

May 15, 2024

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9911-P, P.O. Box 8016
Baltimore, MD 21244

Dear Administrator Brooks-LaSure:

In April, the Centers for Medicare & Medicaid Services (CMS) provided a short one-paragraph description of a Risk-Based Survey (RBS) process for nursing facilities.¹ CMS describes RBS as a shorter “more focused survey” for up to 10% of a state’s nursing facilities that provide “consistently higher quality” care. The justification for the new process that CMS is currently testing is the flat survey budget since 2015. The undersigned organizations are concerned by this proposal and have a number of questions.

Authority for and evaluation of RBS

First, we ask whether CMS has the authority to create an abbreviated survey process for facilities that it describes as consistently providing higher quality of care. The federal Nursing Home Reform Law states at 42 U.S.C. §§1395i-3(g)(2)(A)(i), 1396r(g)(2)(A)(i), Medicare and Medicaid, respectively, “Each skilled nursing facility shall be subject to a standard survey.” The Reform Law also describes the mandatory contents of a standard survey, §§1395i-3(g)(2)(A)(ii), 1396r(g)(2)(A)(iii), and requires that the standard survey be based on a protocol that the Secretary “has developed, tested, and validated by not later than January 1, 1990,” §§1395i-3(g)(2)(C)(i), 1396r(g)(2)(C)(i).

Assuming that CMS can legally develop a new survey process, RBS raises many questions:

- What process did CMS use to develop RBS?
- In how many states will RBS be tested? How are the states selected?
- In how many facilities will RBS be tested? How are the facilities selected?
- Is the same process with the same types of surveyors being used consistently in all of the RBS surveys?
- What are CMS’s plans for validating RBS? Who is doing the validation?

Criteria for selection of facilities for RBS

The criteria for identification of “consistently higher quality facilities” are another area of concern. The CMS description of RBS states only:

Higher quality could be indicated by a history of fewer citations for noncompliance, higher staffing, fewer hospitalizations, and other characteristics (e.g., no citations related to resident harm or abuse, no pending investigations for residents at immediate jeopardy for serious harm, compliance with staffing and data submission requirements).

The criteria are inappropriately limited:

A history of fewer citations for noncompliance is not a meaningful criterion when many facilities have not had a standard (recertification) survey in two to three years or more. Decades of reports by the Government Accountability Office confirm that many deficiencies are missed and that when deficiencies are cited, they are undercoded as less significant with respect to scope and severity than they actually are.²

“No pending investigations for residents at immediate jeopardy” reflects the 2% of facilities with the most serious deficiencies; it is not a criterion reflecting high quality.

How do the criteria for consistently higher performing facilities account for residents’ rights and quality of life requirements? The criteria appear to focus solely on issues related to care.

How is “higher staffing” defined? Which specific staffing levels will qualify as “higher staffing”? Will CMS rely on PBJ staffing data to determine staffing levels?

How does “compliance with staffing and data submission requirements” reflect higher quality facilities? Which specific data submissions will CMS be monitoring to assess compliance?

Factors related to finances are not identified as a relevant criterion, although recently, many facilities have been mismanaged, gone under financially, and abruptly closed.³

Is CMS considering ownership status? For-profit nursing facilities and particularly facilities owned by chains, private equity, and real estate investment trusts typically have more care problems and deficiencies. Is CMS using its affiliated entities files to gauge quality across affiliated facilities?

Identifying “consistently higher-quality facilities” is difficult, if not impossible. Prominent nursing home researchers Charles D. Phillips, Catherine Hawes, Trudy Lieberman, and Mary Jane Koren confirmed the difficulty of identifying consistently high quality facilities. Describing “the multidimensional nature of nursing homes and their residents” in “Where Should Momma Go? Current nursing home performance measurement strategies and a less ambitious approach,”⁴ they concluded that performance measurement systems are better at identifying problem facilities than good facilities.

The “multidimensional nature of nursing homes and their residents” also means that facilities can provide good care to some residents and, simultaneously, poor care to other residents. RBS’s apparent focus on how a nursing home generally performs would violate the Nursing Home Reform Law’s recognition of an entitlement in each resident to high quality care: “A nursing facility must provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of **each** resident, in accordance with a written plan of care . . . [bold font supplied], 42 U.S.C. §§1395i-3(b)(2), 1396r(b)(2).

Finally, we also know that the quality of care in nursing homes can change rapidly and dramatically, for better or worse, following changes in key staff, such as the Administrator and Director of Nursing. The quality of care in a nursing home is not immutable. Even though CMS’s description of RBS states that a survey would be expanded “[i]f any concern about resident safety were encountered during the RBS,” that promise is not sufficient. CMS should not wait for resident harm to occur; the regulatory system should take appropriate action to prevent avoidable harm to residents. The Reform Law provides:

It is the duty and responsibility of the Secretary to assure that requirements which govern the provision of care in skilled nursing facilities under this subchapter, and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys.

42 U.S.C. §1395i-3(f)(1) (Medicare); the Medicaid law is substantively identical, 42 U.S.C. §1396r(f)(1).

Additionally, we are concerned that an abbreviated survey could marginalize resident input and lead to less emphasis on residents’ rights and quality-of-life violations that are so prominent in nursing homes today. Because there is so little information on RBS, it is impossible for residents, families, and advocates to know what role they will play in an annual survey.

Other responses to flat-line federal funding for surveys

Flat-line federal funding of the survey process is a serious problem, but there are other solutions. The President’s budget for fiscal year 2025 includes a proposed increase in federal funding for survey activities. On-site surveys are not necessary in all instances before survey agencies can cite deficiencies. The President’s 2022 nursing home reform initiative⁵ also calls for “expand[ing] the instances in which [CMS] takes enforcement actions against poor-performing facilities based on desk reviews of data submissions, which will be performed in addition to on-site inspections.”

CMS could give more comprehensive guidance to state survey agencies in how to use the authority already existing in the Nursing Home Reform Law to conduct surveys on the nine-15 month cycle authorized by law. Facilities with better records and other indicators of good care could be surveyed less frequently, freeing up more surveyor time for more troubled facilities.

Finally, more effective enforcement practices could either improve facility performance or encourage poor providers to leave the nursing home business. As a result, better enforcement

could reduce the need for multiple revisit and complaint surveys each year to the same poorly performing facilities, reducing the survey burden on state agencies and making standard surveys at every facility more readily achievable. CMS's affiliated entity information provides the identity of some of the poorest performing facilities in the country.

Thank you.

AFL-CIO

California Advocates for Nursing Home Reform

Center for Medicare Advocacy

The Geriatric Circle

The Hale Group, an Iowa-Based Advocacy Firm

Justice in Aging

Kelinson & Lerner, PLC

Long Term Care Community Coalition

Michigan Elder Justice Initiative

National Association of Local Long Term Care Ombudsman

National Association of Social Workers (NASW)

National Association of State Long-Term Care Ombudsman Programs

National Committee to Preserve Social Security and Medicare

National Consumer Voice for Quality Long-Term Care

United Food and Commercial Workers International Union (UFCW)

¹ Available at <https://www.cms.gov/medicare/provider-enrollment-and-certification/guidanceforlawsandregulations/nursing-homes>

² E.g., *Nursing Homes: Improved Oversight Needed to Better Protect Residents from Abuse*, GAO-19-433 (Jun. 13, 2019), <https://www.gao.gov/products/gao-19-433>; *Nursing Homes: More Reliable Data and Consistent Guidance Would Improve CMS Oversight of State Complaint Investigations*, GAO-11-280 (May 9, 2011), <https://www.gao.gov/products/gao-11-280>; *Nursing Homes: Some Improvement Seen in Understatement of Serious Deficiencies, but Implications for the Longer-Term Trend Are Unclear*, GAO-10-434R (May 27, 2010), <https://www.gao.gov/products/gao-10-434r>; *Poorly Performing Nursing Homes: Special Focus Facilities Are Often Improving, but CMS's Program Could Be Strengthened*, GAO-10-197 (Apr. 19, 2010), <https://www.gao.gov/products/gao-10-197>; *Nursing Homes: Addressing the Factors Underlying Understatement of Serious Care Problems Requires Sustained CMS and State Commitment*, GAO-10-70 (Dec. 28, 2009), <https://www.gao.gov/products/gao-10-70>; *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, GAO-08-517 (May 15, 2008), <https://www.gao.gov/products/gao-08-517>; *Nursing Homes: Federal Actions Needed to Improve Targeting and Evaluation of Assistance by Quality Improvement Organizations*, GAO-07-373 (Jun. 29, 2007), <https://www.gao.gov/products/gao-07-373>; *Nursing Homes: Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents*, GAO-07-241 (Apr. 23, 2007), <https://www.gao.gov/products/gao-07-241>; *Nursing Homes: Despite Increased Oversight, Challenges Remain in Ensuring High-Quality Care and Resident Safety*, GAO-06-117 (Jan. 17, 2006), <https://www.gao.gov/search?keyword=%22nursing%20homes%22%201998-2000&page=2>; *Nursing Homes:*

Prevalence of Serious Quality Problems Remains Unacceptably High, Despite Some Decline, GAO-03-1016T (Jul. 17, 2003), <https://www.gao.gov/products/gao-03-1016t>; *Nursing Homes: Sustained Efforts Are Essential to Realize Potential of the Quality Initiatives*, HEHS-00-197 (Sep. 28, 2000), <https://www.gao.gov/products/hehs-00-197>; *Nursing Homes: HCFA Should Strengthen Its Oversight of State Agencies to Better Ensure Quality Care*, -HEHS-00-27 (Nov. 4, 1999), <https://www.gao.gov/products/t-hehs-00-27>; *Nursing Homes: CMS's Special Focus Facility Methodology Should Better Target the Most Poorly Performing Homes, Which Tended to Be Chain Affiliated and For-Profit*, GAO-09-689 (Sep. 28, 2009), <https://www.gao.gov/products/gao-09-689>; *Nursing Homes: Proposal To Enhance Oversight of Poorly Performing Homes Has Merit*, HEHS-99-157 (Jun. 30, 1999), <https://www.gao.gov/products/hehs-99-157>; *Nursing Homes: Complaint Investigation Processes Often Inadequate to Protect Residents*, HEHS-99-80 (Mar. 22, 1999), <https://www.gao.gov/products/hehs-99-80>; *Nursing Homes: Additional Steps Needed to Strengthen Enforcement of Federal Quality Standards*, HEHS-99-46 (Mar. 18, 1999), <https://www.gao.gov/products/hehs-99-46>; *Nursing Homes: Quality of Care More Related to Staffing than Spending*, GAO-02-431R (Jul. 15, 2002), <https://www.gao.gov/products/gao-02-431r>; *Nursing Homes: More Can Be Done to Protect Residents from Abuse*, GAO-02-312 (Mar. 5, 2002), <https://www.gao.gov/products/gao-02-312>; *California Nursing Homes: Care Problems Persist Despite Federal and State Oversight*, HEHS-98-202 (Jul. 27, 1998), <https://www.gao.gov/products/hehs-98-202>;

³ Northview Village Nursing Home: Jim Salter and Heather Hollingsworth, “Largest nursing home in St. Louis closes suddenly, forcing out 170 residents,” *AP News* (Dec. 18, 2023), <https://apnews.com/article/northview-nursing-home-closure-st-louis-78f24bc169ca7aaeed7aeb776e23dd80>; Princeton Care Center: Krystal Knapp, “Princeton Care Center nursing home closes abruptly, leaving families scrambling to move loved ones,” *Planet Princeton* (Sep. 2, 2023), <https://planetprinceton.com/2023/09/02/princeton-care-center-long-term-care-facility-closes-abruptly/>.

⁴ *BMC Health Services Research* 7, 93 (2007), <https://doi.org/10.1186/1472-6963-7-93>, <https://bmchealthservres.biomedcentral.com/articles/10.1186/1472-6963-7-93>

⁵ The White House, “FACT SHEET: Protecting Seniors by Improving Safety and Quality of Care in the Nation’s Nursing Homes” (Feb. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>