GAO

United States
General Accounting Office
Washington, D.C. 20548

Health, Education, and
Human Services Division

B-283329

August 13, 1999

The Honorable Charles E. Grassley
Chairman
Special Committee on Aging
United States Senate

Subject: Nursing Home Oversight: Industry Examples Do Not Demonstrate That Regulatory Actions Were Unreasonable

Dear Mr. Chairman:

At your request, we have in the past year issued several reports about quality of care in the nursing home industry.[1] Among other findings, we have reported that one in four nursing homes nationwide has serious deficiencies involving harm to residents. The federal enforcement system does not adequately ensure that homes sustain compliance with federal quality standards, because 40 percent of the homes with serious deficiencies are repeat violators.

The nursing home industry has contended that the Health Care Financing Administration (HCFA) and state surveyors are at times overzealous in their regulation of nursing homes and that states cite deficiencies that are trivial or do not warrant sanctions. Specifically, in March 1999, the American Health Care Association (AHCA) stated publicly that deficiencies cited as causing harm to residents include "everything from canceling [a scheduled social] activity such as a painting class to giving a patient the wrong medication . . . . [T]he system needs to—and doesn't—distinguish between minor infractions and major problems." You subsequently asked that AHCA give specific examples that would document instances of these and other surveyor actions that AHCA considered inappropriate. In response, AHCA provided information on citations for 10 nursing homes that it considers examples of an overzealous regulatory process. Seven of these homes received federal and state deficiency citations that AHCA believes were more serious than warranted. For the

[1]See Nursing Homes: HCFA Initiatives to Improve Care Are Under Way But Will Require Continued Commitment (GAO/T-HEHS-99-155, June 30, 1999); Nursing Homes: Proposal to Enhance Oversight of Poor Performing Homes Has Merit (GAO/HEHS-99-157, June 30, 1999); Nursing Homes: Additional Steps Needed to Strengthen Enforcement of Federal Quality Standards (GAO/HEHS-99-46, Mar. 18, 1999); Nursing Homes: Complaint Investigation Processes Often Inadequate to Protect Residents (GAO/HEHS-99-80, Mar. 22, 1999); and California Nursing Homes: Care Problems Persist Despite Federal and State Oversight (GAO/HEHS-98-202, July 27, 1998).

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remaining three homes, AHCA believes that states inappropriately recommended them for termination from Medicare and Medicaid. We have included AHCA's cover letter explaining these examples in enclosure I.

You asked that we analyze the materials AHCA forwarded to you and determine whether any cases reflected the actions of an overly aggressive regulatory process (see enc. II). In response, we analyzed the examples and other materials AHCA provided to determine whether the state surveyors acted appropriately. In most cases, we supplemented the materials AHCA provided with information obtained through specific inquiry to the state agency involved. We collected this information to evaluate the complete context and ultimate disposition of each case. Any questions we had about clinical issues were addressed by members of our staff who are registered nurses.

In summary, in each of the eight cases for which there was sufficient information for an objective assessment, we believe appropriate regulatory action was taken. In these cases, either the surveyor's actions were justified or HCFA or the state withdrew the initial actions after the nursing homes presented additional information. In the remaining two cases, we were unable to obtain sufficient information to make a determination. Specifically, of the seven cases AHCA believes represent inappropriate citations, we found that in three of these cases a citation was justified. In another two cases, the states withdrew the citations when the nursing homes supplied additional information not available to the surveyors, and for the final two, we were unable to obtain enough information to make a judgment. In all three of the cases in which the homes were recommended for termination by a state agency, we believe the states and HCFA ultimately acted correctly in accordance with regulatory requirements. Furthermore, in only one of these cases did HCFA actually terminate the home from Medicare and Medicaid. In the remaining two, HCFA rescinded the termination actions: in one case because deficiencies were corrected and in the other because of procedural errors by the state.

In our analysis of the cases that AHCA selected as "symptomatic of a regulatory system run amok," we did not find evidence of inappropriate regulatory actions. Furthermore, in a recently released report in which we examined a random sample of 107 nursing home surveys containing 201 actual harm citations affecting one or a few residents, we found that 98 percent of the surveys documented that one or more residents had experienced actual harm.[2] Moreover, two-thirds of these 107 nursing homes also were cited for actual harm or higher-level deficiencies in a prior or subsequent survey. Most of these repeat violators (56 percent) were cited for the same deficiency, and an additional 34 percent were cited for closely related deficiencies. We also found that most of the examples AHCA provided to you had deficiencies, in addition to those cited by AHCA, that caused harm to residents.

[2]See GAO/HEHS-99-157, June 30, 1999.

BACKGROUND

HCFA, within the Department of Health and Human Services (HHS), is responsible for ensuring the quality of nursing homes as part of its oversight of the Medicare and Medicaid programs. HCFA contracts with state agencies to survey nursing homes to ensure that they meet Medicare and Medicaid participation requirements. As a part of this oversight, state agencies are required to record any deficiencies that exist in the nursing homes they survey. The state surveyor places each deficiency identified during the survey in one of 12 categories ranging from "A" to "L," depending on the extent of resident harm (severity) and the number of residents adversely affected (scope) (see table 1). The scope and severity of each deficiency are determined by state surveyors, who receive uniform technical training from HCFA and who are trained in nursing, social work, and other health-related disciplines. Each deficiency category has associated mandatory or optional sanctions. States refer nursing homes to HCFA with recommendations for specific sanctions. Only HCFA can impose sanctions on nursing homes with Medicare certification.[3]

Table 1: HCFA's Scope and Severity Grid for Medicare and Medicaid Compliance Deficiencies

Severity category	Isolated	Pattern	Widespread
Actual or potential for death/serious injury[a]	J	K	L
Other actual harm	G	H	I
Potential for more than minimal harm	D	E	F
Potential for minimal harm (substantial compliance)	A	B	C

[a]Also referred to as "immediate jeopardy."

Available sanctions include requiring a directed plan of correction, fines, and denial of Medicare and Medicaid payments for both new and current residents. The most

[3]States can impose sanctions on nursing homes with Medicaid, but not Medicare, certification. However, such homes constitute only about 14 percent of nursing homes nationwide.

severe sanction is termination from the Medicare and Medicaid programs, which can occur under one of two circumstances. First, a nursing home must be terminated if the surveyor determines that the home has one or more deficiencies that place residents at risk for serious harm or death[4] and this risk is not removed within 23 days. Second, regulations require that a nursing home be terminated if it has been continuously noncompliant with HCFA requirements over a 6-month period. A notice of termination may be withdrawn if the state verifies that the home has returned to compliance within a set time frame.

Nursing homes that disagree with documented deficiencies have one opportunity to dispute the citations when they receive the official deficiency report. This informal dispute resolution (IDR) process between the state agency and the nursing home may be used to refute the deficiency. Nursing homes may appeal to HHS' Departmental Appeals Board any sanctions imposed as a result of deficiencies identified by the state agency.

NURSING HOMES AHCA BELIEVES WERE INAPPROPRIATELY CITED FOR DEFICIENCIES

AHCA presented seven cases as examples of deficiencies cited by state surveyors that it believes did not cause actual harm or place residents at risk for serious injury, or were otherwise of questionable merit. We found that in three of these seven cases, state surveyors' citations were fully merited. In another two cases, the state or HCFA withdrew citations or actions when the nursing home presented additional information, which also represents an appropriate use of the survey and certification process. In the two remaining cases, we lacked sufficient documentation to make a judgment about the appropriateness of state and HCFA actions related to the cases.

In the following three cases, we believe the actions of the state surveyors and agencies were justified:

1. A California nursing home was given a G-level citation because it failed to provide appropriate services to promote healing and prevent infection of a resident's pressure sore. AHCA stated that the pressure sore existed at the time the resident was admitted to the nursing home and was healing and decreasing in size. Therefore, it believes a citation of actual harm was not appropriate.

   The surveyor's deficiency report indicated that the resident was admitted to the home with a moderate pressure sore on his left heel. Nursing staff stated that the resident's heels were to be protected from pressure to promote healing. Despite

[4]This represents "immediate jeopardy," defined in HCFA regulation as a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death.

this, the surveyor observed on all days of the survey that when this resident was in a wheelchair, he was wearing leather shoes, which would place pressure on his heels, and when he was in bed, his heels were not elevated to relieve pressure. In addition, the surveyor observed that the nurse who changed the resident's pressure sore dressing did not use appropriate techniques to prevent infection. The surveyor observed that this pressure sore had worsened.

We believe that the citation of this deficiency at the level of actual harm was justified. An IDR also upheld the actual harm citation. The nursing home did not face any sanctions because it corrected the deficiency within a grace period set by the state.

2. A Michigan nursing home was cited for immediate jeopardy, assessed a civil monetary penalty, and warned that it could be terminated within 23 days for having an unsupervised, dangerously hot, coffee urn available to its frail residents. The nursing home's policy was for staff to provide coffee to residents who required assistance. The nursing home argued that coffee had been served in this manner for many years without serious injuries.

   The surveyor found that residents were allowed unsupervised access to a coffee maker with a surface temperature of 160 degrees. The surveyor intervened when she observed two residents particularly vulnerable to scalding pulling at the spigot of the hot urn in order to obtain coffee. One of the residents had a diagnosis of Alzheimer's disease and the other resident was unsteady and confined to a wheelchair. The surveyor issued a widespread immediate jeopardy (L level) citation because these residents and others were in imminent danger of burning themselves with the hot coffee.

   On the basis of the information in the state surveyor's report, we believe that the surveyor reasonably determined that the two residents were in immediate danger of suffering serious burns from the hot coffee. The nursing home removed the coffee urn because of the citation. As a result, the immediate jeopardy citation was removed, and the state did not refer the home to HCFA for termination.

3. Another Michigan nursing home was cited with an immediate jeopardy (K level) violation for failing to remove accident hazards because of the excessive temperature of its baseboard heaters in a majority of residents' rooms. The nursing home alleged in an accompanying document that the state surveyor recorded only the temperature of the interior of the unit, rather than its surface temperature. Consequently, the home argued, the risk of harm to residents was exaggerated.

   A report by an engineer on the state survey team makes it clear that the surface temperature of the heaters was recorded. The engineer reported surface temperatures high enough to represent a significant burn hazard to residents,

given the location of these units close to ground level in residents' rooms. The engineer found that the surface temperatures of the heaters in several residents' rooms ranged from 124 degrees to 197 degrees, with the majority of these heaters having surface temperatures above 160 degrees. The engineer's report indicated that baseboard heaters' surface temperatures in nursing homes should not exceed 140 degrees because of the enhanced risk of burns to elderly residents.

We believe that the state reasonably determined that this deficiency warranted an immediate jeopardy citation because of the surveyor's findings that residents were at risk of imminent harm.[5] Subsequently, a HCFA survey found that the home had acted to prevent the immediate risk of burns to residents by frequently monitoring the temperature of the heaters and ordering covers for them but that the potential for more than minimal harm to residents remained. In response to this home's problem and an instance in which a resident of another home received serious burns from baseboard heaters, Michigan issued a written alert requiring nursing homes to properly cover their baseboard heaters by September 1, 1999.

In the following two cases, once the nursing home provided additional information in the IDR process that was not available at the survey, the state withdrew the citation. These cases also represent appropriate uses of the survey and certification process:

1. An Iowa nursing home was cited for causing actual harm to a small number of residents (a G-level deficiency) by failing to ensure that residents did not receive excessive medication.[6] One resident was administered a nighttime pain reliever for insomnia, even though the patient record did not indicate that this treatment was necessary or that other interventions were explored. The medication was discontinued at the request of the resident. A second resident was administered 30 mg. of a hypnotic drug daily, 4 times the normal dosage of this particular drug, as ordered by the resident's physician. The surveyor cited a deficiency because the nursing home staff could provide no documentation at the time to explain the physician's basis for ordering this high dosage.

   Following the survey, as part of the IDR process, the home provided a physician's report on the resident who had been administered the hypnotic that justified the

[5]According to Michigan officials, a state appeals court subsequently invalidated this citation, thereby prohibiting the state agency from sending the survey results to HCFA. The court invalidated the citation because the state failed to comply with Michigan's Administrative Procedures Act by attempting to establish a Medicaid nursing home enforcement procedure through a policy bulletin rather than through regulation.

[6]AHCA's letter states that this nursing home was cited in this survey for three G-level violations related to medication errors. However, the portion of the survey report given to us contains only this deficiency—which reports two instances—and another, lower-level, deficiency—which reports one instance—related to medication errors.

higher than normal dosage. The state survey agency told us that it deleted this deficiency upon obtaining the physician's justification.

2. A Wisconsin nursing home was given a D-level citation for failing to give a resident access to his desired activity of model shipbuilding. AHCA alleged that the resident is blind and voluntarily gave up this activity because of his vision problems.

   The surveyor's report indicated that the resident was in isolation because of a wound infection and complained that he did not have enough to do. The resident told the surveyor that he wanted a small table in his room so that he could continue with his model shipbuilding. The nursing home staff informed the state surveyor that the activity was put on hold for 3 weeks while the resident prepared to undergo eye surgery. The surveyor believed that the nursing home should have provided some type of activity for the resident during the 3 weeks before his surgery. The nursing home maintained in the IDR that it had suggested alternative activities and that these were rejected by the resident. On the basis of this additional information presented at the IDR, the state deleted this deficiency.

AHCA documentation about the following two cases was insufficient for us to obtain the additional information we needed to determine whether state and HCFA actions were appropriate:

1. A Florida nursing home was given a G-level citation for having violated the individual dignity of its residents. The home had residents wait in line for a long period of time for a bath. A state surveyor observed two residents in wheelchairs waiting in line for 30 minutes to an hour. She also interviewed residents and found that other residents had similar experiences.

   We asked the Florida state survey agency to provide information about the ultimate disposition of this case. However, the provider information supplied by AHCA was inadequate to permit the state to find the survey materials in question. Because we do not know the disposition of this case, we cannot judge the appropriateness of state actions.

2. AHCA described a deficiency cited in an Alabama nursing home regarding a kitchen worker who failed to wear a hair net, even though this worker was bald. However, AHCA did not identify the specific nursing home involved or the severity level of this deficiency, nor did it provide any documentation of this incident, such as the surveyor's deficiency report. Therefore, we could not obtain additional information needed to assess the appropriateness of the state and HCFA actions.

NURSING HOMES AHCA BELIEVES WERE INAPPROPRIATELY RECOMMENDED FOR TERMINATION

AHCA cited three cases in which nursing homes were terminated from the Medicare and Medicaid programs or were recommended by the state for termination, although these homes' most recent surveys did not identify actual harm or immediate risk of serious harm to residents (G level or higher). Instead, the most recent surveys identified a potential for more than minimal harm to residents (D, E, or F level). In each case, we found that the home had previously had more serious citations and had been continuously noncompliant for more than 6 months, a condition for which termination is authorized. Therefore, the recommendation for termination was appropriate in each case. In two cases, HCFA rescinded the termination actions: in one case because deficiencies were corrected and in the other because of procedural errors by the state.

1. A Maryland nursing home was terminated from the Medicare and Medicaid programs in September 1998 with no deficiencies at a higher level than the potential for more than minimal harm at the time of this action. The nursing home claims that a standard of immediate risk to residents is necessary to warrant termination, and that this standard was not reached. However, HCFA regulations require that a facility be terminated from Medicare and Medicaid when it has been continuously noncompliant for 6 months.

   In a survey of this nursing home completed on January 26, 1998, several instances of actual harm to residents were identified. One resident was inappropriately given a diuretic medication, which resulted in severe dehydration. She eventually was sent to a hospital, where she died. Another resident was administered an excessive dose of a medication, which increased her risk of significant internal bleeding. For a third resident, the nursing home failed to communicate effectively with the physician, and as a result, the resident did not receive needed medication. All subsequent inspections during the next 6 months, including a joint survey by HCFA and Maryland surveyors, found the home to be continuously out of compliance.[7] On the basis of the information AHCA provided, we believe that HCFA's termination action was appropriate.

2. The California state survey agency informed a nursing home that it was recommending to HCFA that the home be terminated following the state's third revisit that found deficiencies at the scope and severity level of potential for more

[7]AHCA—and the nursing home, in a lawsuit against HCFA—also argue that the home had accepted a temporary manager sought by the U.S. Attorney at the time of termination, and that the home should not have been terminated until the temporary manager had a chance to improve the situation. However, the temporary manager was not appointed until September 15, 4 days after HCFA had notified the home that it would be terminated on September 26.

than minimal harm to one or a small number of residents (D level). AHCA asserts that this sanction is too harsh because no deficiencies constituting actual harm to residents were detected in the third revisit survey.[8]

However, this nursing home had been continuously noncompliant for more than 6 months. An initial survey of the home had identified six separate citations for actual harm. The violations included failure to prevent abuse of residents, inadequate clinical assessment of residents, poor quality of care, and insufficient nursing services. Four citations of actual harm were given on the first revisit, and the nursing home was determined to still present the potential for harm to its residents on the second and third revisits.

We believe that the findings support the state's recommendation to HCFA that this home be terminated because the state found that this nursing home had been noncompliant for more than 6 months. However, the decision to terminate this nursing home was rescinded when the state changed the scope and severity of the deficiency from a D to a B and, accordingly, determined that the home was in substantial compliance. The home remains in the Medicare and Medicaid programs.

3. Florida recommended that a nursing home be terminated because it had been continuously out of compliance for more than 6 months. AHCA argued that the nursing home should not be terminated because the nursing home had received its deficiency report 150 days after the conclusion of the initial survey, not within the 10-day maximum required by HCFA. Because of this late notification of findings, the home alleged that it lacked the information necessary to correct its deficiencies in time for subsequent inspections.

   We obtained additional information from the state confirming the nursing home's allegation that it did not receive timely notice of its deficiencies. Because of procedural problems, the state did not send the survey report to the nursing home until 5 months after the initial survey and only 6 days before the first revisit intended to determine whether the home had corrected the deficiencies identified in the initial survey report. Although this home remained noncompliant for more than 6 months, HCFA ultimately decided not to terminate it because of the state's procedural lapse in the case. Thus, this home remains in the Medicare and Medicaid programs. HCFA and the state agency have taken action to ensure that nursing homes are given timely notification of deficiencies.

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[8]AHCA also complained that the state surveyor had referred the nursing home for termination because the surveyor had observed an aide eating cake in the kitchen. However, this deficiency, which was also based on the observation of another dietary aide violating sanitary protocols, was classified at the B level as a violation of serving food under sanitary conditions. Such low-level deficiencies are considered substantial compliance and may not be used to justify a termination action.

AHCA'S COMMENTS AND OUR RESPONSE

We obtained comments from AHCA on a draft of this correspondence, raising several specific points (see enc. III). First, AHCA commented that the draft title did not accurately reflect the data contained in the correspondence. AHCA maintained that our data indicate that only three citations were justified and suggested that we modify our title to indicate this. Second, AHCA disagreed that removal of a citation after an appeal is a good outcome, pointing out that appeals take tremendous resources to prepare and cause disruptions in services. Finally, AHCA challenged our methodology, noting that we limited our verification of its examples to reading the citations and speaking with those who issued them, rather than augmenting them with clinical records and the medical opinion of professional caregivers in the nursing homes.

With regard to AHCA's first point, we revised the title to reinforce that, overall, the regulatory process was not unreasonable for these examples. The focus of our prior nursing home work was the prevalence of documented problems and the absence of enforcement action. In all of our work, including this correspondence, we have used as the basis for our analysis not the initial citation but the ultimate outcome of the regulatory process. We found that the AHCA cases do not provide evidence that trivial cases survive the regulatory safeguards, such as the IDR process, intended to protect homes from inappropriate deficiency citations and sanctions. This finding is reinforced by our review of a random sample of more than 200 level G deficiencies pertaining to documented actual harm to one or more residents—the threshold we used to define quality problems.[9]

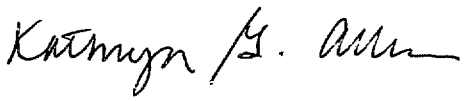
With regard to AHCA's objections to the IDR process, this process was created to provide an informal way for a nursing home to dispute deficiency citations and avoid the costly and elaborate administrative appeals process. In three of the cases we examined, this process resulted in changes to the survey findings favorable to the nursing home. We consider this to be a good outcome. Finally, in analyzing these cases, we used the official documentation, either supplied by AHCA or obtained from the state agency, and information obtained from state agency officials relating to the cases' outcomes. Because all regulatory decisions relating to these cases were made on the basis of the case record, which included the nursing homes' positions, we do not believe that contacting the facilities would have materially enhanced our analysis.

[9]GAO/HEHS-99-157, June 30, 1999.

As agreed with your office, we will make no further distribution of this correspondence until 30 days after its issue date. At that time, we will make copies available to other interested parties on request.

If you or your staff have any questions about the results of this analysis, please call me on (202) 512-7118. Christopher Kelly, Mary Ann Curran, and Peter Schmidt prepared this correspondence under the direction of John Dicken.

Sincerely yours,



Kathryn G. Allen
Associate Director, Health Financing
and Public Health Issues

Enclosures – 3

AHCA'S LETTER DATED MAY 6, 1999

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Michael Massey CHAIR-COUNCIL OF REGIONAL VICE CHAIRS
Shelly Peterson PRESIDENT OF ASHCAE
David Seckman INTERIM PRESIDENT

May 6, 1999

The Honorable Charles Grassley
Chairman
Senate Special Committee on Aging
SDG-31
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for your request for further information regarding the ongoing problems with the nursing home survey, certification, and enforcement system. On behalf of the 11,000 long term care providers we represent, I want to reiterate how deeply we appreciate your diligent work to create a fair system that best serves the complex needs of the elderly population for which we care.

Your request for information referenced a citation for canceling a painting class, which we used in our testimony *as an example* of a G violation which could be cited that caused no actual harm. There are many other examples of such citations. I am including examples of G-level citations for violations that did not cause actual harm and were of questionable merit. I am also describing and enclosing documentation on cases where facilities have been closed and have received official notices of termination for violations which caused no actual harm to residents.

With regard to the former, we have collected 2567L (Statement of Deficiency) forms for various perceived violations that were cited, along with supporting documentation. The examples of citations that I am summarizing and enclosing are clearly symptomatic of a regulatory system run amok. For example, in Alabama, a deficiency was cited because a kitchen worker failed to wear a hair net. This male employee was completely bald. A Michigan caregiver was fined $4,000 and given a notice of termination for allowing access to complimentary coffee that had been made available to family members, staff, and residents for 30 years in five homes without incident. The surveyor felt they caused "immediate jeopardy". The facility removed the coffee urns, and the result was that residents and staff no longer have coffee available to them. This is an example of regulatory zeal that takes away the freedoms and conveniences that make our facilities "homes". **(Appendix A).**

THE AMERICAN HEALTH CARE ASSOCIATION IS A FEDERATION OF 50 AFFILIATED ASSOCIATIONS, REPRESENTING 12,000 NON-PROFIT AND FOR-PROFIT ASSISTED LIVING, NURSING FACILITY AND SUBACUTE PROVIDERS NATIONALLY.

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- Also enclosed are the 2567s from another Michigan facility that was cited with a K-level violation for the baseboard heaters which had been in operation for 22 years and from which no resident was ever harmed **(Appendix B)**
- In your own state of Iowa, in the town of , this facility's 1/8/99 survey revealed 3 G-level violations from the surveyor questioning resident's physician ordered medication (either dosage or appropriateness). In each of three cases the physician wrote a letter to explain the appropriateness of their order citing medical journals and years of experience with the resident, and to express indignation for having to justify their expertise to surveyors. This is an example of less-qualified surveyors citing facilities for following orders from medical doctors, and is extremely common. Again, no harm was caused. **(Appendix C)**

Other examples include:

- A G violation was cited in Florida because a resident voluntarily waited in line for the whirlpool bath, supposedly a violation of her "dignity" **(Appendix D)**,
- In another home, a blind resident was not supplied with model shipbuilding materials **(Appendix E)** and was cited with a deficiency (despite the fact that the resident said he could not build models due to his vision problems).
- Many facilities are cited for having pressure ulcers that were documented to have existed on admission (which were healing and shrinking) **(Appendix F)**.

The bottom line is that this is an adversarial system that cites minor imperfections, encourages distrust on the part of regulators, and serves to demoralize residents and staff.

With regard to examples of facilities that were closed without immediate harm or jeopardy to the residents, one of the best examples can be found in the recent closure of the in Maryland. This was a facility that endured six surveys (state, federal HCFA, and Department of Justice [DoJ]) in eight months, none of which found immediate harm or jeopardy for the residents. Yet was closed by HCFA - just as the DoJ was implementing a plan of correction utilizing a temporary manager whom it had appointed.

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This facility was closed by HCFA despite the pleas of residents, families, the temporary manager, and a federal court judge. The 83 residents of and their families were never consulted in the process. began evacuating its residents on January 4th, and was able to place those for whom it used to care at the rate of about 20 per week. The families have expressed concern about transfer trauma. These families also reported to regulators and the court that conditions had continued to improve as the temporary manager was put into action. The residents and families are confused about why the facility was shut down just 8 weeks after the DoJ appointed a temporary manager.

The case shows that overlapping governmental regulators often work at cross-purposes and do not often take into account the needs and desires of the residents they purport to protect.

Maryland's U.S. Attorney, Lynne Battaglia, noted that closure of a facility is the last resort, and should only be used when all other efforts have failed. This was not the case in . I am enclosing the 2567 forms from this facility, the opinion of the Federal Judge, and an article on the closure that appeared in the *Wall Street Journal* Jan. 4th, 1999 **(Appendix G)**.

Closure of facilities where there is no actual harm is serious inasmuch as it threatens resident well being, causes great hardship with spouses, family, and other visitors, and displaces the elderly from "their homes". However, it is not a common problem. More often, termination is used by regulators as a club to threaten facilities into compliance. The following case examples are further evidence that regulators are issuing official notices of termination for violations where no one is actually harmed.

1. , Dade Co., FL – This is a facility which had a record of compliance problems under the previous owner, but was acquired by Integrated Health Services (HIS) on July 7, 1998. This facility endured eight surveys between April 9, 1998 and February 1, 1999. In each of these instances, the Survey Agency failed to furnish the facility the Statement of Deficiencies (Form 2567L). In one case, 150 days lapsed between the annual survey and when the Agency notified the facility of their findings (State Operations Manual, Appendix P requires that it be furnished within 10 days). If the survey had found any serious problems, they would not be corrected during the five months that the agency failed to notify the caregivers of those problems. Nevertheless, after final revisit, the survey team left one tag at level D, and the facility was terminated from the Medicare and Medicaid programs on February 7, 1999. **(Case history attached as Appendix H).**

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2. :, CA – An April 30, 1999 revisit survey revealed "Isolated deficiencies that constitute no actual harm..." The most serious violation was one resident's attending physician discussed her need to lose weight in front of the nurse and with one resident within earshot. Additionally, an employee was seen eating cake in the kitchen! The state has recommended closure of this facility for these violations. **(Appendix I)**

As you can see, this is clearly not a system which focuses on correcting problems, but rather focuses on punishment at the expense of improvement. Caregivers are forced to spend precious time and resources on compliance that should be spent on patient care.

I hope the forgoing examples and attached documentation are helpful in painting a better picture of the complex and subjective system under which our providers struggle to care for our elderly. For the most part, these are not isolated occurrences, but are indicative of the types of citations that occur in facilities at every inspection.

I sincerely hope we can take concrete steps this session of Congress to reform this system, and move forward to one that does indeed measure quality of care and quality of life. The American Health Care Association has created a package of improvements that we plan to discuss with you soon. I look forward to working with you in these endeavors.

Sincerely,

Bruce Yarwood
Legislative Counsel

H:\mh\grassley 4-15

Sorry this took so long to get back to you — Yes - the system is a concern - look forward to our next steps

REQUEST LETTER FROM CHAIRMAN GRASSLEY, SENATE SPECIAL COMMITTEE ON AGING

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, DC 20510-6400

May 27, 1999

William Scanlon, Ph.D.
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Washington, DC 20548

Dear Dr. Scanlon:

As you may remember, the American Health Care Association (AHCA) issued a news release on March 17, 1999, that was distributed at the news conference I held with other members of Congress to release the General Accounting Office's (GAO) report on the enforcement of federal quality standards in nursing homes.

The AHCA's news release critiques the GAO report and states, in pertinent part:

> "Perhaps the biggest failure of the [GAO] report is the creation of a catch-all category of deficiencies, what the GAO calls 'severe deficiencies,' that includes everything from canceling [a scheduled social] activity such as a painting class to giving a patient the wrong medication. ... [T]he system needs to -- and doesn't -- distinguish between minor infractions and major problems."

In response, I wrote a letter to Bruce Yarwood, legislative counsel for the AHCA, asking for documentation for the facility or facilities alluded to that had received a G-level citation for canceling a painting class or other social activity.

I also asked Mr. Yarwood to provide documentation of a second statement from the release:

> "Furthermore, inspectors have closed down facilities, without consulting residents and their families, for technical violations posing no jeopardy to residents."

Enclosed is the response I received from Mr. Yarwood and the attendant attachments. I would like to receive your analysis of these materials. Do you agree that any of the citations he presents reflect the actions of overly aggressive surveyors? Is the documentation provided sufficient to evaluate the merits of the citations? Please feel free to comment on any other aspects of these

materials as you see fit. I would appreciate receiving your response in writing if possible.

Thank you for your attention to this matter.

Sincerely,

Chuck Grassley

Chuck Grassley
Chairman

Enclosures

COMMENTS FROM AHCA

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August 5, 1999

Ms. Kathryn G. Allen
Associate Director, Health Financing
and Public Health Issues, HEHS
U.S. General Accounting Office
Washington, D.C. 20548

Dear Ms. Allen:

Thank you for providing my office with a copy of your draft report to the Senate Special Committee on Aging. Our response to Senator Grassley was intended to satisfy his request for examples, while illustrating specific problems with the survey system which pervade the caregiving environment. I had hoped that these examples would show policymakers some of the flaws with the current system, and that this would lead to a dialogue about solutions.

To that end, I would like to raise several issues with regard to your draft report:

1. There is a disparity between the title of your report and the actual data. While your title implies that all surveyor citations were appropriate, the facts support that in only three cases was a citation justified. I would suggest an alternative title such as: "In fewer than 1/3 of cases were citations determined to have merit."

2. Your report creates the impression that even if the citation was not justified, the removal or deletion of the citation upon appeal is a good outcome. Quite to the contrary, these appeals take tremendous resources, cause disruption in services, and take caregivers away from caregiving to research paperwork. The IDR process is one area that begs for reform. Often those hearing and deciding upon the appeal are the same individuals who issued the citations.

3. It appears your verification of our examples was limited to re-reading the citations and speaking with those who issued them. You would have been well served to seek the clinical record and medical opinion of the trained, professional caregivers in these facilities.

THE AMERICAN HEALTH CARE ASSOCIATION IS A FEDERATION OF 50 AFFILIATED ASSOCIATIONS, REPRESENTING 12,000 NON-PROFIT AND FOR-PROFIT ASSISTED LIVING, NURSING FACILITY AND SUBACUTE PROVIDERS NATIONALLY

4. There were two cases where AHCA provided insufficient information on citations for HCFA to identify the facilities involved. In one case we redacted facility identifying numbers, and in the other we were asked not to disclose the 2567. In both of these cases information was provided to AHCA only upon condition of anonymity due to the very real and pervasive fear of surveyor retribution.

I want to take a moment to react specifically to one example we presented rather than debate the merits of each. In the Wisconsin case where providers were cited for not providing a table to a blind man for model shipbuilding here are some other factors that were significant but not reported:

- Resident was NOT in isolation (contrary to the surveyor's report).
- Resident was admitted 5 days prior to survey (care plan on non-nursing care not required for 7 days).
- Resident had met with activity director and already attended several activities.
- Resident was scheduled (at the time of the survey) to give a presentation to the other residents on sailing. (not in surveyor's report)
- Resident stated to activities director "Maybe after my surgery, I can get a table to build model ships", and was told that would be fine. (contrary to surveyor's report)
- All of this information was available to the surveyor at the time of the survey.

It is worth noting that the facility in question spent over 200 hours preparing, researching, writing and presenting the Informal Dispute Resolution (IDR) for this survey. This supports my contention that erroneous citations are not without costs to caregiving.

One other reaction; in the California facility used in your pressure ulcer example the pressure ulcer was present upon admission, this was documented and made available to the surveyor, and the pressure ulcer was healed by the caregivers. There was no harm, but improvement, yet the facility was cited, their nurse aide training program shut down, and the appeal on IDR was upheld by the same surveyor who issued the citation.

Again, I want to stress that these examples are intended to highlight areas where reform is needed. We do not intend to cast aspersions or assign blame.

We are anxious to move forward from the current practice in which we debate specific anecdotes, and toward more active collaboration to improve quality of care. The American Health Care Association has developed specific solutions to the survey process that we will advance through the policymaking process. They focus on the following principles.

- The survey system should be one in which regulators, consumers, and providers work together to develop solutions and improve care within the facility.
- Monies collected through fines should be used to fix the problems and improve quality in those homes.
- A new, more objective system based upon clinical data and other objective measures must be instituted.
- There must be more communication between surveyors and caregivers, not less.
- Residents and their families should be included in the quality assessment process.

We welcome a new era where dialogue will triumph over accusation, and in which we can foster a new collaborative approach that focuses upon improved patient care rather than punishment and citation.

I look forward to working with you, with Senator Grassley, and with the Aging Committee as we strive for solutions to the complex problems we face in delivering high quality long term care.

Sincerely,

Bruce Yarwood
Legislative Counsel

(101856)

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