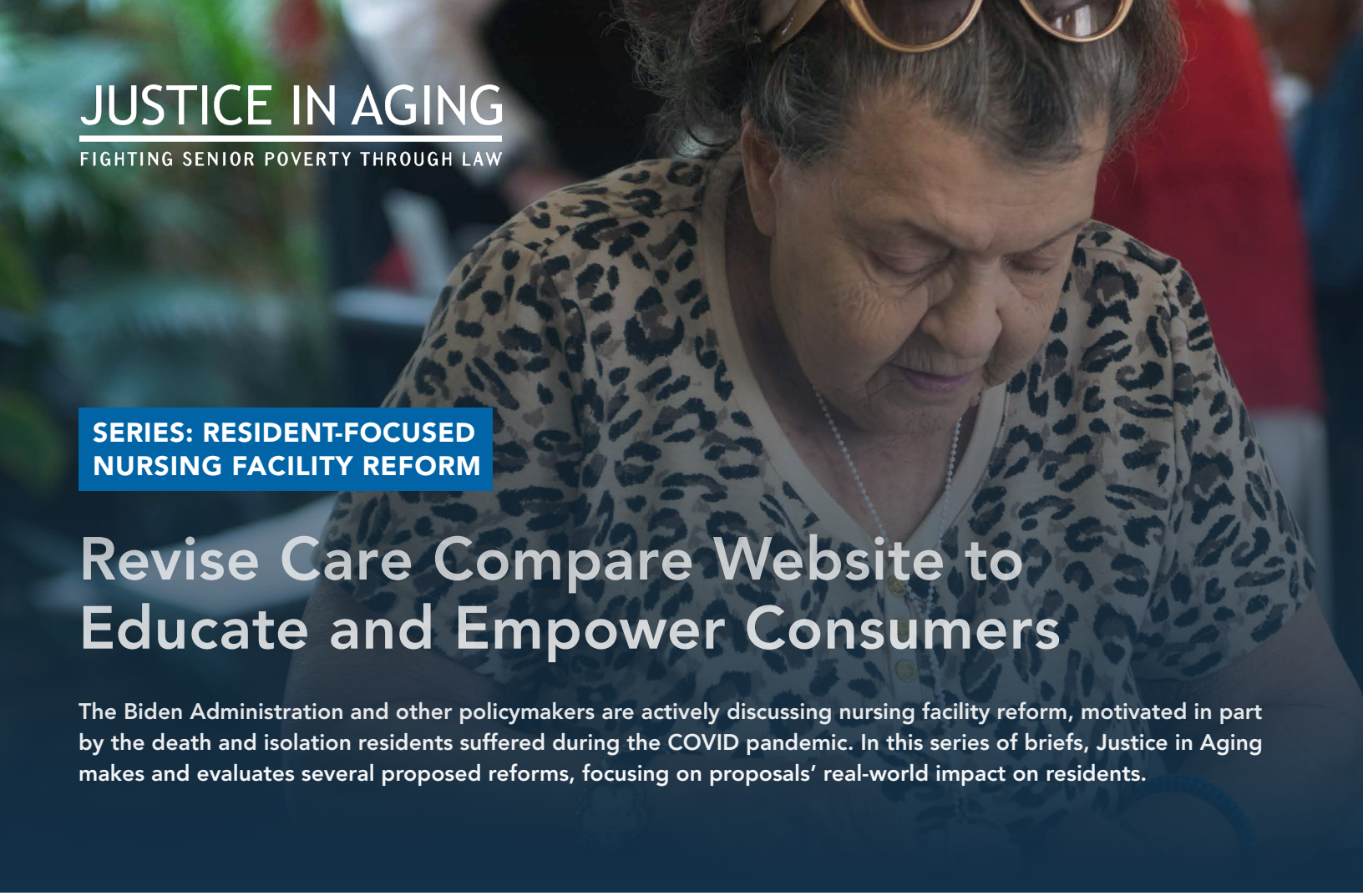

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

SERIES: RESIDENT-FOCUSED NURSING FACILITY REFORM

Revise Care Compare Website to Educate and Empower Consumers

The Biden Administration and other policymakers are actively discussing nursing facility reform, motivated in part by the death and isolation residents suffered during the COVID pandemic. In this series of briefs, Justice in Aging makes and evaluates several proposed reforms, focusing on proposals' real-world impact on residents.

NOVEMBER 2022

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SUMMARY

Several current reform proposals advocate for increased transparency around nursing facilities, but the discussion of consumer-oriented transparency focuses almost exclusively on choosing facilities. Reform conversations should expand to consider how transparency might support current facility residents. The federal government could take an important first step by revising the Care Compare website to better educate and empower current facility residents and their families.

INCREASING TRANSPARENCY TO IMPROVE NURSING FACILITY CARE

Poor nursing facility care is an ongoing problem. The many nursing facility deaths during the COVID pandemic have brutally illustrated long-standing weaknesses, both in individual facilities and in the nursing facility system overall.[1]

One frequently-cited remedy is "transparency." President Biden in February 2022 announced an initiative entitled "Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes." In

that initiative, an "Increasing Transparency" section includes four separate initiatives: Create a Database of Nursing Home Owners and Operators; Improve Transparency of Facility Ownership and Finances; Enhance Nursing Home Care Compare; and Examine the Role of Private Equity.[2]

In another 2022 proposal, the National Academies of Sciences, Engineering, and Medicine released seven broad goals for nursing facility reform, including "Increase Transparency and Accountability of Finances, Operations, and Ownership." This goal includes two implementing recommendations, that the federal government:

- Collect, audit, and make publicly available detailed facility-level data on the finance, operations, and ownership of all nursing homes; and
- Ensure that data allow for the evaluation and tracking of care quality by common owner or management company and the assessment of the impact of ownership models and related-party transactions.[3]

TRANSPARENCY TO BENEFIT CONSUMERS

To be clear: transparency is good. Too many nursing facility ills stem from lack of transparency, particularly in the deceptive ways that many nursing facility operators report finances.

But the literature around nursing facility reform already is replete with calls for transparency. This issue brief, while it echoes calls for greater transparency, also advocates for an improved focus on when, how, and to what extent consumers can use relevant information.

Federal Information on Nursing Facility Care

For health care quality issues, the federal government communicates with consumers principally through the Care Compare website. For nursing facility residents, the website originally was entitled "Nursing Home Compare" when it debuted in 1998, but the broader "Care Compare" title was adopted in 2020 when the facility-specific information on nursing facilities was combined with similar provider-specific information for doctors, hospitals, home health services, and other Medicare-certified providers.[4]

The nursing facility information on Care Compare reflects years of development, as well as continuous debates regarding methodology.[5] Each facility's star rating is derived from government inspection records, daily staffing information submitted electronically by facilities to the Centers for Medicare & Medicaid Services (CMS), and 34 clinical quality measures, again submitted electronically by each facility. Ultimately, through the application of various algorithms, each facility receives a separate rating of one to five stars for inspections, staffing, and quality measures, along with an overall rating star rating that synthesizes the three individual star ratings.[6]

Limits of Care Compare Model

The Care Compare information provides an invaluable service to consumers and others who care about nursing facility quality. But one can both recognize the value of Care Compare while also identifying what Care Compare does not do.

In general, CMS quality initiatives (including but not limited to Care Compare) do little to support consumers once they have moved into a facility. Explicitly or implicitly, the Care Compare model posits that facilities can be classified as "good" or "bad" (or, more precisely, as having one to five stars). The star rating system assumedly incentivizes higher quality nursing facility care. Nursing facilities will put time and money into improving their star rating, and the more successful (and presumably better) facilities will be rewarded with admissions, managed care contracts, and other benefits.

But not everyone will move into a "good" facility. Most obviously, the better-rated facilities don't have enough space to accommodate everyone, and in any case may be located far from a potential resident's community — particularly for communities of color.[7] Also, star ratings may not accurately measure quality. Although relying on differing theories, both consumer advocates and provider representatives flag many instances where a "good" facility may actually be "bad," or vice versa.[8]

More fundamentally, the concept of "good" and "bad" has significant limitations in the long-term care context. The prototypical consumer rating system applies to manufactured items. Consumer Reports can evaluate different brands of automobiles, dishwashers, or exercise bikes (for example) with reasonable assurance that the reviewed product will match the product for sale, and the purchased product's quality will remain relatively consistent.

The same cannot necessarily be said of nursing facilities. A "good" nursing facility today may not be a good facility a year from now, due to staff turnover or other factors. But more crucially, a "good" facility is not guaranteed to do the right thing at any specific moment. Nursing facility quality for each resident depends on dozens of individual interactions daily, and none of those interactions occurs with the type of mechanical certainty that one expects when pushing a dishwasher's "Start" button.

Thus, facility-specific quality information is useful but certainly not sufficient. In essence, residents and their families need operating instructions for nursing facility care, combined with extensive and ongoing customer support.

RESIDENTS OVERWHELMED BY ONGOING ILLEGAL PRACTICES

Unfortunately, many nursing facilities are poor performers. Due to short staffing, selfish or slipshod business practices, or just human mistakes, nursing facilities often fail to provide necessary care. In a different world, poor care would be identified and remedied. But, for decades now, even when problems have been identified, those problems too frequently continue with the implicit acceptance at ground level that, well, there's nothing to be done about it.[9]

It is this author's experience, based on over 30 years of representing residents and residents' interests, that many facilities maintain business practices that violate the law.[10] Federal law, for example, clearly requires equal treatment regardless of reimbursement, yet it is an article of faith in many nursing facilities that residents reimbursed through Medicaid receive lesser care.[11]

Such improper business practices have become entrenched in many facilities. In one of the author's first nursing facility cases, in 1991, a nursing facility told client Mr. P that he had to move out within 48 hours: he was in a "Medicare bed" but his Medicare coverage had ended. The facility was not telling the truth —

nothing in law required the resident to leave —but only the author's legal representation forced the facility to drop its intended eviction.

Today, more than 30 years later, nursing facilities still seek to evict residents with the same dishonest claim about "Medicare beds." In one recent instance, the Maryland Attorney General sued and obtained an injunction against a regional nursing facility chain based on this same illegal practice.[12] But that lawsuit certainly did not resolve the problem, as residents around the country continue to hear — and be intimidated by — their facility's claim that they must move out immediately because their Medicare coverage has ended.

In short, many facilities violate the law. Residents suffer as a result but are generally resigned to the current state of affairs, given their perceived lack of tools and support.

PROPOSALS FOR REFORM

Broad Initiatives to Support Resident Self-Advocacy

Reform discussions tend to revolve around certain topics: the federal enforcement system, Medicare and Medicaid reimbursement rates, facility ownership and management, and employee recruitment and training.[13] In these discussions, residents generally appear as recipients of services rather than protagonists, except for any influence they might have in choosing one facility over another.

But the reform potential of the resident/family member protagonist should not be ignored, as is noted in calls for facility "culture change."[14] Nursing facility problems persist in part because residents and their families do not have enough support to advocate for themselves. In a variety of situations, the federal law says that the facility is in the wrong but the resident sees no way forward, given that the violation may appear to be business as usual. A feeling of helplessness, possibly accompanied by fear of retaliation, leads residents to stay silent and hope for the best. Many never even file the complaints that are necessary to alert government surveyors to potential problems.

What would it take to reverse the desultory status quo? Several possible initiatives come to mind. The Long-Term Care Ombudsman program provides support nationwide, but is chronically underfunded and often heavily dependent upon volunteers.[15] Improved funding could better equip ombudsman programs to take the initiative on quality of care issues in local facilities. Likewise, CMS and the ombudsman programs could provide more affirmative support for resident and family councils, allowing residents and families to better support each other and advocate for better care.[16]

Or, thinking more expansively, CMS and/or ombudsman programs could begin initiatives to publicly "call out" longstanding poor practices. Think of common but illegal practices — eviction of residents after Medicare coverage ends, for example, or administration of antipsychotic medication to sedate residents. Residents, family members, and facility staff, along with the broader community, must receive the clear message that these practices should not be tolerated. Strong enforcement of law — including imposition of appropriate penalties — should be combined with messaging/education campaigns that reinforce legal and professional standards.

Improving the Care Compare Website

One relatively simple and inexpensive reform would be to incorporate these ideas into the Care Compare website. As explained in more detail in the Appendix, the current Care Compare site does a generally poor job of alerting the public to critical self-advocacy issues, particularly when compared to the extensive time and money devoted to the Five-Star rating system. The educational material is both difficult to find and poorly presented, suggesting strongly that it was tacked on as an afterthought, with relatively little consideration as to how it could be more effective. Further, the entire Care Compare website is available only in English and Spanish, while many linked resources are English-only.

One good model (but certainly not the only one) is the Justice in Aging guide, 25 Common Nursing Home Problems, and How to Resolve Them. The *25 Common Problems* guide identifies real-life situations that residents will face, and explicitly calls out illegal facility practices. This type of presentation can be much more effective than a recitation of resident's rights, which unreasonably expects consumers to act as quasi-lawyers in evaluating whether a particular act violates the law.

In revising Care Compare, CMS should solicit input and feedback from communities that will use the nursing facility information. Likewise, when implementing changes, CMS should translate the material broadly into languages other than English, and publicize the information through collaboration with persons and entities trusted within relevant communities.

But to be clear: the specific guide or process is a downstream consideration. As a necessary initial step, CMS first must recognize the value of educating and empowering the public, as well as the untapped potential of the Care Compare website. CMS has the power to make meaningful changes on this front by the end of 2023, with a tiny fraction of the time and expense of other ongoing (and worthy) reform initiatives.

APPENDIX: EVALUATING THE CARE COMPARE WEBSITE FOR NURSING FACILITY CARE

Extensive Quality and Ownership Information

A search for a nursing facility begins at medicare.gov/care-compare/ by 1) selecting "nursing home" as the provider type and 2) indicating a city, state or Zip Code as the relevant location. With that information, the website returns a list of facilities within a designated distance from the selected location — as limited as 5 miles, or as great as 200 miles. For each facility, the website provides a rating from one to five stars for the facility's performance as measured by health inspections, staffing levels, and clinical quality measures, along with an overall star rating that synthesizes the other star ratings through a specified algorithm.

Data Supporting the Star Ratings

The star ratings themselves comprise a small fraction of the information available for each facility. First, the website provides the underlying data for each of the individual star ratings (health inspections, staffing levels, and clinical quality measures). For the health inspection rating, this data includes inspection data from the previous three years, including annual inspections as well as inspections for complaints and infection control (primarily COVID-19). Underlying the staffing rating, the website lists hours-per-resident-

per-day for nurse aides, licensed nurses, registered nurses (for weekdays and weekends), physical therapists, and overall nursing services. In addition, the website includes staff turnover data for nursing staff, registered nurses, and administrators.

The data underlying the "quality measures" star rating is by far the most voluminous. In addition to the quality measure star rating, the Care Compare website also provides separate star ratings for "short-stay" and "long-stay" residents, based on whether a resident has lived in the facility for 100 days or less or, on the other hand, for more than 100 days. The short-stay star rating is derived from 18 separate quality measures, the data for each of which are provided on the website. These include, for example, the percentage of short-stay residents who developed pressure ulcers, or who contracted an infection that required hospitalization. Similarly, the long-stay star rating is derived from 16 separate quality measures, including the percentage of long-stay residents with a urinary tract infection or excessive weight loss.

Other Information Regarding the Facility

For each facility, the Care Compare website also provides certain basic information — the address and phone number, of course, but also whether the facility is located within a hospital or a continuing care retirement community. In addition, the website states whether the facility is certified for Medicare and/or Medicaid, maintains a sprinkler system, or hosts a resident or family council.

Regarding facility ownership, the site lists the ownership type — for example, "for profit – individual" —as well as the facility's legal business name. Through an "ownership details" button, a user also can click through to find names of persons or entities who own at least five percent of the facility, have operation/managerial control, or who serve as officers.

Finally, each facility site also includes additional information related to facility quality and operations. Regarding compliance (or noncompliance) with the law, the site details the facility's performance in inspections related to fire safety and emergency preparedness. In addition, in a recently-added segment, the site also lists COVID vaccination and booster rates for both staff and residents.

Limited Self-Advocacy Resources

The Care Compare website is clearly designed for one primary function: to provide consumers with information that allows them to make informed choices when choosing between federally-certified health care providers. The website does provide some not-provider-specific information about nursing facilities and other types of federally-certified health care providers, but this information is not initially visible on the Care Compare website. Only by scrolling down through the equivalent of two screens does the user find the website's "Tips & Resources" section, comprised of three boxes entitled "About this Tool," "Info for Health Care Providers," and "Resources & Information."

The "About this Tool" section is of little use to consumers: the short discussion provides a just-the-facts summary of the Care Compare tool, along with various legal disclaimers. Likewise, as the name suggests, the "Info for Health Care Providers" page also is not particularly useful for consumers. For nursing facility operators, the page contains a variety of links to obtain more information about (for example) the Skilled Nursing Facility Quality Reporting Program, the Payroll-Based Journal System, and data for Skilled Nursing Facility swing bed performance measures.

Resources and Information

Federal Resources

It is in the "Resources & Information" section for nursing facilities that a consumer (finally) finds information that may be somewhat useful for self-advocacy. The section first lists six different hyperlinks to federal resources on nursing facilities, Medicare, and related topics:

1. Learn about Medicare's coverage of nursing home and skilled nursing care
2. View a checklist of things to ask and look for when visiting a nursing home
3. Your Guide to Choosing a Nursing Home or Other Long-Term Services & Supports
4. View providers and suppliers that are terminated or are at risk for termination from Medicare
5. View a list of nursing homes that have a history of poor care and may need increased oversight and enforcement
6. Find a Long-Term Care Ombudsman in your state or territory. Long-term care Ombudsmen solve problems between residents and nursing homes, as well as assisted living facilities.

By and large, each of these linked resources provide some value to consumers, with the possible exception of #4 and #5, each of which is a list of poor-performing providers.

The history-of-poor-care facilities are those that have been designated a "special focus facility" for additional assistance and enforcement. The list itself may not be of much practical value to consumers — more important is that fact that the facility-specific Care Compare page for a special focus facility includes a "warning" icon that alerts a consumer to the facility's care history and probationary status.

The page for termination-threatened providers is not particularly useful because it includes many different types of facilities and is organized chronologically by the dates of issued notices. The first sentence of the page states that "[r]egulations for providers and suppliers require CMS to notify the public of Medicare terminations prior to effectuation of the termination" and, indeed, the page's design gives every indication that it exists solely to satisfy legal requirements.

Resident's Rights

Below the federal resource hyperlinks, the "Resources & Information" page next lists a snippet of a resident's rights outline, along with a link to a four-page bullet-point outline of resident's rights, laid out in basic Microsoft Word format on the digital equivalent of 8 ½ X 11 inch sheets of paper. The outline's content and presentation suggest that CMS invested minimal effort into making the material usable for residents and families — or for anyone else for that matter, particularly when compared to the relatively sophisticated presentation of the star rating material. As discussed above, it is unrealistic to merely give consumers a list of rights and expect them to act as quasi-lawyers, applying those rights to their own factual situation and advocating on that basis.

Information on Filing Complaints, Along with Contact Information for State Survey Agencies

The "Resources & Information" page includes a five-paragraph discussion on how to file complaints, followed by a listing of contact information for each of the 50 states' survey agencies. These five paragraphs do a relatively solid job of communicating important information, and the state-specific information is easily accessible.

Other Websites and Publications

Finally, the "Resources & Information" page provides 13 links to "helpful websites and publications." Some of the linked resources are provided by government entities; others are provided by non-governmental entities. Some are potentially useful to consumers but others are not. For example, one of the links connects to a highly-technical webpage entitled "Skilled Nursing Facility (SNF) Quality Reporting Program (QRP) Measures and Technical Information."

Information Often Not Usable by Limited-English-Proficient Consumers

Like Medicare's website generally, the Care Compare site offers parallel pages in Spanish, accessed through a Cambiar a Español (Change to Spanish) link in the upper right-hand corner. This translation to Spanish is minimal, however, compared to some other CMS materials. The widely-distributed Medicare & You guide is available in Spanish, Chinese, Korean, and Vietnamese.[17] Likewise, CMS requires a multi-language insert in 15 non-English threshold languages to accompany 20 key documents for Medicare Advantage managed care plans.[18] Outside of CMS, the Consumer Financial Protection Bureau translates consumer-facing materials not just into Spanish but also to Chinese, French, French Creole, Korean, Tagalog, Vietnamese, Russian, and Arabic.[19]

Also, even though the Care Compare site is translated into Spanish, most of the linked documents are English-only. This is true even for those documents that should be particularly targeted to consumers, including the "Nursing Home Checklist," "Your Guide to Choosing a Nursing Home or Other Long-Term Services & Supports," and "Your Rights and Protections as Nursing Home Resident" (the four-page bullet-point list of resident's rights).

ENDNOTES

1 *See, e.g.*, National Academies of Sciences, Engineering and Medicine (NASEM), The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff (April 2022).

2 The White House, Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes (Feb. 28, 2022).

3 NASEM, The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff, at 518-19 (April 2022).

4 M. Tamara Konetzka et al., *Two Decades of Nursing Home Compare: What Have We Learned?*, Medical Care Research and Review, Vol. 78, No. 4, at 295 (2021); CMS, Memo to Nursing Home Stakeholders and State Survey Agencies, QSO 21-06-NH (Dec. 4, 2020).

5 *See, e.g.*, CMS, Design for *Care Compare* Nursing Home Five-Star Quality Rating System: Technical Users' Guide (Oct. 2022); CMS, Updates to the Care Compare Website July 2022 (July 27, 2022); M. Tamara Konetzka et al., *Two Decades of Nursing Home Compare: What Have We Learned?*, Medical Care Research and Review, Vol. 78, No. 4, at 295 (2021); Marcelo Coca Perraillon et al., *Consumer Response to Composite Ratings of Nursing Home Quality*, Am. J. Health Econ., Vol. 5, No. 2, at 165 (2019).

6 *See, e.g.*, CMS, Design for Care Compare Nursing Home Five-Star Quality Rating System: Technical Users' Guide (Oct. 2022).

7 *See, e.g.*, Justice in Aging, Racial Disparities in Nursing Facilities— and How to Address Them (Sept. 2022); Nicholas G. Castle, *Consumers' Use of Internet-Based Nursing Home Report Cards*, Joint Commission J. on Quality & Patient Safety, Vol. 35, No. 6, at 316 (June 2009) (consumers using report cards primarily to find facility location).

8 *See, e.g.*, National Consumer Voice for Quality Long-Term Care, Using the Five-Star Quality Measure to Mask Bad Care (March 22, 2022); Amy Stulick, *Why the Five-Star Rating System Needs an Overhaul — and How to Fix It*, Skilled Nursing News (Sept. 20, 2022).

9 *See, e.g.*, HHS Office of Inspector General, CMS Should Take Further Action to Address States with Poor Performance in Conducting Nursing Home Surveys, Report No. OEI-06–19–00460 (Jan. 2022); HHS Office of Inspector General, States Continued to Fall Short in Meeting Required Timeframes for Investigating Nursing Home Complaints: 2016–2018, Report No. OEI-01-19-00421 (Sept. 2020); HHS Office of Inspector General, Incidents of Potential Abuse and Neglect at Skilled Nursing Facilities Were Not Always Reported and Investigated, Report No. A-01-16-00509 (June 2019); HHS Office of Inspector General, Early Alert: The Centers for Medicare & Medicaid Services Has Inadequate Procedures To Ensure That Incidents of Potential Abuse or Neglect at Skilled Nursing Facilities Are Identified and Reported in Accordance With Applicable Requirements, Audit No. A-01-17-00504 (Aug. 24, 2017).

10 *See, e.g.*, Eric Carlson, Justice in Aging, 25 Common Nursing Home Problems and How to Resolve Them (2022).

11 *See* 42 U.S.C. §§ 1395i-3(c)(4), 1396r(c)(4)(A); 42 C.F.R. §§ 483.10(a)(2), 483.15(b)(1).

12 *State v. Neiswanger Mgmt. Servs., LLC*, 179 A.3d 941 (Md. Ct. App. 2017) (state with authority to seek injunctive relief on residents' behalf). The State subsequently obtained an injunction against the nursing facility chain.

13 The White House, Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes (Feb. 28, 2022); NASEM, The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff, at 518-19 (April 2022).

14 *See, e.g.*, Pioneer Network, What Is Culture Change?.

15 *See* 42 U.S.C. §§ 3027(a)(9), 3058g; Administration for Community Living, Long-Term Care Ombudsman Program.

16 *See* 42 U.S.C. §§ 1395i-3(c)(1)(A)(vii), 1396r(c)(1)(A)(vii) (right to form resident and family councils); 42 C.F.R. § 483.10(f)(5), (7) (same).

17 CMS Press Release, "Medicare & You" Handbook Now Available in Chinese, Korean, and Vietnamese (Oct. 21, 2021).

18 42 C.F.R. §§ 422.2267(e)(31), 423.2267(e)(33). The 15 threshold languages are Spanish, Chinese, Tagalog, French, Vietnamese, German, Korean, Russian, Arabic, Italian, Portuguese, French Creole, Polish, Hindi, and Japanese.

19 Final Language Access Plan for the Consumer Financial Protection Bureau, 82 Fed. Reg. 53,482, 53,487 (Nov. 16, 2017).