

## III. Discussion & Recommendations

### Discussion: A Failure to Enforce

The results of this study indicate that, in the years leading into the COVID-19 pandemic and the first year of the pandemic, the state and federal response to longstanding and often serious problems in nursing homes was, overall, very weak. The failure to vigorously enforce the range of minimum standards we reviewed – from basic infection control to dementia care to treating residents with humanity and dignity – fostered a system in which poor care and demeaning conditions are rewarded and facilities were woefully unprepared to deal with the COVID-19 pandemic. The decimation of the U.S. nursing home population, and the heartbreak suffered by families, was the tragic (but *not* inevitable) result.

This report also provides insights into the regional differences in the effectiveness of the State Survey Agencies (SAs). While oversight of nursing home care is generally weak nationwide, we identified often significant differences among the CMS Regions and patterns of differences (i.e., weaknesses) which, we believe, should inform public policy going forward. As discussed in depth in our companion piece to this report, [A Practical Guide to the State Operations Manual](#),<sup>39</sup> the 10 CMS Regional Offices are charged with ensuring that the SAs in their region provide effective oversight and monitoring of nursing home care. A failure at the state level reflects a failure at the regional level to ensure that the state surveyors and state agency leadership are capable and willing to carry out their mission: to protect vulnerable residents and the billions of dollars American taxpayers spend on nursing home care every year. **In short, the persistence of poor care in our nursing homes is the result of a cascade of failures, at the facility, state, and federal levels. The results are, too frequently, catastrophic for residents and families.**

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The nursing home industry has historically complained that uneven enforcement hurts nursing homes (rather than residents and families) because it makes for an inconsistent environment in which to do business; facilities do not know for what they are – or are not – going to be cited. However, given that the federal regulations implementing the 1987 Nursing Home Reform Law have been in effect for three decades, we would argue that providers are – or should be – aware of minimum requirements. When nursing homes don't suffer consequences for failing to meet requirements, residents and the public pay the price. Nursing home industry

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<sup>39</sup> Available at <https://nursinghome411.org/survey-enforcement/>.

representatives often state that their industry is one of the most regulated in the country. But if those regulations are not enforced, what does that actually mean?

## Recommendations:

Fundamentally, we believe that there is a strong body of knowledge regarding how to effectively identify and cite deficiencies. Refinement and improvement are always needed (such as, for example, in respect to the serious problem with the guidance for citing Quality of Life deficiencies identified in our report). However, overall, the federal guidance and process for surveying facilities, together, provide a strong and practicable basis for quality assurance, including the effective identification of substandard care and resident harm.<sup>40</sup>

**The problem is essentially due to three serious deficiencies in the functioning of our state and federal survey agencies: (1) lack of will, (2) lack of knowledge, and/or (3) lack of resources.**

To help address these issues, **we recommend that CMS ensure that State Agencies – and the Regional Offices charged with overseeing them – fulfill their shared mission to protect residents.** Residents and families count on their State Survey Agency (SA) to ensure that providers are meeting standards of care, including effective infection control, treatment with dignity, and sufficient staffing. American taxpayers depend on CMS and the SAs to assure financial integrity of the billions of dollars spent annually on nursing home care. However, too often, CMS and the state agencies treat the industry as their client and prioritize the industry's interests over those of the residents, their families, and taxpayers.

Too often, CMS and the state agencies treat the industry as their client and its interests as paramount, rather than those of vulnerable residents, their families, and taxpayers.

### LTCCC's recommendations:

1. Ensure that the State Survey Agencies (SAs), and the CMS Regional Offices (ROs) overseeing the SAs, focus efforts on implementing both the *letter* and the *spirit* of the law, regulations, and the State Operations Manual. For example, an SA that conducts 100% of the federally required surveys per year should not be considered to have fulfilled its duties to CMS (or the public) if it is not effectively ensuring that standards are met consistently and that deficiencies are appropriately cited and meaningfully corrected.<sup>41</sup>

<sup>40</sup> For detailed information on the requirements for state oversight activities, see, *A Practical Guide to the State Operations Manual*, available at <https://nursinghome411.org/survey-enforcement/>.

<sup>41</sup> See, for example, the OIG report, *CMS Guidance to State Survey Agencies on Verifying Correction of Deficiencies Needs To Be Improved To Help Ensure the Health and Safety of Nursing Home Residents*, Audit (A-09-18-02000) (Feb 7, 2019). Available at <https://oig.hhs.gov/oas/reports/region9/91802000.asp>.

2. Develop and implement quality assurance processes to identify, assess, and address patterns of low citations and infrequent identification of resident harm or immediate jeopardy in both the states and regions.
3. Issue guidance to state survey agencies that each violation of regulations should be given its own separate deficiency to stop “stacking” of f-tags. [Stacking is the combining of multiple violations into one citation.]
4. Increase survey frequency to at least one survey per facility every 6-12 months (rather than 9-15 months). It is the responsibility of state and federal oversight agencies to ensure that residents are safe, receive decent care, and are treated humanely every day. **The current 9-15-month inspection cycle has proven to be insufficient and, in the face of any urgent situation (from the COVID pandemic to a fire threat), potentially catastrophic.**
5. Improve composition and competency of state (and federal) survey teams:
  - Strongly encourage state survey offices to utilize permanently employed surveyors with minimum reliance on contract surveyors.
  - Improve the caliber of survey agency staff by ensuring that surveyors and managers do not have conflicts of interest (including not being allowed to work in the nursing home industry for at least two years after leaving government service and not being assigned to the same facility for consecutive surveys), and ensuring appropriate wages and benefits for state surveyors, especially RN surveyors, to attract and retain a high-quality surveyor and professional workforce.
  - Require states to report number and composition of survey staff. Composition to include professional training/accreditation (i.e., nurse, dietician, social worker, etc.), whether permanent or contract staff, and years of experience.
  - Require all survey teams to be multidisciplinary (include individuals with a social work background in addition to persons with a nursing background and experience).
  - Train surveyors in both state and federal regulations and in the meaning and purpose of the laws and regulations: to protect residents and ensure that each is provided good care and quality of life in the facility.
  - Require survey agencies to consult with individuals and entities with expertise and experience in law enforcement, infection control, financial auditing and accounting, and other disciplines useful for evaluating regulatory compliance.
  - Ensure that surveyors are familiar with current care and quality of life practices and standards. To accomplish this, annual training requirements for both state and federal surveyors should include training on:
    - Clinical standards of care, including for pressure ulcers, infection control, and psychotropic drugging; and
    - Current quality of life practices and standards, including for dementia care, cultural competency (such as for communities of color and LGBT individuals), and age and ability appropriate activities.

- Continue to prohibit state surveyors from providing consultation and training activities for the nursing home industry. Better monitoring of the state agencies is needed to ensure that this prohibition is not violated.
- 6. Reinstatement of the definition of Immediate Jeopardy to include violations of minimum standards that have a “potential” for serious harm definition. This definition was in place under the Nursing Home Reform Law of 1987 but was abruptly changed in 2019 ([QSO-19-09-ALL](#)).
- 7. Review and refine the Scope and Severity grid. Numerous studies have indicated that the improper identification of problems, including those relating to serious abuse and neglect of residents, is widespread. For instance, most deficiencies are rated as D (no resident harm) and – as our study found – very few violations are identified as G or higher (causing any resident harm or immediate jeopardy).

**For our full range of recommendations for improving nursing home safety, dignity, and financial integrity, visit <https://nursinghome411.org/recs-safety-integrity/>.**