

Kevorkian Says His Role in Death Was 'Duty'

By ANDREW BLUTH

PONTIAC, Mich., March 22 — Dr. Jack Kevorkian today told a jury here considering murder charges against him that he was no more a criminal for giving a seriously ill Michigan man a lethal injection of chemicals last year than is an executioner.

Acting as his own lawyer for the first time in his five trials, Dr. Kevorkian said in his opening statement that like an executioner, his "intent is to do his duty."

After prosecutors objected to his arguments, Dr. Kevorkian, who has said that he has presided over more than 130 suicides, explained himself to Judge Jessica R. Cooper of Oakland County Circuit Court with jurors out of the courtroom.

"I despise a human being dying in my hands," he told Judge Cooper. "But my intent isn't to kill the person. I thought it was my duty as a physician to do this."

But the prosecutor, John Skrzynski, told the jury that the case was about no broader issue than the

death of Thomas Youk, a 52-year-old Michigan man who was suffering from amyotrophic lateral sclerosis.

"The issue you will decide is whether Jack Kevorkian has the right to kill or whether he's accountable to the law and guilty of murder," Mr. Skrzynski said in his opening statement. "Jack Kevorkian killed Tom Youk and Jack Kevorkian did not have the right to kill."

In four previous trials on charges of assisted suicide, juries have acquitted Dr. Kevorkian three times and failed to reach a verdict once. This time Dr. Kevorkian decided to intensify the debate on assisted suicide by actively administering the lethal drugs to Mr. Youk in Mr. Youk's home last September, rather than setting up his "suicide machine" that let patients inject themselves. Dr. Kevorkian videotaped the injection and gave the tape to the CBS News program "60 Minutes." In the broadcast, Dr. Kevorkian said he was daring prosecutors to charge him.

After the broadcast of the video-

tape, prosecutors charged Dr. Kevorkian with first-degree murder and delivery of a controlled substance. They also charged him with assisted suicide, but dropped that count in an apparent effort to prevent Dr. Kevorkian from presenting evidence about Mr. Youk's suffering.

Before jury selection began early this morning, Dr. Kevorkian told Judge Cooper that he was prepared to defend himself. This day in court was something he had wanted for a long time, Dr. Kevorkian said, adding that only he had a good enough understanding of his beliefs to adequately present his defense.

"There are certain points I can bring out better than any attorney," he told the court during a thorough questioning session in which Judge Cooper tried to determine if Dr. Kevorkian understood the risks of representing himself.

"I've been planning this all along," Dr. Kevorkian said.

In the questioning, Judge Cooper explained the weight of the charges and the maximum penalty associated with both.

When she cautioned Dr. Kevorkian that he was facing a prison term that could last the rest of his life, he responded, "There's not that much of it left, Your Honor."

Dr. Kevorkian will enlist the legal advice of David Gorosh and Lisa Dwyer, the two lawyers who had argued his case in pretrial hearings, but they will serve only as advisers and be prohibited from voicing objections, addressing the court or questioning witnesses.

Mr. Gorosh said that he urged Dr. Kevorkian not to represent himself, but that Dr. Kevorkian told him over the weekend that he would not follow that advice.

"We advised Dr. Kevorkian that in our opinion it was in his best interest to have lawyers represent him," Mr. Gorosh said, "but it is his constitutional right to represent himself."

While juries have never ruled against Dr. Kevorkian, experts say he is taking a risk by not using lawyers in the most serious trial he has faced.

"If his prime objective is to be acquitted, then I think it would be in his best interest to present himself in a more respectful way in the courtroom and to let his attorneys try the case," said Larry Durbin a law professor at the University of Detroit Mercy.

But, Mr. Durbin acknowledged that Dr. Kevorkian might have bigger goals.

"If he tries to let his lawyer defend him on the murder charge, he loses the opportunity to talk about the issues of euthanasia and assisted suicide," Mr. Durbin said.



Reuters

Dr. Jack Kevorkian giving opening arguments in his own defense yesterday, at the start of his murder trial in Pontiac, Mich.

Reports of Abuse of Elderly Are Ignored, Panel Is Told

By ROBERT PEAR

WASHINGTON, March 22 — Complaints about the abusive treatment of elderly people in nursing homes are often ignored for many months by state and Federal officials, Congressional investigators said today.

Relatives of people who have died in nursing homes told Congress they were outraged that no one had looked into their complaints about substandard care.

William J. Scanlon, director of health care studies at the General Accounting Office, an investigative arm of Congress, said that the Federal Government would spend \$39 billion on nursing home care this year, but that complaints about serious harm to nursing home residents "often go uninvestigated."

Moreover, Mr. Scanlon said, Federal officials do little to prod, supervise or monitor the states, which are responsible for the initial inquiries.

Mr. Scanlon and two relatives of nursing home residents testified at a hearing of the Senate Special Committee on Aging, headed by Senator Charles E. Grassley, Republican of Iowa.

The accounting office found that one-fourth of the nation's 17,000 nursing homes had deficiencies that caused "immediate jeopardy or actual harm" to residents. Most fines and other penalties proposed by the Federal Government are never actually imposed, and nursing homes that correct deficiencies often violate the law again, the auditors said.

David R. Seckman, acting president of the American Health Care Association, a trade group for nursing homes, said that inspectors often focused on "technical violations posing no jeopardy to residents." The Government often seemed more eager to punish nursing homes than to work with them to fix problems, Mr. Seckman said.

President Clinton announced a major initiative to improve the quality of care in nursing homes last July, but the accounting office found that problems persisted in many states.

The G.A.O. said the states had failed to investigate hundreds of complaints like these:

¶A Baltimore nursing home had no hot water for months at a time. A resident was "sitting in urine for extended periods of time."

¶A resident of a Detroit nursing home fell, shattered her hip and complained of pain, but X-rays were not taken for three days, and then only after the family demanded attention

for her.

¶A patient at another Michigan nursing home had maggots in the sores of his feet, but the staff would not send him to a hospital because the home's nursing director feared that a state agency would be called in to investigate.

In a March 8 letter, the Senate Aging Committee invited Nancy-Ann Min DeParle, administrator of the Federal Health Care Financing Administration, to testify today. But the Clinton Administration refused to testify, saying the committee had violated protocol by allowing ordinary citizens to testify prior to officials from the executive branch.

Senators of both parties said the Administration's demand was petty and unreasonable.

"It's totally unacceptable," said Senator John B. Breaux of Louisiana, the senior Democrat on the committee. Mr. Grassley said the Administration's refusal to testify suggested that it was not serious about responding to consumers' complaints.

Michael Hash, deputy administrator of the Health Care Financing Administration, said he agreed that "we need stricter standards for the prompt investigation of serious complaints." States will now have to investigate any complaint of "actual harm" to a nursing home resident within 10 working days, Mr. Hash said.

One witness, Gloria Cruz, said she had been frustrated in efforts to get Maryland authorities to investigate the death of her grandmother in October, one week after being released from a Baltimore nursing home. Ms. Cruz said she filed a complaint asserting that the nursing home had been negligent.

Ms. Cruz said a Maryland health official told her that the state authorities were very busy because they received 80 complaints a month and had to "deal with the live residents before they deal with the dead ones."

In an interview, Carol Benner, director of licensing and certification at the Maryland Department of Health and Mental Hygiene, said: "I would hope that my staff would not be that insensitive. This nursing home did not have a poor track record. We investigate complaints immediately when we can make a difference. But if a resident has died, we can investigate at a later time because it's clear that the investigation won't have an impact on that resident."

The New York Times

TUESDAY, MARCH 23, 1999

Deep Desert Grave Awaits First Load Of Nuclear Waste

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By JAMES BROOKE

LOS ALAMOS, N.M., March 25 — Putting a coda on the cold war, a flatbed truck rumbled out tonight from this "atomic city," the birthplace of nuclear weapons, carrying an inaugural shipment for the world's first deep underground nuclear waste depository.

After \$2 billion and 25 years of environmental studies, political protests and legal challenges, the depository outside Carlsbad, 256 miles southeast of here, is to receive its first waste shipment on Friday morning. On Monday, a Federal judge in Washington allowed the plant to receive this first shipment of nuclear waste, although a state permit is still pending for later shipments of waste mixed with hazardous chemicals.

Transported in huge stainless steel containers, the barrels of plutonium waste are to be placed in chambers carved from an ancient salt bed, nearly half a mile below ground. Geologists say the deposit of salt has been stable for 250 million years.

"We won the cold war by building nuclear weapons, but we have not cleaned up the legacy of the cold war and its waste," Energy Secretary Bill Richardson, a former Congressman from northern New Mexico, said today. "The opening of this facility is a step to meeting this obligation."

The underground dump, which was ready to take shipments a decade ago, has been designed to receive nuclear waste and radioactively contaminated materials from 23 military sites from across the nation. Today, 61 million people, or about one quarter of the nation's population, live within 50 miles of a military nuclear waste storage site. By the time the Carlsbad site, which is called the Waste Isolation Pilot Plant, has been in operation for 10 years, the number of people living near sites with military nuclear waste would be reduced to 4 million.

"We have a cleanup job around the country that is being held up by an absence of a disposal site," Mary Anne Sullivan, the Energy Department's general counsel, said today from Washington. Defending the department's decision to move today, she said, "It costs us \$300,000 a day to maintain that facility ready to operate."

Over the next 35 years, barring successful court challenges, almost 40,000 truckloads of waste will be taken to the plant from across the country. The underground maze of 55 man-made storage chambers at Carlsbad has the capacity to store six million cubic feet of waste, roughly half of the military's projected needs.

So far, the Energy Department has authorized the plant to receive waste from the Los Alamos National Laboratory, from the Idaho National Engineering and Environmental Laboratory and from Rocky Flats, a former nuclear trigger factory near Denver.

Ever since the Carlsbad nuclear storage site was proposed in 1974, New Mexico has been split between opponents and proponents.

Opponents say it is a folly to lock up dangerous waste simply because the technology does not exist today to render it harmless. They say that the \$2 billion spent on the Waste Isolation Pilot Plant, or WIPP, has become a justification for following through with it.

At a rally in Santa Fe tonight, protesters waved signs reading "WIPP = new waste" as they waited for the truck, which traveled under heavy police escort down a highway bypass especially constructed last year for nuclear waste removal. Opponents argue that the waste should not be trucked around the country, but stored in local, above-ground facilities that would allow for retrieval at later dates.

"We may find in 50 years, if the technologies are developed, that this waste is a resource," said Joni Arends, a director of a Santa Fe group, Concerned Citizens for Nuclear Safety. Referring to the salt caverns in Carlsbad, she said, "Once the barrels collapse, it is too hazardous for anyone to go down there and get it."

Largely contaminated with plutonium, the waste, which continues to be produced, generally consists of protective clothing, laboratory tools and equipment, and soils and sludges from earlier disposal efforts.

Critics also say that accidents are bound to happen as nuclear convoys from as far away as California and Ohio converge on Carlsbad, a city of 27,000 in the Chihuahuan Desert.

Energy Department officials reply that the shipments will take place at night, when traffic is low, and will be tracked by satellite. Underscoring their promise to move waste only when weather permits, they said that fog on roads forced them to delay the first shipment, which had been planned for early this morning.

By moving the waste from surface storage sites around big cities, the Energy Department eases nuclear nightmare scenarios — an earthquake in Los Angeles, or a plane crash in Denver. At Carlsbad, the waste will be stored almost half a mile below a desert site that has only 113,000 people living within 50 miles.

"All the drums will be smashed in until the pressure is equalized — that is why it is a perfect site," said John A. Heaton, a retired Carlsbad pharmacist who represents the area in the State Legislature. Mr. Heaton and other local notables plan to turn out Friday before dawn to welcome the first truck.

According to the Energy Department, the transport containers for the waste barrels have passed a series of grueling tests: dropping 30 feet onto a concrete pad, submitting to jet fuel flames at temperatures greater than 1,475 degrees Fahrenheit and falling on a steel spike to test puncture resistance.

But vowing to continue to fight the waste plant in court, plaintiffs have a hearing scheduled on May 3 before the Circuit Court of Appeals in Washington, arguing that the state can only grant a permit to a new disposal site if it is empty. Critics say that the Energy Department is jumping the gun this week because the New Mexico Environment Department is still evaluating its application for an operating permit.

"WIPP is a hazardous waste facility, and a hazardous waste facility cannot operate without a permit," said Don Hancock, a lawyer for one plaintiff, the Southwest Research

and Information Center. "The D.O.E. is breaking the law. Because they are operating without a permit, we expect that the courts are going to require them to ship the waste from WIPP back to Los Alamos."

The judge's decision on Monday came in response to a suit by New Mexico, Mr. Hancock's group and three other environmental groups to block shipment of waste to the plant until the state had issued a permit.

Officials at the State Environment Department, the major oversight agency for the plant, are angry that the Federal Government decided to go ahead with disposal without waiting for the final permit, which is expected to be issued this fall.

"We continue to caution D.O.E. that these pre-permit shipments are probably not in their best interest as they are risking years and probably hundreds of thousands of dollars in litigation," Nathan Wade, the department's spokesman, said today, referring to legal challenges by citizens groups.

Gov. Gary E. Johnson of New Mexico, a Republican and a political rival of Mr. Richardson, noted in a statement on Wednesday that "New Mexico has been under unbelievable pressure to simply step aside and let D.O.E. open WIPP."

Elsewhere in the "nuclear West," politicians are fighting to keep nuclear waste repositories out of their backyards.

Last week in Utah, Gov. Michael O. Leavitt signed legislation that stripped state liability protection from utilities that want to store high-level radioactive waste at a commercial disposal site on an Indian reservation 50 miles west of Salt Lake City. Earlier, Mr. Leavitt seized control of roads leading to the site.

In Nevada yesterday, Gov. Kenny Guinn joined other politicians from the state in opposing a repository for nuclear power plant waste at Yucca Mountain. In a statement before the Energy and Natural Resources Committee of the United States Senate, Governor Guinn said that, from 1976 to 1996, there had been more than 620 significant earthquakes within a 50-mile radius of the mountain.

In New Mexico, perhaps in recognition of the finality of the Energy Department's action, Governor Johnson tried to make the best of it.

"Never before has a deep geologic repository for the disposal of radioactive wastes commenced operations anywhere in the world," he said. "Now that the court has ruled, the light is finally green to go."

The New York Times

FRIDAY, MARCH 26, 1999

Bill Protecting Medicaid Patients Is Signed

Rules on Evictions For Nursing Homes

By ROBERT PEAR

WASHINGTON, March 25 — President Clinton today signed legislation that prohibits nursing homes from evicting people on Medicaid, as some have done in recent years as part of an effort to recruit more affluent patients.

The bill, passed by Congress with bipartisan support, protects Medicaid patients who live in nursing homes that decide to withdraw from the program.

Under the new law, if a nursing home decides to pull out of Medicaid, it must continue to care for people who live in the home, including those who may later qualify for medical assistance.

Medicaid helps pay the bills for two-thirds of the 1.6 million people in nursing homes in the United States. Though it is generally perceived as a program for low-income Americans, it also covers many middle-class people who deplete their assets in old age.

Families can easily exhaust their assets on nursing home care because the costs average more than \$110 a day nationwide, and much more than that in urban areas like New York City.

The legislation results directly from the efforts of a Florida couple who fought back when a nursing home in Tampa tried to evict 54 Medicaid patients.

The couple, Nelson and Geri Mongiovi, went to court to stop the evictions last March. And they went to Congress for help. The problem was well defined, and Congress responded faster than usual.

Mr. Mongiovi, a retired letter carrier who was at the White House for today's signing ceremony, said the law came too late to help his mother, Adela Mongiovi, who died in November at the age of 93. But he said, "This bill is a good memorial to her and will help thousands of other people."

The bill was pushed through Congress by three lawmakers from Florida: Senator Bob Graham, a Democrat, and Representatives Michael Bilirakis, a Republican, and Jim Davis, a Democrat.

Mr. Graham said: "Nursing homes would accept Medicaid patients, then change the rules in the middle of the game and dump them on the street. These evictions have a devastating effect on senior citizens. The death rate for people uprooted in this way is two or three times as high as for those who receive continuous care."

Mr. Bilirakis said: "This law closes a legal loophole that allows nursing homes to evict their most vulnerable residents. It puts patients ahead of profits."

The nursing home industry supported the bill. But Linda Keegan, vice president of the American Health Care Association, which represents nursing homes, said, "We will see more and more nursing homes opt out of Medicaid because of the inadequacy of Medicaid payments," which are set by the states.

Medicaid generally pays nursing homes less than the rates paid by Medicare, private insurance and families who pay entirely with their



Paul Heselros/The New York Times

President Clinton signed into law yesterday a bill that prohibits the eviction of patients by nursing homes that withdraw from Medicaid.

own money.

Toby S. Edelman, a lawyer at the National Senior Citizens Law Center, praised the bill signed today. But Ms. Edelman said Congress should pass a comprehensive bill to prevent nursing homes from discriminating against Medicaid beneficiaries.

"Few nursing homes withdraw entirely from Medicaid," she said, "but many limit their participation by certifying only a small number of beds for Medicaid. They discriminate against Medicaid beneficiaries by denying them admission. And if a person is admitted as a private patient and later becomes eligible for Medicaid, the person may be told that 'no Medicaid beds are available.'"

Whether a nursing home may enforce such restrictions has been a

question in several lawsuits around the country. States have taken different positions on the issue.

The new law would not require nursing homes to accept Medicaid patients. But if a nursing home participates in Medicaid and decides to withdraw, it may not evict those Medicaid patients it already has. And it would have to inform new patients, at the time of admission, that it did not accept Medicaid payments.

As evidence of the inadequacy of nursing home rates, Bruce Yarwood, legislative counsel for the American Health Care Association, said that "69 percent of nursing home residents rely on Medicaid for their care, but Medicaid accounts for only 48 percent of nursing home revenue."

The New York Times

FRIDAY, MARCH 26, 1999

Included in the crime bill will be a provision that significantly strengthens our enforcement capabilities against nursing home quality violations by adding new criminal penalties and new civil authority to impose sanctions on substandard nursing home facilities and chains. In the wake of recent reports of continuing problems with nursing home quality, such an action may well be viewed by the public as a strong and desirable action by the Federal government to penalize bad apple nursing homes.

BACKGROUND

A series of GAO reports and reports by the HHS Inspector General indicated that almost 25 percent of the nation's nursing homes have severe quality infractions that often go unpunished, even though the conditions jeopardize the health and safety of residents. These reports also found that nursing home quality regulations were ineffectually enforced. Approximately 40 percent of the nursing homes in the study frequently corrected problems to escape fines only to be cited later for the same violation, a clear indication that the current enforcement authority that HHS has to impose sanctions and fines on facilities that are out of compliance is not effective in preventing quality of care violations.

These studies contribute to a growing perception that HHS, in consultation with the Department of Justice, cannot adequately handle this caseload. It appears clear that they need more resources and sanction authority to improve our record in this area.

CURRENT STATUTORY LIMITATIONS

Because our Federal authority to enforce nursing home quality standards is extremely limited, most nursing home enforcement activities are handled at the state and local level. Unfortunately, states usually limit criminal prosecution to individual nursing home employees and rarely pursue chains, management companies, or officials. In addition, it is extremely difficult for a state to pursue cases against chains, management companies, or corporate officers when the business headquarters are located in a different state.

Presently, there is no Federal authority to bring criminal sanctions against individual employees, nursing homes, or facility chains for violations of Federal and state nursing home quality provisions. In addition, although United States Attorneys have begun to use the False Claims Act to prosecute cases alleging quality of care violations, they currently have no civil authority to pursue nursing homes specifically and are concerned that using the False Claims Act to leverage injunctive relief against nursing homes will make us vulnerable to criticism that we are misusing the threat of these suits.

Both HHS and DOJ feel that neglect and abuse of nursing home residents is so egregious and widespread that they require more severe penalties than exist under current law to address this problem, including stiff civil fines and criminal prosecution.

PROPOSED LEGISLATION

The proposed legislation would give DOJ and HHS the civil and criminal authority they need to effectively prosecute individuals, nursing homes and facility chains for egregious violations of nursing home quality standards. It would create: criminal sanctions for organizations or individuals who knowingly and willfully harm residents; civil penalties that could be imposed on individuals, facility chains, or management companies if they engage in conduct that results in harm to residents; new injunctive authority that would allow DOJ and HHS to order facility chains to put an immediate stop to behavior that harms residents.

This new legislation would build on our prior commitment in this area. The President has already included an investment of \$309 million for nursing home quality enforcement activities in his FY 2000 budget, an increase of 31 percent (\$74 million) over last year's funding level, which will provide additional assurances that nursing-home residents will receive quality care by: increasing the frequency of nursing home quality surveys; requiring nursing homes to conduct criminal background checks of employees; establishing a national registry of workers who have been convicted of abusing residents; and allowing more types of nursing home workers with proper training to help residents eat and drink during mealtimes. In addition, the President recently directed HHS to: create higher civil monetary penalties for quality violations and permit these penalties to be more quickly determined and imposed; require states to investigate resident complaints within 10 days; and begin a national campaign this spring to educate the public about the risk of malnutrition and dehydration and preventing abuse and neglect.

LIKELY REACTION FROM ADVOCATES

LIKELY REACTION FROM PROVIDERS

HHS NURSING HOME OVERSIGHT SPENDING: FY 1999 AND FY 2000*Dollars In Millions***DRAFT**

ACTIVITY	FY 1999	FY 2000	\$ Increase	% Increase
SURVEY & CERTIFICATION/NURSING HOMES				
<u>Medicare</u>				
Direct Survey Costs				
Base Funding /1	\$118.6	\$127.7	\$9.1	7.7%
Nursing Home Initiative	\$4.0	\$14.5	\$10.5	262.5%
Subtotal, Direct Surveys	\$122.6	\$142.2	\$19.6	16.0%
Support Contracts				
Base Funding /2	\$4.7	\$3.6	(\$1.0)	-22.1%
Nursing Home Initiative	\$0.0	\$3.6	\$3.6	-----
Subtotal, Support Contracts	\$4.7	\$7.2	\$2.6	55.0%
Subtotal, Medicare (Direct + Support)	\$127.3	\$149.4	\$22.1	17.4%
<u>Medicaid</u>				
Federal Share				
Base Funding /3	\$93.9	\$103.3	\$9.3	10.0%
Nursing Home Initiative	\$0.0	\$15.6	\$15.6	-----
Subtotal, Medicaid/Federal Only	\$93.9	\$118.9	\$24.9	26.6%
Total Survey & Certification/(Medicare + Medicaid)	\$221.2	\$268.3	\$47.1	21.3%
FEDERAL ADMINISTRATION				
Federal Surveyor Activity				
Base Funding /4	\$9.4	\$9.7	\$0.3	3.2%
Nursing Home Initiative	\$0.0	\$6.9	\$6.9	-----
Patient Abuse Registry	\$0.0	\$10.0	\$10.0	-----
Total Federal Admin	\$9.4	\$26.6	\$17.2	183.0%
DEPARTMENTAL APPEALS BOARD				
Base Funding	\$1.2	\$1.3	\$0.1	11.2%
Nursing Home Initiative	\$0.0	\$2.8	\$2.8	-----
Total DAB	\$1.2	\$4.1	\$2.9	252.6%
OFFICE OF GENERAL COUNSEL				
Base Funding	\$3.9	\$3.9	\$0.0	0.0%
Nursing Home Initiative	\$0.0	\$6.7	\$6.7	-----
Total OGC	\$3.9	\$10.6	\$6.7	171.8%
TOTAL NURSING OVERSIGHT HOME SPENDING	\$235.6	\$309.6	\$73.9	31.4%

/1 Includes nursing home direct survey costs (\$116.3 million in FY 1999 and \$121.4 million in FY 2000), MDS costs (\$0 in FY 1999 and \$4 million in FY 2000), and allocation of miscellaneous direct costs (see back-up sheet).

/2 Represents nursing-home only portion of the \$7.0 million in base support contract funding (see back-up sheet).

/3 See back-up sheet for calculation of Medicaid survey and cert base funding for Medicaid nursing homes.

/4 FY 1999 total equals \$8.6 million for 108 FTE plus \$0.8 million for travel for look-behind surveys;

FY 2000 total equals \$8.6 million for 108 FTE plus \$1.1 million for travel for look-behind surveys

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DRAFT**HHS NURSING HOME OVERSIGHT SPENDING: FY 1999 AND FY 2000***Dollars In Millions*

SUMMARY BY ACTIVITY	FY 1999	FY 2000	\$ Increase	% Increase
HCFA				
Medicare Survey and Certification	\$127.3	\$149.4	\$22.1	17.4%
Medicaid Survey and Certification	\$93.9	\$118.9	\$24.9	26.6%
Federal Administration	\$9.4	\$26.6	\$17.2	183.0%
Departmental Appeals Board	\$1.2	\$4.1	\$2.9	252.6%
Office of General Counsel	\$3.9	\$10.6	\$6.7	171.8%
TOTAL NURSING HOME OVERSIGHT SPENDING	\$235.6	\$309.6	\$73.9	31.4%
<i>Base Funding</i>	\$231.6	\$249.5	\$17.8	7.7%
<i>Nursing Home Initiative Funding</i>	\$4.0	\$60.1	\$56.1	1402.5%

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DRAFT**Back-up Sheet/Misc. Direct Survey Costs and Support Contract Costs****Dollars in millions****FY 1999****Direct Survey Activity (not including \$4m earmark for initiative)****Calculation**

Nursing Homes	116.346	74.2%
Other Providers	<u>40.554</u>	25.8%
Direct Survey Activity Costs	156.900	

Nursing Homes	2.299	3.1 * 74.2% (# appears on first page)
Other Providers	<u>0.801</u>	3.1 * 25.8%
Misc. Direct Survey Costs	3.100	from 1999 CJ

Nursing Homes	118.645	74.2%	116.346 + 2.299 misc
Other Providers	<u>41.355</u>	25.8%	40.554 + .801 misc
Total Direct Survey Costs	160.000		

<u>Support Contract Activity</u>	<u>Total</u>	<u>Nursing Home</u>	<u>Calculation</u>
QIES Operation Support	1.725	1.279	1.725 * 74.2%
Telecommunications	1.000	0.742	1.000 * 74.2%
Software Development/COTS	0.816	0.605	0.816 * 74.2%
Network Refreshing	0.120	0.089	0.120 * 74.2%
Collection of Data for Core Data Set	0.400	0.297	0.400 * 74.2%
Quality Improvement (MDS)	0.300	0.300	0.300 * 100% -- nursing home only
Systems Improvement (OSCAR)	0.840	0.840	0.840 * 100% -- nursing home only
Surveyor Training	0.699	0.518	0.699 * 74.2%
Psychiatric Hospital Survey Review	<u>1.100</u>	<u>0.000</u>	not nursing home related
Total 1999 Support Contract	7.000	4.670	

FY 2000**Direct Survey Activity (not including \$14.5m for initiative)**

Nursing Homes	121.40	69.0%
Other Providers	47.50	27.0%
MDS/OASIS	<u>7.00</u>	4.0%
Direct Survey Activity Costs	175.90	

Nursing Homes	2.278	69.0%	3.3 * 69.0% (# appears on first page)
Other Providers	<u>1.022</u>	31.0%	3.3 * 31.0%
Misc. Direct Survey Costs	3.300		from 2000 CJ

Nursing Homes	123.678	69.0%	121.4 + 2.278 misc
Other Providers	48.522	27.1%	47.5 + 1.022 misc
MDS/OASIS	<u>7.00</u>	3.9%	
Total Direct Survey Costs	179.200		

<u>Support Contract Activity</u>	<u>Total</u>	<u>Nursing Home</u>	<u>Calculation</u>
QIES Development	4.400	3.037	1.725 * 69.0%
Maintenance of OSCAR System	0.600	0.600	0.600 * 100% -- nursing home only
Psychiatric Hospital Survey Review	<u>2.000</u>	<u>0.000</u>	not nursing home related
Total 2000 Support Contract	7.000	3.637	

DRAFT

Back-up Sheet/Medicaid Survey and Cert
Dollars in millions

FY 1999

Medicaid Share of Dually Certified Facilities
 (from 1999 CJ)

SpendingAssumption

94.024

x 75% Federal Share

70.518

Plus Cost for Medicaid Only Facilities
 (1802 facilities according to OSCAR)

23.401 1802 X \$12,986 unit cost

1999 Medicaid Survey & Cert/Nursing Home Only

93.919**FY 2000**

Medicaid Share of Dually Certified Facilities
 (from 2000 CJ)

97.759

x 75% Federal Share

73.318

Plus Cost for Medicaid Only Facilities
 (2306 facilities according to OSCAR)

29.946 2306 X \$12,986 unit cost

1999 Medicaid Survey & Cert/Nursing Home Only

103.265

HEALTH CARE FINANCING ADMINISTRATION

**ADDRESSEE:***Deborah Adler*

PHONE: _____

FROM:*Maria Martinez***OFFICE OF THE ADMINISTRATOR
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DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

Deputy Administrator
Washington, D.C. 20201

MAR - 4 1999

The Honorable Michael Bilirakis
Chairman
Subcommittee on Health and the Environment
Committee on Commerce
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I would like to commend you and your colleagues on both sides of the aisle for your introduction and support of H.R. 540, the Nursing Home Resident Protection Amendments of 1999. This bipartisan bill would close a significant loophole in the protections available to some of this nation's most vulnerable people -- frail elderly and disabled nursing home residents.

We all saw the potentially devastating effects of the gap in our enforcement tools when the Vencor chain decided to evict 52 Medicaid recipients. HCFA, the Florida State agency, and the Courts were able to intervene in this case and address the inappropriate transfer situation, but only because of a technicality, because the facility failed to follow the correct procedures under current law. The evictions were halted and residents previously transferred were permitted to return.

Even this remedy in the Florida case was, at best, only a partial solution. The Medicaid beneficiaries, both those transferred and those who were at risk of it, as well as their family members, were put through an unnecessary ordeal of wondering where they would go and what would happen to them. Such "transfer trauma" is recognized by the medical community as posing a serious problem for most nursing home residents. That is why both our law and regulations strictly limit the circumstances under which a nursing home participating in the Medicaid program may undertake such transfers.

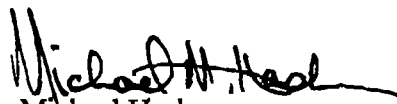
What neither our current law nor regulations can adequately address is the situation where a nursing facility that participates in Medicaid withdraws completely from such participation. Frail residents and family members, who arranged for admission of the resident to the home in good faith, with the expectation that the resident could remain there as long as necessary, with Medicaid picking up the cost when private funds ran out, are faced with the harsh reality of suddenly making other arrangements, sometimes on impossibly short notice.

The Honorable Michael Bilirakis -- Page 2

Your bill addresses this problem in a fair and balanced way. If a nursing home participates in Medicaid, then decides to withdraw from Medicaid but continue operating as a nursing home, your bill sets two, very reasonable requirements. First, the home may not transfer or discharge people residing in the facility before the effective date of the withdrawal from Medicaid, whether the individuals were entitled to Medicaid then or not. Such residents, who entered with a reasonable expectation of being able to use Medicaid to pay for their care at some point if they needed it, could then continue in the home without fearing discharge for this reason. The bill balances this stricter requirement for current residents with a full disclosure of information for new individuals seeking admission after the effective date of the facility's withdrawal from Medicaid, that the facility does not accept that form of payment and that the facility may transfer or discharge the individual if the individual is unable to pay for their own care. Thus, prospective residents, family members, and discharge planners can make informed decisions about choosing a nursing home, knowing that any particular home they are considering either does or does not accept Medicaid as payment and that this fact will not suddenly change at some unpredictable point for that resident after he or she is admitted.

The bill thus allows a nursing home to withdraw from Medicaid participation in a way that honors commitments made to current residents when the home did participate, but changes the rules promptly and unambiguously for anyone new considering admission. I want to be clear that the protections of H.R. 540 are not available to nursing facility residents under current law. We believe that this bill represents a more than fair effort to meet the needs and reasonable expectations of vulnerable low income people in the context of business incentives to both benefit from public funding and maximize profits. We appreciate your efforts to strike a balance in this difficult situation and to provide an appropriate set of requirements to fill this gap in our nursing home oversight mechanisms. We would be pleased to provide any technical assistance that you or your staff may require.

Sincerely,


Michael Hash
Deputy Administrator

cc: The Honorable Sherrod Brown
Ranking Member
Subcommittee on Health and the Environment
Committee on Commerce

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE U.S. DEPARTMENT OF JUSTICE
AND THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES**

I. Purpose

This Memorandum of Understanding ("MOU") between the undersigned parties representing the U.S. Department of Justice ("DOJ") and the U.S. Department of Health and Human Services ("HHS") constitutes an agreement as to the terms and conditions necessary to implement § 1128A(c)(1) of the Social Security Act ("the Act"), 42 U.S.C. § 1320a-7a(c)(1). This section requires the imposition of civil money penalties ("CMP") only as authorized by the Attorney General pursuant to procedures agreed upon by the Attorney General and the Secretary. This MOD governs only the imposition of CMPs by HHS that may be assessed against skilled nursing facilities and nursing facilities as authorized by §§ 1819(h)(2)(B) and 1919(h)(3) of the Act, 42 U.S.C. §§ 1395i-3(h)(2)(B) and 1396r(h)(3). CMPs under these provisions became available to the Secretary on July 1, 1995 pursuant to rules that became effective on that date.

II. Objectives

A. It is the objective of the DOJ to be able to preserve its interest in pursuing investigations of fraud and abuse that may occur in nursing homes without facing potential interference that might be caused by a parallel administrative proceeding.

B. It is the objective of HHS, and the Health Care Financing Administration ("HCFA"), to be able to move swiftly, through the imposition of CMPs and other remedies, to protect the health and safety of residents residing in nursing homes that participate in the Medicare and Medicaid programs when nursing home providers violate requirements at §§ 1819 and 1919 of the Act, 42 U.S.C. §§ 1395i-3 and 1396r.

III. Procedures

A. Acting as HCFA's agent, States conduct surveys of nursing homes to determine if they comply with Federal requirements for participation in the Medicare program. Where a State survey agency identifies noncompliance in facilities that participate in the Medicare program, or both the Medicare and Medicaid programs, the State survey agency may recommend to HCFA that certain remedies be imposed, including CMPs. For such facilities, only HCFA, through its Regional Offices, may impose CMPs. The contact person for such actions is the Associate Regional Administrator for Health Standards and Quality in the appropriate HCFA Regional Office or the person indicated on the notification by HCFA to the United States Attorney ("USAO") of the specific CMP action. Within thirty (30) days of the signing of this MOU, HCFA will furnish to DOJ a list identifying each Associate Regional Administrator having the authority to impose CMPs on nursing

homes. Within thirty (30) days of the signing of this MOU, DOJ will provide to HCFA the names of the appropriate persons in the USAO to whom notification shall be made of HCFA CMP actions.

B. Poor performing facility CMP cases. In those cases where HCFA seeks to impose a CMP on a poor performing facility, HCFA will send a notice to the noncompliant facility advising it that a CMP is being imposed. The definition of "poor performing facility" appears in HCFA's State Operations Manual, and has been furnished to DOJ. Should HCFA revise the definition at any time, HCFA shall promptly advise DOJ of that fact and furnish to the USAOs a copy of the revised definition. Simultaneous with HCFA's notification to a facility that it is imposing a CMP, HCFA will provide to the USAO, or its designated representative, for the District in which the facility is located, by hard copy and/or electronic transmission, a copy of the notice it has sent to the facility along with a copy of the Statement of Deficiencies (Form 2567) upon which the CMP is based. The USAO will have fourteen (14) days from receipt of this information to advise HCFA that it ought not proceed further with the CMP, and in no case may HCFA seek to collect, or accept payment of, the CMP before the USAO has had its fourteen (14) day opportunity to review the matter. Should the USAO advise HCFA not to proceed with the CMP in a manner consistent with the procedures set forth in section IV of this MOU, HCFA will rescind the CMP.

C. Immediate jeopardy cases. In those cases of immediate jeopardy (as defined in 59 Fed. Reg. 56238 (1994) [to be codified at 42 C.F.R. § 488.301]), where HCFA seeks to impose a CMP, HCFA will send a notice to the noncompliant facility advising it that a CMP is being imposed. Simultaneous with HCFA's notification to a facility that it is imposing a CMP, HCFA will provide to the USAO, or its designated representative, for the District in which the facility is located, by hard copy and/or electronic transmission, a copy of the notice it has sent to the facility along with a copy of the Statement of Deficiencies (Form 2567) upon which the CMP is based. The USAO will have fourteen (14) days from receipt of this information to advise HCFA that it ought not proceed further with the CMP, and in no case may HCFA seek to collect, or accept payment of, the CMP before the USAO has had its fourteen (14) day opportunity to review the matter. Should the USAO advise HCFA not to proceed with the CMP in a manner consistent with the procedures set forth in section IV of this MOU, HCFA will rescind the CMP.

D. All other cases. In all other cases of facility noncompliance, when HCFA seeks to impose a CMP it will advise the facility of the possibility that this remedy may be imposed. Simultaneous with the time that HCFA sends such a notice to the facility, but in no case less than fourteen (14) days before the imposition of a CMP, HCFA shall send a copy of the notice, by hard copy and/or electronic transmission, to the USAO, or its designated representative, for the District in which the facility is located. Along with a copy of the notice, HCFA will be

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responsible for assuring that the USAO receives a copy of the Statement of Deficiencies (Form 2567) upon which the CMP would be based. In no case under this subsection may HCFA seek to impose, collect, or accept payment of, a CMP before the USAO has had its fourteen (14) day opportunity to review the matter. Unless the USAO advises HCFA within fourteen (14) days of its receipt of the notice that the CMP should not be imposed, HCFA may assess the CMP as indicated in the notice to the facility. If the USAO concludes its review in less than fourteen (14) days, and advises HCFA that it may proceed with the CMP, HCFA will be free to impose, collect, and accept payment of the CMP at that time. Should the USAO advise HCFA not to proceed with the CMP in a manner consistent with the procedures set forth in section IV of this MOU, HCFA shall not impose, collect or accept payment of the CMP.

E. In all notifications by HCFA to the USAO of CMPs proposed or imposed pursuant to paragraphs III B., C., and D. of this MOU, HCFA will provide to the USAO, to the extent that it is readily available to HCFA, the following information:

1. the number of residents affected by the deficiency;
2. an estimate of how long the deficiency has existed;
3. the identity of the owners and managers of the facility in question;
4. the names and addresses of other facilities owned or managed by the same individuals or entities; and
5. an estimate of the actual damage which was caused by the deficiency (i.e. injury, death, additional medication or treatment).

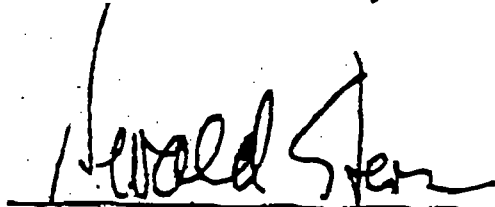
F. Consistent with law enforcement needs and limitations on permissible disclosure of such information, the USAO shall advise HCFA of any investigations it is pursuing against a nursing provider certified for participation under the Medicare or Medicaid programs where the USAO has information that might have a bearing on the health and safety of residents in those facilities in order to enable HCFA to undertake its statutory obligations to protect those residents' interests.

G. The procedures set forth herein shall be reviewed by HCFA and DOJ within one year of the date of this MOU to evaluate its effectiveness and any need for modification.

IV. Intent of the Parties

It is the parties' intent that the procedures set forth above by which the USAO may cause HCFA not to proceed with a CMP, will be used where the USAO has a good faith basis to request that a CMP not be pursued. Where the USAO has no ongoing investigation, but intends to initiate one only after receiving notice of HCFA's imposition of (or intent to impose) a CMP, the USAO and HCFA

shall discuss possible ways to allow HCFA to proceed with the CMP in a manner that accommodates the interests of both HCFA and the USAO. Where the USAO believes that a CMP imposed by HCFA may interfere with an ongoing investigation of that facility, the USAO shall make every effort, consistent with law enforcement needs and limitations on permissible disclosure of such information, to contact HCFA to determine if the CMP may proceed.



Gerald Stern
Special Counsel for Health Care Fraud
U.S. Department of Justice

Date:



Bruce C. Vladerck, Administrator
Health Care Financing Administration
U.S. Department of Health and Human
Services

Date: AUG 31 1995

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FAX 596-5084
Therine McCoy, MRS 596-1856
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Sina Mercado, MRS 353-3642
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HCF-2
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Jean Nofles, MRS 844-4721
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Lankford Williams, MRS 744-3720
PROF ID HCFASFO GN-12

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Steven D. Helgeson, M.D., M.P.H.
Associate Regional Administrator
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Seattle, Washington 98121-2500
Telephone: (206) 615-2310
Bunnee A. Butterfield, MRS 615-2317
PROF ID HCFASRA GJ-56

Change made to Region IX: Nancy Rothwell is now the Acting Associate Regional Administrator
NOTE: In compliance with postal regulations, labels and envelopes addressed for the Dallas
Regional office should be prepared exactly as the sample shown below:

HCF-2
MR ROGER PEREZ
ASSOCIATE REGIONAL ADMINISTRATOR
DIVISION OF HEALTH STANDARDS AND QUALITY
HEALTH CARE FINANCING ADMINISTRATION
1200 MAIN ST STE 1940



Fax Transmission
DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of Budget, ASMB
FAX: (202) 690-6896

To: Devora Date: 3/22/99
Fax #: 456-5557 Pages: 4, including this cover sheet
From: Mark Elder Telephone #: (202) 690-8722
Subject: Tables

☒ Immediate Action ☐ Per your Request
☒ For Your Information ☐ Response Needed

COMMENTS: Here is what we come up with. Call me if you need help deciphering any thing. I've asked ~~OMB~~ OMB & HCFA to review tonight and talk to me first thing tomorrow if they have a problem w/ any assumption/calculation.

HHS NURSING HOME OVERSIGHT SPENDING: FY 1999 AND FY 2000

Dollars in Millions

DRAFT

ACTIVITY	FY 1999	FY 2000	\$ Increase	% Increase
SURVEY & CERTIFICATION/NURSING HOMES				
<u>Medicare</u>				
Direct Survey Costs				
Base Funding /1	\$116.30	\$125.40	\$9.10	7.8%
Nursing Home Initiative	\$4.00	\$14.50	\$10.50	262.5%
Subtotal, Direct Surveys	\$120.30	\$139.90	\$19.60	16.3%
Support Contracts				
Base Funding /2	\$4.60	\$3.36	(\$1.24)	-27.0%
Nursing Home Initiative	\$0.00	\$3.60	\$3.60	-----
Subtotal, Support Contracts	\$4.60	\$6.96	\$2.36	51.2%
Subtotal, Medicare (Direct + Support)	\$124.90	\$146.86	\$21.96	17.6%
<u>Medicaid</u>				
Federal Share				
Base Funding /3	\$93.92	\$103.26	\$9.35	10.0%
Nursing Home Initiative	\$0.00	\$15.60	\$15.60	-----
Subtotal, Medicaid/Federal Only	\$93.92	\$118.86	\$24.95	26.6%
Total Survey & Certification/(Medicare + Medicaid)	\$218.82	\$265.72	\$46.90	21.4%
FEDERAL ADMINISTRATION				
Federal Surveyor Activity				
Base /4	\$9.40	\$9.70	\$0.30	3.2%
Nursing Home Initiative	\$0.00	\$6.90	\$6.90	-----
Patient Abuse Registry	\$0.00	\$10.00	\$10.00	-----
Total Federal Admin	\$9.40	\$26.60	\$17.20	183.0%
DEPARTMENTAL APPEALS BOARD				
Nursing Home Cases	\$1.16	\$4.09	\$2.94	253.8%
OFFICE OF GENERAL COUNSEL				
Nursing Home Cases	\$3.90	\$10.60	\$6.70	171.8%
TOTAL NURSING HOME SPENDING	\$233.28	\$307.02	\$73.74	31.6%

/1 FY 2000 includes \$121.4 million in direct survey costs plus \$4 million for Minimum Data Set (MDS) costs.

/2 Represents nursing-home only portion of the \$7.0 million in base support contract funding (see back-up sheet).

/3 See back-up sheet for calculation of Medicaid survey and cert base funding for Medicaid nursing homes.

/4 FY 1999 total equals \$8.6 million for 108 FTE plus \$0.8 million for travel for look-behind surveys;

FY 2000 total equals \$8.6 million for 108 FTE plus \$1.1 million for travel for look-behind surveys

3/22/99

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DRAFT

Back-up Sheet/Support Contracts**Dollars in millions****FY 1999**Direct Survey Activity

Nursing Home Direct Survey Costs	116.346	72.7%
Other Direct Survey Costs	<u>43.654</u>	27.3%
Total 1999 Direct Survey	160.000	

<u>Support Contract Activity</u>	<u>Total</u>	<u>Nursing Home</u>	<u>Calculation</u>
QIES Operation Support	1.725	1.254	$1.725 * 72.7\%$
Telecommunications	1.000	0.727	$1.000 * 72.7\%$
Software Development/COTS	0.816	0.593	$0.816 * 72.7\%$
Network Refreshing	0.120	0.087	$0.120 * 72.7\%$
Collection of Data for Core Data Set	0.400	0.291	$0.400 * 72.7\%$
Quality Improvement (MDS)	0.300	0.300	$0.300 * 100\% - \text{nursing home only}$
Systems Improvement (OSCAR)	0.840	0.840	$0.840 * 100\% - \text{nursing home only}$
Surveyor Training	0.699	0.508	$0.699 * 72.7\%$
Psychiatric Hospital Survey Review	<u>1.100</u>	<u>0.000</u>	not nursing home related
Total 1999 Support Contract	7.000	4.601	

FY 2000Direct Survey Activity (not including \$4m earmark)

Nursing Home Direct Survey Costs	121.40	62.7%
Other Direct Survey Costs	65.30	33.7%
MDS/OASIS	<u>7.00</u>	3.6%
Total 2000 Direct Survey	193.70	

<u>Support Contract Activity</u>	<u>Total</u>	<u>Nursing Home</u>	<u>Calculation</u>
QIES Development	4.400	2.758	$1.725 * 62.7\%$
Maintenance of OSCAR System	0.600	0.600	$0.600 * 100\% - \text{nursing home only}$
Psychiatric Hospital Survey Review	<u>2.000</u>	<u>0.000</u>	not nursing home related
Total 2000 Support Contract	7.000	3.358	



HEALTH CARE FINANCING ADMINISTRATION

**ADDRESSEE:***Levorah Allen***FROM:***Nana Martins*
**OFFICE OF THE ADMINISTRATOR
200 INDEPENDENCE AVE., S.W.
ROOM 314G
WASHINGTON, DC 20201****PHONE:** _____**PHONE:** 202-690-6726**FAX :** 202-690-6262**TOTAL PAGES:****ADDRESSEE'S FAX MACHINE NUMBER:****DATE:****REMARKS:**

Summary of Nursing Home Transfer Bill

Purpose: Amends title XIX to prohibit transfers or discharges of residents of nursing facilities as a result of voluntary withdrawal from or significant reduction in participation in Medicaid

Introduced: Planned for February 2, 1999 (similar bill, H.R. 4046 introduced June 11, 1998)

Sponsors: Staff indicate all Democratic Members of the Commerce Health subcommittee have agreed to sponsor, as has subcommittee chairman Bilirakis, who is committed to obtaining Republican subcommittee Members as co-sponsors.

Original co-sponsors in 105th Congress: Davis (D-FL), Bilirakis (R-FL), Dingell (D-MI), Shaw (R-FL), Brown (D-OH), Canady (R-FL), Waxman (D-CA), Young (R-FL), Deutsch (D-FL), Foley (R-FL), Wexler (D-FL), Fowler (R-FL), Markey (D-MA), Diaz-Balart (R-FL), Hastings (D-FL), Ros-Lehtinen (R-FL), Brown (D-FL), Boucher (D-VA), Thurman (D-FL), Meek (D-FL), Boyd (D-FL), Manton (D-NY), Towns (D-NY), Pallone (D-NY), Furse (D-OR), Rush (D-IL), Eshoo (D-CA), Stupak (D-MI), Green (D-TX), Kennedy (D-MA), Bishop (D-GA)

Referred: Committee on Commerce

Companion: Sen. Graham had a companion bill in the 105th Congress (which was essentially the same as the House bill from the 105th Congress, without the "distinct part" provisions). He is expected to introduce a bill in the 106th Congress)

Provisions:

- o The bill grandfathers current residents of a Medicaid-certified NF who are already residing there on the day before the NF voluntarily withdraws from participation in Medicaid by granting such residents protection from transfer or discharge due to the withdrawal if the facility continues to provide NF-type services.
- o New residents entering the facility after the withdrawal are protected only to the extent that they must be given oral and written notice, and must sign acknowledgment of receipt, that the facility is not participating in Medicaid and that they are not protected from transfer or discharge if they become unable to pay the private rate, even if they are or become eligible for Medicaid.
- o The facility's participation agreement is deemed to continue to cover the grandfathered residents after the withdrawal for purposes of Medicaid reimbursement, compliance with Medicaid requirements, and survey, certification, and enforcement (including involuntary termination of the facility).
- o The bill applies to voluntary participation withdrawals/reductions on or after enactment.

Provisions in H.R. 4046 (105th Congress) but Dropped in the Bill for the 106th Congress:

- o Provisions of the bill applied not only to voluntary withdrawal of the facility entirely from Medicaid but also "in a similar manner" to "significant" voluntary reductions of the extent of the facility's participation. In the case of a significant reduction, protection was provided to residents who are entitled to Medicaid on or within 90 days after the effective date of the reduction. ["In a similar manner" and "significant" were not defined in the bill.]

These provisions were dropped at the request of the National Senior Citizens' Law Center and AARP due to the objection of these organizations to the underlying "distinct part" option for nursing homes under current law/regulations.

- o Five years after enactment, the Secretary would have been required to report to Congress on the impact of implementation on NFs and their residents, including the impact of changes in NF reimbursement rates on the extent of participation withdrawals/reductions and on access to and quality of NF services. Recommendations for legislative changes in the report were to have included the appropriateness of waiving or modifying requirements of section 1919 to balance the burden of requirements on facilities with the protection of health safety and welfare of small numbers of covered residents remaining for extended periods.

This requirement was dropped as unnecessary because Senate Finance Committee staff advised that a similar reporting requirement had been included in the BBA. [Unclear which BBA provision they mean. Sec. 8417 calls for an October 1997 report by the Medicare Payment Review Commission, primarily on adequacy of SNF PPS rates.]

Notes: Staff from HCFA (CMSO and OL) and OGC/HCF provided technical assistance during drafting of the bill during the 105th Congress, at the request of Congressional staff. Many of our suggestions were adopted.

The protections of the bill apply primarily to the current residents of Medicaid-certified facilities who entered with the expectation that, if they spent down from private pay status to Medicaid eligibility, they could remain indefinitely. New residents of facilities that still have grandfathered residents will be informed that they will not receive such protection.

OGC notes that we would be essentially powerless to enforce the bill's protections for remaining residents administratively for a provider intent on withdrawing from Medicaid since there would be no ongoing reimbursements from which CMPs might be withheld.

Recommended Administration Position: Support

The bill is generally consistent with the Administration's efforts to enhance consumer protection and information.

Nursing Home Resident Protection Act of 1999¹
Draft - 1/29/99 -- Draft

SEC. 1. **SHORT TITLE.** This Act may be cited as the "Nursing Home Resident Protection Act of 1999".

SEC. 2. **PROTECTION OF RESIDENTS IN NURSING HOMES AND OTHER RESIDENTIAL HEALTH CARE FACILITIES.**

Title 18, United States Code, is amended by adding the following new section:

"SEC. 1348. **Pattern of Violations Resulting in Harm to Residents of Nursing Homes and Related Facilities.**

"(a) **Criminal offense.**—Whoever knowingly and willfully engages in a pattern of violations of Federal or State law, regulation or rule governing the care of individuals residing in the residential health care facility, and where such pattern results in physical or mental harm to one or more such residents, shall be punished as specified in Section 1347 of this title,¹ except that any organization found guilty of an offense under this section shall be fined not more than \$2,000,000 per residential health care facility, and any individuals found guilty of an offense under this section shall be fined pursuant to the individual fine provisions of Title 18, Section 3571.

"(b) **Civil provisions.**—

(1) **Civil Penalties.**— The Attorney General may bring an action in a United States district court to impose on any individual or entity that engages in a pattern of violations of Federal or State law, regulation or rule governing the care of individuals residing in the residential health care facility and where such pattern results in physical or mental harm to one or more such residents, a civil penalty of --

(A) in the case of an individual (other than an owner, operator, officer or manager of such a residential health care facility) up to \$10,000;

(B) in the case of an individual who is an owner, operator, officer or manager of such a residential health care facility up to \$100,000 for each separate facility involved in the pattern of violations under this

¹ The elements of such an offence are:

- knowledge and intent to violate law
- pattern of violations
- of federal or state laws or regulations governing nursing homes or other residential health care facilities
- violations resulted in physical or mental harm

section; or

(C) in the case of a residential health care facility up to \$1,000,000 for each pattern of violations, and in the case of an entity up to \$1,000,000 for each separate residential health care facility involved in the pattern of violations owned or managed by that entity.

"(2) Other appropriate relief.-- If the Attorney General has reason to believe that an individual or entity is engaging in or is about to engage in a pattern of violations of Federal or State law, regulation or rule governing the care of individuals residing in the residential health care facility, and where such pattern results in or has the potential for resulting in physical or mental harm² to one or more such residents, the Attorney General may petition an appropriate United States district court for appropriate equitable and declaratory relief to eliminate the pattern. In pursuing such equitable or declaratory relief under this subsection, the Attorney General shall consult with the appropriate Federal agencies.

"(3) Procedures for this subsection (subsection 1348(b) of this Title) —

(A) A subpoena requiring the attendance of a witness at a trial or hearing conducted under this subsection may be served at any place in the United States.

(B) An action brought under paragraph (1) of this subsection may not be brought more than 6 years after the date on which the violation of this subsection occurred.

² Section by Section analysis: " Physical harm includes acts or omissions that result in death, hospitalization, medical treatment, external or internal bodily injury, illness, disease, infection, loss of consciousness, interruption in breathing, pain, discomfort, sexual assault, unlawful chemical, physical, or mechanical restraint, adverse reaction to medication, poisoning, self-injurious behavior, suicide attempt, substance abuse, ingestion of dangerous substance or object, or deterioration of skills or in level of functioning. The harm may be temporary or permanent. It includes, but is not is not limited to the following: a fracture, sprain, strain, laceration, damage to an internal or external organ, abrasion, contusion, wound, abrasion, skin irritation, bite, burn, scalding, concussion, swelling, bleeding, strangulation, choking, aspiration, edema, hematoma, exacerbation of symptoms of chronic illness, loss of limb, organ, teeth, or bodily function, malnutrition, dehydration, clinically detrimental weight loss or gain, or pressure sores.

Mental harm includes mental anguish, emotional distress, intimidation, humiliation, loss of dignity, fear, or loss of cognitive functioning. It can be measured by either an objective or subjective standard.

"(4) 'Pattern of violations' is defined as multiple violations that are widespread, systemic, repeated or similar in nature, or result from a policy or practice.³

"(5) 'Whoever' is defined as in 18 U.S.C. § 921(a)(1).

"(6) 'Attorney General' is defined as the Attorney General of the United States or her designee and 'Secretary for the Department of Health and Human Services' is defined as the Secretary for the United States Department of Health and Human Services or her designee.

"(e) The Attorney General and the Secretary for the Department of Health and Human Services shall develop policies and procedures to reduce the negative impact of actions taken under this section on the residents of the residential health care facility."

SEC. 3. DEFINITION OF FEDERAL HEALTH CARE OFFENSE.

Subsection (a)(1) of section 24 of title 18, United States Code, is amended by adding "1348," after "1347,".

SEC. 4. AUTHORIZED INVESTIGATIVE DEMAND PROCEDURES.

Section 3486(a)(1) of title 18, United States Code, is amended by inserting after "Federal health care offense", "or other allegation of fraud or wrongdoing (whether civil or criminal) made in connection with a health care benefit program (as defined in section 24(b) of title 18, United States Code)".

³ Section by section analysis: "The term 'pattern of violations' refers to a repeated violation that is widespread, systemic, repeated, similar in nature, or resulting from a policy or practice. For example, a widespread group of violations, even if not the result of a common policy or practice or not involving the same or similar regulations, could be covered by this section. On the other hand, one or more isolated violations that do not rise to the level of a 'pattern', as described above, would not be covered. The term incorporates a concept of proportionality so that the number of violations required to establish a pattern within an entity operating numerous facilities across the country would be greater than the number of violations required for a single facility. The term also incorporates a concept of severity so that the number of violations required to establish a pattern within a single entity or an entity operating numerous facilities would be fewer, the more severe the harm.

(C) The United States shall be required to prove all actions under this subsection by a preponderance of the evidence.

(D) The Civil Investigative Demand procedures set forth in 15 U.S.C. §§ 1311 - 14 and regulations promulgated pursuant thereto shall apply to investigations and actions pursued under this subsection.

(E) The filing or resolution of a matter under this subsection does not preclude any other remedy that is available to the United States or any other person. The Federal Rules of Civil Procedure shall apply to actions brought under this subsection.

"(c) Prohibition against retaliation.-- Any person who is the subject of retaliation, either directly or indirectly, for reporting conditions that may constitute a violation of this section shall be authorized to bring an action in an appropriate United States district court for damages, attorneys' fees and other relief.

"(d) Definitions.-- For purposes of this section, the following definitions apply:

"(1) 'Residential health care facility' is defined as any facility (including any facility that does not exclusively provide residential health care services) including but not limited to skilled and unskilled nursing facilities and mental health and mental retardation facilities, that receives Federal funds, directly from the Federal government or indirectly from a third party on contract with or receiving a grant or other monies from the Federal government, to provide health care, or that provides health care services in a residential setting and that, in any calendar year in which a violation occurs, is the recipient of benefits or payments in excess of \$10,000 from a Federal Health Care Program.

"(2) 'Entity' is defined in this section as any residential health care facility (including facilities that do not exclusively provide residential health care services), any entity that manages a residential health care facility, or any entity that owns, directly or indirectly, a controlling interest or a 50% or greater interest in one or more residential health care facilities.

"(3) 'Federal Health Care Program' is defined as:

(A) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government; or

(B) any State health care program, as defined in section 1320a-7(h) of Title 42, United States Code.

HEALTH CARE FINANCING ADMINISTRATION

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REMARKS:

Nursing Homes, 400

New rules require quicker response to nursing home complaints

WASHINGTON (AP) State inspectors will have to investigate complaints of harm to nursing home residents more quickly under new federal rules announced Tuesday.

"The complaint process ... was not working as well as it should be," said Nancy-Ann DeParle, administrator of the agency that oversees federal dollars going to nursing homes. "In some states, complaints can sit there for weeks, even months."

As a remedy, DeParle said, state inspection agencies were informed in a letter sent Tuesday that they must now respond within 10 days to any complaint alleging harm to nursing home residents. In the past, inspectors had to meet a two-day deadline only in situations meeting the graver standard of posing "immediate jeopardy" to a resident.

Families of nursing home residents and other advocates for the elderly and disabled have brought attention to the problem, DeParle said. An audit by the government's General Accounting Office, expected out later this week, raises similar concerns and a congressional hearing has been scheduled later this month, say those who have seen it.

DeParle said new posters, pamphlets and videos will help educate nursing home residents and their families about the new standards and how to file complaints.

"It's not just physically hurting someone," she said. "It could also be things like not providing proper nutrition."

The educational materials are to be in nursing homes by May.

The new complaint guidelines are the latest step in a campaign President Clinton announced last summer to improve enforcement of nursing home standards.

Other steps include immediate fines of up to \$10,000 for serious violations of health and safety standards. In the past, nursing homes got time to correct such problems before being subject to fines.

The government also has posted nursing homes' individual inspection records on the Internet and is requiring more frequent, surprise inspections of homes with a history of serious violations.

Clinton's fiscal year 2000 budget asks Congress for an additional \$60 million to help pay for the efforts. While states are primarily responsible for inspecting nursing homes and recommending sanctions, they get money for those activities from the federal government.

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REMARKS:



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Assistant Secretary
for Legislation

Washington, D.C. 20201

MAR 22 1999

The Honorable Charles Grassley
Chairman
Senate Special Committee on Aging
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

It is with sincere regret that I inform you that we are unable to provide a witness from the Health Care Financing Administration (HCFA) for today's hearing on "Residents at Risk" due to the Committee's decision not to honor the Department's longstanding witness policy for HHS representatives testifying at congressional hearings. This policy predates the Clinton Administration and represents a courtesy routinely extended by congressional committees in the past, including the Special Committee on Aging.

We are eager to present testimony on our activities to improve the quality of care in nursing homes, and would greatly appreciate your inclusion of our prepared testimony in the formal hearing record.

Mr. Chairman, we are especially disappointed not to be able to have HCFA participate in today's hearing because of the bipartisan, collaborative spirit in which you have approached our work together to improve the quality of nursing home care. We value your strong leadership and the committee's constructive oversight efforts in this regard.

We also regret this situation because of the opportunity you have arranged to hear firsthand from two courageous people, Denise Bryant and Gloria Cruz, about their personal experiences on behalf of family members who were nursing home residents. In fact, to ensure that their experiences inform our policies, we hope to arrange a meeting with them today for Michael Hash, the Deputy Administrator of the Health Care Financing Administration, who had hoped to testify at the hearing today.

Thank you for considering our written testimony. We look forward to continuing to work with you on the important subject of nursing home quality of care and enforcement.

Sincerely,

Richard J. Tarplin
Assistant Secretary for Legislation

cc: The Honorable John Breaux
Ranking Member

DRAFT

21st Century Crime Bill

Protecting the Elderly Against Fraud and Other Crimes

DRAFT

Telemarketing

- Cracks down on telemarketing fraud by requiring telephone companies, upon notification in writing from the Department of Justice that a particular phone number is being used to engage in telemarketing or other fraudulent conduct, and after notice to the customer, to terminate the subscriber's phone service. This provision is modeled after a similar statute (18 USC 1084) involving telephones used to engage in illegal gambling. (Sec. 3051)

Health Care Fraud

- Authorizes the Attorney General to take immediate action to halt illegal health care fraud kickback schemes. Specifically, the bill would authorize the Attorney General to obtain injunctive relief against persons engaged in illegal kickback schemes under 42 USC 1320a-7(b). (Sec. 3031)
- Authorizes the Attorney General to recover civil penalties of \$25,000 to \$50,000 against persons or entities engaged in illegal kickback schemes. (Sec. 3032)
- Authorizes the sharing of information obtained via grand jury investigations of criminal wrongdoing to federal prosecutors civil health care fraud cases. At this time, grand jury information cannot be shared with civil prosecutors. As a result, information in the hands of the government that could be used to assist in a civil matter cannot be shared, resulting in duplicative efforts to obtain this information via other means or, in some cases, dropping civil cases altogether due to insufficient evidence. (Sec. 3033)
- Allows federal prosecutors to issue administrative subpoenas – so-called authorized investigative demands – to investigate civil health care fraud cases. (Sec. 3034)
- Directs the Sentencing Commission to study current health care fraud sentencing guidelines with an eye toward increasing the current penalties. The directive also requires the Sentencing Commission to examine scams that specifically target the elderly. (Sec. 3036).
- Prohibits the discharge in bankruptcy of debts resulting from judgments or settlements in Medicare and Medicaid fraud cases under the False Claims Act. In some cases, persons who rip off the Medicare or Medicaid system can avoid repaying their ill-gotten gains or penalties by filing for bankruptcy. (Sec. 3037)
- Extend various anti-fraud safeguards applicable to the Medicare and Medicaid program to

DRAFT

the Federal Employees Health Benefits Program. These safeguards include the anti-kickback provisions under 42 USC 1320a-7(b). (Sec. 3038)

- Creates new criminal and civil penalties for nursing home operators or companies that engage in a pattern of violations of federal nursing home rules or regulations where harm occurs.

Pension and Retirement Fraud

- [To be included]

Other Provisions to Protect the Elderly Against Fraud

- Boosts the penalty for fraudulent schemes that result in serious injury or death. Existing law provides such an enhancement for a narrow class of fraudulent activities (see 18 USC 1347). There is little reason, however, to limit such an enhancement to one particular class of fraud. This provision would extend this penalty enhancement to virtually all forms of fraud resulting in death or serious injury. (Sec. 7033)



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DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

Washington, D.C. 20201

PRESS RELEASE

FOR IMMEDIATE RELEASE
Tuesday, March 16, 1999

Contact: HCFA Press Office
(202) 690-6145

HCFA ANNOUNCES NEW ACTIONS FOR NURSING HOME RESIDENTS

HCFA Administrator Nancy-Ann DeParle today announced new steps the agency is taking to ensure high quality nursing home care and make better consumer information available to residents and their families.

DeParle said these actions build on the Clinton Administration's aggressive initiative to improve enforcement of federal and state nursing home standards and to promote quality care for 1.6 million elderly and disabled Americans in nearly 17,000 nursing homes. HCFA, which administers Medicare and Medicaid, is:

- today issuing a regulation that subjects nursing homes with problems to tougher fines;
- instructing states to investigate complaints about harm to nursing home residents more quickly;
- launching a national campaign this spring to prevent neglect and abuse of nursing home residents;
- promoting a website today where families can get comparative information about nearly 17,000 nursing homes nationwide.

"Today's actions are one more chapter in our on-going campaign to assure that nursing home residents get attentive, good quality care, and that their concerns are taken seriously and addressed," HCFA Administrator Nancy-Ann DeParle said. "We owe it to these residents and their families to prevent problems where we can and address them quickly when they occur."

DeParle also called on Congress to pass patient protection legislation proposed by President Clinton in his Fiscal Year 2000 budget.

In 1995, the Administration issued the nation's toughest-ever nursing home enforcement rules, which led to measurable improvements in quality of care. Ongoing monitoring found that many nursing homes continued to violate rules and that enforcement by some states -- which conduct on-site inspections for HCFA and recommend penalties against homes that violate health and safety rules -- remained lax. Those findings helped the Administration develop additional actions announced in July 1998 to enhance protections and target specific needed improvement in nursing home care.

"Americans deserve the peace of mind that they and their loved ones will receive quality, compassionate care in nursing homes. We have taken action to improve the quality of life in nursing homes and to prod states to do a better job of inspecting nursing homes and recommending sanctions. But we need to do even more," DeParle said.

Tougher fines for health and safety violations

HCFA is issuing a regulation, on display today at the Federal Register, that creates a more effective tool to use against nursing homes that fail to meet the needs of vulnerable residents.

It will enable states, which inspect nursing homes, to recommend fines -- up to \$10,000 -- for each serious incident that threatens residents' health and safety. Existing rules simply link fines directly to the number of days that nursing homes fail to comply with federal requirements.

This new civil monetary penalty regulation ensures that regulators do not have to wait until a violation is fixed to assess a penalty. In addition, nursing homes will not have an opportunity to avoid such fines by fixing the violations that led to their imposition. Nursing homes will continue to have the right to appeal such remedies as the law requires.

Quicker state investigations of complaints

HCFA will strengthen complaint-investigation requirements because some state investigations of allegations have lagged.

States already are required to investigate complaints alleging immediate jeopardy to residents within two days and all other complaints in a timely manner. Now, HCFA will require states to investigate within 10 working days whenever a complaint alleges harm to a resident. States also must now add confirmed violations to HCFA's database that tracks compliance in nursing homes. DeParle explained these new requirements in a letter sent to states today.

HCFA also will develop minimum federal standards for states to conduct complaint investigations and will identify ways to better oversee states' performance.

Existing remedies when surveys and investigations find nursing homes fail to follow federal requirements include terminating their Medicare and Medicaid participation; cutting off payments for new residents; appointing temporary managers; and requiring on-site state monitoring.

HCFA toughened enforcement in the 1998 initiative by requiring states to conduct more frequent inspections of nursing homes with repeated serious violations and impose sanctions without a grace period against poor performers. States also must stagger surveys and conduct many on nights and weekends, when safety and staffing problems often occur. HCFA also implemented a new federal monitoring system to ensure that states conduct effective surveys and fulfill their enforcement responsibilities.

Campaign to detect and prevent neglect and abuse

HCFA will launch a national education campaign this spring on how to identify, report and stop neglect and abuse. By teaching residents, their families, nursing home workers and other caregivers to stay alert for signs of neglect and abuse and to act quickly to spot it, the campaign will help residents stay safer and healthier.

The campaign will include a new publication, "Living in a Nursing Home;" a video with tips on selecting a nursing home; posters that tell residents and their families where to report abuse; and a new version of HCFA's "Guide to Choosing a Nursing Home."

Nursing home comparison information on the Internet

A new website -- Nursing Home Compare at www.medicare.gov -- will enable Americans to more easily obtain and review that information, which can help them make educated decisions about nursing homes for their loved ones.

Nursing homes already are required to make survey results available to residents who request them, but the new web site has the most recent information from state inspections of every Medicare- and Medicaid-certified nursing home in a consumer-friendly format, as well as location, size and ownership. Users can search nursing homes by name, city, county or ZIP code, and compare data from two or more homes. The information comes from HCFA's Online Survey, Certification, and Reporting (OSCAR) database, which comprises survey data provided and updated by states.

HCFA will continue to refine Nursing Home Compare to increase its usefulness for consumers, such as by adding information about staffing and the condition of residents. Since testing began in September 1998, HCFA has clarified material on the site in response to comments from users.

Additional budget, legislative proposals

These newest enforcement tools and education efforts are part of HCFA's strategy for ongoing quality improvement in nursing homes. The Administration is also seeking additional funds and legislation to carry out its initiative to protect residents.

To implement fully the initiative announced last July, the fiscal year 2000 budget proposes an additional \$60.1 million in funding. The Administration has legislative proposals to require nursing homes to conduct criminal background checks of employees; to establish a national registry of workers who have been convicted of abusing residents; and to allow more types of nursing home workers with proper training to help residents eat and drink during mealtimes. The Administration also supports legislation before Congress protecting Medicaid beneficiaries from being evicted inappropriately by nursing homes.

DeParle said HCFA will monitor the implementation of these and earlier actions, making other improvements whenever necessary.

"Continuing to work with Congress, Medicare and Medicaid must use every available tool to make sure nursing homes do right by their residents," DeParle said. "States must investigate thoroughly and use the full range of sanctions. Residents and their families must have useful information. Together, we can provide strong incentives for nursing homes to provide quality care and a safe environment in the first place."

#

**Draft Q&As for Nursing Home Event Rollout
March 15, 1999 -- 5 p.m.
FOR INTERNAL USE ONLY**

Q: Is it true that HCFA has no formal requirements for the prompt investigations of otherwise serious complaints that do not meet the test of immediate jeopardy? Why not?

A: Let me be clear on this: HCFA has always demanded that states investigate all serious complaints promptly to ensure that residents are safe and well-cared for. We require that they investigate the most serious complaints -- alleging immediate jeopardy -- within two days, but states must respond to all complaints in a timely manner.

But we also know that some states haven't taken this responsibility seriously enough. That's why, as of today, we will require states to investigate any complaint that alleges harm to a nursing home resident within 10 working days. We're also requiring states to do a better job in reporting complaints to our national database to better track compliance in homes and chains.

These new instructions are the latest steps, designed to improve the complaint process to better protect residents from poor-quality care and other health and safety risks. We intend to work aggressively to develop more comprehensive guidance in this area.

We also want to urge Congress to okay our budget request for an additional \$60.1 million to fund our nursing home initiative.

Q: The GAO says HCFA provides minimal oversight. Why don't you do more?

A: HCFA has been increasing oversight of states and nursing homes for annual surveys and complaint investigations, and we've asked Congress for more money to support this essential mission.

Consistent with the July 1998 initiative, we have also already implemented a new federal monitoring system that will give us a more thorough picture of how well each state's surveyors perform. This will allow us to target problem areas with focused training and, if necessary, to cancel the contracts of poor-performing states and hire others to do the job.

But states clearly need more guidance on proper complaint investigations, and today we are issuing it. We are making it clear to states that they must respond promptly to situations where residents face potential injury or harm. We are reminding them of the two-day rule for the most serious complaints, and establishing a 10-day rule for other

serious complaints. This is the latest step in our initiative to improve complaint investigations. We will continue to work with states and others to strengthen our oversight to ensure states take their responsibilities seriously.

Q: What else is in your new complaint improvement project?

A: Our goal is to ensure the complaint process responds to the needs of nursing home residents and their families. Toward that end, we are initiating systems to ensure that consumers understand their right to file complaints; that states properly record complaints and investigate them effectively and thoroughly; that complaints are resolved appropriately.

Ultimately, we will set minimum federal standards for states to conduct complaint investigations and identify ways for HCFA to better oversee their performance. The resulting system will respond more effectively to concerned consumers and will better ensure the health and safety of nursing home residents around the country.

Q: Aren't these changes prompted entirely by Sen. Grassley and the new GAO reports?

A: Actually, we've been seriously concerned about the way some states investigate complaints for some time, and we've been thinking of ways to strengthen the system. Today's step moves us closer in that direction.

That said, we are also very grateful for the on-going work by Sens. Grassley and Breaux, and the rest of the Aging Committee, as well as for the GAO research. Their findings underscore the need for the action and clarify some issues so that we can work cooperatively on behalf of nursing home residents.

Q: When you implemented the regulations in 1995, why didn't you include any provisions aimed at increasing oversight of state complaint investigations?

A: What we did in 1995 was implement the nation's toughest-ever nursing home enforcement regulations despite fierce industry opposition. We strengthened enforcement and increased sanctions, and those changes led to measurable improvements in quality of care, such as reducing the misuse of restraints and anti-psychotic drugs.

But we didn't stop there. We looked at what else needed to be done and found states needing to step up their efforts. So last year we began a series of additional steps to strengthen our oversight of state enforcement efforts and to improve quality of care for nursing home residents. Those changes have improved the annual survey process; now we

are focusing on complaints.

As of today, we are requiring states to investigate any complaint that alleges harm to a nursing home resident within 10 working days. This is just the latest step. We also will work aggressively to develop more comprehensive guidance for complaint investigations to better protect residents from poor-quality care and other health and safety risks.

Q: Why didn't you make states enter complaint information into the database before?

A: Actually, we've always required states to enter information about federal complaints into the OSCAR database, and many do. However, some states conduct virtually all complaint investigations under state licensure laws, which aren't reported to us.

Today's guidance makes it clear that states must enter the data for any complaint investigation that concludes federal requirements were violated -- even if the state investigated it as a licensure complaint. This will ensure that we get a complete picture of each nursing home's history so we can take appropriate action.

Q: Will you pay states more to do this extra work on complaint investigations?

A: States already are required to investigate complaints about nursing-home conditions. Today, we're simply telling them how quickly we expect them to respond when someone may have been harmed. And we're working to get more resources out there to help.

The President's Fiscal Year 2000 budget does request a \$60 million increase to support our nursing-home initiatives, and we urge Congress to support the increase. Much of the increase will go to the states to support their stepped-up survey activities. In addition, we increased resources for survey and certification in our Fiscal Year 1999 budget, including \$4 million added by Congress and \$4 million in reprogrammed funds.

Q: Do you agree that your sanction policy needs improvement (as GAO recommends)?

A: In the past year, we've taken steps to do just that. This week, we will publish a final regulation to allow states to propose fines of up to \$10,000 for specific violations. Such penalties could be imposed immediately without an opportunity for the nursing home to fix the problem and avoid a fine. Existing rules simply link fines to the number of days that nursing homes fail to comply with federal requirements, so this creates a tougher alternative for appropriate cases.

In addition, states now must impose sanctions against problem nursing homes without a grace period to fix a second violation that harms residents. States also must conduct more

frequent inspections of certain homes with histories of serious problems, increasing the pressure to provide a safe environment and quality care for residents every day of the year.

In the months ahead, we intend to do even more to further strengthen state enforcement and to make sanctions -- including termination -- as effective a deterrent as possible to encourage nursing homes to provide appropriate care and a safe environment. That's what nursing home residents deserve and what our regulations demand.

Q: Isn't there a backlog of nursing home appeals before the Department Appeals Board?

A: Since 1996, when the Department Appeals Board started hearing these cases, nursing home appeals have increased from about 30 new appeals per year to more than 400 without any significant increase in the Board's staff to handle this burgeoning caseload. The Department has requested **\$3.4 million in additional funds -- a 72 percent increase** -- for the Departmental Appeals Board to hire 29 new staff, including 5 new judges, 10 staff attorneys, 8 paralegals and 6 clerical assistants. To address this problem, the FY2000 budget also includes funds for HCFA and the Office of the General Counsel to fully implement its Nursing Home Quality Initiative.

Q: So does that mean HCFA is letting bad nursing homes off the hook, even temporarily? Are bad nursing homes getting a reprieve from fines or more forceful punishments because of a slow appeals process?

A: The appeals process in no way ties HCFA's hands. Nursing homes continue to be subject to inspections throughout the appeals process, and the pace of the appeals process does not affect the most serious cases of facility noncompliance. While the Departmental Appeals Board focuses primarily on civil money penalty cases, HCFA and the states have a broad range of sanctions which can be used to encourage compliance, including termination of Medicare and Medicaid payments, disallowing payment for new admissions, appointing a temporary manager, and requiring states to monitor care on site.

In other words, a nursing home that continually jeopardizes patients' health and safety would not be allowed to continue to operate, despite its pending appeal, if HCFA believes such action is appropriate. HCFA would take additional actions to ensure that. Plus we have the capability to prioritize severe cases, too. It is not uncommon for the Department Appeals Board to give a higher priority to termination cases, and to hear them far more promptly than civil money penalty cases.

Q: Why haven't you increased resources for the Administration on Aging's

ombudsman program?

- A:** The ombudsman is often the first person a family contacts for help when someone is abused or neglected in a long-term care facility. They work as advocates for these families to make sure that abusive and neglectful situations are corrected. HHS provided a \$3 million increase for the Ombudsman program for 1999, and its budget would preserve that level for the year 2000.

We also want states to have more flexibility in using federal dollars for ombudsman programs. With the recent increase in total Title III funding, State and area agencies may commit additional funding to ombudsman services, depending on their individual priorities. Also, we have proposed a consolidation of the Title VII programs that serve vulnerable elders, providing the States with flexibility to use as much of their allotment as they wish for ombudsman services.

The Administration on Aging (AoA) works in partnership with the states' Long-Term Care Ombudsman Programs to emphasize the significant role provided by ombudsman staff and volunteers. Through the provision of on-going training, guidance and reviews of best practices, AoA consistently focuses on maintaining and improving the quality and effectiveness of the ombudsman program.

Q: What have you done to make surveys less predictable?

- A:** We now require states to stagger their survey dates and times to ensure that nursing homes can't predict when state inspectors may come to check on conditions in their home. At least 10 percent of all surveys must start on nights, weekends and other off hours, when surveyors are most likely to find problems that put residents at risk.

In every state, some problem nursing homes also will face more frequent inspections to ensure that they fix serious violations quickly and permanently. We've also encouraged state surveyors to stop by troubled homes whenever they're in the neighborhood, so they can monitor their progress and ensure they maintain continuous compliance.

These changes are stepping up the pressure on nursing homes to stay in continuous compliance, and that will ensure residents remain safe and well-cared for.

Q: Why haven't you enhanced survey and certification staffing and training?

- A:** Actually, the President's Fiscal Year 2000 budget request includes an extra \$60 million to

implement the President's nursing-home oversight initiative, and we urge Congress to fully fund this request. Much of the money will go to the states to bolster enforcement efforts.

In addition, we increased resources for survey and certification in our Fiscal Year 1999 budget, including \$4 million added by Congress and \$4 million in reprogrammed funds. That money has already helped cover the costs of some additional training for our regional offices and state surveyors. Later this spring, we will conduct additional training for state surveyors as we put more of our initiatives into place.

Q: Have you done anything to improve nursing home staffing levels?

A: In order to know if minimum staffing requirements are necessary, we need better data about current staffing practices at nursing homes -- and their relationship to quality. We're now conducting a comprehensive study on the relationship between staffing levels and quality of care. Last year, we commissioned the independent study, and we expect that report back later this year.

This comprehensive study will help HCFA and Congress determine if minimum nurse staffing levels are appropriate and what the potential costs would be for such standards.

In the meantime, we have proposed legislation to train more nursing home workers to help residents eat during busy mealtimes, and we urge Congress to pass that legislation. Also, our other reforms will help improve the work done by existing staff.

Background: Congress requested a report on nursing home staffing levels in the early 1990s. That project was not developed until last summer.

Q: Have you done anything to improve coordination from state survey agencies and the ombudsman?

A: **(mostly from AOA)** Ombudsmen at the state and local levels already collaborate on an on-going basis with state survey agencies. They participate in facility exit surveys, joint meetings on a variety of issues, and confer on specific cases. In addition, federal and state survey and certification representatives participate in virtually all national ombudsman training and professional meetings, exchanging information and strategy with ombudsmen on solutions to particular problems.

Still more needs to be done to ensure that specific consumer complaints are consistently addressed by both the survey and certification system and ombudsmen in a way that is responsive to the complainant and effective in resolving the problem.

Q: Are you going to create an annual report for nursing homes?

A: We already provide consumers with an easy way to compare nursing home inspection reports -- our new Nursing Home Compare site on the Internet. This allows consumers to directly compare inspection reports -- and deficiencies -- for specific nursing homes.

Consumers also can find out how each home compares to state averages. That may be more useful than national comparisons, since people typically choose a home locally to be near family and friends. And the site includes links to other resources, such as HCFA's Guide to Choosing a Nursing Home.

The Inspector General has suggested that it may consider the creation of a national report card on nursing homes. We obviously will work closely with them to flush out how to develop such a report card in a way that best helps residents and their families.

Q: What are you doing about what the IG calls chronically substandard homes?

A: We now require states to conduct regular surveys twice as often for certain homes with those kinds of troubled histories. We've also ordered states to stop letting problem nursing homes avoid sanctions by fixing problems during a grace period.

The analysis highlighting this problem predates the initiatives begun last year. Those will promote continual compliance and further ensure that nursing home residents get the quality care that they deserve.

Q: Is it true that over 90 percent of complaints are concluded with no action, plan of correction, or other remedy? (See page 19)

A: According to the Inspector General, state inspectors concluded that two-thirds of all those complaints were unfounded, and therefore required no action. Many of the remaining ones did result in sanctions, and the raw statistics don't reveal how many of the remaining ones fixed their problems quickly enough to satisfy the state to avoid sanctions. Our overall goal is to improve quality, not impose sanctions.

Still, we recognize that states must treat complaints from residents with the same seriousness that we do. That's why today we are announcing a tougher CMP regulation; a 10-day rule and other state guidance on complaints; a ~~\$25 million~~ beneficiary education campaign; and the unveiling of Nursing Home Compare on the Internet.

Q: Will the new CMP regulation end the long delays for collecting fines?

A: The new regulation will allow us to impose fines more quickly. We would not have to wait until a nursing home fixes a violation to impose a fine, as now required. Nursing homes would still have the right to appeal those fines as the law requires, but we believe the additional option will strengthen the effectiveness of civil monetary penalties.

Also, the President's Fiscal Year 2000 budget requests more money for the Department Appeals Board to handle the growing caseload of nursing home appeals. The request would double the number of judges available to hear such cases. That will further improve the effectiveness of civil monetary penalties to encourage nursing home compliance. HCFA firmly supports this increase.

Of course, the best solution is for nursing homes to care for residents properly, so they don't face sanctions in the first place.

Q: Everyone knows abuse and neglect is bad. Why do you need a P.R. campaign?

A: To help people spot it and report it and help stop it. If people recognized the warning signs, we could prevent many cases of pressure sores, malnutrition, dehydration and resident abuse. The campaign later this spring will teach resident, their families and caregivers what to look for and how to stop problems, so residents are safer and healthier.

The campaign will help residents, family members and other visitors -- as well as workers and caregivers -- to stay alert for signs of abuse and neglect and act quickly to stop it. We also will update our consumer Guide to Choosing a Nursing Home, and will produce videos, posters and other information to help residents and their families.



HEALTH CARE FINANCING ADMINISTRATION



ADDRESSEE: Deborah Adler
Chris Tarninger

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DATE:

cover + 12

456-5557

cover 3/15

REMARKS:

HCFA response to GAO report. +
letter to state survey directors.
(letter will be loaded int @
"event" tomorrow.)

Complaint Investigation Processes Inadequate to Protect Residents"

TO: William J. Scanlon, Director
General Accounting Office (GAO)

We appreciate the opportunity to review your draft report regarding state complaint investigation processes. This report underscores the need for the states and for HCFA to develop and maintain an effective complaint monitoring program for all nursing homes, and for nursing homes to do a better job caring for residents.

We generally agree with, and will address, the recommendations set forth by the GAO in this report. Our specific comments are attached. We look forward to working with the GAO and the Congress as we further our commitment to protecting the health and safety of beneficiaries residing in nursing homes.



DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

Office of the Administrator
Washington, D.C. 20201

**COMMENTS OF THE HEALTH CARE FINANCING ADMINISTRATION
ON THE GENERAL ACCOUNTING OFFICE (GAO) DRAFT REPORT,
"NURSING HOMES: COMPLAINT INVESTIGATION PROCESSES
INADEQUATE TO PROTECT RESIDENTS"**

In 1995, the Clinton Administration implemented the toughest-ever enforcement regulations, which resulted in measurable improvement in quality of care in nursing homes. Building on that foundation, the President announced an aggressive initiative in July 1998 to further strengthen enforcement and to ensure that all nursing home residents receive the quality care that they deserve and their families expect.

We have already implemented many aspects of the initiative. We have issued new guidance to States to strengthen their nursing home inspection systems and to crack down on nursing homes that repeatedly violate safety rules. We have also taken other steps to reduce the incidence of bed sores, dehydration and malnutrition, and to give consumers ready access to comparative information about nursing home quality. The President's Fiscal Year 2000 budget request includes additional resources to fully implement all aspects of the initiative.

We very much appreciate the opportunity to review the GAO report entitled "Nursing Homes: Complaint Investigation Processes Inadequate To Protect Residents." This report underscores the need for the states and for HCFA to develop and maintain an effective complaint monitoring program for all nursing homes, and for nursing homes to do a better job caring for their residents.

We strongly believe that the President's nursing home initiative has done much to strengthen enforcement and to enhance the quality of care for all nursing home residents. Nevertheless, we are troubled by what the GAO has found in its most recent draft report on complaints, and agree that further refinements to our complaint processes are needed. We remain committed to taking appropriate steps to ensure that residents are safe and receive quality care, and we will continue to work with the States, Congress, residents and their families, advocacy groups, and nursing home providers to advance this essential mission. We generally agree with, and will address, the recommendations set forth by the GAO in this report.

Complaint Investigation Process

We have long viewed complaints as a valuable source of information about the health and safety of nursing home residents. In response to these problems, we created an internal workgroup in 1995 to develop formal complaint guidelines for the states. Unfortunately, survey and certification budgets, a large increase in providers, and the difficulty associated with devising national standards and maintaining state flexibility proved to be a formidable challenge. Instead, we developed a set of complaint investigation protocols that were sent to the regional offices for distribution to the states as "tools, not rules." Clearly these protocols for the states must be strengthened.

Therefore, in order to address our own concern that the complaint process is not responsive to beneficiaries and their families, and the GAO recommendations, we have taken two major steps. First, we have sent a letter to all state survey agencies notifying them that any complaint that alleges actual harm to an individual in a certified facility must be investigated within 10 working days of its receipt. We have also reminded the states to enter complaint information into the OSCAR system in a timely manner.

Second, as we focus our resources on improving the survey and certification system, we have also begun an examination of states' responses to nursing home complaints from residents, their families, nursing home staff, and other sources. To this end, we have initiated a Complaint Improvement Project (CIP). This project will assist us in developing cost-effective standards for prioritizing and determining the appropriate time frames for complaint investigations. As we proceed, the concerns of beneficiaries, their families, consumer representatives, and representatives from AoA's Ombudsman program will be solicited and incorporated into the design and final work products.

GAO Recommendations

The following more specifically outlines our responses to the findings and recommendations in this report:

Recommendation #1

Develop additional standards for the prompt investigation of serious complaints alleging situations that may harm residents but are categorized as less than immediate jeopardy. These standards should include maximum allowable timeframes for investigating serious complaints and for complaints that are deferred until the next survey schedule.

HCFA Comment

We concur. Effective immediately, any complaint that alleges actual harm to an

individual in a certified facility must be investigated by the state within 10 working days of its receipt. We have sent a letter to all state survey agencies notifying them of this new interim requirement, and reminding them that all complaint data must be entered in a timely fashion into the On-line Survey, Certification and Reporting system (OSCAR). The states have also been reminded of current policy -- any allegation involving immediate jeopardy must be investigated within two working days.

Furthermore, as we begin to conduct an analysis of complaint investigation processes, we anticipate developing more standards and long-term improvements (for example, in the OSCAR system). These standards may have resource implications and we look forward to working with the Congress to address critical resource issues.

The Complaint Improvement Project (CIP) will help HCFA strengthen the key elements of the complaint investigation and resolution process. These elements include: (1) how consumers are informed of their right to make complaints and how to do so; (2) the complaint intake process, including how complaints are received, classified and scheduled for investigation; (3) the investigation process, including the training, knowledge, attitudes, and case load of investigators; (4) the resolution process, by which the determination is made about whether a complaint is substantiated; (5) the administrative hearing process, including back-log of cases; (6) the compliance or response process for addressing substantiated complaints, including the range and actual use of remedies and back-log of actions; and (7) interaction of the complaint investigation process with the licensure and certification systems, the legal system, and facility-level grievance or continuous quality improvement processes.

HCFA will use this information to set minimum standards for complaint investigations. HCFA will then produce a manual for the states that describe each element of a model complaint investigation process, how states have implemented these processes, and staffing levels, training, and other needs. In addition, HCFA will specify measures to strengthen federal monitoring/audits of state performance, including the elements that should be included in a federal complaint investigation reporting system and database. And HCFA will explore other changes needed to strengthen oversight of the states in order to enhance the responsiveness of the complaint investigation process and to better protect beneficiaries.

Recommendation #2

Strengthen federal oversight of state complaint investigations, including monitoring state practices regarding priority-setting, on-site investigation, and timely reporting of serious health and safety complaints.

HCFA Comment

We concur. We have taken steps to address this problem and other steps will be initiated:

- ▶ We will allow the HCFA Regional Offices to perform "look-back," (or verification) surveys based upon complaints from nursing home residents. This means, in effect, that a complaint from a resident can trigger a standard survey for a nursing home.
- ▶ Consistent with the nursing home initiative, we are working on improving federal oversight of state performance. Currently, we are in the process of outlining a number of actions that HCFA can take when there is evidence that states are not fulfilling their survey responsibilities. In order to evaluate and improve state accountability specifically for complaints, we will include state responsiveness to complaints as a performance measure. Since we are also concerned about the backlog of complaints for several states that are not entered into our OSCAR database, we will also include this as a performance measure. In addition, as part of the Complaint Improvement Project (CIP), we plan to review federal monitoring processes to identify those practices which are most effective in monitoring State processing of complaints.
- ▶ HCFA regional offices are required to maintain a log of complaint information reported by the states. If we confirm that these logs are not being maintained, as reported by the GAO, we will take immediate steps to reemphasize the requirement and correct this omission.

Recommendation #3

Require that the substantiated results of complaint investigations be included in federal data systems or be accessible by federal officials.

HCFA Comment

We concur. States are currently required to report this information. If the current complaint form is not adequate, as suggested by the GAO report, interim improvements will be made and states will be monitored more closely. To this end, HCFA has:

- ▶ directed the states to immediately enter all complaints into HCFA's OSCAR system even if the complaint has been or is going to be entered into a State licensure system. States will be closely monitored to ensure that the information currently required is actually entered into HCFA's database. The reporting of complaints will be a new performance evaluation element for the states.

- ▶ directed staff to revise the current complaint form so that HCFA can effectively monitor states' performance and prioritization and timeliness.

Nursing Home Initiative Accomplishments

We very much appreciate the opportunity to review this report and to receive critical information and recommendations from the General Accounting Office. While this report demonstrates the need for additional steps we are taking on state complaint investigations, I would like to share with the GAO the accomplishments that have been made within the past eight months as a result of the President's nursing home initiative:

Faster Remedies

HCFA has expanded its definition of the type of facility for which HCFA would take an immediate enforcement action without a grace period (i.e., an opportunity for the facility to correct before sanctions are imposed). We previously labeled these facilities as "poor performing facilities (PPFs)". However, we are now revising our guidance to remove this label, and provide, in its place, direction about when facilities will be given an opportunity to correct. The guidance will make the assumption that unless a facility has no actual harm on the current survey it would not automatically be given an opportunity to correct before sanctions are imposed. Because facilities have no right to a period of correction prior to the imposition of sanctions, there could be other instances where facilities would not be given such an opportunity; for example, where a facility's pre-termination history indicated no commitment to achieve and maintain compliance with participation requirements, we believe it would be appropriate to impose sanctions immediately.

Enhanced Enforcement Training

HCFA has been vigorous in encouraging States to apply appropriate sanctions for the noncompliance identified in the President's initiative. We will be providing training and guidance to States beginning this Spring on the nursing home initiatives including enforcement, use of quality indicators in the survey process, survey tasks in the areas of medication review, pressures sores, dehydration, weight loss, and abuse prevention.

Enhanced Oversight of Selected Facilities

As part of our July 1998 initiative, HCFA has identified facilities in each State for more frequent inspection and intense monitoring. In selecting these special focus facilities (SFFs), HCFA scored each nursing home based on the results of its most recent annual inspection and any substantiated complaints during the past 2 years. HCFA presented each State survey agency with the names of those homes that generated the highest scores. States selected two facilities and have begun to monitor them more frequently.

Baseline data has been collected on each facility and monthly status reports are required. The monthly status report includes any survey outcomes, complaint investigations, enforcement actions, or press attention for each facility. The purpose of more intense monitoring of these facilities is to determine whether or not closer scrutiny and imposition of immediate remedies will have a lasting effect on these homes, i.e., whether the "yo yo" compliance history is affected. HCFA will conduct systematic analysis to determine if more intense monitoring is effective and if there are innovations with monitoring these facilities which can be used in the overall program.

Stronger Federal Oversight

HCFA has also initiated a national program for improving the accuracy and consistency of State survey results. In October 1998, a standardized system for evaluating State survey performance was implemented. The Federal Oversight and Support Survey (FOSS) is a structured protocol for HCFA staff to use onsite in assessing the State survey teams' adherence to Federally mandated procedures and policies. Where training needs or corrective actions are identified, HCFA staff works with the State to assure that the necessary changes are implemented. We expect that this more standardized and aggressive approach to oversight will improve national consistency in the performance of nursing home surveys.

Quality of Care Enhancements

HCFA is in the process of implementing a wide range of initiatives to improve its ability to detect and prevent bed sores, dehydration, and malnutrition in nursing homes. In conjunction with national experts in nursing home care and quality indicator development, HCFA is developing a systematic data driven process for assessing quality problems in nursing homes. This data driven surveillance system will use indicators of potential care problems for facility residents to identify a sample for more in-depth on-site assessment including a larger sample to review for weight loss and pressure sores. National roll outs of this systematic approach are expected to be completed by the end of 2000 with an interim enhancement to the survey process implemented in 1999. In addition, HCFA staff are working with the American Dietetic Association, clinicians, consumers and nursing homes to share best practices for residents at risk for weight loss, dehydration, and pressure sore development. This includes better guidance and training for surveyors on standards of care practices. A national campaign to educate residents, families, other consumers, and nursing home staff about the risks of malnutrition and dehydration as well as nursing home residents' rights to quality care in nursing homes will begin this year.

Abuse Prevention Campaign

HCFA has concentrated efforts on the reduction of abuse and neglect in facilities. A national abuse and neglect forum consisting of representatives from groups concerned with the frail elderly and disabled has been formed. A survey protocol developed through

the forum workgroup for evaluating nursing homes' abuse and neglect prevention processes will be implemented nationally by July 1999. A national consumer education campaign on prevention and detection will also be inaugurated this Spring.

Management Information System

HCFA is in the process of a major redesign and enhancement of its information system for nursing home quality. The goal is to implement in stages a system that is both user friendly for HCFA, State survey agencies, providers and consumers, and includes information necessary for nursing home quality of care evaluation and improvement. In June 1998 the first segment of this information system began with the development of State and national repositories with resident-specific data on declines and improvement (Minimum Data Set (MDS) longitudinal data). In July 1999, HCFA will start using quality indicators developed by national experts to analyze MDS data and identify domains of potential care problems. These quality indicator reports will be available to HCFA and State survey agencies for enhancing the survey system as well as to providers for internal quality improvement activities.

In addition, in July 1999, an improved system for information collection, consolidation, and integration will be available to State survey agencies. State staff and managers will be able to generate, for individual facilities, tables that include relevant survey results as well as quality indicator information. This improved information system will enhance States' ability to assess the overall performance of an individual nursing home and to better manage survey resources. Future stages of the improved information system on facility quality will include: enhancement to the State systems on enforcement actions; major revisions to the current On-line Survey, Certification and Reporting (OSCAR) system to provide better and more integrated national information in a more user friendly environment; consumer information on quality indicators; updated quality indicators; and better national enforcement data. HCFA will proceed as quickly as possible with development of its improved information system for nursing home quality although there will be some delays attributable to Y2K priorities.

Consumer Information

HCFA is working to make survey results more accessible to the public. HCFA's new Internet site -- Nursing Home Compare -- now gives families and consumers direct Internet access to comparative information about nursing homes as well as provides incentives for nursing homes to improve the quality of care. Since the site was established last September, approximately 826,000 pages have been viewed and we are working with consumers, industry and others to make it more useful to consumers and their families. These and other such projects reflect HCFA's commitment to improving care in nursing homes through better information, education and enforcement.

Budget

In support of the nursing home initiatives, Congress appropriated an additional \$4 million to the \$167 million in total survey and certification funds requested and approved for fiscal year (FY) 1999. The additional \$4 million earmarked by Congress will be used primarily to fund four key components of the nursing home initiative announced last July.

The Administration has proposed to expand its total survey, certification and enforcement related funding in the FY2000 budget request to \$204.3 million, an increase of \$33.3 million over the FY 1999 funding. This increase includes another \$18.1 million for survey and certification activities associated with the nursing home initiative. In addition, HCFA requests another \$32.5 million in FY 2000 for the nursing home initiative, including: \$15.6 million in mandatory Medicaid funds to supplement State inspection and enforcement activities in dually-certified and Medicaid-only nursing homes, and \$16.9 million in other discretionary funds to improve Federal oversight of State surveyor efforts and establish a national patient abuse registry.

With the approval of this funding, HCFA envisions making significant gains in improving the care of beneficiaries and in providing the oversight necessary to assure that all are working toward this common goal.

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

Washington, D.C. 20201

MAR 15 1999

Dear State Survey Agency Director:

The purpose of this letter is to reaffirm and clarify our expectation for the State survey agencies' responsibilities in the collection, review, investigation and reporting of complaints of improper care or treatment at a Medicare or Medicaid-certified nursing home.

We have been concerned about the effectiveness of current processes for collecting, investigating, resolving and reporting complaints received by the State survey agency from nursing home residents, their families and their representatives. HCFA's own assessments, supplemented by reports from consumer groups, the media and outside auditors, have highlighted failures in complaint investigation, enforcement and reporting. This has been particularly true for complaints received about care provided in nursing homes. Medicare and Medicaid beneficiaries and all other nursing home residents must receive the protections to which they are entitled, so we are initiating a series of short and long term improvements to the complaint process which build on other reforms begun in recent years.

Investigation and resolution of complaints are a critical certification function. HCFA, the State survey agency and the State Medicaid Agency (SMA) share responsibility for making sure that participating facilities continually meet these certification requirements. This requires prompt review and, where necessary, on-site investigation by the State survey agency which has primary responsibility for monitoring and investigating reports alleging mistreatment of beneficiaries. Any complaint investigations resulting in deficiency citations must be processed in accordance with the State Operations Manual (SOM).

The SOM at section 3281 outlines processing instructions for certification-related complaints. It requires that any allegation involving an immediate and serious threat to patient health and safety must be investigated by the State survey agency within 2 working days of receipt. It defers to existing State agency procedures for prioritizing and investigating other certification-related complaints. However, based on reports from a number of sources, we are concerned that too often, States do not adhere to the requirement for 2 working day investigations of immediate and serious threat allegations. Also, some States are not adhering to their own guidelines for responding to complaints that are less serious and some State agencies do not adequately address complaints which cause actual harm.

For the well-being of residents, it is essential that all State agencies comply with the existing Federal requirements for scheduling immediate and serious threat investigations and State guidelines for processing other complaints. We have determined the need for more guidance from HCFA on prioritizing and scheduling of other complaint investigations. To assure consistent implementation of this guidance for investigating complaints, HCFA will work with the Association of Health Facility Survey Agencies (AHFSA) to expand this guidance where necessary and to provide appropriate training.

Based on the concerns outlined in this letter, HCFA is taking action in four separate arenas. Two changes will take effect immediately:

1. Scheduling of Complaint Investigations

Effective immediately, any complaint that alleges actual harm to an individual in a certified nursing home must be investigated within 10 working days of receipt. This is in addition to the existing requirement of a two day investigation for cases alleging immediate jeopardy. Where investigations reveal noncompliance with conditions or requirements for participation, the State agency must process the complaint in accordance with the SOM.

2. Data Entry

Another criticism of the current complaint process is the failure of some State survey agencies to enter complaint data into the Online Survey, Certification and Reporting system (OSCAR) complaint subsystem. The State Operations Manual, sections 3281-3284, requires and provides instructions for encoding the results of all complaints resulting in citations of Federal deficiencies. Where an investigation reveals a finding that should be interpreted as a violation of a federal requirement, the finding must be cited under an appropriate tag and entered into OSCAR even if it is also going to be entered into a State licensure system. Since this information is essential to the effective management of the survey and certification program, it is important that any State not entering comprehensive complaint data into OSCAR do so immediately and continue to do so.

On a longer-term basis we will undertake the following:

1. Complaint Improvement Project (CIP)

HCFA is undertaking a CIP which will address a wide range of issues related to complaints in nursing homes. These include: informing consumers of their right to make complaints and the procedure for filing a complaint; reviewing the complaint

intake process including prioritizing and scheduling of complaint investigations; the investigative process; the resolution of complaints and enforcement actions; administrative hearing processes; the interaction of the complaint investigation with various State organizational components and the legal system; the coordination between Federal systems for complaint processing; and, a review of the reporting requirements and tracking systems. Initially, we will work closely with the State survey agencies and then expand our discussion to include consumer groups, ombudsman, and other parties interested in the CIP. Our goal is to further improve our ability to assure that allegations of providers' failure to protect the health and safety of residents are treated timely and effectively.

2. OSCAR Redesign

HCFA is also working on the redesign of the OSCAR system which will include a new complaint module. We will develop a more user friendly, integrated system that will allow for better management of the complaint process.

These are ambitious but critical efforts. Through HCFA's Regional Offices, we will help State agencies set priorities in carrying out these responsibilities. We will work with AHFSA to assess and resolve any budget issues. By working together to assure that all complaints are investigated and resolved in a timely manner and that all results of complaint investigations are promptly entered into OSCAR, we will be making major strides toward an improved complaint process and more importantly, in ensuring the health and safety of nursing home residents across the United States.

Sincerely yours,

A handwritten signature in cursive script that reads "Sally K. Richardson".

Sally K. Richardson
Director of Medicaid and State
Operations

KEY INFORMATION:

Nursing Home Initiative Funding Source	FY 2000 \$ in millions
HCFA:	
<i>Discretionary</i>	
Medicare Survey and Certification	\$18.1
Federal Oversight	\$6.9
National Patient Abuse Registry	\$10.0
<i>Mandatory</i>	
Medicaid Survey and Certification	\$15.6
Subtotal, HCFA	\$50.6
Departmental Management:	
<i>Discretionary</i>	
Office of the General Counsel	\$6.7
Departmental Appeals Board	\$2.8
Subtotal, Departmental Management	\$9.5
TOTAL, Nursing Home Initiative	\$60.1



HEALTH CARE FINANCING ADMINISTRATION



ADDRESSEE:

Deborah Adler

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REMARKS:

3/14/99: DRAFT #4

**COMMENTS OF THE HEALTH CARE FINANCING ADMINISTRATION
ON THE GENERAL ACCOUNTING OFFICE (GAO) DRAFT REPORT,
"NURSING HOMES: COMPLAINT INVESTIGATION PROCESSES
INADEQUATE TO PROTECT RESIDENTS"**

There has been substantial improvement in nursing home quality since 1995, when the Clinton Administration began enforcing the nation's toughest-ever enforcement regulations. However, our July 1998 Report to Congress and a July 1998 GAO report made clear that more needed to be done. That is why, building on the earlier reforms, the President (in July 1998) unveiled an aggressive nursing home initiative (NHI) to further strengthen enforcement and assure quality care. We look forward to working collaboratively with the General Accounting Office (GAO) and the Congress to further sharpen our focus on specific enforcement areas so that residents receive quality care.

We very much appreciate the opportunity to review the GAO report entitled "Nursing Homes: Complaint Investigation Processes Inadequate To Protect Residents." This report underscores the need for the states and for HCFA to develop and maintain an effective complaint monitoring program for all nursing homes.

We strongly believe that the President's nursing home initiative has done much to strengthen enforcement and to enhance the quality and care for all nursing home residents. Nevertheless, we are troubled by what the GAO has found in its most recent draft report on complaints and agree that further refinements to our complaint processes are needed. We remain committed to taking appropriate steps to ensure that nursing home residents are safe and receive quality care, and we will continue to work with the States, Congress, residents and their families, resident advocacy groups, and nursing home providers to advance this essential mission. We generally agree with and will address the recommendations set forth by the GAO in this report.

Complaint Investigation Process

We have long viewed complaints as a valuable and unique source of information about the health and safety of nursing home residents. In addition, we have been aware of problems in responding appropriately to nursing home complaints from residents, their families, nursing home staff, and other sources. In response to these problems, we created an internal workgroup in 1995 to develop formal complaint guidelines for the states. Unfortunately, flat-lined survey and certification budgets, a large increase in providers, and the difficulty associated with devising national standards and maintaining

state flexibility proved to be a formidable challenge. Instead, we developed a set of complaint investigation protocols that were sent to the regional offices for distribution to the states as "tools, not rules." Clearly these protocols are not sufficient and many problems remain.

Accordingly, in order to address the GAO recommendations, as well as our own concern that the complaint process is not responsive to beneficiaries and their families, we have taken two major steps. First, we have sent a letter to all state survey agencies in the country notifying them that any complaint that alleges actual harm to an individual in a certified facility must be investigated within 10 working days of its receipt. We have also reminded the states to enter complaint information into the OSCAR system in a timely manner, and to immediately reduce any backlog.

Second, in order to address the fundamental concerns raised the GAO regarding the structure and effectiveness of the complaint process, we have initiated a Complaint Improvement Project (CIP). This project will identify key elements of this process, incorporate resident and consumer concerns, and will ultimately assist us in developing cost-effective standards for prioritizing complaints and determining the appropriate time frames for complaint investigations. As we proceed, the concerns of beneficiaries, their families, consumer representatives, and representatives from AoA's Ombudsman program will be solicited and incorporated into the design and final work products.

GAO Recommendations

The following more specifically outlines our responses to the findings and recommendations in this report:

Recommendation #1

Develop additional standards for the prompt investigation of serious complaints alleging situations that may harm residents but are categorized as less than immediate jeopardy. These standards should include maximum allowable timeframes for investigating serious complaints and for complaints that are deferred until the next survey schedule.

HCFA Comment

We concur. Effective immediately, any complaint that alleges actual harm to an individual in a certified facility must be investigated within 10 business days of its receipt. We have sent a letter to all state survey agencies notifying them of this new interim requirement, and reminding them that all complaint data must be entered in a timely fashion into the On-line Survey, Certification and Reporting system (OSCAR). Furthermore, as we begin to conduct an analysis of complaint investigation processes, we

anticipate developing more standards and long-term improvements (for example, in the OSCAR system). We expect that these standards will have resource implications and look forward to working with the Congress to address critical resource issues.

The Complaint Improvement Project (CIP) will help HCFA identify and understand the key elements of the complaint investigation and resolution process. We believe these key elements include: (1) how consumers are informed of their right to make complaints and how to do so; (2) the complaint intake process, including how complaints are received, classified and scheduled for investigation; (3) the investigation process, including the training, knowledge, attitudes, and case load of investigators; (4) the resolution process, by which the determination is made about whether a complaint is substantiated; (5) the administrative hearing process, including back-log of cases; (6) the compliance or response process for addressing substantiated complaints, including the range and actual use of remedies and back-log of actions; and (7) interaction of the complaint investigation process with the licensure and certification systems, the legal system, and facility-level grievance or continuous quality improvement processes.

From this information, our intent is to identify federal minimum standards for complaint investigation and the resource and program implications of different levels of increased standards. We will then produce a manual for the states that describes each element of a model complaint investigation process, how states have implemented these processes, and the resource implication issues (for example, staffing levels and training). In addition, HCFA will specify measures we can use to strengthen federal monitoring/audits of state performance, including the elements that should be included in a federal complaint investigation reporting system and database. We will also explore other changes needed to strengthen HCFA's oversight in order to enhance the responsiveness of the complaint investigation process and ensure the welfare of beneficiaries.

Recommendation #2

Strengthen federal oversight of state complaint investigations, including monitoring state practices regarding priority-setting, on-site investigation, and timely reporting of serious health and safety complaints.

HCFA Comment (Need to clarify this section).

We concur. We have already taken actions to address this problem and other steps will be initiated:

- ▶ We will enhance federal oversight of state complaint investigations by redefining the validation survey to include the expansion of a complaint survey to a standard survey. In essence, this reallocates the 5% look behind surveys to include full

FMS surveys that are generated by complaints; (Cyndi, Helene-- I don't really understand what this means.)

- ▶ One component of the nursing home initiatives that was announced in July, 1998 is directed to improve federal oversight of state performance. Consistent with this objective, we have initiated a new process that is focused exclusively on state performance with respect to nursing home survey and certification, independent of the SAQUIP process. This new process is evaluative, designed to improve state accountability, and includes responsiveness to complaints as a performance measure. **(DOES THIS MEAN WE ARE DOING THIS NOW?)** We are also concerned about the backlog of complaints for several states that are not entered into our OSCAR database and will also include this as a performance measure.
- ▶ HCFA regional offices are required to maintain a log of complaint information reported by the states. If we confirm that these logs are not being maintained, as reported by the GAO, we will take immediate steps to reemphasize the requirement and correct this omission.

Recommendation #3

Require that the substantiated results of complaint investigations be included in federal data systems or be accessible by federal officials.

HCFA Comment

We concur. States are currently required to report this information. If the current complaint form is not adequate, as suggested by the GAO, interim improvements will be made. To this end, HCFA has:

- ▶ directed the states to immediately enter all current and backlogged complaints into HCFA's OSCAR system even if the complaint has been or is going to be entered into a State licensure system. States will be closely monitored to ensure that the information currently required is actually entered into HCFA's database. The reporting of complaints will be a new performance evaluation element for the states.
- ▶ directed staff to revise the current complaint form so that HCFA can effectively monitor states' performance and prioritization and timeliness.

We very much appreciate the opportunity to review this report and to get critical information and recommendations from the General Accounting Office. Though we agree that much work needs to be done in the area of complaint investigations, I would

like to share with the GAO the accomplishments that have been made within the past eight months as a result of the President's nursing home initiative:

Faster Remedies

HCFA has expanded its definition of the type of facility for which HCFA would take an immediate enforcement action without a grace period (i.e., an opportunity for the facility to correct before sanctions are imposed). We previously labeled these facilities as "poor performing facilities (PPFs)". However, we are now revising our guidance to remove this label, and provide, in its place, direction about when facilities will be given an opportunity to correct. The guidance will make the assumption that unless a facility has no actual harm on the current survey it would not automatically be given an opportunity to correct before sanctions are imposed. Because facilities have no right to a period of correction prior to the imposition of sanctions, there could be other instances where facilities would not be given such an opportunity; for example, where a facility's pre-termination history indicated no commitment to achieve and maintain compliance with participation requirements, we believe it would be appropriate to impose sanctions immediately.

Enhanced Enforcement Training

HCFA has been vigorous in encouraging States to apply appropriate sanctions for the noncompliance identified in the President's initiative. We will be providing training and guidance to States beginning this Spring on the nursing home initiatives including enforcement, use of quality indicators in the survey process, survey tasks in the areas of medication review, pressures sores, dehydration, weight loss, and abuse prevention.

Enhanced Oversight of Selected Facilities

HCFA has identified facilities in each State for more frequent inspection and intense monitoring. In selecting these special focus facilities (SFFs), HCFA scored each nursing home based on the results of its most recent annual inspection and any substantiated complaints during the past 2 years. HCFA presented each State survey agency with the names of those homes that generated the highest scores. States selected two facilities and have begun to monitor them more frequently.

Baseline data has been collected on each facility and monthly status reports are required. The monthly status report includes any survey outcomes, complaint investigations, enforcement actions, or press attention for each facility. The purpose of more intense monitoring of these facilities is to determine whether or not closer scrutiny and imposition of immediate remedies will have a lasting effect on these homes, i.e., whether the "yo yo" compliance history is affected. HCFA will conduct systematic analysis to determine if more intense monitoring is effective and if there are innovations with monitoring these facilities which can be used in the overall program.

Stronger Federal Oversight

HCFA has initiated a national program for improving the accuracy and consistency of State survey results. In October 1998, a standardized system for evaluating State survey performance was implemented. The Federal Oversight and Support Survey (FOSS) is a structured protocol for HCFA staff to use onsite in assessing the State survey teams' adherence to Federally mandated procedures and policies. Where training needs or corrective actions are identified, HCFA staff works with the State to assure that the necessary changes are implemented. We expect that this more standardized and aggressive approach to oversight will improve national consistency in the performance of nursing home surveys.

Quality of Care Enhancements

HCFA is in the process of implementing a wide range of initiatives to improve its ability to detect and prevent bed sores, dehydration, and malnutrition in nursing homes. In conjunction with national experts in nursing home care and quality indicator development, HCFA is developing a systematic data driven process for assessing quality problems in nursing homes. This data driven surveillance system will use indicators of potential care problems for facility residents to identify a sample for more in-depth on-site assessment including a larger sample to review for weight loss and pressure sores. National roll outs of this systematic approach are expected to be completed by the end of 2000 with an interim enhancement to the survey process implemented in 1999. In addition, HCFA staff are working with the American Dietetic Association, clinicians, consumers and nursing homes to share best practices for residents at risk for weight loss, dehydration, and pressure sore development. This includes better guidance and training for surveyors on standards of care practices. A national campaign to educate residents, families, other consumers, and nursing home staff about the risks of malnutrition and dehydration as well as nursing home residents' rights to quality care in nursing homes will begin this year.

Abuse Prevention Campaign

HCFA has concentrated efforts on the reduction of abuse and neglect in facilities. A national abuse and neglect forum consisting of representatives from groups concerned with the frail elderly and disabled has been formed. A survey protocol developed through the forum workgroup for evaluating nursing homes' abuse and neglect prevention processes will be implemented nationally by July 1999. A national consumer education campaign on prevention and detection will also be inaugurated in 1999.

Management Information System

HCFA is in the process of a major redesign and enhancement of its information system for nursing home quality. The goal is to implement in stages a system that is both user friendly for HCFA, State survey agencies, providers and consumers, and includes information necessary for nursing home quality of care evaluation and improvement. In

June 1998 the first segment of this information system began with the development of State and national repositories with resident-specific data on declines and improvement (Minimum Data Set (MDS) longitudinal data). In July 1999, HCFA will start using quality indicators developed by national experts to analyze MDS data and identify domains of potential care problems. These quality indicator reports will be available to HCFA and State survey agencies for enhancing the survey system as well as to providers for internal quality improvement activities. In addition, in July 1999, an improved system for information collection, consolidation, and integration will be available to State survey agencies. State staff and managers will be able to generate, for individual facilities, tables that include relevant survey results as well as quality indicator information. This improved information system will enhance States' ability to assess the overall performance of an individual nursing home and to better manage survey resources. Future stages of the improved information system on facility quality will include: enhancement to the State systems on enforcement actions; major revisions to the current On-line Survey, Certification and Reporting (OSCAR) system to provide better and more integrated national information in a more user friendly environment; consumer information on quality indicators; updated quality indicators; and better national enforcement data. HCFA will proceed as quickly as possible with development of its improved information system for nursing home quality although there will be some delays attributable to Y2K priorities.

Consumer Information

HCFA is working to make survey results more accessible to the public. HCFA's new internet site -- Nursing Home Compare -- gives families and consumers direct Internet access to comparative information about nursing homes as well as provides incentives for nursing homes to improve the quality of care. Since the site was established last September, approximately 826,000 pages have been viewed and we are working with consumers, industry and others to make it more useful to consumers and their families. These and other such projects reflect HCFA's commitment to improving care in nursing homes through better information, education and enforcement.

Budget

In support of the nursing home initiatives, Congress appropriated \$4 million to the \$118.7 million in Medicare survey and certification funds requested for fiscal year (FY) 1999. And in order to ensure adequate funding of these efforts, the Clinton Administration intends to reprogram \$4 million from other activities so that a total of \$126.7 million will be directed to the nursing home related survey, certification and enforcement initiatives for FY99. These funds are being used primarily to support key improvements in state survey processes, including:

- staggering the beginning of at least 10% of the annual surveys during the morning and evening hours and on weekends;

- providing enhanced monitoring of those nursing homes who past compliance and complaint survey records indicate a poor history of compliance;
- revising the definition of and targeting nursing homes in which actual harm was found in the current survey and in either the last standard survey or an intervening complaint survey and;
- altering the survey protocol and resident sample selection in a way that identifies residents more susceptible to abuse and to having health problems associated with the lack of proper nutrition and hydration.

The Administration has proposed to expand its nursing home survey, certification and enforcement related funding in the FY2000 budget request to \$135.9 million, an increase of \$9.2 million over the FY 1999 funding. With the approval of this funding, HCFA envisions making significant gains in improving the care of beneficiaries and in providing the oversight necessary to assure that all are working toward this common goal.

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Alan D. Solomont
Co-Chairman and Co-CEO

FAX COVER SHEET

To:	Chris Jennings	Fax Number:	202-456-5557
Company:	The White House	Phone Number:	202-456-5560
Date:	April 21, 1999	Time:	4:00 p.m.
Number of pages including cover:	5	From:	Celia D. Harris Assistant to Alan Solomont

Memo:

This facsimile transmission is intended only for the use of the individual(s) to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient(s) or the employee or agent responsible for delivering the message to the intended recipient(s), you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original transmission to us at the address listed above via the United States Postal Service. Thank you.

SolomontBailis

V E N T U R E S, L L C

ALAN D. SOLOMONT

4/21

Chris -

This arrived after we talked.
Some people could reasonably argue
that the financial problems and
even the management problems cited
were caused in large part by the
BBA^{and HCFA} -- and that this response by
HCFA will only make matters worse.

It is certainly an unconstructive
message! I don't see how, at
the end of the day, it serves the
public.

we need lemonade! Alan

APR 21 1999 11:29AM FHCA

NO.673 P.2/4

DEPARTMENT OF HEALTH HUMAN SERVICES
Health Care Licensing Administration

Center for Medicaid and State Operations
7000 Security Boulevard
Baltimore, MD 21204-2800

DRAFT
4/15/99 11:00 a.m.

Dear State Survey Agency Director:

This letter requests your assistance in monitoring nursing homes and hospitals owned or managed by several chains and protecting the health and safety of their residents. We also are asking you to send us particular information about the chains of concern.

At least three health care providers—Sun Health Group, Vencor Corporation, and Canada Health Systems—are reporting financial and management problems. We are concerned that chains may take cost cutting measures which could impact on the quality of care delivered in their facilities. Some facilities may attempt to close their doors or withdraw from Medicare or Medicaid. We ask that you pay special attention to facilities owned or managed by these three chains, and to any other facilities that may face a similar financial condition. If facilities should close or leave the program, we want to be sure that States have adequate plans in place to ensure smooth transition to State receivership or that sufficient other resources exist to care for these residents.

We are interested in gathering specific information about nursing homes and hospitals in each State that are affiliated with each of these chains. Included with this letter are a number of forms specific to each of the 3 chains named above that we ask you to complete. Also enclosed is a page with questions for the State to answer about disaster plans for providing care for nursing home or hospital residents in the event of multiple facility closures.

Completed forms should be returned to the Assistant Regional Administrator (ARA) for Medicaid and State Operations in your HCFA Regional Office by not later than _____. If you have any questions in the interim, please contact the ARA's office.

We greatly appreciate your assistance in this matter.

Sincerely,

Sally K. Richardson
Director
Center for Medicaid and State Operations

Enclosures

04/21/99 11:11

617 646 3401

HARBORSIDE HLTH

0003/0004

APR 21 1999 11:29AM FHCR

Health Care Financing Administration

NO. 673

P. 3/4

Center for Medicaid and State Operations
1800 Security Boulevard
Baltimore, MD 21244-1800

for: SKL
J. Smith
Kara G. J
Linda
Nanci M
Chris P
Don G
Shirley Kardon

DRAFT

Dear State Survey Agency Director:

I am writing this letter to alert you to the serious fiscal condition of several nursing home chains in this country and to request your assistance in monitoring these chains in order to ensure that the health and safety of nursing home residents are not jeopardized.

We have been informed by the U.S. Department of Justice and other sources that at least three health care providers—Sun Health Group, Vancor Corporation, and Genesis Health Systems—are facing drastic declines in revenues. We are concerned about the possibility that some nursing homes and some other types of facilities owned or administered by these chains may suddenly close their doors, potentially placing residents at risk. We are therefore asking you to pay special attention to facilities owned or managed by these three chains, or to any other facilities that may face a similarly precarious financial condition. In the event that nursing homes should close their doors, we want to be sure that adequate plans are in place to ensure smooth transition to State receptivity or that sufficient other resources exist to care for these residents.

Your HCFA regional office will be in further contact with you to discuss these matters. We are asking the regional offices to gather specific information about nursing homes in each State that are affiliated with one of these chains and about alternate plans for providing care for nursing home residents in the event of multiple nursing home closures. If you have any questions in the interim, contact your HCFA Regional Administrator's office.

We greatly appreciate your assistance in this matter.

Sally K. Richardson
Director
Center for Medicaid and State Operations

04/21/99 11:11

617 646 5401

HARBORSIDE HLTH

0004/0004

APR.21.1999 11:23AM FHCA

NO.673 P.4/4

We are stating information about mechanisms that are available ensure smooth transitions in the event multiple nursing home closures in your state, e.g., closures resulting from State or Federal termination, or from operator abandonment.

1. What contingency plans does your State have to handle closures of multiple nursing homes?
2. Do you have a process established to identify the availability of beds or alternative resources that can be drawn upon?
3. Are civil money penalty funds available to help in the transition, (e.g. to help with resident relocation costs)?
4. Does your State have receivership laws that would allow the State to take over management and control of the facility?
5. What specific plans do you have to ensure smooth transition in the event of State takeover of the facility? For example, how would you plan to provide information to families and staff and maintain public confidence that care would be continuously provided to residents? What mechanisms do you have to ensure that care would be continuously provided to residents?
6. Does your State have a formal current contingency plan with the Ombudsman Program that spells out responsibilities of the Survey Agency and Ombudsman Program dealing with the well-being of residents?
7. Are there other steps or measures that you have identified that have not been included on this survey?

Long-Term Care Companies

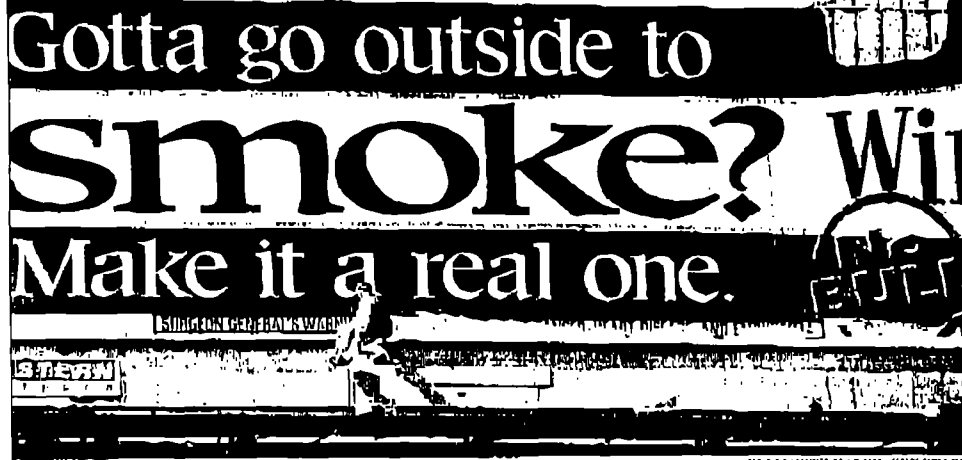
One-Year Price Movements

<u>Company</u>	<u>Closing Price on 4/9/99</u>	<u>Closing Price on 3/9/98</u>	<u>%Decline</u>
Vencor	\$.75	\$10.38	(92.8%)
Sun Health	\$.88	\$18.88	(95.3%)
Advocat	\$ 1.94	\$ 9.00	(78.4%)
Mariner	\$ 2.31	\$19.38	(88.1%)
IHS	\$ 3.63	\$36.00	(89.9%)
Centennial	\$ 3.94	\$21.25	(81.4%)
Beverly	\$ 4.44	\$15.50	(71.3%)
Genesis	\$ 4.63	\$29.25	(84.2%)
NHC	\$ 7.69	\$34.75	(77.9%)
HCR/Manorcare	\$24.44	\$46.31	(47.2%)

10

THE GREEN SHEET

Balt. Sun; 4-23-99



Coming down: A workman begins to remove a cigarette billboard along Interstate 95 near the Fort McHenry Tunnel. The settlement with U.S. tobacco companies banned manufacturers' billboards as of last night.

Wall St. Jnl.; 4-23-99

Federal Officials Urge States to Boost Oversight of Some Nursing-Home Chains

By LAURIE MCCORMY

STAFF REPORTER OF THE WALL STREET JOURNAL—Federal officials, citing the precarious finances of some big nursing-home chains, are urging states to increase oversight of the companies and prepare contingency plans in case they fail.

Officials at the Health Care Financing Administration, which runs Medicare and Medicaid, have called state officials urging them to redouble efforts to ensure the health and safety of nursing-home residents.

The HCFA also has prepared a draft letter to the states listing a number of big chains as the focus of special concern, including Sun Healthcare Group Inc., Albuquerque, N.M., and Vencor Inc., Louisville, Ky.

The letter, dated April 15, notes that the chains "are reporting financial and management problems."

Sun Healthcare and Vencor, among the biggest nursing-home companies in the country with hundreds of facilities, have reported financial problems.

The letter also says the HCFA is con-

cerned that the chains may take "cost-cutting measures which could impact on the quality of care delivered in their facilities."

The draft letter is being prepared for Sally Richardson, director of HCFA's Center for Medicaid and State Operations. It surfaced as Senate Budget Committee Chairman Pete Domenici warned at a committee hearing yesterday that "we may be on the verge of many closures" of nursing homes because of Medicare-payment changes stemming from the 1997 Balanced Budget Act.

Under the new payment system, phased in beginning last year, nursing-home operators that were once reimbursed based on their business costs are now paid a fixed amount for their services. The plan has

sharply reduced payments. The industry is mounting an aggressive lobbying campaign to try to get Congress and the Clinton administration to rethink the changes.

Sun Healthcare said, "It is HCFA that has brought on the huge financial losses the industry is facing because of how the prospective payment system is being implemented." Vencor officials couldn't be reached for comment.

USA Today; 4-23-99

WELFARE LAWS: States need more flexibility to use federal money to help people who left the welfare rolls but are struggling to find paying jobs, Wisconsin Gov. Tommy Thompson told a House panel.



Thompson: 'Can't do it on the cheap'

Wisconsin reduced the number of people on welfare by more than 80%, tops in the nation, but is spending more for each remaining family than it used to since they have more profound problems.

"It's not just moving people off welfare," the Republican governor told the Government Reform Committee. "You're dealing with some very fragile human beings. You can't do it on the cheap."

Thompson suggested that Congress release states from nearly a dozen rules laid out by the welfare overhaul of 1996. Among them: broaden the list of acceptable uses for federal welfare money and relax work requirements for welfare recipients with the toughest problems.

CDC Studies Malaysian Mystery Virus

Critics Blast Lateness of Summons to the U.S. Agency

By RICK BROOKS
And RAPHAEL PURA

Staff Reporters of THE WALL STREET JOURNAL
As scientists from the U.S. Centers for Disease Control and Prevention scramble to identify a mystery virus that has killed at least 101 people in Malaysia, some critics are posing another question: Why weren't the CDC experts called in much earlier?

Malaysian authorities first heard of the virus, which has jumped from pigs to people, in late September. After initially declaring that the virus was Japanese encephalitis, an erroneous diagnosis that failed to detect a new, more deadly bug, the authorities finally ordered the slaughter of almost 900,000 pigs in a frantic attempt to halt the scourge. Only in mid-March did Malaysia finally ask for the CDC's help. By that time, the disease had killed scores of people in Malaysia and one in neighboring Singapore.

Lim Kit Siang, a Malaysian opposition political leader, said Sunday that the deaths "were unnecessary and avoidable [and] the result of criminal negligence and . . . ministerial bungling." Malaysian epidemiologist Chan Chee Khoo, without specifically pointing to the delay in bringing in the CDC, said the handling of the outbreak has been "plagued by a lack of clear-thinking [and] well-advised and decisive leadership."

Malaysian government officials haven't said why the CDC and other outside help weren't called in sooner. Spokesmen for the government Health Ministry didn't respond to requests for comment last week.

Concern Over Wider Effects

For now, the outbreak of the Nipah virus—named for the Malaysian village where it erupted—seems to be subsiding. But medical experts remain worried about the potential for the disease to spread to more countries, such as Thailand and

Diary of a Deadly Virus

Important dates in the spread of the Nipah virus:

Sept. 29, 1998: First case reported to Malaysian authorities

January 1999: Virus spreads to pig farms south of Kuala Lumpur; researcher posts suspicions about government's diagnosis on the Internet

March 3: Malaysian government decides to vaccinate 2.4 million pigs against Japanese encephalitis; death toll reaches at least 28

March 7: A Malaysian scientist discovers virus that can't be identified and then flies to U.S. to deliver samples to Centers for Disease Control

Source: WSJ reporting

Mid-March: CDC researchers rule out Japanese encephalitis, concluding virus had never been seen before; death toll reaches 43

March 19: Malaysian government asks CDC for help; death toll reaches 53

March 20: More than 2,000 soldiers and policemen start slaughtering pigs in effort to stop spread of virus

March 22: CDC researchers depart for Malaysia

Mid-April: Death toll reaches at least 101 out of 258 reported Nipah virus cases

China, where pork is a staple of the diet.

"The real concern is whether this will emerge where it could have even more devastating effects, and what are you going to do then?" says Tom Monath, a former CDC disease-fighting expert, who now is vice president of research and medical affairs at Oravax Inc., a vaccine developer in Cambridge, Mass.

The CDC is saying little about the prognosis. "We are looking at the nature of the disease as far as we can," said Brian Mahy, the CDC's director of viral and rickettsial diseases. "We still have a long way to go."

For the Atlanta-based CDC, the long delay reflects the delicate relationship between one of the world's leading disease-fighting organizations and countries that need its help. The situation is particularly sensitive in Malaysia, where officials have long bristled at what they see as lecturing from Westerners. CDC officials intervene only when asked to do so, remaining hands-off until then, even when an emerging disease like the Nipah virus is claiming

lives. "We're always at the whim of whether the country wants to invite us," Dr. Mahy says.

Though infectious-disease experts around the world began discussing their suspicions about the Nipah virus on a popular Internet site in January, CDC researchers didn't spring into action until a Malaysian scientist brought samples of the virus to a CDC laboratory in March. Once there, it was quickly identified as a new virus.

A 10-person CDC team is screening hundreds of humans and animals in Malaysia for clues about the Nipah virus, and CDC officials say they are pleased with the cooperation being offered by Malaysian health authorities.

Ministry Gets the Lead

Still, Tom Kziazek, the CDC's team leader in Malaysia, was cautious Friday about discussing the agency's role in ending the outbreak. "We give the ministry [of health] the lead on this," he said in an interview in Kuala Lumpur. "We're techni-

cal advisers."

Among the first victims late last year was Lai Mai, a 66-year-old ethnic Chinese pig farmer in the northern Malaysian state of Perak, whose death baffled local doctors. After several more farmers died, the Malaysian Health Ministry launched an investigation, concluding that the mysterious illness probably was a strain of Japanese encephalitis.

But the death toll kept climbing, despite the vaccination of residents against Japanese encephalitis, leading independent Malaysian scientists to question the government's diagnosis. Jane Cardosa, an Oxford-trained virologist at the University of Malaysia Sarawak, posted her suspicions on the Internet, noting that Japanese encephalitis usually affected a wider population because it is mosquito-borne. "It doesn't make much sense where every person who died was in some way directly handling pigs," she says.

Malaysian authorities continued to insist until mid-March that no new virus was at work, claiming that health officials could control the epidemic without foreign assistance. As the virus spread, though, panicked residents fled afflicted areas. The entire village of Sungai Nipah, 62 miles south of Kuala Lumpur, emptied, and 800 pigs were left unattended. Government officials began a desperate campaign to kill pigs that might be infected. The disease also has spread to at least two stray dogs, and last week Malaysian soldiers began slaughtering some dogs. Authorities have ordered tests of other animals that might be infected, including rodents, horses and cattle. The Nipah virus is believed to spread through direct contact with an infected host, but researchers acknowledge they still know little about it for certain, including whether the virus can be passed between humans.

A Step Forward

The first big step in identifying the new virus came early last month, when academic researcher Chua Kaw Bing took samples to a CDC lab in Fort Collins, Colo. After initial testing, the samples were sent to Atlanta and classified as similar to the

Hendra virus, a disease carried by fruit bats that killed one horse trainer and 14 horses in Australia in 1991 and 1995.

Initial findings from the CDC's research effort are expected within the next two weeks. But even then, some infectious-disease experts are skeptical that the results will become fully known to the public. Countries that ask the CDC for help often oppose the disclosure of information because they fear embarrassment and potential economic damage, say former CDC officials.

"There is a lot of politics involved in all of this," says Charles Calisher, a microbiology professor at Colorado State University, who worked at the CDC for 27 years. "It's really up to the Malaysian government to decide what the world will know."

THE WALL STREET JOURNAL
MONDAY, APRIL 26, 1999

Assisted-Living Centers Criticized in Study

By LAURIE MCGINLEY

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—Some assisted-living facilities for the elderly provide information that is insufficient and sometimes inaccurate, even on such crucial issues as whether residents will be asked to leave if their health deteriorates, a new government report says.

A General Accounting Office survey of facilities in four states found that only about half provided prospective residents with important written information such as the amount of help they would receive in taking medications, or when they might face higher costs or discharge because of worsening health problems. The watchdog agency plans to release the report today.

The GAO also said that more than 25% of the facilities surveyed, in California, Oregon, Florida and Ohio, were cited for five or more quality-of-care or consumer-protection problems during 1996 and 1997. The most common problems involved inadequate care and giving residents the wrong medication or failing to give them medicines they needed.

The report will be the focus of a hearing today by the Senate Special Committee on

Aging, whose chairman is Sen. Charles Grassley. The Republican from Iowa said, "It disturbs me that too many people may lack the information they need to choose a facility that's right for them."

In recent years, the number of assisted-living facilities has mushroomed. For seniors, the facilities provide long-term care through a combination of housing, personal-support services and health care.

The GAO found that monthly fees ranged from \$1,000 to \$4,000, and the facilities varied widely in the intensity of care they were willing to provide. Only about half the facilities said they would admit or keep residents who developed a need for nursing care.

Some marketing materials were inaccurate, according to the agency. One Florida facility, for example, states in marketing materials that it is committed to helping people live at the facility "for the rest of their lives." The contract, however, states that the facility may terminate the agreement immediately if the resident needs services outside the scope of those the facility is licensed to provide, or if the management "determines that the discharge of the resident is appropriate for the resident's wel-

fare or for the welfare of other residents."

The report also cited some major quality-of-care problems. In one California facility, the staff didn't call 911 after a resident fell and injured her head. Instead, staff members gave the woman aspirin. She was found several hours afterward in a coma, and died three days later.

In an Oregon facility, a resident's catheter wasn't washed out for six weeks even though that was supposed to be done daily. The resident contracted a urinary-tract infection and had to be taken to the emergency room.

Because of such problems, states are taking an increasingly active role in overseeing the facilities, with 32 states expected to consider legislation this year regulating the assisted-living industry.

Despite the GAO's findings, industry officials said it would be a mistake to add federal regulations on top of state rules. "The assisted-living industry is in its adolescence and is still maturing and growing," said Robert Lohr, president of Peridot Enterprises Inc., in remarks prepared for delivery at today's committee hearings. "Government policies should nurture this growth, not stunt it," he said.

Bruce Yarwood

Chris

Here is
a quick run-down
for tomorrow

Bruce
4/28

ENVIRONMENT:

The past years have been a continuous struggle for the nursing home industry. The continued reductions in resources from government funding cuts has been coupled with an increase desire for more service. That desire has been joined with a fierce need to have tougher oversight of nursing home service coming from the White House and HCFA. The need to balance the budget and be tough on those who provide service services to the elderly has caught the nursing home industry in a crossfire that has resulted in major losses to the companies providing service. Top ten corporations in the country have seen a loss of capitalization of over \$10 billion just this last year. (From \$15 billion to \$5 billion) One company alone recently announced layoffs of 10,000 employees.

Attempts to solve the problem have gone on relatively deaf ears. The Administration has pushed cuts in the Medicare reimbursement, elimination of the simple Medicaid reimbursement protection (the Boren Amendment) and pushed HCFA to be much more aggressive in the oversight and enforcement of oversight regulations.

The culmination of the insensitivity of the Administration to the industry occurred a week ago. The industry has gone out of its way to support the Administration. Yet, the President recently announced nursing home operators would be viewed the same as telemarketing scam artists and be held liable to criminal penalties and jail terms---a major embarrassment. At a time the industry is trying to work with the Administration to solve its resources and oversight problems, the White House is slamming some of its biggest supporters.

TIME FOR A CHANGE:

The industry needs help in two ways, and needs it fast. First, there can be an influx of cash into the SNF Medicare system. That can be done by simply raising rates, by offering facilities choices of a rate base, and by changing the market basket index to reflect current acuity's of patients. Additionally, the Administration can immediately send the signal to the Congress that it is willing to solve the problem created by capping Part B therapies at \$1500 per year. The signal should also be sent that there is a willingness to solve the problem of insufficient resources that are present to care for the "sub acute" class of residents.

The target is to put \$7billion back into the system. That is the figure that the CBO has said that was "oversaved" from BBA target. (BBA saved \$9.5, actual numbers are now \$16.6 billion.)

Second, the President can sit down with the industry and start the dialogue to improve quality of care in nursing homes. It does no good to continue to beat up on the industry through enhanced penalties. They have not worked for over 20 years. It does help to set positive incentives and to focus on the outcome of services and improving the quality of life of the elderly population. Such a meeting should be held within the next few weeks.

CONCLUSION:

By pushing to increase payments to the SNF industry and by pushing to enhance care through positive means, the President and the Administration will take a forward move that will solve the problems of the industry, put the President in the position of caring for the elderly, and will take away the criticism that will soon be leveled at the White House by the industry and the Congress. It will help to continue to posture the Democrats as providing help and care to the elderly and the care givers, while currently the atmosphere is one of non caring and combat.

DOJ Response to Latest HHS Nursing Home Legislation Comments
(Draft - 4/15/99 - Draft)

Provisions HHS wants included in the statutory language	DOJ Response
I.A - Secretary to have prior approval of injunctive actions <i>DOJ should give in on this one</i>	DOJ believes this should be in the Memorandum of Understanding. Placing this in the statute could give rise to litigation and discovery as to whether DOJ had obtained the necessary approval. Since an MOU would be binding on both parties and would remain in force until both DOJ and HHS agreed to change it, there should be no concern about one agency unilaterally deciding to amend the MOU.
I.B - Language preserving the Secretary's "authority, including enforcement authority, under the SSA."	Since the new statute does not amend the SSA, the purpose and effect of this provision is not clear. If the language is purely symbolic, it is not necessary. If HHS believes it will substantively alter the authority of HHS or DOJ, we would like a more complete explanation of its effect. <i>HHS should provide rationale.</i>
I.C - Requirement that civil actions be approved in advance by AG, DAG, ASG, or AAG	This requirement is unacceptable. DOJ had offered to include - in the MOU - a reiteration of the existing dispute resolution mechanism (which requires a US Attorney's Office that wishes to take a position contrary to the position of the relevant programmatic agency to obtain approval at Main Justice). <i>Can we say this in statute anywhere?</i>
I.D - Administrative authority for Secretary to impose sanctions against "individuals in chains and management companies." <i>HHS should draft language for review</i>	DOJ has no <u>conceptual</u> objection to giving HHS authority to impose administrative sanctions against nursing home chains and management companies (indeed, DOJ believes this would be desirable). (Note -- the HHS paper refers to "individuals in chains and management companies" - DOJ would like clarification as to whether these sanctions are directed against corporate entities, individual persons, or both). DOJ would like to see actual legislative language before endorsing this beyond the conceptual stage. Also, we recommend against putting such provisions in Title 18.

Why?

*those are not unreasonable —
same time frames
that state survey
agencies use*

Provisions HHS wants included in the Memorandum of Understanding	
II.A – Requirement that DOJ notify HCFA within 2 days "whenever it receives, or hears allegations of such conditions, that allege immediate jeopardy of patient harm" or within 10 days of allegations of actual patient harm.	DOJ objects to the specific requirements (including the unreasonable time limits) but agrees that some notification process is appropriate. In mid 1998, DOJ issued a Memorandum to all US Attorneys' Offices and Civil and Criminal Division attorneys requiring them to refer certain allegations of patient harm or abuse to appropriate programmatic agencies (HCFA and the HHS OIG commented upon this Memorandum). DOJ believes the agencies should review that memo to determine if it effectively captures the sought-after notification and adapt this to the MOU.
II.B – HCFA will promptly notify DOJ of disposition of actions taken in response to notifications made under II.A, supra.	No objection.
II.C – HCFA will refer to DOJ "cases of egregious noncompliance as that term is defined by the mutual agreement" of DOJ and HHS.	DOJ believes that HCFA should refer matters where there is credible evidence of violations of the new statute (i.e., credible evidence that an individual or entity has engaged in a pattern of violations of nursing home regulations where such violations have resulted in patient harm). DOJ believes it would be productive to further define in the MOU the circumstances that might rise to such a level.
II.D – A request for written certification to undertake a prosecution [NB – presumably, a request to one of the senior officials listed in I.C, supra] must include HCFA's position on the matter. If HCFA objects, the AAG must obtain views of HCFA Administrator (or designee) prior to authorizing that an action go forward.	Since DOJ objects to the requirement in I.C, this requirement is unnecessary. The MOU should require advance consultation with HCFA on civil and criminal enforcement actions. DOJ also has offered to include a reiteration of the existing dispute resolution mechanism (which requires AAG or higher approval of actions where the programmatic agency [HCFA] objects to the position taken by a US Attorney). Moreover, if such a requirement (i.e., a mechanism to document HCFA's views on whether to pursue a particular action) were to be drafted, there would need to be an explicit deadline (e.g., 10 working days) on a response from HCFA.

II.E - Any action taken by DOJ will be based on a set of definitions of key terms used by HCFA so as not to create conflicting standards that facilities will need to meet	DOJ agrees that the MOU should define key terms in a manner that is consistent with HCFA rules and regulations (in fact, that is why the statute refers to violations of nursing home rules and regulations). These terms should be spelled out in the MOU.
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