

September 15, 2016

Jay Weinstein
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Mr. Weinstein:

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) supports the Special Focus Facility (SFF) program as a way to bring nursing facilities with a history of persistently poor care into compliance. We appreciate the opportunity to comment on the proposed SFF memo. Our feedback and suggestions are discussed below.

Number of SFF slots

The current number of SFF slots per state is far too low. In the majority of states, there is only one SFF. Even in states where there are more than one SFF, the overall percentage of facilities designated as an SFF is infinitesimally small. For instance, in both Texas and Georgia, only 0.5% of the state's nursing homes are SFFs. These numbers are not sufficient to have a significant impact on poor care and the nursing home industry. Consumer Voice agrees with the Long-Term Care Community Coalition (LTCCC) that the number per state should be increased to the pre-sequestration level and that CMS should establish a plan to ultimately include all the nursing homes on the candidate list. If a nursing home's performance is bad enough to qualify the facility for the candidate list, it should be designated a SFF.

Selection of SFF

Consumer Voice encourages CMS to require that the State Long-Term Care Ombudsman (SLTCO) have input into the selection of the SFF. Ombudsmen have important on-the-ground information and knowledge about facilities that should be taken into consideration. Such input could be provided in a number of different ways. One possible approach could be to ask the SLTCO for feedback on each nursing home on the candidate list. Another way might be for the SLTCO to provide a list of the homes it considers to be the "worst" in the state. The State Agency (SA) could give additional weight to any home on the candidate list that also appears on the SLTCO list.

Finally, we realize that state political pressures can have an impact on which facilities are designated as SFFs. Thus we ask CMS to consider changing the process so that the RO makes the final decision on SFF designation, with input and evidence from the SA director.

Notification that a facility has been selected as an SFF

Stakeholders We recommend the following agencies/entities/programs also receive written notification of the SFF selection: Adult Protective Services, guardianship programs, the QIO-QIN, the state Medicaid agency, the state nursing home administrator licensing board (a board might consider review of an administrator's license based on the facility's poor performance), and hospitals in the areas surrounding the SFF.

We concur with LTCCC's recommendation that consumer advocacy organizations also be notified.

The residents of the selected SFF and their legal representatives should be notified as well. Residents should be aware that their home has been designated as a SFF since they are the ones most impacted and with the most at stake. This notification would allow them to make an informed decision about whether they wish to remain at the facility or look for another place. Such notification should be accomplished in the following ways:

- The facility could be required to send a letter to its residents/legal representatives. CMS could create a model letter as it has done with the provider letter.
- A notice could be posted in the facility. This would alert not just current residents and family members, but also prospective residents. This might create extra incentive for the facility to come into compliance.

We agree with the Center for Medicare Advocacy (CMA) that all entities identified in §6101 of the Affordable Care Act, 42 U.S.C. §1320a-3(c) [Required Disclosure of Ownership and Additional Disclosable Parties Information] should be notified too.

Meeting in conjunction with notice of initial selection as SFF In "E" under "Other Considerations," the memo states that a meeting either *onsite or via telephone* must be held in conjunction with the notice of the initial selection. We recommend that CMS require that this meeting be held onsite, except under extraordinary circumstances approved by the RO. In the past, CMS has encouraged face-to-face communication at this meeting (S&C-10-32-NH), and we believe should do so again. An in-person meeting would better underscore the seriousness of being designated an SFF.

Additionally, we support LTCCC's recommendation that representatives from the resident and family councils should be included in the meeting. We also ask that CMS replace the term "the State Ombudsmen" with "the State Long-Term Care Ombudsman and/or any representatives of the Office of the State Long-Term Care Ombudsman." [Note: CMS should be consistent throughout the memo in how it refers to the ombudsman.]

Graduation from the SFF program

We are concerned that although a facility may show improvement between two consecutive surveys, i.e. no deficiencies at a scope and severity of “F” or greater (or “G” or greater for LSC deficiencies) and no complaints substantiated with deficiencies at “F” or greater (or “G” or greater for LSC deficiencies), this time period is too short to indicate that sustainable improvement has been made. Long-term care ombudsmen and other advocates report that homes come into compliance for a brief period after being selected for the SFF list, but do not show sustained improvement after graduation. They continue to see poor performance from facilities after they graduate.

To better ensure that facilities have attained and maintained improvement over time prior to graduation, Consumer Voice proposes that homes that have completed two consecutive standard surveys with no deficiencies at a scope and severity of “F” or greater (or “G” or greater for LSC deficiencies) and no complaints substantiated with deficiencies at “F” or greater (or “G” or greater for LSC deficiencies), be required to remain in the SFF program. CMS should consider changing the process to require one of the following processes for graduation:

- A SFF must continue to have no deficiencies at a scope and severity of “F” or greater (or “G” or greater for LSC deficiencies) and no complaints substantiated with deficiencies at “F” or greater (or “G” or greater for LSC deficiencies), for four more consecutive standard surveys (every 6 months); or
- The survey frequency could be increased to an 8-month interval (a slightly longer time between surveys because improvement has been made). A SFF must then continue to have no deficiencies at a scope and severity of “F” or greater (or “G” or greater for LSC deficiencies) and no complaints substantiated with deficiencies at “F” or greater (or “G” or greater for LSC deficiencies), for three more consecutive standard surveys.

Both these approaches would require the facility to sustain improvement for three years. This corresponds to the timeframe used on Nursing Home Compare and the Five Star Rating System as an indication of performance over time: the health inspection domain for the Five Star Rating System is based on a three-year period of time and a facility’s survey record over three years is displayed on Nursing Home Compare.

Surveys

We recommend that at least 25% of the surveys be conducted on a weekend and/or after business hours. This would better ensure that surveyors are getting an accurate picture of conditions in the facility. Furthermore, we urge CMS to make a minimum of one survey a Federal Monitoring Survey. At least one instance where a federal survey team cited significantly more deficiencies than the state survey team has come to our attention. One

or more Federal Monitoring Surveys could help counterbalance possible underciting by a state survey team.

Progressive enforcement

We are pleased to see that remedies must be imposed with increasing severity, but are concerned that there is not sufficient guidance on what increasing severity means. Given the variation among states, some state survey agencies could impose remedies that are much less severe than others for the same situations. We urge CMS to provide a list of progressively severe enforcement actions to be imposed after each non-compliant survey or update the Progressive Enforcement Table from S&C-10-32-NH to guide states in deciding what sanctions to levy. We agree with CMA's suggestion that only per day CMPs be permitted, not per instance CMPs.

Operational Procedures

In general, we support the guidance for nursing homes remaining on the SFF program after two standards surveys.

However, if the "last chance" survey indicates a deficiency with S/S findings of "F" or greater (or "G" or greater for LSC deficiencies), we recommend that the state be required to apply for temporary management/receivership, or if state law does not permit temporary management/receivership, the federal temporary management remedy should be imposed. The purpose of the receivership/temporary management should be to oversee correction of the deficiencies and assure the health and safety of the facility's residents while the corrections are being made. Termination should occur if, and only if, this measure fails.

Involving State Long-Term Care Ombudsman: For those SFFs remaining in the program after two standard surveys, we encourage CMS to require the SA to share the plan outlining further action to be taken by the SA and/or the CMS RO with the SLTCO (Section VI.A.). We also urge CMS to require the SA to ask the SLTCO if and to what extent the SFF has improved (Section VI.1.).

Quality Improvement

We support LTCCC's recommendation that CMS provide clear and stringent guidelines 1) for a SFF's QAPI program to focus on identifying and addressing the systemic causes of the facility's deficiencies; and 2) for ROs and SAs to cite at the level of actual harm or higher, nursing homes that fail to either have an adequate and robust QAPI or to follow it effectively.

Other

Nursing Home Compare We recently noted that when you hover over the icon for a SFF (a triangle with an exclamation point) on Nursing Home Compare, the first sentence of

the description states that the facility “can be considered a Special Focus Facility.” Saying “can be” leaves the reader unsure as to whether or not the facility is or isn’t a SFF. Given how serious the care issues usually are in a SFF, consumers should not be left in doubt about a facility’s status. We urge CMS to change this description to read, “If a nursing home has a history of persistent poor quality of care it is a Special Focus Facility (SFF).”

Thank you for your consideration of these comments.

Sincerely,



Lori Smetanka
Executive Director



Robyn Grant
Director of Public Policy & Advocacy