noted in the public report. **Sen. Stabenow** asked Dr. Gifford if CMS could incorporate that change right now. **Dr. Gifford** said it would require setting up a program for data collection, and CMS would have to issue a rule and regulation, but nothing prohibits it. **Sen. Stabenow** asked Dr. Grabowski if he has suggestions for improving the quality of information available to families. **Dr. Grabowski** said very few residents access the Nursing Home Compare website. Hospital discharge planners could mandate viewing information about nursing homes in the area. Additionally, the quality ratings must be accurate and more comprehensive of the entire experience, not just the nursing component. There is very little about patient satisfaction and quality of life.

**Sen. Hassan** spoke about one nursing home in her state where all the clinical and administrative staff are cross-trained as licensed nursing assistants, with stipends provided for their training. On-site daycare is also provided to attract employees. Despite this, the nursing home is struggling with staffing to the point that their census is affected. Low staffing rates are linked to poor outcomes for patients. **Dr. Grabowski** said that staffing is a national crisis. Some states have been very innovative in developing wage pass-through programs, where they put the dollars specifically towards staff. Payroll-based data is an important innovation for monitoring nursing homes, so they need to have sufficient resources for staffing. **Dr. Gifford** said that the debt of healthcare workers is so big, it's not just a salary issue. Loan forgiveness is easy and fast to implement, allowing the issue to be addressed quickly. **Sen. Hassan** asked Ms. Blank and Ms. Fischer for their suggestions. **Ms. Blank** said that the workers who were fired after her mother's death were never charged and were able to be rehired very quickly in a neighboring state. The staffing shortage allows for bad actors to be rehired. **Ms. Fischer** said that transparency is an issue. Her mother's rapist was continually investigated but still kept his job.

**Sen. Cardin** asked Dr. Gifford ways to reduce unnecessary senior hospitalizations. He has been working with Sen. Thune about getting on-site emergency care in nursing facilities, as well as looking into telehealth. **Dr. Gifford** said that the promise of telehealth is great, but varies all over the map. The nursing home staff he talks to generally say that the emergency room may address the acute, but the patient is in worse condition, so he is eager to work with Congress to find solutions. **Sen. Cardin** asked if the proliferation of this problem is a cost issue of staffing, lack of understanding of telehealth or lack of funding for telehealth. **Dr. Gifford** said that incorporating the current reimbursement system into telehealth is difficult. **Dr. Grabowski** said that telehealth prevented hospital transfers when staff and nurses weren't there, but the nursing home did away with telehealth due to payment. Bridging the disconnect between who pays for the service and who gets the discount would help, especially for rural nursing homes.

**Sen. Thune** referenced the New York Times article referenced by Dr. Grabowski. He asked what challenges rural nursing homes face in providing care. **Dr. Grabowski** replied that Medicare is a less generous payer of resources, so rural nursing homes struggle with staying in business. Rural nursing homes must be provided with additional resources. Medicaid pays for 80 to 90 percent for rural facilities, compared to 20 to 30 percent for nursing homes nationally, and they also tend to have the most issues with neglect and poor quality of care. It varies state to state, but the margins tend to be negative on Medicaid and it can be even lower in low-payment states. It is very challenging to be a high Medicaid home. **Sen. Thune** reiterated the importance of telehealth in delivering quality care to rural areas, despite the reimbursement challenges.

**Sen. Cortez Masto** created the unit to enforce and prosecute elder abuse in the Nevada Attorney General Office. She knows that there are some bad players that need to be held accountable. **Sen. Cortez Masto** asked Dr. Grabowski about the payment incentives that drive over prescribing and inappropriate medication. **Dr. Grabowski** answered that medication is paid through Medicare Part D or through Skilled Nursing Facility benefits. A lot more oversight about inappropriate prescribing is needed. The inappropriate prescribing of antipsychotics to nursing home residents with dementia is used for chemical sedation, despite a FDA black box. For reimbursement, drugs must be assessed as to whether they are adding value. Nursing homes can be a partner in addressing this issue. **Sen. Cortez Masto** asked if training can be a starting point, not payment. **Dr. Grabowski** agreed, citing how excessive rates of hospitalization can also contribute to excessive medication.

**Sen. Casey** asked if families should have access to a secret list of 360 facilities in need of monitoring in order to make a decision. **Ms. Blank** said yes. **Ms. Fischer** agreed. If she had known that her mother's nursing home had issues with sexual misconduct, she would have chosen differently. **Sen. Casey's** letter raised nine points in order to shine a bright light on Medicare's relationship with nursing homes.

**Sen. Daines** referenced the New York Times article about high rates of rural nursing home closures, which is especially relevant to Montana. In the last ten years, the senior population has grown 40 percent, but the number of nursing homes in Montana has decreased by about 30. He asked Dr. Grabowski how the federal government could help. **Dr. Grabowski** said that fragmentation across Medicare and Medicaid is a national issue. Nursing homes could leverage Medicare financing, like the financial alignment initiative for dual-enrollment individuals. **Sen.**

**Daines** said that the consumer can hold institutions accountable through platforms like Yelp, which has nursing home reviews. However, the reviews are few and scattered. **Dr. Grabowski** said that there is a private and public role. Vignettes about care could be useful, especially like the stories of Ms. Fischer and Ms. Blank. Reviews on social media offer a different dimension of transparency. **Ms. Blank** said that Iowans hear more about nursing homes through the news than they do on websites. **Ms. Fischer** does not think that Yelp is one of the things that people look to when finding a long-term care facility. The employee who abused her mother had been repeatedly disciplined by the department of health, which is not an issue that can be addressed on Yelp.

**Sen. Warner** said that it is important to get the incentives right for rural nursing homes. The existing Five Star rating system is graded purely on a curve, so there will be one- and five-stars regardless. The mix-and-match on the funding streams between Medicare and Medicaid is a real problem. MedPAC estimated that the margin for Medicare skilled nursing facilities is 11 percent, but when Medicaid reimbursement is added in, the overall industry average drops to half a margin. **Dr. Grabowski** said that it becomes haves and have-nots between the nursing homes, with unequal funding. Everything is benchmarked within states, putting it on a normal distribution. **Sen. Warner** is concerned over the closure of nursing homes. **Dr. Gifford** said that it is a priority to keep nursing homes open, since they are also large employers in their communities. **Sen. Warner** said that electronic health records for nursing homes should be included. **Dr. Grabowski** said that nursing homes being excluded from the HITECH Act was a mistake leading to increased fragmentation.

**Sen. Whitehouse** emphasized the importance of not allowing mandatory arbitration and welcomed working with Sen. Wyden to defend against it. He asked about the difference between telehealth reimbursement in rural versus urban settings, and the clarity of the ratings for nursing care quality. **Dr. Gifford** said he will respond in the QFR session. **Sen. Whitehouse** asked about progress in end-of-life care issues, such as the patient being forcibly moved to palliative care from curative care or being forcibly dislocated to a hospital setting.

**Ranking Member Wyden** said that he wrote to CMS last year after hearing that nursing homes had overstated their staff rosters. He asked **Dr. Goodrich** how CMS is dealing with nurse staffing. **Dr. Goodrich** said that there is fully in place a new process, the Payroll-Based Journal, by which nursing homes must report to CMS every quarter their staffing for nurses and nurse's aides, among other positions. This is much stronger and more accurate than the previous system. She said that she can submit a written report about the Payroll-Based Journal within 10 days. **Ranking Member Wyden** said he is very troubled over a CMS regulatory rollback allowing nursing homes to review emergency plans just once every 10 years and to scale back emergency training requirements. Climate change will only make emergency planning more important. He is requesting the agency to rescind its rollback over emergency preparedness standards in nursing homes. **Dr. Goodrich** said that the agency has received a number of comments and that all are taken strongly into account. She said that some of the points in Sen. Wyden's reports do not fall under the guidance of CMS, but that the agency will work on incorporating many of the suggestions.

**Sen. Daines** said that in Lewistown, Montana, officials were not notified about verbal, physical and sexual abuse in senior homes, with some staff saying they were not trained in how to handle dementia patients in long-term care services. **Dr. Goodrich** replied that nursing homes are expected to keep residents safe and free from abuse. There are regulatory requirements for nursing homes to report allegations and substantiated cases of abuse, with state surveyors sent to investigate immediately. Staff in nursing homes may not have received appropriate training, so certain penalties are implemented with a plan of correction required, such as ensuring all staff have training. **Sen. Daines** asked how patients can receive the high quality care they need and deserve in the most appropriate and cost-effective settings. **Dr. Goodrich** responded that CMS has authority over home health agencies, hospice and nursing homes, and that in order for those facilities to get paid, they must adhere to a certain set of standards. That is one key way to hold facilities accountable, along with quality measures for payment programs and transparency websites like Home Health Compare and Hospice Compare. **Sen. Daines** asked if the star rating system provides an accurate assessment of nursing home quality. **Dr. Goodrich** said that a number of changes were made to strengthen the five-star rating system. There is now the Payroll-Based Journal which is auditable and thus more accurate. There are additional quality reporting measures like Transfer to an Emergency Department. Additionally, there are higher thresholds for a three- or four-star rating.

**Sen. Cortez Masto** said that coordination amongst the task force members, as well immediacy and response are important. She asked how the federal government can help states recognize the need for the immediate survey and referral and help improve the coordination. **Ms. Mitchell** said that it is critical for the task force to be able to survey the site immediately once there is an allegation of abuse. **Sen. Cortez Masto** asked if there is something that needs to be addressed to ensure that CMS and the Department of Justice work together. **Ms. Bacon** said that the Elder Justice Coordinators can bring together state attorneys generals, MFCUs and local prosecutors. **Dr. Goodrich** said that CMS does oversee the states' performance in their survey activities and they do work closely. There are some good examples of states and law enforcement agencies working together, such as the Hollywood Hills home case in Florida. There could be more standardization. **Sen. Cortez Masto** asked what CMS's obligation is to protect against abuse and neglect in individuals' homes where Medicaid or Medicare is paying for services delivered. **Dr. Goodrich** said that CMS has authority to hold providers of care responsible in in-patient settings of care, not within the actual home.

**Sen. Menendez** asked if Dr. Goodrich was aware that Medicare had cited the Wanaque facility in New Jersey that was responsible for a viral outbreak that killed 11 children. **Dr. Goodrich** said yes. **Sen. Menendez** asked why facilities with multiple citations are allowed to continue accepting patients. **Dr. Goodrich** said that facilities are expected to come into compliance rapidly. Wanaque likely came back into compliance after demonstrating compliance. If facilities cannot demonstrate provision of safe care, CMS will terminate them from Medicare and Medicaid programs. **Sen. Menendez** asked what the gaps in oversight are. **Dr. Goodrich** said that CMS does have an expectation that facilities provide safe care. One of the things over the year is that there may be inconsistency over how oversight and penalties are applied. There are a number of important steps to further that consistency so expectations are the same across the states. **Sen. Menendez** then asked why the Administration is relaxing regulations while tragedies like Wanaque occur. **Dr. Goodrich** said that the agency is trying to be thoughtful of



administrative and paperwork requirements may be getting in the way of patient care. **Sen. Menendez** asked why the agency is walking away from care measures implemented by the Obama administration. **Dr. Goodrich** said she is unsure of which measures he is referring to. **Sen. Menendez** asked whether CMS has a proposal for facilities to ensure they are adequately staffed. **Dr. Goodrich** said that nursing homes must report to CMS every quarter, with data auditable to their payroll, so there is a much clearer picture of where they may be gaps in staffing. CMS continues to review the data. **Sen. Menendez** said that there is a gulf between expectation and reality in several of these instances.

**Sen. Cortez Masto** asked whether the Trump administration moratorium of eight measures of care for long-term care facilities was still in effect. **Dr. Goodrich** said that the enforcement remedies were put in place to be more educational in nature, and starting this May, the typical remedies will be back in effect. This moratorium was put in place to help phase in changes in the participation requirements for long-term care facilities. Some facilities in rural areas were struggling with preparing for those eight items, so CMS decided to take a more educational approach instead of applying civil and monetary penalties.