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Senators Use Hearing To Stake Out LTC Positions

HHS' Sebelius Addresses Range Of LTC Issues In Testimony

“While the bugs in the [Five-Star Quality Rating System] are being worked out, will you consider suspending the program so that consumers are not misled and providers will not be unfairly penalized?” This was one of many questions asked by Sen. Orrin Hatch (R-Utah) and other members of the Senate Finance Committee during the confirmation process for new Health and Human Services (HHS) Secretary Kathleen Sebelius. Hatch took the opportunity to outline a litany of concerns he had about the Five-Star rating system, including the exclusion of stakeholders in discussions on draft proposals of the system, “flawed and out-of-date data,” and the possibility that the program “may well be a breeding ground for lawsuits.”

Sebelius' 137 pages of written testimony, submitted to the committee for the record, reveals much about the senators' positions on an array of long term care topics. Sen. Ron Wyden (D-Ore.), for example, seized the occasion to proclaim his firm belief that long term care should be part of health care reform, while Sen. Charles Grassley (R-Iowa) confirmed his support for home- and community-based services.

Included in the testimony are at least 15 questions directly related to long term care. Not unlike many confirmation processes, however, much of Sebelius' answers are relatively short and guarded. Nonetheless, she does reveal some details about her stance

on a range of issues, including nursing facility ownership transparency, arbitration, liability coverage, survey and certification, and payment bundling for post-acute care.

Provider has gleaned these details from the document, and following are the questions and answers, organized by topic.

Home- And Community-Based Care

Grassley: As you well know from your time as a state governor, long term care in Medicaid is a growing financial burden on states. Sen. John Kerry [D-Pa.] and I have introduced a bill, the Empowered at Home Act, which we believe makes great strides to keep people who provide home- and community-based services [HCBS] as a legitimate alternative to institutional care. What do you think the administration should do to increase the use of [HCBS] in Medicaid?

Sebelius: I share your concern about the escalating costs of long term care and understand the burden these costs place on state budgets. It is important to address the institutional bias in Medicaid and empower individuals to self-direct their care, while also ensuring their care is provided in the most cost-effective setting. [HCBS] enables Medicaid to provide services in the most integrated setting appropriate to a person's needs.

A study recently published in *Health Affairs* has demonstrated that the expansion of HCBS reduces institutional

spending and produces savings over the longer term, a promising finding as states contemplate expansions of these programs. This study further confirms that the tools Congress provided in this area are key ingredients to relieve states of the financial burden for long term care and also provide quality long term care to Medicaid beneficiaries.

Congressional action to implement Medicaid state plan options for HCBS and self-directed care, along with the Money Follows the Person Rebalancing Demonstration, have made alternatives to institutional care more of a reality. Kansas has been aggressive at pursuing waivers that allow our citizens to live in the least-restrictive setting. If confirmed as secretary, I look forward to working with you to continue the existing partnership the administration has had with Congress and the states on moving this important issue forward.

Sen. Michael Enzi (R-Wyo.): I support keeping people in their communities, rather than placing them in institutions. How do we ensure that long term care benefit packages accommodate home and community care and provide appropriate assistance to family caregivers?

Sebelius: Educating patients and family caregivers on the options available for care assistance is the key to empowering them to then choose the long term care benefit package that works best for them. The president has outlined a series of principles he would like reforms

to encapsulate, including the principle of choice. Empowering consumers to make informed decisions will spur long term care plans and providers to provide an array of options from home and community care to institutionalized care, and to compete on quality and cost. If confirmed, I will also work to improve such choices in Medicaid.

The American Recovery and Reinvestment Act

Grassley: The [Centers for Medicare & Medicaid Services (CMS)] recently issued guidance to states on the enhanced Medicaid funding provisions included in the American Recovery and Reinvestment Act, and some of it addresses the rules placed on states' eligibility for this additional money. As a governor, I'm sure you appreciate the need to provide states with a certain amount of flexibility in managing their Medicaid program. Are there aspects of the current guidance (specifically the interpretation of procedures) that would restrict states' ability to manage their programs as efficiently as possible and hinder their ability to protect the integrity of the program? The purpose of the increased Medicaid funds as I understood it was to provide some fiscal relief to states. I know where you sit effects where you stand, but do you think HHS is allowing states to appropriately access needed funds?

Sebelius: President Obama is committed to transparency and accountability on how all American Recovery and Reinvestment Act [ARRA] funds are disseminated and spent, including the increased Federal Medical Assistance Percentage [FMAP] funds. Consistent with those principles, CMS has provided guidance to states on the statutory requirements associated with accepting ARRA's FMAP funds; this guidance has been provided through all state calls, individual state calls, and written guidance documents and letters. CMS has also disseminated information on ARRA through the Web site, the quarterly state budget call letter, and a fact

sheet describing the methodology for determining the amount of additional Medicaid funding made available to states.

The guidance and grant award letters to states are clear that as a condition of accepting these increased FMAP funds, states must comply with all ARRA eligibility requirements for the increased FMAP, including maintaining Medicaid eligibility levels, methodologies, and procedures. CMS is working diligently with each of the states to ensure they can meet this and other ARRA requirements. Additionally, states are required to report to CMS on an ongoing basis the use of the increased FMAP funds.

CMS is committed to ensuring that states can understand and meet the requirements spelled out in ARRA. Thus far, \$23.5 billion in increased FMAP funds were made available to states for the first, second, and third quarters of [fiscal year] 2009. For territories, \$94 million in additional funding is available for [fiscal year] 2009 under the increased spending cap. President Obama is committed to making sure these funds are helping keep state Medicaid programs financially viable, while helping states avoid drastic cost-saving measures.

Nursing Home Ownership Transparency

Grassley: In America today, there are over 1.7 million elderly and disabled individuals in roughly 17,000 nursing home facilities. This number is going to grow by leaps and bounds as the baby boomer generation ages. Unfortunately, as in many areas, with nursing homes a few bad apples often spoil the barrel. Too many Americans receive poor care, often in a subset of nursing homes. Unfortunately, this subset of chronic offenders stays in business, in many ways keeping their poor track records hidden from the public at large, and often facing little or no enforcement from the federal government. In the market for nursing home care, like in all markets, consumers must have ad-

equated data to make informed choices. To this end, last Congress I introduced legislation requiring greater transparency regarding nursing home staffing, ownership, whether a home has been cited for deficiencies, and other measures. If confirmed, will you support greater transparency in the nursing home industry regarding nursing home ownership, staffing, and quality?

Sebelius: I share your commitment to assuring the quality of care, transparency, and accountability in nursing homes. Over the course of your career, beginning with your chairmanship of the Senate Special Committee on Aging in the late 1990s and continuing with your role on the Finance Committee, you have shined a bright light on serious deficiencies in the quality of care provided by poorly performing nursing homes.

You have also demonstrated the need for strengthened federal oversight of nursing home survey and certification. If confirmed as secretary, I will continue to support efforts to ensure the quality and safety of beneficiaries receiving care in America's nursing homes, and I look forward to working with you to make even greater strides in this area.

Five-Star Nursing Home Quality Rating System

Grassley: CMS recently launched the Five-Star Quality Rating System in an effort to bring about greater transparency regarding quality of care. While this is a good beginning, the system will need a lot of work to ensure that the information presented online is useful and gives the full picture about a nursing home. Will you direct CMS to work with my office and others to continue to improve this program?

Sebelius: If confirmed as secretary, I pledge to work with you and your colleagues to advance HHS' quality initiative to improve the quality and safety of our nursing home care.

Hatch: CMS instituted a new program called Five Star in December of 2008. The program was designed to create a

rating system for nursing homes that would assist consumers in choosing a nursing home. My understanding is that the program was not tested prior to implementation. I am also informed that the stakeholders were not brought in for any meaningful discussions to provide comments on any draft proposal, nor did this go through the rule-making process. I have heard a lot about the fact that the data upon which the rating system is built is flawed and out of date. There are apparently unintended consequences where HUD [Department of Housing and Urban Development] has raised questions about whether some one-star or two-star facilities can qualify for HUD loans. Apparently, the program is based upon a bell-shaped curve such that only a small number of facilities can receive a five-star rating, even if they otherwise have no citations and have an exemplary record of patient care. In addition, I understand that hospitals may be reluctant to place patients in a one- or two-star facility. In rural Utah, the choices may be few and far between. And these one- or two-star facilities may in fact be very good. This can create anxiety for consumers as well as nursing homes that are given the low rating. You also have a program which may well be a breeding ground for lawsuits. Trial attorneys looking to make some money may troll around looking at one- or two-star facilities and find fault, which may not otherwise exist, in an effort to find a basis for a lawsuit. We hear a lot about transparency, but our agencies should be transparent, too. While the bugs in the program are being worked out, will you consider suspending the program so that consumers are not misled and providers will not be unfairly penalized?

Sebelius: I share your commitment to assuring the quality of care, transparency, and accountability in nursing homes...Data, upon which Five-Star is based, has been publicly available on Nursing Home Compare since 2002. No rating system can address all of the

important and individualized considerations that should go into a decision about which nursing home may be best for a particular person. Consumers should use the Web site as one tool, together with other sources of information, including geographic considerations, an in-person visit to the nursing home, and consultation with state or local organizations, such as local advocacy groups and the state ombudsman program.

Nevertheless, Nursing Home Compare represents an important information source for beneficiaries and their families when making as critical a decision about where to receive care. It is my understanding that CMS intends to increase the usefulness of the CMS Nursing Home Compare Web site to consumers, family members, and the general public. This new rating system is rooted in the tradition of the OBRA'87 nursing home reform law and quality improvement campaigns such as the Advancing Excellence in America's Nursing Homes. We can continue to make strides in improving measurement, reporting, and ultimately the quality of care in America's nursing homes. I look forward to working with you to identify areas of further transparency and improvement.

Long Term Care And Health Care Reform

Sen. John Rockefeller (D-W.Va.): Governor Sebelius, I firmly believe that long term care needs to be part of overall health care reform. The main coverage for long term care in America is Medicaid, which means people have to spend down meager savings to the level of impoverishment to qualify for help. Additionally, we must provide greater opportunities for people to receive care in their homes and communities, instead of institutions. Governor, why should long term care be a part of health reform?

Sebelius: I would welcome it if Congress decides to address the gaps and financing challenges of long term care

in health reform. As a governor, I know first-hand the challenges of our fragmented long term care system. States, through Medicaid, are a major source of financing of nursing home care as well as [HCBS]. Protecting vulnerable seniors and people with disabilities, improving the quality of care, and promoting consumer choices are high priorities for me as governor, and will continue to be if I am confirmed as Secretary. Regardless, as Secretary, I would use the tools and resources across the department—from Medicaid waivers to the community-support programs at the Administration on Aging to research at the National Institute on Aging—to improve the long term care system.

Wyden: One of the pressing issues in health care and for families is the issue of long term care. Demographics are catching up with us, and public funding for long term care is inadequate. Medicaid has historically under funded the costs of nursing home care, and given the budget crunch states are now in, we can expect that to continue. Most Americans have not saved enough or cannot save enough to cover the costs of long term care. What role do you see for long term care as part of health reform? What approaches do you think should be taken to fund long term care needs and make sure seniors and their families have access to appropriate services as they age and needs change?

Sebelius: As a governor, I know first hand the challenges of our fragmented long term care system. Protecting vulnerable seniors and people with disabilities, ensuring quality of care, and promoting consumer choices are high priorities for me as governor, and will continue to be if I am confirmed as secretary. If Congress decides to address the gaps and financing challenges of long term care in health reform, I would work with you to ensure the policies meet their goals and are consistent with the president's agenda. Regardless, as secretary, I would use the tools and resources across the department—from

Medicaid waivers to the community support programs at the Administration on Aging, to research at the National Institute on Aging—to improve the long term care system.

Long Term Care Financing

Enzi: The demographics of long term care seem insurmountable. [HHS] says that people who reach age 65 will likely have a 40 percent chance of entering a nursing home. With 77 million baby boomers retiring over the next few years, how can we finance provision of long term care without bankrupting our health care system?

Sebelius: Ensuring effective and efficient coordination of care for patients in long term care facilities will help provide affordable, high-quality care without bankrupting our system. The president's budget includes Medicare proposals to better coordinate care across settings. Several policies to prevent the need for nursing home care in the first place have already received funding through the American Recovery and Reinvestment Act.

First, the expansion of health information technology will prevent medical errors and duplicative tests and facilitate improvements in the quality of health care. Second, expanding the use of case management for chronic conditions such as asthma, diabetes, and congestive heart failure should reduce long term care use and costs. Third, health training programs will build a 21st century health workforce capable of meeting the needs of our aging population. Finally, investing in research through the National Institutes of Health and comparative effectiveness research may yield information to better treat and cure conditions that require long term care. If confirmed, I look forward to working with you on building on this investment to achieve the goal of high-quality, efficient care for patients in long term care facilities.

Payment Bundling For Post-Acute Care Services

Hatch: I am interested in your thoughts on President Obama's proposal on payment bundling for post-acute care services. The president has proposed bundling all of the post-acute payment and gives hospitals the responsibility to distribute these payments. To me, this is a very ambitious undertaking—I believe it makes more sense to study this issue through a pilot or demonstration program before implementing national policy. How will the hospital determine where the patient will go? There are several choices—nursing homes, rehab hospitals, long term care hospitals, and home health care—if a patient goes back home after being discharged from the hospital. In Utah, we have many rural communities around the state, and, as a result, there may be limited post-acute settings in many of our small towns. How will bundling affect both hospitals and post-acute providers where there are limited places for patients to go after they are discharged from the hospital? I am worried about the impact this bundling proposal could have on patients and providers in rural and medically underserved areas. Therefore, I highly recommend that you bring in stakeholders such as hospitals and post-acute providers before moving forward with bundling. I hope you agree.

Sebelius: It is my understanding that the Medicare program currently covers post-acute care services in a variety of settings and often pays different reimbursement rates to post-acute care providers treating similar patients. The intent behind the president's budget proposal is to improve incentives for providers to deliver the right mix of services to beneficiaries at the right time. It is also intended to create greater incentives for providers to manage patients during the entire episode of care.

Having said that, I can assure you that the president is very mindful of ensuring that beneficiaries have adequate access to post-acute care services—particularly beneficiaries residing in

rural and medically underserved areas. I am very interested in your views on this subject and look forward to working with you and others in Congress on this policy if confirmed.

Nursing Home Arbitration

Hatch: Some in this Congress want to eliminate the use of arbitration to resolve disputes between nursing homes and patients. I happen to oppose eliminating arbitration as an option. A decrease in arbitration will result in a corresponding increase in litigation, and that would increase costs and prolong disputes. Ultimately, eliminating arbitration as an option would force providers to spend more resources fighting lawsuits rather than caring for patients. In particular, I am concerned about the impact on Medicaid funding that removing arbitration might have by adding costs at a time when states are concerned about dwindling funds for health care. Do you believe arbitration should remain in place?

Sebelius: Currently, under Medicare, whether to have a pre-dispute arbitration agreement is a decision between the resident and the nursing home. Under Medicaid, state law governs whether or not such arbitration agreements are permitted, subject to where federal regulations may be implicated. Under both programs, however, there may be consequences when facilities attempt to enforce these agreements in a way that violates federal requirements. I appreciate your concern about the cost and quality of long term care, and, if confirmed, I intend to monitor this issue closely.

Long Term Care Insurance

Enzi: Although most people think of long term care as an issue for the elderly, the frightening truth is that a person could need long term care at any point in their life. How can we incentivize more people to buy long term care insurance?

Sebelius: Education and outreach are the cornerstones of informed decision

making in long term care and financial planning. Too few people are aware of their risks and options. As a former insurance commissioner, I also know that we need to promote high-quality long term care insurance. I look forward to working with Congress to ensure that the American people are able to make informed decisions regarding long term care insurance.

Special Focus Facilities/Oversight

Grassley: When CMS revamped its Special Focus Facility [SFF] program for poorly performing nursing homes in 2004, it promised to initiate progressive enforcement actions and to remove homes that failed to show improvement within 18 months, but several years later, some poorly performing nursing homes have been in the program for more than 36 months. What steps will you take to improve oversight of poorly performing nursing homes?

Sebelius: Oversight of poorly performing providers that participate in Medicare and Medicaid is an issue I take very seriously. The [SFF] program was created to identify nursing homes that were consistently providing poor quality of care, yet were periodically instituting enough improvement that they would pass one survey only to fail the next for many of the same problems as before. Such facilities with a “yo-yo” compliance history rarely addressed underlying systemic problems that were giving rise to repeated cycles of serious deficiencies.

CMS employs a policy of progressive enforcement, which means that any nursing home, not just those identified as an SFF, that reveals a pattern of persistent poor quality is subject to increasingly stringent enforcement action. If problems continue, the severity of penalties increases over time, ranging from civil monetary penalties, denial of payment for new admissions, and, ultimately, removal from participation in the Medicare and/or Medicaid program.

CMS began releasing the names of

facilities designated as SFF in 2007 and identifies them on its Nursing Home Compare Web site, giving consumers and their families seeking long-term health care services important information when choosing a nursing home. If confirmed as Secretary, I will continue to support efforts to ensure the quality and safety of beneficiaries receiving care in America’s nursing homes. I appreciate your ongoing interest in this issue, and I look forward to working with you to improve the quality of care in the nation’s nursing homes.

Liability Insurance And Tort Reform

Sen. John Cornyn (R-Texas): Earlier this decade, Texas adopted strong reforms of the medical malpractice lawsuit system. These reforms capped noneconomic damages in medical malpractice lawsuits. Plaintiffs can still recover any amount of actual economic damages that they suffer, but the recovery for noneconomic damages—such as pain and suffering or emotional distress—is strictly limited. This reform led to a decrease in insurance costs for Texas doctors, particularly those in high-risk specialties such as obstetrics, orthopedic surgery, neurosurgery, pediatrics, and geriatrics. As a result, Texas patients gained access to more doctors and more care in these important areas of medicine. This effect has been the greatest in rural and underserved counties. For instance, 12 counties in Texas that had no obstetricians before medical liability reform have gained at least one obstetrician since the reform. Would you agree with me that improved access to qualified specialists is an important goal of health care reform, and that medical liability reform is a proven method of achieving that goal?

Sebelius: If confirmed as secretary, my goal will be to work to address this problem without being doctrinaire about solutions. While I share the president’s concerns about caps on damages, I want to work with Congress to address the issue of exorbitant

premiums faced by some doctors—in particular, certain specialists. When he was senator, President Obama recommended an alternative dispute resolution mechanism for medical malpractice claims. These and other ideas should be considered.

Survey And Certification

Cornyn: If confirmed, you will lead CMS, which is responsible for overseeing the survey and certification of new providers seeking to participate in the Medicare program. On May 21, 2007, CMS directed the Texas Department of State Health Services (DSHS) to stop conducting initial Medicare certification surveys until all “higher priority” work is completed. Practically, CMS guidance has meant that all state agencies must put Medicare initial surveys at a low priority level—regardless of the date on which the facility’s request was received. CMS regional staff indicated to DSHS that they should not use state funds to conduct federal surveys. We are aware of a number of facilities that were forced to close as a result of not receiving a timely survey. To date, there are 203 facilities in Texas that are waiting for their initial Medicare survey, of which 145 have been waiting for over 120 days. This bureaucratic mess has reduced access to care for Texas patients. Over the past 10 years, Texas has moved from sixth to third in the country for the number of senior citizens. Not only are these delays causing access-to-care issues, but these facilities are facing serious financial challenges to maintain operations without the ability to get reimbursed by Medicare. I have sent multiple letters to then Secretary Leavitt regarding my concern with the delays in Medicare certification. If confirmed, will you develop a strategy to reduce the backlog of initial Medicare certification surveys? Will you ensure that CMS’ allocation of federal funds to the states is appropriately allocated according to workload?

Sebelius: Securing quality care for Medicare beneficiaries, and all Ameri-

cans, will be among my top priorities if confirmed. The survey and certification function is important to achieving this goal. In order to secure quality care and promote the health and safety of Medicare beneficiaries, [CMS] requires that all facilities seeking participation in Medicare and Medicaid undergo an inspection when they initially enter the program, and on a regular basis thereafter.

It is my understanding that, in the past, budgetary and resource shortfalls have limited the agency's ability to conduct surveys with ideal regularity. If confirmed, and provided Congress fully enacts the key components of President Obama's Fiscal Year 2010 budget request, I will strive to secure the maximum impact from the available survey and certification dollars, working closely with the states to leverage available resources and to ensure the quality and safety of the entire health care delivery system.