

Chair Hawkins and members of the Robert G. (Bob) Bethell Joint Committee on Home and Community Based Services and KanCare Oversight; thank you for the opportunity to appear before you today. I am Mitzi McFatrach, executive director of Kansas Advocates for Better Care (KABC). KABC is a non-profit organization, which advocates along with older Kansans for better quality long-term care in all settings. KABC is beholden to no commercial interests, and supported almost entirely by citizen contributions.

At the Committee's November meeting you heard from a nursing home association and an individual facility bring claims that KDADS was overly punitive in enforcing health and safety regulations and resulting fines were excessive. At the conclusion of the meeting, the **Committee recommended that KDADS** "develop policies and practices for surveying long-term care facilities that will **give surveyors latitude in interpreting deficiencies**, provide adequate salaries and through training to enhance the work of surveyors, and monitor inspections and provide reports to the committee regarding citations and fines." This recommendation was made without any opportunity to hear the perspective of nursing home residents. And it was made based solely upon industry concerns about overreach and excessive fines. At the February meeting of the Committee, KABC brought testimony regarding the role of inspections specific to vulnerable older adults. Rep. Barbara Ballard asked that the Committee revisit the recommendation at its next meeting.

Today KABC is presenting additional information for your consideration about inspections and the concern for older adult safety and well-being raised by the Committee's recommendation, specifically regarding policies and practices to give surveyors latitude in interpreting deficiencies. **We are asking that the Committee review and rescind one portion of its recommendation, to "give surveyors latitude in interpreting deficiencies."** Implementing that part of the Committee's recommendation will serve to weaken inspections which are the single entity that can stop harm to a vulnerable adult(s) living in a nursing facility, and that is able to require a facility to correct a harmful practice.

There are a number of **key factors** which cause us to raise this issue and which **cause older adults and families to be concerned about the Committee's specific recommendation to "give surveyors latitude in interpreting deficiencies."**

- Kansas has an **inadequately staffed survey/inspection unit** reported by KDADS, and which began under this administration. In 2017-18 it was down as many as 22, or one-third of trained inspectors. A chronic understaffing has left this unit unable to effectively assure resident health and safety as required by law. A Government Accounting Office/GAO report reviewing the issue of understatement points out, "workforce shortages and greater use of surveyors with less than 2 years' experience sometimes contributed to understatement [of deficiencies and harm]".¹
- **2 years** is the length of time required for a surveyor/inspector to be fully trained, and possess the **experience and expertise to competently identify** deficient practices and assign the proper severity level of harm. Mistakes made in assigning deficiencies and severity of harm have real consequences for older individuals and may result in injury, death, hospitalizations, and miserable quality of life.
- KDADS has **high turnover among inspectors**, as evidenced by chronically vacant positions which limit the experience level of inspectors to competently identify poor practices and actual harm.
- **Significant turnover in Survey leadership** between 2010-present – all **new permanent leadership hires have been facility administrators**. Hiring administrators did not occur prior to this administration

¹ GAO report NURSING HOMES Addressing the Factors Underlying Understatement of Serious Care Problems Requires Sustained CMS and State Commitment <https://www.gao.gov/assets/300/298953.pdf> (2009)

- and is of note because both LeadingAge and AHCA, and their Kansas affiliates are on record and have lobbied hard to eliminate inspections and weaken oversight and enforcement for deficient health safety issues. It is also of note that Kansas did not experience delayed surveys, unfilled positions, and high turnover in previous administrations.
- KDADS is **not in compliance** with State or Federal requirements for **frequency of inspections which weakens oversight and enforcement and its effectiveness. 15-24 months instead of 12.** Older adults are at increased risk for un-checked harm, suffering longer from harm that occurs.
- According to the HHS OIG, KDADS is **not in compliance** and not assuring that **deficient practices are corrected.** A whopping 52% of correction plans went unverified by KDADS – and left frail elders in harms way when corrections were not done.²
- Prior reports by the Government Accounting Office/GAO identified reasons which affect survey reliability shortcomings: insufficient and inexperienced survey staff, confusion about the regulations, inadequate state oversight of the survey process, and the predictable timing of surveys. Also noted were political pressures to water down inspection findings, and the effectiveness of the enforcement process.³
- A **facility can**, and most do, **appeal** a citation for deficient practice or civil monetary penalty amounts, and have either/both reduced or removed, however an **older resident who suffers harm has no such right** of appeal if no deficiency is cited or severity for harm is under-cited.
- **Facility Practices which harm older adults and promote the inappropriate use of Anti-Psychotic drugs** on older adults with dementia, resulting in increased serious injury, stroke, and doubling the risk of death, **are not being cited at a level of harm or resulting in civil monetary fines** – notwithstanding Kansas 50th worst in the nation ranking, and its failure to improve in rankings over 6 years. This scenario clearly challenges the industry’s claims of overreach, and illuminates a survey/inspection process which is failing to use the tools at its disposal to protect older adults, even with clear guidance from CMS to cite harm deficiencies for the inappropriate use of Anti-Psychotic drugs.
- **33 “much below average” Kansas nursing facilities get 1 Star on Medicare.gov Nursing Home Compare.** (www.nursinghome411.org) This represents 10% of Kansas nursing homes and several from the for-profit chain KDADS recently stepped in to take over due to insolvency and which KDADS had vetted and allowed in 2016 to care for vulnerable adults. (KC Star “How a small company above a N.J. pizza parlor put Kansas nursing home residents at risk” 4/15/18)
- **78 nursing facilities** landed on a **3-year look back of poor performance trends, 66 had serious deficiencies, all had above the average number of deficiency citations.** This is nearly a quarter of Kansas nursing facilities.
- Surveys protect each resident from abuse, physical punishment, and being separated from others. For example a survey report documented the following: *“A report made on 4/11/17 to the State agency regarding an allegation of staff-to-resident abuse. The facility reported direct care staff D witnessed direct care staff G and direct care staff H forcing resident #1 to take medications. Staff D said staff G held the resident's hands and pinched his/her nose. When the resident opened his/her mouth staff H (also trained for medication administration) shoved the spoon full of medications into the resident's mouth. Staff H allegedly popped the resident in the mouth, held his/her hand over the resident's mouth and demanded he/she swallow. When staff H removed his/her hand the resident screamed ‘you are killing me, you hurt me so bad’. The facility indicated the incident occurred on 4/1/17.”* (Meade District

² KANSAS DID NOT ALWAYS VERIFY CORRECTION OF DEFICIENCIES IDENTIFIED DURING SURVEYS OF NURSING HOMES PARTICIPATING IN MEDICARE AND MEDICAID HHS OIG 2016 <https://www.oversight.gov/sites/default/files/oig-reports/71703218.pdf>

³Reliability of the Nursing Home Survey Process: A Simultaneous Survey Approach Robert H. Lee, PhD Byron J. Gajewski, PhD Sarah Thompson, PhD The Gerontologist, Volume 46, Issue 6, 1 December 2006, Pages 772–779, <https://academic.oup.com/gerontologist/article/46/6/772/584650> Purpose: We designed this study to examine the reliability of the nursing home survey process in the state of **Kansas** using regular and simultaneous survey teams.

Hospital Long Term Care Unit DBA Lone Tree Retirement; 4/26/17) The facility received an Immediate Jeopardy (IJ) level deficiency

KABC staff talks with older adults in long-term care and concerned family members nearly every day, and we do not find support for a weaker inspection, oversight, or enforcement system among Kansas citizenry, in fact just the opposite.

KABC respectfully asks the Committee not to weaken protections for 18,000 vulnerable older adults, and to reconsider and rescind the language in its recommendation to “give surveyors latitude in interpreting deficiencies.”

Additional Recommendations:

- **KDADS has requested additional funding to make nurse surveyor salaries competitive, but the funding will not address the agency’s chronic understaffing of the unit which is down by about a third, or 20 surveyors. We encourage legislators to “fill the gap” and allocate full funding for surveyors who are able to protect older adults from inappropriate drugging and chemical restraints.**
- **Additionally KDADS survey unit could use the oversight tools at its command to prompt corrections for misuse of anti-psychotic drugs on older adults with dementia. KDADS could also provide leadership for a single focused effort to reduce use statewide.**
- **KDHE should provide oversight and direction to MCO’s to achieve the 10% annual reduction in the KanCare contract; publish progress result data; set higher reduction goals.**
- **The Legislature could empower K-TRACS to identify and educate prescribing physicians on the dangers of antipsychotic drug use on older adults with dementia; and to contact residents or their legal representative to inform them about dangers of anti-psych drug use.**
- **The Legislature could require in statute that facility administrator, nurse, and nurse aide training programs include in their curriculum dementia disease progression, intervention and treatment (non-pharmacologic and pharmacologic). Include requirement for continuing education for administrators, operators, nurses and nurse aides working in adult care facilities.**
- **Through law or regulation, address the need for safe staffing levels on all shifts and consistent staffing for residents in nursing facilities.**

The older adults who live in nursing facilities and are constituents are a vulnerable group:

- 18,000 older adults and adults with disabilities live in Kansas nursing facilities
- Half to 70% have Alzheimer’s or other dementia
- Typically they are 85+ years old
- On average an older Kansan lives in a nursing facility for a little over 2 years -- although they average 45 years of long term care when we include care at home, in assisted facilities and in nursing facilities
- A majority of older adults entering KS nursing facilities need help with 4 Activities of Daily Living (5 is the maximum)
- Older Kansans delay going to a nursing facility as long as possible, and once there, their care needs are high, often they have multiple chronic health conditions.
- Many are alone, having outlived family or live away from family
- Many of them do not get a safe level of daily nurse & aide care. Research defines 4.1 hours daily per person as the minimum floor of safe care that avoids unnecessary illness, injury, and death.
- Older adults and taxpayers are paying upwards of \$66,000 a year to nursing facilities. Facilities agree to provide safe care in exchange for making money.

- Just under half of older Kansans use their savings to pay for nursing facility care. Just over half have their care covered by a combination of their own contributions (social security, pensions, etc.) and Kansas tax payers or wholly by tax dollars. KanCare covers nearly 2,000 fewer seniors than prior to it.
- All are vulnerable to poor care.

Care costs and duration averages are from Genworth's 2016-17 Cost of Care Survey for Kansas

These are the Kansans I'd ask you to keep front and center when the nursing facility industry asks your support for less oversight, less enforcement, a weakened inspection process, to turn back the clock and allow more self-policing.

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KABC does not provide any form of direct care or receive any government funding. KABC is an established resource for older adults on long-term care issues. Those seeking our guidance and assistance are primarily elders and their families facing difficult, life-altering decisions.