Cynthia Rudder, PhD
917-623-1269
cynthiarudder@gmail.com

Thank you for the opportunity to testify today. My name is Cynthia Rudder and I was a Founder and Director of LTCCC (fka) Nursing Home Community Coalition of NYS from 1982 to 2012. Today, I am a consultant working on research projects with national and state advocacy groups. Among my many studies are analyses of our state's ability to monitor nursing home complaints and compliance with federal and state regulations as well as the state's enforcement of these regulations once deficiencies have been found. I started my research and advocacy into nursing homes in 1979.

Why did Covid 19 have such a disastrous effect on our state's nursing home residents?

When I told some colleagues that I had only 5 minutes to testify, they said, why don't you just refer the legislators to the numerous testimonies given over the years? That made sense since the many problems I testified on over the years are still here.

I believe that the long history of poor care in our nursing homes and the failure of our surveillance and enforcement systems both before and during Covid 19 have led to a perfect storm during this pandemic. But, since I do have 5 minutes, and I unfortunately have new data, I will go on.

There has been a crisis in the quality of care and the oversight by the state in nursing homes for many years. There has been little effective monitoring and fines seem to be merely the cost of doing business and do not create a disincentive to poor practices and inadequate number of staff.

There are many issues I could testify on today – among them the negative impact on resident care and rights due to a chronic lack of staffing and the shortage of PPE; the ban on visitation which led to isolation, physical and mental deterioration, and the lack of oversight by the ombudsman; the corporate structure of nursing homes and its contribution to the lack of quality and infection control; and the inability to appropriately discharge residents to the community due to lack of housing and community supports and "dumping" to shelters – but I will focus on the long time failure of the state's surveillance and enforcement systems and its failure to protect nursing home residents before and during the Covid 19 pandemic. I am in support of the testimonies of advocates such as: Statewide Senior Action Council, Elder Justice Committee, Neighbors to Save Rivington House, Center for Elder Law and Justice, the Center for Independence of the Disabled, NY, Tri County Ombudsman Program, and the Long Term Care Community Coalition and the many other advocates who have raised such issues.

The history of poor care in our nursing homes and the failure of our surveillance and enforcement systems have led to a perfect storm during this pandemic. As we look to the future, we must improve our systems to see how to prevent this from happening again.

Surveyors are not identifying the many deficiencies.

We have long known that the many deficiencies seen by families, residents and ombudsmen every day are not identified by our surveyors and those that are found are not listed as serious and thus enforcement is non-existent or weak.

I conducted a study in 2005 comparing the number of deficiencies identified by federal surveyors to the number found by state surveyors at the same facility in the same time period. I found that over a three year period, federal surveyors identified over four times the number of violations than did the state.[1]

When surveyors do identify violations, they are rarely classified as causing harm.

Other studies have shown that when surveyors do identify violations, they are classified as causing no harm. A study conducted by HHS Office of Inspector General[2] in 2011 found that an estimated 22 percent of Medicare residents in nursing homes across the country experienced harm; many were preventable. Yet, in the same year, NYS cited only 5 percent of its citations as causing harm to all of its Medicare and Medicaid residents.[3] For the year 2019, right before the pandemic hit, New York cited only 2 percent of the deficiencies as causing harm.[4] Thus, 98 percent of non-compliance was said to have caused no harm or only a potential for harm.

Once a deficiency is listed as no harm, even if it has a potential for harm, the sanction issued is often not a real incentive to improve care.

Infection prevention and control is a longstanding, serious problem in nursing facilities. The General Accounting Office reported in May 2020 that between 2013 and 2017, 82 percent of nursing facilities nationwide were cited with one or more infection control deficiencies,

[1] https://nursinghome411.org/wp-content/uploads/2017/03/nursing-home-residents-at-risk-2005.pdf
[2] https://oig.hhs.gov/oei/reports/oei-06-11-00370.asp
[3] https://qcor.cms.gov/report41snf.jsp?which=0&report=report41snf.jsp
[4] Ibid.

including 48 percent of facilities cited in multiple consecutive years.[5] Most infection control deficiencies are cited at such a low level of severity that financial penalties are not imposed.[6]

Because of Ebola and Zika, in 2016 and revised in 2019, new regulations requiring nursing facilities to train staff on dealing with the arrival of a contagious virus. Homes were required to create staffing contingency plans, as well as plans for evacuating residents, sheltering in place, and getting residents food, medicine, and water during the crisis.

The industry heavily lobbied against the rules, describing them as "extremely burdensome".[7] About 43 percent of nursing homes violated them.[8] Were they held accountable for this? Were these deficiencies listed as only a potential for harm?

I believe that the lack of the required pandemic plans helps explain why our nursing homes were caught unprepared. We now see how the "potential for harm" of not having plans led to this disaster.

In NYS, there were 544 citations for infections violations during the years 2017 to 2019.[9] Not one of them were labeled as causing harm.[10] And, from March 2020 to June 2020, data from the federal government on 5724 homes on targeted infection control surveys across the country shows that New York State identified only one deficiency and classified it as affecting few residents and causing no harm. This is not plausible given the pandemic and the death rate.[11]

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[5] Government Accountability Office, *Infection Control Deficiencies Were Widespread and Persistent in Nursing Homes Prior to COVID-19 Pandemic* (May 20, 2020), https://www.gao.gov/assets/710/707069.pdf.

[6] Jordan Rau, "As Coronavirus Cases Grow, So Does Scrutiny of Nursing Home Infection Plans," *Kaiser Health News* (Mar. 4, 2020), https://khn.org/news/as-coronavirus-cases-grow-so-does-scrutiny-of-nursing-home-infection-plans/ (reporting 61% of facilities had been cited with infection prevention deficiencies in the prior three years, including more than one-third that had been cited more than once); Jordan Rau, "Infection Lapses Rampant In Nursing Homes But Punishment Is Rare," *Kaiser Health News* (Dec. 22, 2017), https://khn.org/news/infection-oflapses-rampant-in-nursing-homes-but-punishment-is-rare/ (reporting 74% of nursing homes cited for infection control deficiencies, more than any other deficiency, but only one is 75 facilities received a high-level deficiency that can lead to a financial penalty).

[7] https://www.propublica.org/article/nursing-homes-fought-federal-emergency-plan-requirements-for-years-now-theyre-coronavirus-hot-spots.

[8] Ibid.

[9] Nursinghome411.org

[10] Ibid.

[11] https://medicareadvocacy.org/wp-content/uploads/2020/06/Infection-Control-Surveys-Report.pdf

A number of nursing homes had two or three infection control violations in the years 2017 to 2019[12] and again in the beginning of 2020, before the pandemic hit. [13] In the few I looked at, not having the time to conduct a complete study, showed infection control deficiencies found in December 2019 or January and February 2020 were not rated as causing harm and no fines were levied. In those homes, many residents died. There is a need to examine homes that received infection control violations before the pandemic to see whether they had adequate plans for such a pandemic and how the state dealt with their violations.

Recommendations

Once again, I call for a change in our state's surveillance and enforcement systems. We need to hold providers accountable. New procedures must be put in place to make sure: non-compliance is identified; each deficiency is followed up, not by just reviewing a facility's plan of correction, but to make sure the plan really made an impact.

- Surveyors must be given the time they need to identify deficiencies. Right now, they do not have the time to accurately identify deficiencies and label their severity. It takes time to interview residents. Here is an example on how the federal manual for surveyors teaches them how to discover concerns:

  "Resident B has an indicator for weight loss. The resident is in her room at 8:30 am with her breakfast meal on the over-the-bed table. The resident consumed 100% of her breakfast. After introducing myself, I ask a few high level questions (e.g., how long have you lived here; do you have any concerns with your care?). I would then ask about the food and weight loss. The resident says she likes the food. The resident says she had a cold and lost her appetite a couple months back but has gained the weight back. My screening is complete after a couple of minutes and I would not include this resident in the initial pool."[14]

  A couple of minutes? It takes time to gain the trust of a resident. She may fear retaliation; she may feel too loyal to her home to make any negative comments. Getting information from nursing home residents takes time.

[12] nursingHome411.org
[13] CMS Nursing Home Compare.
[14] https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Downloads/LTCSP-Procedure-Guide.pdf

- We must make sure that surveyors are trained to understand how to ask the appropriate follow up questions to make sure there was no harm.

- Potential for harm in serious. I always give the example of a resident in a wheel chair who is found by the surveyor on the top of the stairs. The surveyor stops her from falling down the stairs. No harm done.

  State fines should be given for potential for harm and should be high enough to be meaningful.

One positive for me about this pandemic is that it has highlighted the problems of care and state surveillance and enforcement that I and others have seen and researched for many years. It is now time to do something about this.