

LONG TERM CARE COMMUNITY COALITION

Advancing Quality, Dignity & Justice

Nursing Home Reform: Where Are We Now? Where Do We Need to Go?

Remarks from Toby Edelman (Center for Medicare Advocacy) at LTCCC's 13th Annual Event held November 9, 2022, at the New York City Bar Association.

Last month, the White House announced additional steps to implement President Biden's comprehensive nursing home reform agenda, which he originally announced in February. The White House described why nursing home reform is so needed today. And I quote:

For far too long, nursing home residents have been victims of an industry with little accountability to keep American seniors safe and protected. COVID-19 has laid bare the challenges in America's nursing homes, with over 200,000 residents and staff dying from COVID-19.

COVID-19 was a shocking wake-up call about nursing homes for many Americans. Without question, nursing homes were the site of far too many COVID cases and deaths. Although residents represent a small portion of one percent of the population of our country, residents and staff accounted for an astounding 20-25% of all deaths. Clearly, something is wrong with how we provide care in nursing homes to older people, people with disabilities, and, an increasing number of people under age 65.

We have had some success, but we need to do far more to ensure that all residents receive high quality care.

A major success is the federal Nursing Home Reform Law, enacted in 1987. The law set out comprehensive residents' rights, it described residents' rights to quality of life as well as quality of care, it called for comprehensive assessments and care plans based on those assessments, and much more. It said that every nursing facility must provide all the services that each resident needs in order to achieve the highest physical, mental, and psychosocial well-being. The Reform Law also revised the survey process for determining whether facilities meet those care standards and it revised the enforcement system – what to do when facilities do not provide residents with high quality care.

We have evidence that the standards of care are good, with one exception – staffing standards, which I'll discuss in a moment. In 2015, the Obama Administration decided to look at the care standards, which had not been comprehensively revised in 25 years. What it found, after a lengthy public review, was that those standards were still appropriate. The administration made a few significant changes. For example, it required facilities to have an infection preventionist. Hundreds of thousands of residents got infections each year, leading to many

hospitalizations and deaths that could and should have been avoided. The costs to the Medicare program were enormous, billions of dollars. The 2016 regulations required **all** facilities to have an infection preventionist, that is, a person in each facility with special training to oversee and ensure full implementation of the facility's infection control program. The purpose was to make sure that all staff know how to prevent and treat infections. But essentially, with few changes, the October 2016 regulations repeated what had been required since the 1990s. These are still the care standards today.

The exception to the adequacy of the 1987 law is staffing, particularly nurse staffing. The law requires very little: a registered nurse 8 hours per day, licensed nurses around the clock, and otherwise, "sufficient" staff. As a result of this lax standard, most facilities do not have enough staff to provide good care to residents. More than 20 years ago, the federal government released a 4-volume report that found that more than 90% of facilities did not have enough staff to prevent harm or to meet residents' needs. Shockingly, nursing home trade associations admit **today** that more than 90% of facilities **still** can't meet the staffing standards identified in 2000. We know residents have greater care needs than they had 22 years ago.

Decades of studies have consistently found that more nurses mean better care. The importance of staffing was repeatedly confirmed, again, during the pandemic. One study, in Connecticut, found that if each resident received 20 minutes more of care by a registered nurse, the facility had 22% fewer COVID cases and 26% fewer COVID deaths. Just 20 additional minutes of an RN's time made such a difference. New York Attorney General James similarly found that facilities in New York that had more nursing staff had fewer COVID-19 cases and deaths. Most deaths occurred in nursing facilities with the lowest staffing levels.

The other failing is not in the language of the Reform Law, but in its implementation. When the law was passed in 1987, the only sanction that could be imposed when a facility failed to meet standards of care was complete loss of federal funding – a harsh remedy that hurt residents and was rarely imposed. The 1987 Law set out a full range of intermediate sanctions. Unfortunately, even today, usually just the very worst problems lead to a financial penalty. The federal Government Accountability Office looked at infection control deficiencies between 2013 and 2017, before COVID. Infection control was the most frequently cited problem in the country, but only 1% of the deficiencies led to a financial penalty. Without a penalty, too many facilities ignored infection control rules. And now, with the pandemic, we see the consequences of ignoring those critical requirements.

So we have good standards of care. The Administration has promised to create staffing ratios and is in the middle of preparing its recommendations.

What we hear from nursing homes is that they can't hire staff – there's no one to hire and they need more money.

Staffing shortages are a serious problem. But we know from research that, across the country, nursing staff, especially nurse aides, don't stay on the job because they are underpaid, often

don't have health benefits, have inadequate training, and are injured on the job, often because they try to take care of a resident by themselves, when two aides are needed. As advocates for residents describe the issue of staffing, the main problem is job retention. Poor job quality leads to enormous turnover of staff and too few nurses to provide care. Better working conditions could, and do, help facilities hire and keep good workers.

As for the need for more money, it's just not that simple. More money would not necessarily go to staff and resident care. Specific rules are needed for how facilities spend their money and these rules need to be enforced. The importance of such rules has been made clear in a case in New York.

New York is one of a handful of states that have passed laws requiring nursing homes to spend designated amounts of their reimbursement on care. Effective this year, New York's budget law requires facilities to spend 70% of their revenue on care and to have profits of no more than 5%.

Just before the law was to go into effect, more than 230 nursing homes and three trade associations sued the state. They said that if the law had been in effect in 2019, they would have had to return \$824 million to the state. Think about that. What these facilities are admitting in court is that they did not use 70% of their revenue on care and that their profits were above 5%.

I took a close look at some of the facilities that filed the lawsuit. One facility is among the 400-500 poorest quality facilities in the country, which are identified by the federal government and states together. This facility claimed that it would have had to return almost \$5 million to New York State if the budget law had been in effect in 2019. When I looked at the facility's record, I saw that the state had cited it in May 2021 for not having enough staff. For shift after shift, the facility had just a little more than half of the nursing staff that the facility **itself** considered necessary. For example, in the 7 a.m. to 3 p.m. shift on May 2, 2021, the facility had 5 LPNs, instead of the 8 it considered necessary and just 11 certified nurse assistants, instead of the 20 it believed its residents needed. For the 11pm-7 am shift, the dementia unit, with 53 residents, had just one LPN and one nursing assistant. Imagine if the facility had used that \$5 million for staff.

What we have now is a strong federal law and efforts underway to enact meaningful staffing ratios and to improve enforcement. Richard, Eric, Hayley, and Sara at LTCCC, and I, along with residents' advocates across the country, are doing our best to make these efforts successful.

One of the remaining challenges is getting more transparency and accountability about the owners and operators of nursing homes. It is important to know who is providing care to residents and to have effective policies so that operators who provide poor care are not able to expand the number of facilities they own or manage. Enacting these kinds of legal protections is challenging, but critical.

The nursing home industry looks very different today than it did in 1987, when the federal Nursing Home Reform Law was passed. Then we generally had individually-owned facilities (so-called Mom and Pops) and publicly-traded chains, with a small number of not-for-profit and public facilities. Now we have many different ownership and management configurations, with real estate investment trusts, private equity, and a variety of private owners who are able to conceal their identity (and their records as nursing home owners) by creating new companies when they buy new facilities. Our rules for public oversight and facility transparency and accountability need to catch up with the current reality.

New York is unique in the country, as the only state that prohibits publicly traded companies from owning nursing facilities. But, in other ways, New York facilities are similar to facilities in other states – both the problems and the solutions.

In her January 2021 report about nursing homes and the COVID pandemic, NY Attorney General James describes a facility that her office had criminally prosecuted. In 2014, private owners bought a county-owned facility. The new owners quickly let go many staff members, reducing the staff from 298 to 225. Quality of care problems immediately soared. In 2016, the facility was named one of the worst facilities in the state. In 2018, the New York Attorney General prosecuted the facility for endangering residents and for neglect. Among the examples of neglect, the Attorney General describes a 41-hour period, when staff left a 94-year-old resident in a recliner and failed to provide her with any care. The company and its owner and manager pleaded guilty to various crimes and sold the facility to a new owner. In her 2021 report, the Attorney General describes the facility as illustrating “the too prevalent ‘low staffing for profit’ model of exploitation through insufficient staffing, lack of transparency, and financial incentives.” She also reports that in the three-year period between October 2014 and December 2017, the facility diverted payments to the owner and related parties that totaled more than \$14 million. In the New York lawsuit I mentioned before, this facility said in court that it would have had to return \$764,192 to the state for failing to spend enough on resident care if the law had been in effect in 2019. When I looked up the facility on the federal website two days ago, I saw that it had the lowest rating, but it had not had any fines imposed in the past three years. A survey in March 2022 cited staffing as one of the deficiencies. The problems continue.

As a country, we need to do better for residents, staff, and their families and friends. We have a solid foundation in the Nursing Home Reform Law, plans are underway to strengthen staffing and enforcement, and additional efforts in transparency and accountability are needed.

The COVID-19 pandemic has been a shocking jolt to many people about nursing homes. We can, we must, and we will do better.

Thank you.