

May 9, 2022

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Administrator Brooks-LaSure,

I write with concern about the timeliness of surveys conducted at nursing homes in the Special Focus Facility (SFF) program and seek information about how these low-performing facilities will be overseen as the White House's recently announced plans to overhaul the program are implemented.¹ A review of standard surveys conducted at nursing homes in the SFF program appears to show that many of these facilities are not being surveyed as frequently as required by law. These apparent survey delays among SFF participants are part of a larger backlog the Office of Inspector General for the Department of Health and Human Services (OIG) has identified as a concern. I appreciate the White House's attention to the SFF program following my bipartisan efforts with Senator Toomey to improve program transparency through oversight and expand the program's reach through legislation. I am also aware that the Centers for Medicare & Medicaid (CMS) recently issued guidance to address the backlog of inspections at SFF participants and nursing homes generally.² In addition to the Biden Administration's efforts to strengthen the SFF program, I seek assurance that current survey requirements are being met and transparent information about these facilities is maximized for residents, their families and the public.

Conducting regular standard surveys of SFF participants is an important means of ensuring safety, accountability and compliance with Federal law.³ Nursing homes in the SFF program are subject to standard surveys every six months, whereas nursing homes outside the SFF program are typically subject to standard surveys every 15 months.⁴ Representing less than 1 percent of all nursing homes, SFF participants "substantially fail" to meet the required care standards and resident protections afforded by the Medicare and Medicaid programs. There also are approximately 400 SFF "candidates" that do not receive additional oversight due to limited resources at CMS, despite being indistinguishable from SFF participants in terms of their

¹ The White House, *Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes*, February 28, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>.

² Centers for Medicare & Medicaid Services (CMS), *Changes to COVID-19 Survey Activities and Increased Oversight in Nursing Homes*, QSO-22-02-ALL, November 12, 2021, <https://www.cms.gov/files/document/qso-22-02-all.pdf>, at 3.

³ CMS, *State Operations Manual Chapter 7 - Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities*, November 16, 2018, <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107c07pdf.pdf>. Standard surveys are defined as "a periodic, resident-centered inspection that gathers information about the quality of service furnished in a facility to determine compliance with the requirements of participation." Abbreviated surveys is narrower and "may be premised on complaints received; a change in ownership, management, or director of nursing; or other indicators of specific concern." See Section 7001.

⁴ 42 U.S.C. §1396r(g)(2)(A)

qualifications for enhanced oversight.⁵ Like all nursing homes, SFF participants and SFF candidates also are subject to “abbreviated surveys” for complaints and infection control, which take place between standard surveys and are narrower in focus.⁶ The statutory survey requirements coupled with CMS’s publicly identifying SFF participants and SFF candidates help residents and their families make better informed choices about their care.

Data, Documents Shows Persistent Survey Delays at SFFs

Aging Committee staff conducted a review that found 15 nursing homes in the SFF program had gone six months or longer without a standard survey as of CMS’s February 23, 2022 program report. Spread across 14 states, these nursing homes represent 22 percent of the 63 facilities in the SFF program that were subject to more frequent inspections at the time.⁷ Four of the facilities had gone at least seven months without a standard survey; three more had gone eight months without a standard survey, according to the program report.

These delays would be concerning on their own but also are not isolated to recent months: Aging Committee staff identified multiple examples of SFF participants that went long periods without these statutorily required inspections. These delays took place after CMS allowed states to restart standard surveys in August 2020, following restrictions put in place early in the COVID-19 pandemic.⁸ In Florida, a SFF participant went 12 months with no standard survey from September 2020 to September 2021.⁹ In California, one SFF participant did not have a standard survey for more than 10 months after the CMS survey restrictions were lifted.¹⁰ And in Georgia, the state’s two SFFs went without standard surveys for 9 months¹¹ and 10 months, respectively.¹²

⁵ Senators Bob Casey and Pat Toomey, *Families' and Residents' Right to Know: Uncovering Poor Care in America's Nursing Homes*, June 2019, <https://www.aging.senate.gov/imo/media/doc/Casey%20Toomey%20SFF%20Report%20June%202019.pdf>, at 2. In response to this report and additional oversight, CMS began monthly identifying SFF candidates.

⁶ Phone call between Office of Inspector General for the Department of Health and Human Services (HHSOIG) and the U.S. Senate Special Committee on Aging, February 16, 2022.

⁷ CMS, *Special Focus Facility (“SFF”) Program*, February 23, 2022, <http://web.archive.org/web/20220303182751/https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/downloads/SFFList.pdf>, at 2. There are six categories of nursing homes in the SFF program. “New additions” are nursing homes recently added to the SFF program that have not had a standard inspection since being added to the list. “Not improved” are nursing homes that have failed to show significant improvement since the prior standard survey after entering the SFF program. “Improving” are nursing homes that have shown significant improvement on the most recent standard inspection. “Recently graduated” nursing homes are those that have been released from the program after showing continued improvement through two standard surveys. “No longer in Medicare and Medicaid” are nursing homes that were terminated by CMS from participation in Medicare and Medicaid. Finally, the “SFF Candidate” list consists of nursing homes that are qualified to be selected. States maintain a candidate list ranging from five to 30 nursing homes.

⁸ CMS, *Enforcement Cases Held during the Prioritization Period and Revised Survey Prioritization*, QSO-20-35-ALL, August 17, 2020, <https://www.cms.gov/files/document/qso-20-35-all.pdf>.

⁹ CMS, *Health Inspection Summary for Oak Haven Rehab and Nursing Center*, last accessed April 29, 2022, <https://www.medicare.gov/care-compare/inspections/nursing-home/105302/health>.

¹⁰ California Department of Public Health, *Survey and Inspection Results for La Mariposa Care and Rehabilitation Center*, last accessed May 2, 2022, <https://www.cdph.ca.gov/Programs/CHCO/LCP/CalHealthFind/Pages/FacilityDetail.aspx?facid=110000031>; see also CMS, *Medicare and Medicaid Notice to the Public re: La Mariposa*, <https://www.cms.gov/files/document/california-056086-la-mariposa-care-rehab-ctr-public-notice03042022.pdf>. La Mariposa, which was in the SFF program for more than five years stopped accepting payments for Medicare and Medicaid after it was decertified from the program in March 2022. The California Department of Public Health told the Aging Committee that a new owner is seeking to buy the facility and reinstate it.

¹¹ CMS, *Health Inspection Summary for River Brook Healthcare Center*, last accessed April 29, 2022, <https://www.medicare.gov/care-compare/inspections/nursing-home/115635/health>.

¹² CMS, *Health Inspection Summary for Pioneer Health of Central Georgia*, last accessed April 29, 2022, <https://www.medicare.gov/care-compare/inspections/nursing-home/115564/health>.

Nursing homes that go long periods between standard surveys can accumulate deficiencies in the absence of regular oversight. One Missouri SFF participant that has been in the program for three-and-a-half years provides an illustrative example. The most recent standard survey was conducted in July 2021, the first since September 2019, and 11 months after CMS lifted its survey restrictions.¹³ The September 2019 survey identified six deficiencies while the July 2021 survey identified 20—more than twice the state and national average—including failing to document resident falls and failing to timely provide blood cancer medication to a resident.¹⁴ In the intervening time, a March 2021 survey conducted in response to a complaint detailed how a resident was found injured in “an unoccupied room on an unoccupied hall, with the door shut.”¹⁵ The facility’s social worker, who only learned of the fall when they overheard coworkers “gossiping” two days later, reported that “[t]he resident looked bad, had a cut under one eye, a bruise on the forehead and what appeared as possible rug burn to his/her nose and cheek.”¹⁶ The nursing home was cited for failing to ensure the resident, who also had been hit with an office binder by a staff member in an incident captured on a security camera and investigated in October 2020,¹⁷ was kept free from abuse and neglect.

In another instance, one Minnesota SFF participant with a pattern of abuse and neglect deficiencies was not subject to a standard survey until June 2021—10 months after CMS reinstated them.¹⁸ The facility had been cited for five deficiencies related to the prevention and reporting of abuse and neglect in 2019 and 2020, including several in its most recent standard survey in November 2019. The November 2019 standard survey detailed three residents who had been harmed by the nursing home’s practices, including a resident who was hospitalized and died “when the facility failed to monitor for ongoing rectal bleeding.”¹⁹ When the June 2021 standard survey was conducted, the nursing home was cited for failing to timely report suspected abuse and neglect to proper authorities.²⁰

Finally, an infection control survey described how an Ohio SFF participant failed to take appropriate measures against the spread of COVID-19, such as providing protective equipment, ensure that it was used correctly, and screen facility staff. The January 2021 survey reported that 23 of the facility’s 25 residents tested positive for COVID-19 and one was admitted to an intensive care unit.²¹ The nursing home, which entered the SFF program in January 2021, was

¹³ CMS, *Health Inspection Summary for St Johns Place*, last accessed April 29, 2022, <https://www.medicare.gov/care-compare/inspections/nursing-home/265733/health>. St. John’s Place as a program graduate in CMS’s April 2022 SFF list.

¹⁴ *Id.*; see also CMS, *Statement of Deficiencies and Plan of Correction for St Johns Place*, July 28, 2021, <https://www.medicare.gov/care-compare/inspections/pdf/nursing-home/265733/health/standard?date=2021-07-28>, at 9-11, 45-63.

¹⁵ CMS, *Statement of Deficiencies and Plan of Correction St Johns Place*, May 5, 2021, <https://www.medicare.gov/care-compare/inspections/pdf/nursing-home/265733/health/complaint?date=2021-05-20>, at 12.

¹⁶ *Id.*, at 8.

¹⁷ *Id.*, at 8-11.

¹⁸ CMS, *Health Inspection Summary for Moorhead Restorative Care Center*, last accessed April 29, 2022, <https://www.medicare.gov/care-compare/inspections/nursing-home/245052/health>.

¹⁹ CMS, *Statement of Deficiencies and Plan of Correction for Moorhead Restorative Care Center*, November 7, 2019, <https://www.medicare.gov/care-compare/inspections/pdf/nursing-home/245052/health/standard?date=2019-11-07>, at 28.

²⁰ CMS, *Statement of Deficiencies and Plan of Correction for Moorhead Restorative Care Center*, June 16, 2021, <https://www.medicare.gov/care-compare/inspections/pdf/nursing-home/245052/health/standard?date=2021-06-16>, at 2.

²¹ Centers for Medicare & Medicaid Services, *Statement of Deficiencies and Plan of Correction for Crystal Care Center of Franklin Furnace*, January 6, 2021, <https://www.medicare.gov/care-compare/inspections/pdf/nursing-home/366003/health/infection-control?>

not subject to a standard survey until May 2021, nine months after CMS lifted its standard survey restrictions.²² Its most recent standard survey was conducted in March 2019.

I am concerned that similar survey delays identified by recent OIG reports may leave residents at risk at the 400-plus SFF candidates. Senator Toomey and I introduced the Nursing Home Reform Modernization Act, S. 782, last year to enhance accountability at SFF participant and candidate facilities and provide them with on-site consultation to facilitate improvement and enhance quality of care.²³ In addition to continuing to push to get that legislation passed into law, I plan to closely track the Biden Administration's implementation of the White House's proposals to extend the reach and impact of the SFF program.

SFF Survey Delays Part of Broader Backlog Identified by the OIG

The standard survey delays for SFF participants have taken place at a time when HHS's independent watchdog has warned of states falling behind on nursing home inspections generally. The OIG has reported that backlogs of inspections have persisted since CMS suspended standard surveys in response to the outbreak of the COVID-19 pandemic from March 2020 to August 2020 in favor of concentrating on infection control and complaint surveys.²⁴ The OIG issued a report last year that found 71 percent of nursing homes nationally had gone at least 16 months without a standard survey as of May 31, 2021, with backlogs of nursing homes surveyed ranging from 22 percent to 96 percent by state.²⁵ In a recent briefing, the OIG informed Aging Committee staff that while survey backlogs nationally were trending in the right direction, as of mid-February, 45 percent of facilities had gone 16 months or more without a standard survey, according to data on the CMS website.²⁶ The OIG's concerns regarding survey timeliness predate the pandemic. For example, in a recent report identifying 28 states that repeatedly missed CMS's performance goals for nursing home oversight between FY2015 and FY2018, the OIG found that 41 percent of "performance measures that States failed to meet were the result of States not conducting high-priority complaint surveys or standard surveys within required timeframes."²⁷ The OIG noted "staffing shortages as a root cause of State survey performance problems,"²⁸ and issued several recommendations to CMS intended to improve its monitoring of state survey programs.

[date=2021-01-06](#), at 1.

²² CMS, *Health Inspection Summary Crystal Care Center of Franklin Furnace*, last accessed April 29, 2022, <https://www.medicare.gov/care-compare/inspections/nursing-home/366003/health>.

²³ U.S. Senate Special Committee on Aging (Aging Committee), "Senators Casey, Toomey Introduce Bipartisan Nursing Home Reform Legislation," press release, March 17, 2021, <https://www.aging.senate.gov/press-releases/casey-toomey-introduce-bipartisan-nursing-home-reform-legislation->.

²⁴ CMS, *Frequently Asked Questions for State Survey Agency and Accrediting Organization Coronavirus Disease 2019 (COVID-19) Survey Suspension*, March 13, 2020, <https://www.cms.gov/files/document/covid19survey-activity-suspension-faqs.pdf>.

²⁵ HHSOIG, *States' Backlogs of Standard Surveys of Nursing Homes Grew Substantially During the COVID-19 Pandemic*, OEI-01-20-00431, July 2021, <https://oig.hhs.gov/oei/reports/OEI-01-20-00431.pdf>, at 1. This report was an addendum to a December 2020 report that identified similar issues in the early months of the pandemic. See HHSOIG, *Onsite Surveys of Nursing Homes During the COVID-19 Pandemic: March 23–May 30, 2020*, OEI-01-20-00430, <https://oig.hhs.gov/oei/reports/OEI-01-20-00430.pdf>.

²⁶ Phone call between HHSOIG and Aging Committee, February 16, 2022; see also CMS, *S&C Quality, Certification and Oversight Reports Database*, https://qcor.cms.gov/nh_wizard.jsp?which=0&report=late_survey.jsp [hereinafter S&C QCOR].

²⁷ HHSOIG, *CMS Should Take Further Action to Address States with Poor Performance in Conducting Nursing Home Surveys*, January 2022, <https://oig.hhs.gov/oei/reports/OEI-06-19-00460.pdf>, at 10.

²⁸ *Id.* at 11.

Conclusion and Questions

The inspection data and persistent deficiencies, coupled with the OIG's recent reports, leave me concerned about the timeliness, consistency and effectiveness of SFF program oversight and the wellbeing of residents in those facilities. In order to ensure everything possible is being done to protect residents living in these nursing homes, please respond to the following questions not later than June 6, 2022.

1. The White House recently announced changes to the SFF program as part of a broad plan to improve the quality of nursing home care in our Nation.²⁹ I would appreciate you providing additional specifics about the steps CMS anticipates taking to bolster the SFF program and the timeline on which it intends to do so. In addition, I would appreciate your commitment to keep my office apprised of progress as CMS develops its policy. In addition, please provide the following information:
 - a. At the end of February 2021, there were 63 nursing homes in the SFF program, representing 71 percent of the program's maximum capacity. Please provide a list of the number of facilities in the SFF program and the maximum capacity of the program for each of the last 36 months.
 - b. What is the average and median amount of time that nursing homes currently spend as SFF participants before graduating, and as candidates? Do these data vary widely by state?
 - c. What percentage of nursing homes that have graduated or exited the candidate list return to the program as a participant or candidate within five years?
 - d. How would CMS balance efforts to scrutinize more facilities with ensuring that the poorest performing facilities are not inappropriately "graduating" from the program before their performance has sufficiently improved?
2. Given the current and past standard survey delays Aging Committee staff have identified at SFF participants, what plans are currently in place to ensure continuous and timely surveys of SFF participants during periods of national and regional emergencies, such as the COVID-19 pandemic and catastrophic weather events? What lessons from the pandemic can CMS apply to better monitoring this program in the future?
3. Staffing shortages and staff turnover at state survey agencies were cited by the OIG as a "root cause" of delays in nursing home surveys.³⁰ What, if any, information can CMS share about the scope of staffing shortages at state survey agencies, and the

²⁹ *Supra*, note 1.

³⁰ *Supra*, note 28, at 11, 18.

- extent to which it contributes to delays in nursing home surveys? What is CMS doing to address these chronic problems? What strategies, if any, has CMS considered to improve survey agency staffing? What types of technical assistance does CMS provide to states to assist them in conducting timely and effective oversight of SFFs and SFF candidates?
4. I am concerned that information about SFF participants and candidates is difficult for residents, their families and the public to find. For example, Care Compare website users must navigate two links and a dropdown menu to access a lengthy and densely worded PDF in a small font size that lists SFF participants and candidates. In another instance, the Overdue Recertification Surveys Report on the Survey and Certification Quality, Certifications, and Oversight website of CMS provides important transparency to track survey backlogs, as well as Provider, Deficiency, Enforcement, and Abuse reports.³¹ However, the search engine does not allow users to search for SFF participants or candidates. What steps can CMS take to make information about SFF participants and candidates more easily accessible for Care Compare users? What steps does CMS plan to take to enable queries of SFF participants and SFF candidates in its survey oversight search engine to facilitate SFF program oversight?
 5. Recent reporting by the *New York Times* identified longstanding practices that contribute to a lack of transparency for residents and their families regarding serious problems at nursing homes that remain sealed from public view.³² Given the frequency with which SFF participants and SFF candidates are cited for serious deficiencies, it seems likely that residents living in these nursing homes and their families may be unaware of the very existence of such appeals, much less the details of the citation at issue. The chief medical officer of the nursing home industry's largest trade group was recently quoted as saying that the appeals process should be faster and more transparent.³³ Given the lack of transparency and the call by the nursing home industry for speed to address concerns, what steps is CMS taking to improve transparency of the appeals process and actions to reduce the amount of time between a complaint and resolution?

If you have questions, please contact Peter Gartrell, chief investigator for the Aging Committee.

Sincerely,

Robert P. Casey, Jr.
Chairman

³¹ *Supra*, note 27, S&C QCOR.

³² Robert Gebeloff, Katie Thomas, and Jessica Silver-Greenberg, "How Nursing Homes' Worst Offenses Are Hidden From the Public," *New York Times*, December 10, 2021, <https://www.nytimes.com/2021/12/09/business/nursing-home-abuse-inspection.html>.

³³ *Id.*