

United States Senate
WASHINGTON, DC 20510

February 16, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services

Dear Secretary Becerra and Administrator Brooks-LaSure:

I write today regarding the Department of Health and Human Services (HHS), Office of Inspector General's (OIG) report titled *Long-Term Trends of Psychotropic Drug Use in Nursing Homes*.¹ Since the late 1990s, I have fought to ensure that nursing home residents receive high-quality care on a consistent basis, including advocating against the inappropriate and unnecessary use of psychotropic drugs.² In 2020, my colleagues and I requested that HHS OIG examine the use of psychotropic drugs among residents of nursing homes, including trends since the OIG's last major analysis in 2011.³ Unfortunately, the recent report confirms my decades-long concern that nursing homes are misusing potent and potentially lethal psychotropic medications without the requisite diagnosis or oversight.⁴

According to OIG, between 2011 and 2019, nearly 80 percent of Medicare's long-stay nursing home residents were prescribed a psychotropic drug.⁵ The report also found higher use of psychotropic drugs for residents with low-income subsidies. Further, while CMS focused its

¹ U.S. Dept. of Health and Human Servs., Off. Of Inspector Gen., Report No. OEI-07-20-00500: *Long-Term Trends of Psychotropic Drug Use in Nursing Homes* (Nov. 2022), available at <https://oig.hhs.gov/oei/reports/OEI-07-20-00500.pdf>.

² Office of Senator Chuck Grassley, news release, "Grassley Seeks Thorough Review of Nursing Home Use of Anti-Psychotic Drugs," available at <https://www.grassley.senate.gov/news/news-releases/grassley-seeks-thorough-review-nursing-home-use-anti-psychotic-drugs-0>.

³ Office of Senator Chuck Grassley, news release, "Congressional Policy Leaders Seek Review of Psychotropic Prescription Use in Nursing Homes, available at <https://www.grassley.senate.gov/news/news-releases/congressional-policy-leaders-seek-review-psychotropic-prescription-use-nursing>.

⁴ U.S. Dept. of Health and Human Servs., Off. Of Inspector Gen., Report No. OEI-07-08-00150: *Medicare Atypical Antipsychotic Drug Claims For Elderly Nursing Home Residents*, (May 2011), available at <https://oig.hhs.gov/oei/reports/oei-07-08-00150.pdf> (finding that the use of such drugs could cause the death of residents with dementia).

⁵ See OEI-07-20-00500, *supra* note 1.

efforts on reducing the use of one category of psychotropic drug – antipsychotics – the use of a different category of psychotropic drug – anticonvulsants – dramatically increased.⁶ Critical to this surge is the number of unsupported schizophrenia diagnoses. The report found that “[f]rom 2015 through 2019 the number of residents reported in the MDS [minimum data set] as having schizophrenia but lacking a corresponding schizophrenia diagnosis in Medicare claims and encounter data increased by 194 percent.”⁷ Significantly, CMS’s long-stay quality measure that tracks antipsychotic medication use in nursing homes excludes residents reported as having schizophrenia in the MDS.⁸ In other words, if residents are diagnosed with schizophrenia, their use of an antipsychotic drug is not flagged as inappropriate. The same is true for residents diagnosed with Huntington’s Disease and Tourette’s Syndrome.⁹ Because of this, nursing homes may be incentivized to misreport residents as having these medical conditions to improperly inflate CMS’s quality measure and improve their star ratings. This warrants exacting scrutiny given that CMS implemented the ratings tool to help families make a heart-wrenching decision: which nursing home to select for a vulnerable loved one.

The report also highlights well-documented and ongoing shortcomings with CMS’s data collection processes. Specifically, with respect to its third recommendation, OIG stated that “by not collecting a diagnosis on Medicare Part D claims, CMS is limited in its ability to effectively conduct oversight of psychotropic drugs” and “the findings of this report reiterate the need for CMS to implement a previous recommendation by the OIG: that CMS facilitate access to information necessary to ensure accurate coverage and reimbursement determinations.”¹⁰

On January 18, 2023, CMS announced that it was launching its own investigation into certain nursing homes that are misdiagnosing seniors with schizophrenia and treating them with dangerous antipsychotic drugs. The memo, titled *Updates to the Nursing Home Care Compare Website and Five Star Quality Rating System: Adjusting Quality Measure Ratings Based on Erroneous Schizophrenia Coding, and Posting Citations Under Dispute*, details how audits on erroneous Schizophrenia coding will impact Five-Star ratings.¹¹ It also defines how CMS displays citations under dispute on Nursing Home Compare but will not affect Five-Star ratings until the disputes are resolved.¹²

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ U.S. Dept. of Health and Human Servs., Off. Of Inspector Gen., Report No. OEI-07-19-00490: *CMS Could Improve the Data It Uses To Monitor Antipsychotic Drugs in Nursing Homes*, (May 2021), available at <https://oig.hhs.gov/oei/reports/OEI-07-19-00490.pdf> (finding “[t]here was no evidence that these residents received care for the diagnosis that excluded them from being measured in the percentage of residents receiving antipsychotics. The same inconsistency was noted with regard to the reporting of Huntington’s disease and Tourette’s syndrome....”)

¹⁰ See OEI-07-20-00500, *supra* note 1.

¹¹ U.S. Dept. of Health and Human Servs., Dir. Quality, Safety & Oversight Group, QSO-23-05-NH: *Updates to the Nursing Homes Care Compare Website and Five Star Quality Rating System: Adjusting Quality Measure Ratings Based on Erroneous Schizophrenia Coding, and Posting Citations Under Dispute*, (January 18, 2023), available at <https://www.cms.gov/files/document/qso-23-05-nh.pdf>.

¹² *Id.*

While I acknowledge CMS's efforts to address HHS OIG's recommendations, recent news reports paint a disturbing picture of CMS's Five Star Quality Ratings System, as well as long-term inappropriate use of powerful and dangerous medications. A 2021 New York Times report found that "[n]ursing homes for years have underreported the number of residents on opiates and antipsychotics."¹³ Further, "[f]rom 2017 to 2019 health inspectors wrote up about 5,700 nursing homes, more than one out of every three in the country, for misreporting data about residents' well-being. That included nearly 800 homes with top ratings. Some facilities didn't tell the government about certain medications they were giving residents."¹⁴ Even more alarming are reports about CMS's failure to penalize homes with serious problems. The Times found that "at 40 five-star nursing homes, inspectors similarly determined that sexual abuse did not constitute actual harm or put residents in 'immediate jeopardy....'"¹⁵ This finding is an outrage – of course that kind of abhorrent conduct constitutes harm.

The OIG report and your agency's memo call into question the effectiveness of CMS's oversight and enforcement actions. It appears that even when nursing facilities are cited with psychotropic drug deficiencies, enforcement is rare. For example, in 2018, CMS issued 4,581 citations for unnecessary medication and only 801 civil monetary penalties for antipsychotic drugs.¹⁶ In 2019, CMS issued 4,321 citations for unnecessary medication and only 706 civil monetary penalties for antipsychotic drugs.¹⁷ The memo, which purports to ramp-up enforcement actions, in reality gives bad actors "an out" by allowing nursing homes identified as high-prescribers "the opportunity to forego the audit by admitting they have errors and committing to correct the issue."¹⁸ A mental health industry watchdog responded to CMS's investigation as follows: "...HHS needs to implement effective oversight, accountability, and penalties for rights violations, as nursing homes currently only get their wrist slapped."¹⁹

While CMS has indicated that some of the OIG recommendations are underway, protecting our nation's most vulnerable nursing home residents remains a top priority for my office. Accordingly, I ask that you provide rolling updates to my staff for HHS OIG recommendations 1 and 2.²⁰ In addition, please answer the following questions no later than March 1, 2023.

¹³ Silver-Greenberg, Jessica and Gebeloff, Robert, *Maggots, Rape and Yet Five Stars: How U.S. Ratings of Nursing Homes Mislead the Public*, (Mar. 31, 2021, updated Aug. 4, 2021), The New York Times, available at <https://www.nytimes.com/2021/03/13/business/nursing-homes-ratings-medicare-covid.html?action=click&module=RelatedLinks&pgtype=Article>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See OEI-07-20-00500, *supra* note 1.

¹⁷ *Id.*

¹⁸ See QSO-23-05-NH, *supra* note 13.

¹⁹ CCHR International, *Dangerous Mental Health Practices Must Stop on Our Elderly in Nursing Homes*, (Jan. 27, 2023), available at, <https://www.cchrint.org/2023/01/27/dangerous-mental-health-practices-must-stop-on-our-elderly-in-nursing-homes/>.

²⁰ (1) evaluate the use of psychotropic drugs among nursing home residents to determine whether additional action is needed to ensure that use among residents is inappropriate, (2) use data to identify nursing homes or nursing home characteristics that are associated with a higher use of psychotropic drugs and focus oversight on nursing homes in which trends may signal inappropriate use.

1. Has CMS taken any steps towards implementing OIG's long-standing recommendation to expand the required data elements on Medicare Part D claims to include a diagnosis code (first recommended in 2011)? If so, please explain. If not, given the significant use of psychotropic drugs, how does CMS justify its ongoing refusal?
2. For the proposed offsite audits of schizophrenia coding, how does offering nursing homes the opportunity to forego an audit by admitting errors and correcting the issue solve the problem of improper use of psychotropic drugs?
 - a. Absent an audit, how will CMS determine what issues need correcting?
 - b. Why does CMS consider conducting audits for nursing homes with high psychotropic drug prescription rates to be a burden?
3. Has CMS considered completely excluding certain conditions, such as schizophrenia, from calculations in future quality measures? If so, under what circumstances? If not, why not?
4. With respect to the discrepancy between citations issued and civil money penalties, why is CMS limiting its enforcement actions?
5. How many citations has CMS issued since 2012 that are linked to resident harm or immediate jeopardy?
 - a. How many of these went through the IDR/IIDR process and what was the final determination for each deficiency?

Thank you for your cooperation and attention to this matter. If you have any questions, please contact my Committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget