

**Congress of the United States**  
**Washington, DC 20515**

May 4, 2020

The Honorable Seema Verma, Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
200 Independence Avenue Southwest  
Washington, D.C. 20201

Dear Administrator Verma,

We write today concerning the spiraling death toll among the residents and staff in our nation's long-term care facilities. As of May 1, 2020, more than 16,000 residents and staff have died from COVID-19 infections in long-term care facilities across the United States.<sup>1</sup> The actual death toll of nursing home residents is undoubtedly higher because of inconsistent mortality reporting practices by states. A *Washington Post* analysis from April 29, 2020, found more than 1 in 6 facilities nationwide are now publicly acknowledging infections among residents or staff.<sup>2</sup>

COVID-19 has exposed and amplified our profoundly flawed system of caring for older adults. The 1.5 million current residents of long-term care facilities are vulnerable to the virus due to their health status and the enclosed environment of the facilities. According to the Centers for Disease Control and Prevention (CDC), eight out of 10 deaths reported in the U.S. have been in adults 65 years and older with the highest percentage of severe outcomes among persons aged over 85 years.<sup>3</sup> The average age of senior living community residents is 85 years old and has 2 or more comorbidities. A minimum of 42% of residents suffer from cognitive impairment, putting them especially at risk.<sup>4</sup>

Timely access to testing kits is the most critical component to COVID-19 prevention and response in nursing homes, but according to the Society for Post-Acute and Long-Term Care Medicine, two-thirds of nursing homes don't have "easy access to test kits."<sup>5</sup> There is no sentinel surveillance requirement at the federal level to find both symptomatic and asymptomatic carriers, and only two states, West Virginia and Maryland, are mandating testing for all nursing home

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<sup>1</sup>"Coronavirus in Nursing Homes: More States Pressured to Name Facilities." Accessed May 4, 2020.

<https://www.usatoday.com/story/news/investigations/2020/05/01/coronavirus-nursing-homes-more-states-pressured-name-facilities/3062537001/>.

<sup>2</sup> Jacobs, Joel, Shawn Mulcahy, Sidnee King, and Debbie Cenziper. "Number of Nursing Homes with Publicly Reported Cases of the Coronavirus Soars." *Washington Post*. Accessed April 30, 2020.

[https://www.washingtonpost.com/investigations/number-of-nursing-homes-with-publicly-reported-cases-of-the-coronavirus-soars/2020/04/29/7375941c-898c-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/investigations/number-of-nursing-homes-with-publicly-reported-cases-of-the-coronavirus-soars/2020/04/29/7375941c-898c-11ea-ac8a-fe9b8088e101_story.html).

<sup>3</sup> CDC COVID-19 Response Team, Severe Outcomes Among Patients With Coronavirus Disease 2019 (COVID-19) – United States, February 12–March 16, 2020, 69 *Weekly* 343, 346 (March 26, 2020).

<sup>4</sup> *Ibid.*

<sup>5</sup> "11,000 Deaths: Ravaged Nursing Homes Plead for More Testing - The New York Times." Accessed April 28, 2020. <https://www.nytimes.com/aponline/2020/04/23/us/ap-us-virus-outbreak-nursing-home-testing.html>.

residents without conditions.<sup>6</sup> Without continued surveillance testing in these vulnerable settings, it will be impossible to catch the virus before it spreads.

Given the rapid and asymptotic spread of the virus, long-term care facilities must have the proper personal protective equipment (PPE) for staff and residents, but our communities are experiencing a shortage of critical supplies. The American Health Care Association says that three-quarters of its long-term care facility members are running out of PPE, and about 60% are reusing or improvising PPE.<sup>7</sup> In surveys conducted during the week of March 30, 2020, CMS found that 25% of nursing homes surveyed failed to demonstrate proper use of PPE.<sup>8</sup>

Structural failings in the long-term care industry are contributing to infections and deaths. Nearly 10,000 nursing homes in the U.S. have been cited for infection control failures such as staff not washing hands or cleaning soiled bed sheets.<sup>9</sup> More than half a million residents live in nursing homes rated “average” or “below average” by your agency, the Centers for Medicare and Medicaid Services (CMS).<sup>10</sup> Nursing homes are also chronically understaffed. About 75% of the nation’s nursing homes do not meet the federal suggested minimum levels for staffing.<sup>11</sup> These staffing levels are further decreasing as underpaid nursing home staffers are asked to risk their health without the guarantee of proper PPE or the ability to readily test.

Your agency is responsible for ensuring long-term care facilities meet federal quality standards, but it has repeatedly weakened quality regulations and penalties for nursing homes. Last July, CMS proposed to weaken the requirement that every facility employ at least one specialist in preventing infections.<sup>12</sup> Attorneys general in 17 states have called the proposed rules a threat to “the mental and physical security of some of the most vulnerable residents of our states.”<sup>13</sup> In

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<sup>6</sup> “Hogan Orders Tests for All Nursing Home Residents, Staff | Maryland News | US News.” Accessed April 30, 2020. <https://www.usnews.com/news/best-states/maryland/articles/2020-04-29/hogan-orders-tests-for-all-nursing-home-residents-staff>.

<sup>7</sup> “Trump Called PPE Shortages ‘fake News.’ Health Care Workers Say They’re Still a Real Problem. - POLITICO.” Accessed April 28, 2020. <https://www.politico.com/news/2020/04/26/trump-ppe-fake-news-207523>.

<sup>8</sup> “Trump Administration Issues Key Recommendations to Nursing Homes, State and Local Governments | CMS.” Accessed April 28, 2020. <https://www.cms.gov/newsroom/press-releases/trump-administration-issues-key-recommendations-nursing-homes-state-and-local-governments>.

<sup>9</sup> Rau, Jordan. “Coronavirus Stress Test: Many 5-Star Nursing Homes Have Infection-Control Lapses.” *Kaiser Health News* (blog), March 4, 2020. <https://khn.org/news/coronavirus-preparedness-infection-control-lapses-at-top-rated-nursing-homes/>.

<sup>10</sup> Goldstein, Matthew, Robert Gebeloff, and Jessica Silver-Greenberg. “Pandemic’s Costs Stagger the Nursing Home Industry.” *The New York Times*, April 21, 2020, sec. Business. <https://www.nytimes.com/2020/04/21/business/coronavirus-nursing-home-finances.html>.

<sup>11</sup> Federal News Network. “Nursing Home Outbreaks Lay Bare Chronic Industry Problems,” March 21, 2020. <https://federalnewsnetwork.com/government-news/2020/03/nursing-home-outbreaks-lay-bare-chronic-industry-problems/>.

<sup>12</sup> Federal Register. “Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities: Regulatory Provisions to Promote Efficiency, and Transparency,” July 18, 2019. <https://www.federalregister.gov/documents/2019/07/18/2019-14946/medicare-and-medicaid-programs-requirements-for-long-term-care-facilities-regulatory-provisions-to>.

<sup>13</sup> “Trump Administration Is Relaxing Oversight of Nursing Homes - The New York Times.” Accessed April 28, 2020. <https://www.nytimes.com/2020/03/14/business/trump-administration-nursing-homes.html>.

2017, CMS lowered the fines against facilities found to have endangered or injured residents.<sup>14</sup> Instead of fining nursing homes for each day they were out of compliance, CMS now issues a single fine for most infractions, giving facilities less incentive to fix faulty or dangerous practices. CMS also ended a ban on arbitration agreements by nursing homes,<sup>15</sup> limiting the ability of patients or family members to sue a nursing home for injuries or death and their ability to disclose injuries to the public.

Federal and state oversight of long-term care facilities has also been hampered during the pandemic. CMS suspended federal and state nursing home inspections unless there is an Immediate Jeopardy allegation,<sup>16</sup> meaning if residents were in immediate jeopardy for serious injury or death. Since CMS is no longer allowing visitors to nursing homes,<sup>17</sup> family member visitors, who have historically generated the complaints that trigger inspections, have not been able to scrutinize the care their loved ones are receiving.

A minority of states currently publicly report COVID-19 related deaths in long-term care facilities. While we appreciate CMS's requirement published April 30, 2020 that facilities report nursing home residents and staff infections, potential infections, and deaths related to COVID-19,<sup>18</sup> we strongly urge CMS to publicly release, on a daily basis, the names of residential care facilities with confirmed COVID-19 cases among residents and staff, as well as demographic data about the cases and deaths, including age, gender, and race. To further help prioritize the public health response, and to ensure cases are not missed because of a lack of testing, we urge that all deaths also be reported and include by age, gender, and race whether or not the deceased person had a confirmed case of COVID-19.

We now have a historic opportunity to rethink how we care for older adults and provide the resources needed to improve outcomes. Due to the growing COVID-19 crisis in our nation's long-term care facilities, we ask that you answer the following no later than May 14, 2020:

1. Will you commit to withdrawing the July 18, 2019 proposed rule titled "Medicare and Medicaid Programs; Requirements for Long Term Care Facilities: Regulatory Provisions to Promote Efficiency, and Transparency," which repeals infection control regulations? If not, why not?
2. How is CMS working across the federal government, including with Federal Emergency Management Agency (FEMA) and the Assistant Secretary for Preparedness and Response (ASPR), to secure the needed testing capabilities for long-term care facilities?
  - a. How has the federal government prioritized long-term care facilities' testing needs when disbursing testing equipment?

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<sup>14</sup> Rau, Jordan. "Nursing Home Fines Drop As Trump Administration Heeds Industry Complaints." *Kaiser Health News* (blog), March 15, 2019. <https://khn.org/news/nursing-home-fines-drop-as-trump-administration-heeds-industry-complaints/>.

<sup>15</sup> [84 Fed. Reg. 34718](#).

<sup>16</sup> "CMS Announces Actions to Address Spread of Coronavirus | CMS." Accessed April 28, 2020. <https://www.cms.gov/newsroom/press-releases/cms-announces-actions-address-spread-coronavirus>.

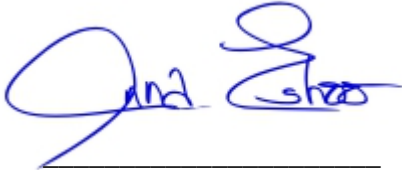
<sup>17</sup> *Ibid*.

<sup>18</sup> CMS-5531-IFC.

- b. How is CMS working with long-term care facilities and states to implement surveillance testing protocols to track and isolate COVID-19 cases among residents and staff?
3. Is CMS enforcing isolation protocols so that COVID-19 positive residents are cared for in separate facilities or units? If so, how? To what extent have facilities adopted separate COVID-19 facilities or units?
4. How is CMS working across the federal government, including with FEMA and ASPR, to secure the needed PPE for long-term care facilities?
  - a. Is CMS enforcing PPE protocols for long-term care facilities so staff must use PPE when interacting with patients?
  - b. Has CMS found that PPE availability has constrained nursing homes from following recommended protocols? If so, what has CMS done, along with its federal partners, to ensure that nursing homes have needed PPE?
5. How is CMS assessing whether long-term care facilities are protecting their staff from infection?
  - a. Is CMS assessing whether long-term care facilities are meeting recommended staffing levels during this crisis? If so, how, and what has CMS found?
  - b. How is CMS helping long-term care facilities ensure their staff are trained on COVID-19 infection control, PPE use, and isolation procedures?
6. On what date will CMS and CDC make COVID-19 reporting data from long-term care facilities public? On what website will this data be made available to the public? How often will CMS and CDC update that public data on the website?
7. With nursing home surveys severely limited, how is CMS ensuring that long-term care facilities are following COVID-19 guidance and safety requirements?
8. How is CMS aiding long-term care facilities in ensuring that virtual visitation is available to residents and their families?
9. How will CMS distribute the \$10 billion fund allocated from the *Coronavirus Aid, Relief, and Economic Security Act (CARES) Act* to long-term care facilities, especially those that treat more Medicaid enrollees than Medicare beneficiaries? Is CMS ensuring that these funds are being used only for maintenance or increase of payrolls and other direct expenses with strict accounting?
10. On April 30, 2020, CMS announced a “Coronavirus Commission for Safety and Quality in Nursing Homes.” Please provide the membership of this commission and how those members were chosen, the commission’s tasks, and any deadlines the commission may have for deliverables to CMS. Going forward, please share with our offices any recommendations the commission makes to CMS.

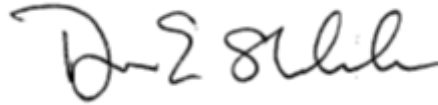
Thank you for your important work to ensure quality care for our most vulnerable Americans.  
We look forward to your prompt response to our questions.

Most gratefully,



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Anna G. Eshoo  
Member of Congress



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Donna Shalala  
Member of Congress