

Member Alert

February 2, 2017

DOH Survey Update: Our Members Under Attack

I have been in the LTSS field for over 40 years. I have been a facility administrator; a Department of Health official (in Illinois) in charge of licensure and surveys of all health care facilities; an advocate for both for-profit and not-for-profit LTSS providers; and a consumer of LTSS services for both of my parents. In all those years, I have never seen such an out of control, purely punitive war on nursing facilities than what is now being conducted by the PA Department of Health (DOH). Much of this aggressive behavior is coming from the highest level of DOH and we have been told that at least some of the surveyors and/or managers struggle with having to be so uncompromising.

We believe that this has resulted in large part because of 'exposes' in both Philadelphia and Harrisburg newspapers. The Philadelphia papers publicized studies from a self-described consumer group that criticized DOH under the Corbett Administration for not investigating anonymous complaints against nursing facilities. The Harrisburg *Patriot News*, the newspaper that most DOH officials and many in the executive legislative branches read while at the Capital, has been running extraordinarily harsh stories about nursing homes. This series has been going on for months. In one article, the paper alleged that over 40 deaths in facilities were not properly vetted by DOH and/or resulted in either no or minimal financial penalties.

In addition, after the report on complaint investigations, DOH requested an audit from the Auditor General's Office. This report called for higher staffing and stiffer penalties for nursing facilities. DOH's response was to issue guidance to survey staff requiring them to be more aggressive in issuing state civil penalties (CPs). Senator Bob Casey, who formerly served as State Auditor General and provided two equally scathing reports of DOH's oversight of nursing facilities, was also quoted as asking the Centers for Medicare & Medicaid Services (CMS) to review whether DOH was adequately surveying nursing facilities. We believe that this might have been the catalyst for DOH's insistence on not following CMS's Appendix Q when citing Immediate Jeopardies (IJs) beginning in mid-November of 2016.

So what is LeadingAge PA doing about this? First, along with the PA Health Care Association (PHCA) and the PA Coalition of Affiliated Healthcare and Living Communities (PACAH), we engaged legal counsel to question the Department's legal authority to essentially ignore Appendix Q of the federal survey guidelines when issuing IJs; and to object to what appeared to be a new and publically unvetted changes to the rules governing CPs.

And of course, we are continuously talking to legislators and their staffs about this issue. Now that the Governor has announced plans to seek to have the Departments of Health, Human Services, Aging, and Drug & Alcohol Programs combined into one Department of Health and Human Services, there will be many opportunities to make legislators aware of this issue. Furthermore, in a few weeks, we will be commencing our legislative breakfasts around the state where our members can also talk to legislators about their own experiences with the survey and penalty process. **It is imperative that members keep LeadingAge PA staff informed about survey abuses, especially the imposition of G and higher deficiencies along with IJs and excessive federal fine recommendations and any state CPs. We will also be holding three Regional Member Interchanges where you can discuss concerns with us.**

Although this is the worst I've seen, in a sense for those of us that have been in this field for an extended time, this is not exactly new. For decades, government and the media have followed the same pattern. A story on poor care makes the headlines. Government increases penalties on all facilities instead of concentrating on the poor performers. Worse, many times new, even more expensive regulations are implemented without regard to overall effectiveness or any corresponding change in funding.

That is what we're seeing now. DOH is recommending egregious penalties, some of which amount to hundreds of thousands of dollars for really good facilities; those facilities that even DOH and other government officials would want to have care for their loved ones. Meanwhile, historically poor quality facilities continue to operate when they should be closed down.

Of course, even the best facilities - like many in our membership - are not perfect. Not one organization can be in 100 percent compliance 100% of the time with the myriad of rules and regulations as they continue to provide 24/7 care to their residents. But good facilities immediately review mistakes to determine the cause, and to remediate either the person at fault, the systemic failure, or both. The recent move by DOH to recommend six figure fines for facilities that have a long history of quality care is punitive, unwarranted, and does nothing to improve care. In fact, at a time when government financial

support continues to dwindle, it's only going to take desperately needed resources away from facilities that otherwise would go towards caring for residents.

The irony is that the facilities that persistently provide substandard care are allowed to continue to operate. Why? Because government knows that they actually need the poor performing facilities or else there will not be sufficient services for low-income citizens who need 24/7 care. The Medicaid program in PA reimburses nursing facilities on average over \$25 per day less than the actual cost of care. In fact, PA has not increased the funding rate for nursing facilities for four out of the past six years despite health care inflation during that period of almost 20%.

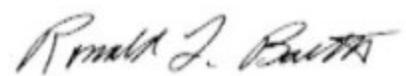
Here is the message we are sending to Pennsylvania policy makers. If we are really serious about improving services for older adults, let's stop the draconian fines for facilities that have already identified and corrected, and in many cases actually self-reported whatever problems that may have occurred. Instead take the following steps:

- Concentrate more surveyor resources on historically poor-performing facilities.
- If facilities do not improve – force them to close or sell to an owner that has a history of quality care.
- Redesign the funding system. Allow funding for low-income citizens so they can access services such as assisted living and housing with services for older adults. Use these savings to adjust Medicaid rates for nursing facilities to cover actual cost of care.

There is no doubt that nursing facilities, including our members, are under an unprecedented attack from DOH. We will continue to work with legal counsel, legislators, and policy staff to make your case and to seek changes in the current environment. LeadingAge PA will continue to update members with webinars, regional interchanges, and other information so you can respond the best way possible. **For instance, we are encouraging members to consider filing Informal Dispute Resolutions (IDRs) for unfair or unwarranted deficiencies. We are aware that filing IDRs has been more effective than ever before and there does not seem to be retaliation as many fear.**

Again, let us hear from you. Let us know your experiences, especially if you have been the subject of large recommended fines and/or IJs. And feel free to call or email me with comments and suggestions about how LeadingAge PA can best help our members during this very troubling time.

Thank you.

A handwritten signature in black ink that reads "Ronald J. Barth". The signature is written in a cursive style with a large initial 'R'.

Ron Barth

President and CEO

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