

TESTIMONY OF

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United States Senate Committee on Finance
“Not Forgotten: Protecting Americans From Abuse and Neglect in Nursing Homes”
MARCH 6, 2019

Chairman Grassley, Ranking Member Wyden, and distinguished members of the Committee, I'd like to thank you for holding this important hearing. My name is Dr. David Gifford, and I am a geriatrician and currently Senior Vice President of Quality and Regulatory Affairs at the American Health Care Association (AHCA). Previously, I served for six years as Director of the Rhode Island State Department of Health. Prior to that, I was the Chief Medical Officer for Quality Partners of Rhode Island, while also serving on the faculty at Brown University. In addition, I've been a medical director in a number of nursing homes in Rhode Island. Throughout my career, I have been asked to participate on numerous federal expert panels, including the Centers for Medicare and Medicaid Services' (CMS) panel to develop the Quality Assurance & Performance Improvement Program for nursing homes and the Center for Disease Control's Infection Control Panel. On behalf of AHCA and its members, I would like to thank the committee for the opportunity to participate in this morning's hearing.

I would like to begin this written statement by saying that Ms. Virginia Olthoff and Ms. Maya Fisher's mother were entrusted into the care of nursing homes. Quite simply and regrettably, these nursing homes not only failed them; they failed and tragically impacted the lives of their families and friends, as well. Families and residents who are often at their most vulnerable and in need of care and support should never have to worry about their physical safety, let alone experience what Ms. Olthoff and Ms. Fisher's mother endured. As a physician who has committed my career to the improvement of care for the elderly and as a son of two elderly parents, on behalf of AHCA, I am appalled and disgusted by the two devastating incidents we will discuss here today. Chairman Grassley and committee members, thank you for making sure that they are not forgotten.

Before I turn to a discussion of some proposed strategies to address abuse in nursing homes, I would like to briefly provide some important context about the industry as a whole. AHCA is the nation's largest association of long term and post-acute care providers representing nearly 10,000 of the 15,000+ nursing homes in the country who routinely provide high quality care to over a million residents and patients every day. We represent nearly half of all not-for-profit facilities, two-thirds of proprietary skilled nursing facilities (nursing homes), and half of government facilities.

Our mission is improving lives by delivering high quality care. While there are tragic stories like the ones presented today, and this hearing is rightfully focused on how to prevent these

tragedies in the future, I also want to remind you and the American public that there are also countless heartwarming accounts of nursing home staff caring for residents as if they were their own family members. One of the privileges of my job is to travel the country and meet nurses, nursing assistants and nursing home staff from around the country who dedicate their lives to the care of the elderly. Today, I hope that we focus on solutions to prevent these unconscionable incidents in the future and limit using too broad a brush to castigate the countless, hard-working, committed staff caring for elderly residents in nursing homes around the country.

Staff such as the more than 200 employees at the Good Samaritan Society in Florida who left their families at home during Hurricane Irma to stay with their residents over several days, make preparations for the storm, and ensure the residents' safety.

Let me also tell you about the staff in a Colorado nursing home who cared for Jeraldine. After her husband passed away, she was prescribed an off-label antipsychotic and became depressed and socially withdrawn while in her home. This led to her admission to a Colorado nursing home. Over time, the dedicated team of certified nursing assistants (CNAs), nurses, and other caregivers got to know her and realized they could safely remove her from all psychotropic medications. Today, Jeraldine has experienced dramatic improvements. She is one of our most active residents, serving as a key member of the residents' council and, as she puts it, is "a different person" today than when she arrived. This turnaround in Jeraldine's quality of life was a direct result of the actions taken by the caring staff – something that is also going on around the country every day for the millions of residents for which our members care.

Quality Improvements in America's Nursing Homes

I am proud to report to you, Chairman Grassley and Ranking Member Wyden, that in the last seven years, both the quality of care and caregiving methods used in our nursing homes have improved dramatically. We need to build off of this success to address the complex issues raised today.

In early 2012, AHCA launched the Quality Initiative, a member-wide challenge to meet specific, measurable targets in areas including hospital readmissions and the off-label use of antipsychotic medications and to adopt the Department of Commerce's Malcom Baldrige framework of health care excellence. Our members stepped up to that challenge.

Since the launch of this Initiative, our members have demonstrated significant qualitative and quantitative improvements in the care provided to nursing home residents. For the first time in the history of Baldrige program, an AHCA member in Idaho won the Department of Commerce's prestigious national Malcom Baldrige award for health care over all other health care providers.

First and most importantly, nursing homes over the past seven years have demonstrated improvement in 18 of the 24 quality outcomes measured and publicly reported by CMS. The data demonstrates further that:

- **Fewer residents are returning to the hospital from the nursing home.** An important measure of nursing home quality is the number of residents who return to a hospital because their condition has deteriorated during their nursing home stay. Today, that indicator of quality has changed for the better. Since 2011, the number of residents returning to the hospital after a nursing home stay has declined 11.6 percent.
- **Fewer residents are receiving antipsychotic medications.** Today, less than one in seven nursing home residents are receiving antipsychotic medications. This is a significant decline from 2011 when 25 percent of all residents received an antipsychotic.
- **Staff are spending more time than ever before with residents.** Remarkably, 75 percent of nursing homes received three out of five stars or better from CMS for staffing. In fact, in 2018, three out of every four nursing homes had more registered nurses and clinical staff caring for residents than what CMS projects they should have based on the type of residents in the facility. This is a significant improvement even compared to just two years ago when 18 percent had staff greater than what CMS expected based on the facility's residents. At the same time as described below we are facing serious staffing challenges.
- **Nursing homes provide more person-centered care today than ever before.** Only one in 18 nursing home residents report experiencing pain compared to one in eight in 2011. Moreover, since 2011, common ailments among nursing home residents have steadily declined. For example, we can document a 20 percent decrease in pressure ulcers, a 61 percent decline in urinary tract infections, and a 35 percent decline in depressive symptoms. And, as Jeraldine's story demonstrates, nursing homes have trained staff to better understand and care for residents with dementia without medications and replace antipsychotic medications with robust activity programs, social workers, and resident councils so that residents can be mentally, physically, and socially engaged.

Improvements Have Been Made, But Challenges Remain

The dramatic improvements described above are the result of the unrelenting commitment of AHCA members dedicated to improving the care provided for their nursing home residents. It also from AHCA's decision to identify and concentrate on root cause issues. However, from time to time, we fall short – sometimes terribly short.

Let me state for the record loudly and unequivocally: the cases of neglect and abuse like those we heard about today are inexcusable and should not happen – ever. The trust the elderly and their families place in us should never be violated.

AHCA is committed to preventing, not just reducing, future cases of neglect and abuse. Indeed, as AHCA's Senior Vice President of Quality and Regulatory Affairs, having spent my career

working to improve nursing home quality, incidents like these are painful to hear, horrific and should never have happened to these individuals or to anyone else.

So how do we prevent something like what happened to Ms. Olthoff and to Ms. Fisher's mother from happening in the future?

As a representative of AHCA who is a primary care physician and former public health official, I think about prevention efforts in two important ways. First, how to prevent a disease from of adverse event from happening in the first place, which would be referred to as primary prevention – versus the second type, how do you treat and prevent a disease from getting worse – so called secondary or tertiary prevention. Both are effective strategies but need to be done in concert since neither alone are effective in preventing disease. Let me use the flu as an example. Primary prevention efforts would include the use of the influenza vaccine to prevent the influenza before it happens. When the vaccine is not effective, secondary and tertiary strategies are needed such using an oral antiviral medication such as Tamiflu, to treat individuals who have already developed the flue in order to prevent complications or the spread of the infection.

Using these public health principles as an analogy, currently, most CMS regulations and enforcement actions to address abuse would be classified as secondary or tertiary prevention efforts (that is steps and actions taken after an allegation of neglect or abuse). There is less focus on steps to prevent instances of abuse, or so-called primary prevention. For example, CMS already has extensive and broad regulations in place,¹ and there are criminal laws and penalties about elder abuse. CMS regulations clearly state that residents shall not suffer from any abuse and require immediate reporting to law enforcement and the state licensing agency within two to 24 hours of any allegation of neglect or abuse; posting and notification of residents' rights; procedures on how to report allegations/concerns; and steps on reporting and investigating any allegations, as well as mandated employee education about abuse and reporting requirements. All of these are steps to be taken after neglect or abuse has occurred.

These regulations do not stand alone. Rather, they are augmented by CMS' vast authority to enforce and mandate penalties upon those nursing homes that are non-compliant after the abuse or neglect has occurred. For example, CMS must apply civil monetary penalties (CMP) up to \$21,393 per day upon a nursing home when cited for abuse or neglect that harms a resident. The per diem CMP remains in effect until the problem leading to abuse or neglect is corrected. Additionally, CMS can limit admissions to a nursing home, deny payments to that same facility, terminate a facility from Medicare and Medicaid, and report those individuals involved in a violation to the state professional licensing boards. In addition to requiring the nursing home to submit a plan of correction, CMS can also mandate remedies to fix the situation, including mandatory staff training, the transfer of at-risk residents to other facilities, hiring of an external

¹ See F-tags 600 through 610 in the State Operating Manual at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_itcf.pdf

manager/consultant, hiring of an external monitor, or any other remedy it determines necessary to remedy the problems found during their onsite inspections.

So as one can see, there is no shortage of regulations addressing abuse and neglect and the penalties are severe.

It is AHCA's position that neither the number of pages of regulations nor the amount of penalties imposed (secondary and tertiary prevention efforts) will stop bad actors from engaging in bad activities. Rather, we would recommend focusing on primary prevention strategies to prevent neglect or abuse before it happens. In order to develop effective primary prevention strategies, another tenant of public health efforts and quality improvement strategies to prevent disease and adverse events is to focus on the underlying root causes.

To identify potential causes, we have spoken with members and considered the abuse and neglect citations. After reviewing these specific citations of abuse and neglect to a resident, we make the following recommendations:

1. Expand federal programs that attract healthcare workers to the nursing home industry.
2. Strengthen federal regulations around reporting and sharing of information about employees who have engaged in abuse.
3. Make ratings of resident and family satisfaction with Nursing Home care publicly available.

First, as we examine these cases and discuss this issue with members, it is AHCA's position that one of the causes for many of the incidents cited by CMS for neglect frequently lies in part with a nursing home's ability to hire, engage, and retain skilled, talented, and suitable staff to care for this frail and vulnerable population. Unfortunately, there is a national workforce shortage, which is even worse in the rural areas. When we do identify or train high quality staff, they often take jobs in the hospital or resign from a nursing home to accept positions in a hospital. We are in desperate need of a program to attract and retain more nurses, aides, and health professionals, such as social workers and activities coordinators. To this end, we would recommend expanding on other successful federal programs that use loan forgiveness to attract health care workers in needed areas, including nursing homes.

Second, we need to a much stronger process to prevent people who are at risk of inflicting abuse or neglect from working in nursing homes. Presently, the federal government prohibits nursing homes from hiring direct-care employees who will care for resident that have been:

- *"Found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law,"* or
- *"Had a finding entered into the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property,"* or

- *“Have a disciplinary action in effect against his or her professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property.”*

Currently, CMS, in its guidance to nursing homes, states that *“facilities must be thorough in their investigations of the histories of prospective staff. In addition to inquiry of the State nurse aide registry or licensing authorities, the facility should check information from previous and/or current employers and make reasonable efforts to uncover information about any past criminal prosecutions.”* AHCA strongly supports this guidance.

Additionally, states can require nursing homes to complete a criminal background check on employees prior to hiring. Many providers also choose to implement more stringent hiring policies than what is mandated by law. In this regard, AHCA routinely advises members on best practices and model policies for employee background screening. After all, the safety and security of patients, residents, and families begins with recruiting staff of the highest integrity. However, we hear from members across the country repeatedly that this is one of the most difficult challenge they face.

In addition to checking state registries, CMS also requires facilities to *“report to the State nurse aide registry or licensing authorities any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff.”* However, this is only required staff found unfit by a court of law. The court systems take time, and other actions are not reported.

In addition, when a negligent staff member moves to another state, their history of abuse or neglect does not consistently make it into the next state’s registry. AHCA proposes that to ameliorate this situation, nursing homes require easier access to and participation in the national practitioner data bank maintained by the Health Resource and Services Administration (HRSA). This data bank currently collects information from hospitals, health plans, and state licensing boards for all health care professionals, including any terminations by providers who participate in the data bank. It is AHCA’s position that the national practitioner data bank must be available to all Medicare and Medicaid certified providers for the purposes of background checks of prospective employees. This will significantly improve the profession’s ability to root out bad actors before they are hired.

Third, AHCA strongly supports a mechanism for public reporting on resident and family satisfaction. Nursing homes are the only sector without a CMS reporting requirement on satisfaction. Making consumer satisfaction information available to families and future residents will go a long way toward enhancing transparency regarding the operation of a nursing home. Often, staff involved in abuse and neglect were identified early on as being “rough” or “difficult” with residents. Having the resident’s and families report their satisfaction with the care and staff can help detect concerns to avoid tragic events like those described today.

Finally, AHCA would be remiss if it did not address the relationship between the safety and security of patients, residents, and families and the ability of its member homes to recruit and retain staff of the highest caliber. We have already established that our members are struggling to find the right staff. It is also a challenge to offer competitive salaries and benefits to staff. In its March 2018 Report to Congress on Medicare Payment Policy, the Medicare Payment Advisory Commission (MedPAC) reported that nursing homes have no extra room to increase costs compared to the reimbursements they receive from Medicaid and Medicare, which cover three-fourths of residents in nursing homes. The cost of more regulation that focuses on paper documentation, allegations requiring investigations, and reports of cases redirects limited resources and staff away from providing care to residents. This is unsustainable, and efforts to further improve nursing home care must be considered within this context.

Conclusion

One of the most important concerns before AHCA – in addition to ensuring that we never again experience incidences like Virginia Olthoff and Maya Fisher’s mother – is how to continue and sustain the improvements in care that we have seen since 2012. This is why we encourage nursing homes to have strong systems in place. Over the past several years, we have supported and strongly encourage members to adopt CMS’ Quality Assurance and Performance Improvement (QAPI) program, despite the fact that these regulations do not go into effect until November 2019. Our members who have adopted this approach consistently have better clinical and workforce outcomes and significantly fewer citations for abuse or neglect.

AHCA is committed to continuing to strive for complete elimination of all instances of abuse and neglect. We are committed to working with this committee and others to achieve that goal. We believe the answers will largely be found, not in adding to an already broad and expansive set of regulations and penalties that fall into the secondary or tertiary prevention category, but in developing and strategies such as those proposed today, that will help prevent these tragic incidents from happening.

Quality care in America’s nursing homes has come a long way, and it remains our focus, our passion, and our commitment. We continue to challenge ourselves to improve and enhance quality, as demonstrated by both the data and the experiences of Jeraldine and our dedicated staff who overcome myriad obstacles to make sure our residents remain safe and properly cared for. This is especially true as we prepare for the increased demand for long term and post-acute care in the future as baby boomers begin to reach the age of 85.

AHCA stands ready to work with Congress, members of this committee, CMS, and other health care providers to continue its mission to improve lives by delivering common sense solutions for quality care so that neither Virginia Olthoff nor Maya Fisher’s mother are forgotten. Thank you for the opportunity to testify today.