

Emerald South: Profile of a Nursing Home

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Purpose and Overview of the Profile

Every nursing home resident, whether in a nursing home for a short-term (i.e. for rehabilitative services after a hospital stay) or long-term stay, deserves quality care and to be safe from harm, abuse, and neglect. As documented throughout this report, we believe actions taken by Emerald South operators such as cutting of staff, has adversely impacted resident care. Private, for-profit ownership has failed to improve resident safety and quality of care.

No one expects to enter a nursing home (for rehabilitation or long-term). However, it is estimated that among persons age 57 to 61, 56% will stay in a nursing home for at least one night during their lifetime.¹ The quality and safety of care in WNY nursing homes is a community-wide issue.

Our goal in developing these Nursing Home Profiles is to improve the quality of care in Western New York (WNY) nursing homes by (1) providing unbiased information on area facilities and ownership and (2) a call to action for the State to address quality of care issues not only in WNY but across NYS.

We believe there is value in providing unbiased information on area nursing homes. With this information, residents and community members will gain a better understanding of how nursing homes operate, how to distinguish high performing facilities from those that are low performing, and act to improve quality of care. Patients, residents, and advocates need to speak up for the resident's right to receive high quality care and to attain or maintain their highest practicable

¹ Hurd, M., Pierre-Carl, M., Rohwedder, S., "Distribution of Lifetime Nursing Home Use and of Out-Of-Pocket Spending. Proceedings of the National Academy of Sciences Sept 2018, 114 (37) 9838-9842; <http://www.pnas.org/content/114/37/9838> ; and <https://www.rand.org/news/press/2017/08/28/index1.html>



physical, mental, and psychosocial well-being regardless of income, race, socio-economic status, or connections.²

This profile draws information from public records regarding important indicators of quality and two nursing home ranking systems: the federal Centers for Medicare & Medicaid Services (CMS) Nursing Home Compare (NHC) and the New York State (NYS) Nursing Home Quality Initiative (NHQI).³

This report begins with an overview of WNY nursing homes, and then focuses on one facility, Emerald South, as follows:

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² This is the federal nursing home legal standard. For additional information on nursing home regulations and resident rights, visit: <http://theconsumervoice.org/> ; <https://nursinghome411.org/> ; and <http://www.justiceinaging.org/nursing-homes/>

³ Public records utilized: NYS Department of Health (DOH) survey visits that report each facility's compliance with federal minimum health standards as well as fire and safety codes; nursing home-reported staffing levels; quality of care measures; and recent changes, if any, in the approved operators of the nursing home. The two nursing home ranking systems, NHC and NHQI share one feature – they process the available performance data from each nursing home and then rank the facilities in 5 tiers, distinguishing higher performing facilities from the lower. NHC and NHQI utilize many common factors related to quality of care, but place differing weights on those factors. Each draws on unique measures, thus offering two viewpoints on a facility's performance.



Overview of Western New York Nursing homes

There are 72 nursing homes in the eight WNY counties with just over 10,000 beds.⁴ The facilities vary widely in size, from 30 beds to 390.⁵ The overall occupancy rate for the eight counties is less than 92%. DOH estimates that four WNY counties (Cattaraugus, Chautauqua, Erie and Niagara) have almost 700 more nursing home beds than are needed to serve the population. The remaining four rural counties (Allegany, Genesee, Orleans and Wyoming) are estimated to have an unmet need of over 400 beds to serve the population.⁶

Among these 72 facilities, some are high performing and others are low performing. The quality of care at any nursing home can change over time. Every facility is required to have an administrator and sufficient staff to provide the care that each resident needs to reach his or her highest practicable level of functioning. However, the Operator of the facility has the ultimate responsibility for the care provided.⁷

In the last decade the operators of WNY nursing homes have changed significantly. The predominant model has moved away from a stand-alone facility with a not-for-profit owner and operator. Only 10 such facilities still operate. Publicly owned and operated nursing homes also are on the wane. In recent years, three County facilities (Chautauqua⁸, Genesee⁹ and Orleans¹⁰)

⁴ Allegany has 4 nursing homes (361 beds); Cattaraugus 5 nursing homes (552 beds); Chautauqua 7 nursing homes (924 beds); Erie 37 nursing homes (5,882 beds); Genesee 4 nursing homes (488 beds); Niagara 10 (1389 beds); Orleans 3 nursing homes (310 beds); Wyoming 2 nursing homes (218 beds). See, e.g. <https://data.medicare.gov/Nursing-Home-Compare/Provider-Info/4pq5-n9py/data> last accessed June 20, 2018, CMS updated May 1, 2018.

⁵ *Id.*

⁶ Figures are for 2016. https://www.health.ny.gov/facilities/nursing/rhcf_bed_need_by_county.htm , last accessed June 20, 2018.

⁷ See 42 CFR 483.70: a facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. The governing body of the facility is responsible for appointing the administrator, and refers to individuals such as facility owner(s). See also NY PHL 2801(1) and 10 NYCRR 600.9.

⁸ See CON Project # 141215-E; and <https://www.bizjournals.com/buffalo/news/2014/02/27/legislature-wraps-16m-sale-of.html>

⁹ See CON Project # 152380-E; and <https://www.bizjournals.com/buffalo/news/2015/06/18/genesee-county-home-sells-for-15-2m-to-li-firm.html>

¹⁰ See CON Project # 141128-E; and <https://www.democratandchronicle.com/story/news/2015/01/02/orleans-countys-nursing-home-sold/21193753/>



have been privatized, Niagara County closed its facility,¹¹ and Erie County's facilities have consolidated and downsized.¹² Four WNY facilities remain as County operated nursing homes.¹³

The new prevailing model features operators with multiple nursing home facilities. Most operations are now run as for-profit businesses.¹⁴ 46 WNY nursing homes are operated by for-profit businesses (64% of local facilities). By comparison, 21 have not-for-profit operators (29%); 4 operate as county facilities (5.5%); and 1 is a State-operated Veterans Home.¹⁵ The trend toward for-profit operation/ownership is continuing as, in the past 2 years, for-profit operators have purchased four not-for-profit facilities and their operations. Also noteworthy is that investors from outside the area own and operate an increasing number of these facilities. Moreover, as evidence of the increasing concentration of ownership, four groups operate almost 50% of the nursing beds in WNY.¹⁶

Under the prevailing for-profit model, operators seek to cut costs to maximize profit. It is the belief of CELJ and other advocacy groups that this is done at the expense of resident safety. Vigilance in compliance and enforcement of nursing home laws and regulations is necessary in order to ensure every individual in WNY (and across the state) receives quality of care. It is a human rights issue and a taxpayer savings issue when nursing home quality of care suffers for the benefit of for-profit operators.

¹¹ The Niagara County nursing home closed in December 2007 in response to the Berger Commission determination there was an excess of nursing home beds. It reopened as Mount View Assisted Living in June 2015. See https://www.cgr.org/NY-county-nursing-homes/docs/FutureofNursingHomes_NYS.pdf and https://www.bizjournals.com/buffalo/blog/morning_roundup/2015/04/mount-view-assisted-living-readies-for-june.html

¹² See https://www.cgr.org/NY-county-nursing-homes/docs/FutureofNursingHomes_NYS.pdf

¹³ Terrace View (Erie County); The Pines Machias and Olean facilities (Cattaraugus County) and Wyoming County Community Hospital SNF. See <https://data.medicare.gov/Nursing-Home-Compare/Provider-Info/4pq5-n9py/data>; and <https://health.data.ny.gov/Health/Health-Facility-General-Information/vn5v-hh5r/data> . Accessed June 19, 2018.

¹⁴ Each for-profit facility is separately established as a for-profit Limited Liability Corporation (LLC). In most cases, a separate but related LLC owns the building and real estate.

¹⁵ See <https://data.medicare.gov/Nursing-Home-Compare/Provider-Info/4pq5-n9py/data>; and <https://health.data.ny.gov/Health/Health-Facility-General-Information/vn5v-hh5r/data> .

¹⁶ The Sherman family and business associates operate facilities with 1477 beds, including those branded as Absolut; Post Acute Care is responsible for 1065 beds; the McGuire Group and family operate 966 beds and the Landa family and business associates operate facilities with 993 beds. Information obtained from: <https://data.medicare.gov/Nursing-Home-Compare/Provider-Info/4pq5-n9py/data>; and <https://health.data.ny.gov/Health/Health-Facility-General-Information/vn5v-hh5r/data> , last accessed June 20, 2018.



Summary of Emerald South and its Indicators of Quality¹⁷

Ownership: Emerald South is a 122-bed facility located at 1175 Delaware Avenue, Buffalo New York. Opal Care LLC d/b/a Emerald South Rehabilitation and Care Center, a for-profit business entity, has operated this facility since 2014. The sole member of Opal Care LLC is Judy Landa.¹⁸

1175 Delaware Avenue Realty, LLC owns the building and land in/on which the facility operates.¹⁹ Ms. Landa's husband, Benjamin, is a member of 1175 Delaware Avenue Realty. From 2012 to 2014, the facility was operated by Receiver Services, whose sole member was Benjamin Landa.²⁰ The not-for-profit Presbyterian Senior Services operated the facility before the receivership.

Survey results: The DOH Statement of Deficiencies from the most recent annual survey of Emerald South, completed on May 8, 2018, identified 27 health deficiencies, with the maximum severity being F, no actual harm with potential for more than minimal harm that is not immediate jeopardy and is widespread. Emerald South has five times the amount of health deficiencies compared to the statewide average over the prior 3 year period and has a pattern of repeat violations.²¹ On June 15, 2018 DOH determined an Immediate Jeopardy situation existed in Emerald South as a result of the June 4, 2018 incident whereby a resident fell to his death.

Staffing: Emerald South has a NHC 1-star (out of 5 stars) staffing rating; much below average, and either failed to submit required payroll based journal data to CMS, or the submitted data did not meet criteria required to calculate a staffing measure.²²

¹⁷ Each area will be discussed in greater detail in this Profile.

¹⁸ State Public Health and Health Planning Council CON Project #161368. Judy Landa also has ownership or a partnership interest in the following WNY facilities: Emerald North Nursing and Rehabilitation Center, Safire Rehabilitation of Northtowns, LLC and Safire Rehabilitation of Southtowns, LLC, as well as three other NYS nursing homes. Her husband Benjamin, in addition to his real estate holdings, has an operational interest in about 130 nursing homes. Information obtained through <https://data.medicare.gov/Nursing-Home-Compare/Ownership/y2hd-n93e/data>

¹⁹ State Public Health and Health Planning Council CON Project #161368, p 7.

²⁰ Id., p.1.

²¹ From the period June 1, 2014 through May 31, 2018, Emerald South received 100 standard health citations (state average 20) and 72 life safety code violations (state average 13).

https://profiles.health.ny.gov/nursing_home/view/150362#inspections last accessed July 10, 2018

²² CMS NHC:

<https://www.medicare.gov/nursinghomecompare/profile.html#profTab=0&ID=335593&loc=14209&lat=42.9137921&lng=-78.8637428&name=EMERALD%20SOUTH%20NURSING%20AND%20REHABILITATION%20CENTER&Distn=0.3> , last accessed July 10, 2018; CMS updated June 1, 2018.



Quality Measures: Emerald South has a NHC 5-star (out of 5 stars) rating for quality measures which are primarily based on facility self-reported data.²³

Ratings: NHC ranks Emerald South as a 2-star facility (out of 5 stars); below average.²⁴ NHQI ranks Emerald South in the 4th quintile of NYS facilities, that is, within the lowest rated 40% of nursing homes in NYS.²⁵

Federal and State Enforcement: Emerald South is now a CMS Special Focus Facility (SFF) as of June 21, 2018.²⁶ Emerald South agreed to pay fines to DOH stemming from regulatory deficiencies twice: \$2,000 on January 3, 2017 for physical environment violations from the January 13, 2016 complaint investigation; and \$10,000 on December 19, 2016 for quality of care violations from the September 16, 2016 complaint investigation.²⁷

Ownership Background through Today

The not-for-profit Presbyterian Senior Care of Western New York (Presbyterian) previously owned and operated this facility under the name Hawthorne Health Multicare Center for Living (Hawthorne). In mid-2012 Presbyterian transferred operational control to a receiver, Receiver Services, LLC, whose sole member was Benjamin Landa, Judy Landa's husband.

In order to operate a nursing home, DOH must approve the prospective operator through the Certificate of Need (CON) application process.²⁸ Judy Landa and Barry Jeremias filed the CON application to become the new operators of Hawthorne, to be renamed Emerald South. The financial plan, as outlined in the CON, and approved by the DOH, focused on cutting costs and increasing revenues. The applicants noted that Benjamin Landa, as receiver, had reduced staffing for a cost savings of over \$677,000. He also cancelled two contracts to save about \$300,000. Finally, he had enhanced revenues through the facility's policy exclusive contract "to admit residents who are difficult to discharge from the hospital..." Benjamin Landa, at the time of the CON application with DOH, was a member of 1175 Delaware Avenue Realty, LLC that owned the

²³ *Id.*

²⁴ *Id.*

²⁵ https://www.health.ny.gov/health_care/medicaid/redesign/nhqi/2017/docs/quintile_ranking.pdf

²⁶ See page 24 of this report for discussion.

²⁷ In the Matter of Zucker v Opal, Care, LLC: State of New York: Department of Health Stipulation and Order NH-17-001; and NH-17-009

²⁸ For additional information on the CON process visit: <https://www.health.ny.gov/facilities/cons/>



property. Opal Care, LLC pays 1175 Delaware Avenue Realty rent. Under the lease agreement, Opal Care, LLC is responsible for taxes, utilities, insurance and maintenance.²⁹

The DOH approved Opal Care, LLC's application to become the new operator of Emerald South on December 12, 2013. On the same date, DOH approved Ruby Care, LLC (comprised of the same Judy Landa and Barry Jeremias) to take over the operation of the neighboring nursing home, Harbour Health, to operate under the new name, Emerald North Nursing and Rehabilitation Center. At the time, DOH found there was a need for the continuation of these operation even though Erie County had a surplus of over 600 nursing home beds.³⁰

In 2016, Mr. Jeremias transferred his operational shares in both facilities to Judy Landa for the purchase price of \$10.00.³¹

In addition to the two Emeralds, the DOH approved the Landas to operate two other local nursing homes, Safire Rehabilitation of Northtowns (formerly Sheridan Manor) and Safire Rehabilitation of Southtowns (formerly Ridgeview Manor).³²

Overview of CMS Nursing Home Compare (NHC)

NHC allows consumers to compare information about nursing homes.³³ It contains detailed quality of care and staffing information, as well as survey results, for all 15,000 plus Medicare and Medicaid participating nursing homes. Much of the information discussed in this profile is drawn from the NHC databases.

CMS also created the Five-Star Quality Rating System to help consumers, their families, and caregivers compare nursing homes more easily and to help identify areas about which they may want to ask questions. The NHC Website shows an Overall rating for each nursing home; between 1 and 5 stars. Nursing homes with 5 stars are considered to have "much above average" quality and nursing homes with 1 star are considered to have "much below average" quality. CMS advises consumers to use the NHC Website together with other sources of information for the nursing homes, especially including a visit to the nursing home.

²⁹ See State Public Health and Health Planning Council CON Project #131156- E; https://www.bizjournals.com/buffalo/blog/morning_roundup/2013/11/transfer-of-2-delaware-ave-nursing.html ; and

<https://www.bizjournals.com/buffalo/news/2016/05/25/ownership-shifts-for-two-buffalo-nursing-homes.html>

³⁰ State Public Health and Health Planning Council CON Project #131156- E, p.3.

³¹ <https://www.bizjournals.com/buffalo/news/2016/05/25/ownership-shifts-for-two-buffalo-nursing-homes.html> ; see also State Public Health and Health Planning Council CON Project # 161367 and 161368.

³² State Public Health and Health Planning Council CON Project #141235-E (Oct. 2, 2014); State Public Health and Health Planning Council CON Project #141237-E (Oct. 2, 2015). Their application to operate a fifth local nursing home, Williamsville Suburban) is pending. The website <http://safirecare.com/> includes Williamsville Suburban as one of the facilities it operates.

³³ <https://www.medicare.gov/nursinghomecompare>



In addition to the Overall rating, the NHC Website also gives a separate rating for each of the following three measures that determine the Overall rating:

- Health Inspections – The health inspection rating contains information from the last 2 years of onsite inspections, including both standard surveys and any complaint surveys. Each deficiency identified is given a point score to reflect its scope and severity. The higher the point score means the worse the inspections. For purposes of the star rating, the most recent survey score is given more weight than the prior year.³⁴ The weighted scores are then added to create the total health inspection score for the nursing home. (Note: CMS instituted a new inspection survey process for use by every State beginning November 28, 2017. The health inspection score is currently frozen until every nursing home has been inspected using the new process. As such, any surveys that occur from November 28, 2017 through November 27, 2018, will not be included in the facility’s Health Inspection star rating.)³⁵
- Staffing – The staffing rating has information about the number of hours of staff time per resident each day by the RNs, LPNs and Certified Nurse Aides (CNAs). This rating considers differences in the levels of residents' care need in each nursing home. For example, a nursing home with residents who had more severe needs would be expected to have more nursing staff than a nursing home where the resident needs were not as high.³⁶
- Quality Measures (QMs) - The quality measure rating has information on 16 different physical and clinical measures for nursing home residents. The nursing home collects this information for all of its short term and long term residents. The QMs offer information about how well nursing homes are caring for their residents’ physical and clinical needs. Each measure is compared to state averages.³⁷

³⁴ CMS Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users’ Guide (May 2018)

<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf>

³⁵ CMS Survey and Cert Letter 18-04-NH <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions-Items/Survey-and-Cert-Letter-18-04.html?DLPage=1&DLEntries=10&DLSort=2&DLSortDir=descending>

³⁶ CMS Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users’ Guide (May 2018)

<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf>

³⁷ *Id.*



Overview of the Survey System and Summary of Recent DOH Survey Visits to Emerald South

Congress set minimum health and fire safety standards for nursing homes that choose to be part of the Medicare and Medicaid programs. In return for these government payments, nursing homes agree to follow the minimum health and fire safety standards and cooperate with an on-site survey process that is conducted about once a year. DOH conducts these periodic inspections and also investigates complaints about nursing home care filed by residents or others. DOH does not give prior notice to the facility as to when the survey team will arrive.³⁸

CMS calculates a weighted score for each survey health inspection based on the scope and severity of the deficiencies that DOH identifies. More serious, widespread deficiencies receive more points. If DOH has to conduct repeat visits to confirm that deficiencies have been corrected, more points are added to the score.³⁹

The below tables show how the points are assigned:

| Severity | Scope | | |
|---|---------------------------------------|---|---|
| | Isolated | Pattern | Widespread |
| Immediate jeopardy to resident health or safety | J 50 points* (75 points) | K 100 points* (125 points) | L 150 points* (175 points) |
| Actual harm that is not immediate jeopardy | G 20 points | H 35 points (40 points) | I 45 points (50 points) |
| No actual harm with potential for more than minimal harm that is not immediate jeopardy | D 4 points | E 8 points | F 16 points (20 points) |
| No actual harm with potential for minimal harm | A 0 point | B 0 points | C 0 points |

Note: Figures in parentheses indicate points for deficiencies that are for substandard quality of care. Shaded cells denote deficiency scope/severity levels that constitute substandard quality of care if the requirement which is not met is one that falls under the following federal regulations: 42 CFR 483.13 resident behavior and nursing home practices, 42 CFR 483.15 quality of life, 42 CFR 483.25 quality of care.
 * If the status of the deficiency is "past non-compliance" and the severity is Immediate Jeopardy, then points associated with a "G-level" deficiency (i.e., 20 points) are assigned.
 Source: Centers for Medicare & Medicaid Services

³⁸ See page 25 of this report for flowchart and discussion on the enforcement process. For additional information on the survey inspection process visit: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/index.html>

³⁹ See, CMS Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide (May 2018) <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf>



Table 2
Weights for Repeat Revisits

| Revisit Number | Noncompliance Points |
|----------------|---------------------------------------|
| First | 0 |
| Second | 50 percent of health inspection score |
| Third | 70 percent of health inspection score |
| Fourth | 85 percent of health inspection score |

Note: The health inspection score includes points from deficiencies cited on the standard health inspection and complaint inspections during a given survey cycle.

On its most recent annual inspection, completed May 8, 2018, Emerald South was cited for 27 health deficiencies and CELJ calculates health inspection score of 108 points.⁴⁰ We expect this number to significantly increase as a result of the incident that occurred on June 4, 2018 whereby a resident fell to his death.⁴¹

In response to the incident, DOH re-entered Emerald South and determined on June 15, 2018, an Immediate Jeopardy (IJ) situation existed effective June 14, 2018, in violation of federal regulation 42 CFR 483.25(d)(1)(2) (F689) for failure to ensure the resident environment remains free of accident hazards and failure to have a system in place to effectively respond to significant reported concerns. Specifically, as identified by letter to Emerald South Administrator from DOH on June 18, 2018:

The director of maintenance reported to the interdisciplinary team that a resident, who resided on the third floor of the facility, repeatedly removed screws that prevented the window in his room from opening beyond six inches. The facility failed to implement appropriate interventions and supervision to ensure the resident’s safety. On 6/4/18, the resident opened the window in his room, attempted to climb out and fell to the ground.

An IJ deficiency is when the deficiency results in noncompliance and immediate action is necessary; an event has caused, or is likely to cause, serious injury, harm, impairment or death to the residents. The DOH cited Emerald South IJ under the scope and severity of “L”. “L” is the

⁴⁰ NYS DOH Survey Event ID WXV11. To obtain a copy visit https://profiles.health.ny.gov/nursing_home/view/150362#inspections. As of July 10, 2018 the survey is not on CMS nursing home compare.

⁴¹ See numerous media reports including: <https://www.wgrz.com/article/news/local/87-year-old-man-dies-after-fall-from-nursing-home-window/71-561353409>; <https://www.wivb.com/news/local-news/get-up-here-your-father-is-going-through-hell-man-describes-father-s-situation-at-emerald-south/1223110364>; <http://spectrumlocalnews.com/nys/buffalo/crime-safety/2018/06/04/emerald-south-nursing-rehabilitation-center-buffalo>



worst deficiency rating and means there was IJ to resident health or safety and the issue was widespread.⁴²

The IJ status was removed June 19, 2018, when, DOH re-visited Emerald South and determined the deficiencies that resulted in IJ were sufficiently corrected and the scope and severity of the deficiency was lowered to a “G”.⁴³ “G” is when a deficiency resulted in actual harm that is isolated.⁴⁴ In removing IJ status, DOH stated the following actions were taken by Emerald South:

- 100% of all facility windows were checked on June 14, 2018 by maintenance personnel and the Administrator to ensure all windows stoppers were securely fastened.
- A 100% audit of all windows in the facility has been completed daily to ensure safety.
- A new policy and procedure was developed to ensure that facility staff identify and communicate all potential or actual accident/hazard risks and clinical/behavioral concerns to the administrator and the interdisciplinary team in daily morning meetings, to ensure timely follow-up action is taken. Off-shift and weekend nursing supervisors will also complete required communication and work request forms to ensure immediate action is taken and all urgent concerns will require Administrator and Director of Nursing notification.
- In-service education regarding the new policy and procedure was provided to all interdisciplinary team members, department heads, and nursing supervisors.
- Survey staff interviewed the Administrator, Director of Nursing, interdisciplinary team members, department heads, maintenance staff and nursing supervisors to ensure their understanding of the new daily reporting and follow-up process to ensure that resident and environmental concerns are addressed in a timely manner.
- Residents’ medical records and 24 hour reports were reviewed by survey staff on 6/20/18 to ensure that clinical/behavioral concerns were identified and communicated to the interdisciplinary team and addressed in a timely manner to ensure residents’ health and safety.⁴⁵

⁴² See page 25 of this report to see how IJ fits within the enforcement process. For additional information on IJ see CMS State Operations Manual, Appendix Q-Guidelines for Determining Immediate Jeopardy:

https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_q_immedjeopardy.pdf

⁴³ DOH letter to Emerald South Administrator, June 21, 2018, amended July 2, 2018.

⁴⁴ *Id.*

⁴⁵ *Id.*



Emerald South has a history of being cited for repeat (chronic) deficiencies. When DOH issues a citation for violation of a regulatory requirement, the facility is supposed to rectify the issue. It is concerning when there are chronic deficiencies cited by DOH for the same regulatory violation.⁴⁶

For example, Emerald South has been cited for regulatory violations under F689 (Free of Accident Hazards/Supervision/Devices)⁴⁷ 7 times since March 10, 2015⁴⁸:

| Citation Date | Description of Deficiency | Scope/Severity | Deficiency Correction Date ⁴⁹ |
|---------------|--|---|--|
| 06/15/18 | Resident repeatedly removed screws that prevented window from opening beyond six inches; resident died when he fell to the ground. | IJ to resident health or safety that is widespread. (L); removed to (G) on June 21, 2018. | TBD |
| 05/08/18 | One resident had issues involving lack of effective interventions and revisions to the plan of care to prevent falls. Another resident had lack of supervision/cueing during meals-resident had a diagnosis of dysphagia (difficulty swallowing). | No actual harm with potential for more than minimal harm that is not IJ that is isolated. (D) | TBD |
| 02/16/17 | Two of three units observed had issues with the lack of window stops on three resident room windows (allowing for windows to | No actual harm with potential for more than minimal harm | 04/12/2017 |

⁴⁶ For additional information on the issue of chronic deficiencies, see LTCCC’s report, “Chronic Deficiencies in Care. The persistence of Recurring Failures to Meet Minimum Safety & Dignity Standards in U.S. Nursing Homes. 2017. <https://nursinghome411.org/wp-content/uploads/2017/02/LTCCC-Report-Nursing-Homes-Chronic-Deficiencies-2017.pdf>

⁴⁷ Starting November 28, 2017 the F-Tags were renumbered. To assist in the transition, CMS issued an “F Tag Crosswalk” that shows the original F Tag and the associated new F Tag. For additional information on F-Tags and the new survey process visit: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Nursing-Homes.html>

⁴⁸ To view prior survey results visit: https://profiles.health.ny.gov/nursing_home/view/150362 and <https://www.medicare.gov/nursinghomecompare/profile.html#profTab=0&ID=335593&loc=14215&lat=42.9397553&lng=-78.8099472&name=EMERALD%20SOUTH%20NURSING%20AND%20REHABILITATION%20CENTER&Distn=4.2>

⁴⁹ As per NYS Nursing Home Profiles webpage: https://profiles.health.ny.gov/nursing_home/view/150362, last accessed July 10, 2018

| | | | |
|------------------------|---|---|------------|
| | <p>open approximately 19 inches wide by 42 inches high).</p> <p>One resident did not have quarterly comprehensive assessments to address smoking safely.</p> <p>Another resident who had a history of choking was not supervised during a meal in accordance with the care plan.</p> | that is not IJ that is a pattern. (E) | |
| 12/01/16 | One resident threatened self-harm with a sharp object. No interventions were put in place to prevent reoccurrence and resident had access to a sharp object a second time and threatened self-harm. | No actual harm with potential for more than minimal harm that is not IJ that is isolated. (D) | 01/25/2017 |
| 09/06/16 ⁵⁰ | Three of six residents had issues pertaining to resident to resident altercations and care plans were not followed. Specifically, every 15 minute checks were not conducted per the care plan for a resident with a history of resident to resident altercation ((involving Resident #3)(Resident #1)) and there was a lack of supervision for the transfer and ambulation on the unit to all destinations per the care plan for a resident with a history of wandering and entering other resident's rooms (Resident #2). Resident #2 wandered into Resident #1's room undetected and upon entering, a resident to resident altercation occurred. Resident #2 sustained critical injuries and was admitted to the intensive care unit and expired three days later. This resulted in actual harm that is not immediate jeopardy. | Actual harm that is not IJ that is isolated. (G) | 10/13/2016 |

⁵⁰ The September 6, 2016 DOH investigation followed the death of a resident, Ruth Marry, whereby Ms. Murray was assaulted by another resident and died of her injuries three days later. The assailant had severe cognitive issues. The Erie County District Attorney declined to prosecute the man since he lacked the capacity to form a criminal intent to injure.

| | | | |
|----------|---|--|------------|
| 03/07/16 | <p>Two of three units observed had issues: a front dining room window was opened fully and the door to the room was unlocked; and a window was opened fully on Unit 2 in Room 202.</p> <p>One resident was noncompliant for safe smoking practices and was not assessed quarterly for safe smoking practices and the ability to smoke independently;</p> <p>Another resident's bathroom had a trip hazard of a metallic bracket approximately 2 (inches) in length with a circular high raised area in the center approximately ¼ high screwed into the bathroom floor.</p> | No actual harm with potential for more than minimal harm that is not IJ that is a pattern. (E) | 04/20/2016 |
| 03/10/15 | Three of six residents reviewed for accidents did not have a call light system in place when the resident was assessed to be at risk for falls. | No actual harm with potential for more than minimal harm that is not IJ that is a pattern. (E) | 05/08/2015 |

In addition, Emerald South, based on the DOH annual inspection survey completed on May 8, 2018, was cited for 6 other regulatory violations that were repeat deficiencies from prior annual and complaint inspections.



The below tables provide a summary of the prior survey results:

CMS NHC⁵¹

Health Inspection Summary

EMERALD SOUTH NURSING AND REHABILITATION CENTER

1175 DELAWARE AVE
 BUFFALO, NY 14209
 (716) 885-6733

| Deficiency Category | Inspection Date: 02/16/2017 Complaint Reporting Period: 5/1/2017 - 4/30/2018 | Inspection Date: 03/07/2016 Complaint Reporting Period: 5/1/2016 - 4/30/2017 | Inspection Date: 03/10/2015 Complaint Reporting Period: 5/1/2015 - 4/30/2016 |
|--|---|---|---|
| Freedom from Abuse, Neglect, and Exploitation Deficiencies | 1 | 2 | 0 |
| Quality of Life and Care Deficiencies | 2 | 4 | 4 |
| Resident Assessment and Care Planning Deficiencies | 1 | 7 | 3 |
| Nursing and Physician Services Deficiencies | 0 | 1 | 0 |
| Resident Rights Deficiencies | 3 | 5 | 3 |
| Nutrition and Dietary Deficiencies | 2 | 0 | 1 |
| Pharmacy Service Deficiencies | 1 | 1 | 1 |
| Environmental Deficiencies | 2 | 7 | 6 |
| Administration Deficiencies | 1 | 2 | 3 |

⁵¹

<https://www.medicare.gov/nursinghomecompare/previousInspections.html?ID=335593&Inspn=HEALTH&profTab=1&loc=14209&lat=42.9137921&lng=-78.8637428&name=EMERALD%20SOUTH%20NURSING%20AND%20REHABILITATION%20CENTER&Distn=0.3> last accessed July 10, 2018. The May 8, 2018 inspection and following complaint citations are not yet on NHC.



*NYS DOH Nursing Home Profiles*⁵²

Nursing Home Complaints, June 1, 2014 to May 31, 2018

| Category | This Facility | Statewide |
|---|---------------|-----------|
| Number of Complaints | 164 | 48,887 |
| Number of Complaints per 100 Occupied Beds | 198.1 | 46.6 |
| Percentage of Complaints Representing Facility-Reported Incidents | 50.0% | n/a |
| All Complaint-Related On-Site Inspections | 35 | 12,676 |
| Deficiencies | 23 | 2,454 |
| Deficiencies per 100 Occupied Beds | 27.8 | 2.3 |

☑ Citations

Citations from June 1, 2014 through May 31, 2018

This report displays citations for Certification Surveys and Complaint Surveys during the reporting period.

Citations Summary

| Measure | This Facility | Statewide Average |
|--|---------------|-------------------|
| Standard Health Citations | 100 | 20 |
| Life Safety Code Citations | 72 | 13 |
| Total Citations | 172 | 33 |
| Citations Related to Actual Harm or Immediate Jeopardy | 1 | 1 |
| Percentage of Citations Related to Actual Harm or Immediate Jeopardy | 1.0% | 2.0% |

The citations above resulted from a total of 10 inspections.

⁵² https://profiles.health.ny.gov/nursing_home/view/150362#inspections last accessed July 10, 2018.



Using the CMS Health Inspection Score, we see that Emerald South’s most recent survey results have not improved since the new operators assumed responsibility.⁵³ While CELJ is waiting on the final complaint inspection report in relation to the June 4, 2018 incident, we expect the calculated health inspection score of 108 points to significantly increase.⁵⁴

| | DOH Standard Survey date | Health Deficiencies Including Complaints | Weighted score after revisits |
|---------|--------------------------|--|-------------------------------|
| | 05/08/2018 | 27/TBD (as cycle year continues) | TBD |
| Cycle 1 | 02/16/2017 | 11 | 72 |
| Cycle 2 | 03/07/2016 | 32 | 216 |
| | 03/10/2015 | 19 | 92 |
| | 5/29/2014 | 6 | 24 |

The average weighted score for the most recent survey of WNY nursing homes is 72 with a median of 24. This means half the nursing homes in the 8 WNY counties received a two survey weighted score of 24 or less.⁵⁵ The CMS Health Inspection Score cut-point (updated June 2018) to receive a “1-star” rating is greater than 41.6 points.⁵⁶

The higher the weighted score = the worse the facility did on DOH annual inspections and complaint investigations = the worse quality of care. Private, for-profit ownership, by Opal Care, LLC has failed to improve resident safety and quality of care.

⁵³ CMS Nursing Home Compare, dataset. Figures for 2014-2016 were obtained through 2016 Annual Files: ProviderInc_2016 using the health cycle score history.

⁵⁴ The number of points added for this deficiency also depends on the number of revisits by DOH. See CMS Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users’ Guide (May 2018)

<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf>

⁵⁵ CMS Nursing Home Compare, dataset. See, *ProviderInfo_Download* @ <https://data.medicare.gov/data/nursing-home-compare> (Processed June 1, 2018, accessed July 10, 2018) As discussed on pg 8 above, Emerald North’s 2018 inspection score will not be included in the NHC Health Inspection rating.

⁵⁶ <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/cutpointstable.pdf>



Staffing

Federal law requires nursing homes provide enough staff to adequately care for residents in order for residents to attain and maintain their highest practicable physical, emotional and social well-being. While CMS had the opportunity to set minimum staffing levels through federal regulation in 2016, CMS declined, instead leaving the issue to the states.⁵⁷

There is currently no NYS minimum staffing law. While there is no federal or NYS minimum nursing home staffing levels, there is considerable evidence of a relationship between nursing home staffing levels and resident outcomes. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems.⁵⁸

There was proposed NYS legislation, titled Safe Staffing for Quality Care Act that would establish minimum nurse staffing levels in both nursing homes and hospitals; it did not pass during the 2018 Legislative session.⁵⁹ NYS Governor Cuomo plans to introduce legislation that would allow DOH to set safe staffing levels by regulation.⁶⁰ CELJ supports Governor Cuomo in his efforts to ensure minimum staffing levels and will also support the Safe Staffing for Quality Care Act when it is re-introduced in the 2019 Legislative session. Minimum staffing levels in conjunction with a competency based approach will improve quality of care in NYS nursing homes.⁶¹

Unless legislation is passed at the state or federal level that specifies minimum nurse staffing levels, the current standard is ‘sufficient’ staff.

The updated federal nursing home regulations do add some definition to the rule. Since November 28, 2017 nursing homes have been required to “have sufficient staff with appropriate competencies and skill sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering number, acuity and diagnoses of the facility’s resident population in accordance with the facility assessment required at 42 CFR 483.70”.⁶² This facility wide assessment also includes behavioral

⁵⁷ Fed Reg Vol. 81, No. 192, October 4, 2016.

⁵⁸ See Kramer AM, Fish R. “Relationship Between Nurse Staffing Levels and the Quality of Nursing Home Care.” Chapter 2 in *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes: Phase II Final Report*. Abt Associates, Inc., Winter 2001.; see also <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf>, at p.6

⁵⁹ Safe Staffing for Quality Care Act, Bill No A01532/S03330:

http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01532&term=2017&Summary=Y&Actions=Y&Memo=Y

⁶⁰ <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-190>

⁶¹ <http://www.elderjusticenyc.org/2018/06/28/legislation-to-set-safe-staffing-levels-in-hospitals-and-nursing-homes-is-supported-by-celj/>

⁶² 42 CFR 483.35



health. While nursing homes should already have taken such self-assessments in order to properly care for residents, it became a requirement starting November 28, 2017.

Emerald South's required payroll based journal data to CMS reported a high number of days with no RN staffing.⁶³ As a result, Emerald South has a 1-star rating for staffing.⁶⁴ Any nursing home that either reports a high number of days with no RN staffing, or fails to submit any data by the required deadline is presumed to have low levels of staff and will receive an automatic one-star rating.⁶⁵

Had data been proper, CMS calculates facility ratings on two measures: (1) RN hours per resident day; and (2) total staffing (RN+LPN+CNA hours) hours per resident day. Staffing measures are derived from data submitted each quarter through the Payroll-Based Journal System (PBJ), along with daily resident census derived from the MDS 3.0 assessments. The data is then case-mix adjusted based on Resource Utilization Groups.⁶⁶ In order to receive an overall staffing rating of 5stars, facilities must have a rating of 5-stars for both RN and total staffing.⁶⁷

We are unable to do a comparison using current data to other nursing homes. The below table is from CMS NHC. Had Emerald South information been proper, we would have been able to see how its staffing levels compared to NY and the national average.

Research has shown that staffing is crucial to preventing resident harm. In addition, as detailed extensively in the recent New York Time article, nursing homes have "had fewer nurses and caretaking staff than they had reported to the government for years."⁶⁸ If a facility does not have enough staff, they should not continue to admit residents they cannot provide quality and safe care.

⁶³

<https://www.medicare.gov/nursinghomecompare/profile.html#profTab=3&ID=335593&loc=14209&lat=42.9137921&lng=-78.8637428&name=EMERALD%20SOUTH%20NURSING%20AND%20REHABILITATION%20CENTER&Distn=0.3>
accessed July 10, 2018

⁶⁴ *Id.*

⁶⁵ See <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions-Items/QSO18-17-NH.html>

⁶⁶ See "Design for *Nursing Home Compare* Five-Star Quality Rating System: Technical Users' Guide." Updated May 2018. CMS. (Accessed June 19, 2018).

⁶⁷ CMS Technical User's Guide pg 10.

⁶⁸Rau, Jordan, NYT Times "'It's Almost Like a Ghost Town.' Most Nursing Homes Overstated Staffing for Years"
<https://www.nytimes.com/2018/07/07/health/nursing-homes-staffing-medicare.html>



| Staffing | | | |
|--|---|------------------------|------------------------|
| The information in this section includes registered nurses (RN), licensed practical/vocational nurses (LPN/LVN), nurse aides, and physical therapists (PT). Physical therapists are not included in the "all staffing" star rating. | | | |
| The "staffing" star rating takes into account that some nursing homes have sicker residents and may therefore need more staff than other nursing homes whose residents are not as sick. | | | |
| | EMERALD SOUTH NURSING AND REHABILITATION CENTER | NEW YORK AVERAGE | NATIONAL AVERAGE |
| Staffing rating | ★●●●● ¹² Much Below Average | | |
| Average number of residents per day | Not Available ² | 168.3 | 86.4 |
| Total number of licensed nurse staff hours per resident per day | Not Available ⁶ | 1 hour and 30 minutes | 1 hour and 32 minutes |
| RN hours per resident per day | Not Available ⁶ | 41 minutes | 40 minutes |
| LPN/LVN hours per resident per day | Not Available ⁶ | 50 minutes | 52 minutes |
| Nurse aides hours per resident per day ¹ | Not Available ⁶ | 2 hours and 15 minutes | 2 hours and 19 minutes |
| Physical therapist staff hours per resident per day ¹ | Not Available ⁶ | 8 minutes | 6 minutes |
| Registered Nurse (RN) staffing only | | | |
| Registered nurses (RNs) are licensed healthcare professionals who are responsible for the coordination, management and overall delivery of care to the residents. Some nursing home residents who are sicker than others may require a greater level of care, and nursing homes that have more RN staff may be better able to meet the needs of those residents. | | | |
| Registered Nurse (RN) staffing rating | ★●●●● ¹² Much Below Average | | |
| Average number of residents per day | Not Available ² | 168.3 | 86.4 |
| RN hours per resident per day | Not Available ⁶ | 41 minutes | 40 minutes |
| How to read staffing charts About staff roles | | | |

Quality Measure

NHC reports on twenty-four quality measures, nine for short-term residents and fifteen for long term residents. Sixteen of these quality measures are included in the NHC quality measure star rating. The majority of the quality measures are based on facility reported data drawn from the Minimum Data Set (MDS); not claims based data. The MDS form is completed by the nursing home for every one of its residents and is a tool for standardized assessment and for facilitating care management.⁶⁹

Emerald South's rating on quality measures is "much above average" according to CMS' rating system (5 stars out of 5) even though the facility has numerous health violations.⁷⁰ This is because the majority of the quality measures are submitted by the facility. The table below shows the

⁶⁹ For additional details, see Table 6 of the Technical Users' Guide for the CMS Five-Star Quality rating system <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf>

⁷⁰ CMS Nursing Home Compare, dataset. See, *ProviderInfo_Download* @ <https://data.medicare.gov/data/nursing-home-compare> (Processed June 1, 2018, accessed July 10, 2018)



quality measures reported by Emerald South and how they compare with the NYS average for the most recent reporting periods.⁷¹ When reviewing the below table, it is important to remember that the majority of the quality measures are self-reported by the facility through the MDS and not are claims based.

For ease of identification, we have *italicized* the quality measures that are *claims based* and included in the NHC quality measure star rating, and CAPITALIZED the quality measures that are FACILITY REPORTED and included in the NHC quality measure star rating.

| Quality measures are reported for four quarters ⁷² | Emerald South | NYS average | ratio |
|--|---------------|-------------|-------|
| Worse than State Average for Long-stay residents | | | |
| PERCENTAGE OF LONG-STAY RESIDENTS WHOSE NEED FOR HELP WITH DAILY ACTIVITIES HAS INCREASED (LOWER % BETTER) | 22.8% | 13.5% | 1.69 |
| Percentage of long-stay residents who have symptoms of depression (lower % better) | 11.7% | 6.9% | 1.70 |
| Percentage of long-stay low-risk residents who lose control of their bowels or bladder (lower % better) | 53.4% | 51.7% | 1.03 |
| PERCENTAGE OF LONG-STAY RESIDENTS WHOSE ABILITY TO MOVE INDEPENDENTLY WORSENE (LOWER % BETTER) | 34.8% | 16.4% | 2.1 |
| PERCENTAGE OF LONG-STAY RESIDENTS WHO RECEIVED AN ANITPSYCHOTIC MEDICATION (LOWER % BETTER) | 16.5% | 15.2% | 1.09 |
| Percentage of long-stay residents who needed and got a flu shot for the current flu season (higher % better) | 75.6% | 96.7% | 0.78 |
| Percentage of long-stay residents who needed and got a vaccine to prevent pneumonia (higher % better) | 64.9% | 95.4% | 0.68 |
| Percentage of long-stay residents who received an antianxiety or hypnotic medication (lower % better) | 31.4% | 12.3% | 2.55 |
| | | | |
| Better than State Average for Long-stay residents | | | |
| PERCENTAGE OF LONG-STAY RESIDENTS EXPERIENCING ONE OR MORE FALLS WITH MAJOR INJURY (LOWER % BETTER) | 2.3% | 2.8% | 0.82 |
| PERCENTAGE OF LONG-STAY RESIDENTS WHO WERE PHYSICALLY RESTRAINED (LOWER % BETTER) | 0.0% | 0.6% | 0 |
| PERCENTAGE OF LONG-STAY RESIDENTS WITH A URINARY TRACT INFECTION (LOWER % BETTER) | 1.1% | 2.9% | 0.38 |

⁷¹

<https://www.medicare.gov/nursinghomecompare/profile.html#profTab=4&ID=335593&loc=14209&lat=42.9137921&lng=-78.8637428&name=EMERALD%20SOUTH%20NURSING%20AND%20REHABILITATION%20CENTER&Distn=0.3>

⁷² The time period depends on the quality measure:

<https://www.medicare.gov/nursinghomeCompare/Data/About.html#qualityOfResidentCareDataCollection> . For additional information on Quality Measures and the NHC star rating: Design for *Nursing Home Compare* Five-Star Quality Rating System: Technical Users' Guide." Updated May 2018. CMS. (Accessed June 19, 2018).



| | | | |
|--|-------|-------|------|
| PERCENTAGE OF LONG-STAY RESIDENTS WHO SELF-REPORT MODERATE TO SEVERE PAIN (LOWER % BETTER) | 0.9% | 3.5% | 0.26 |
| PERCENTAGE OF HIGH RISK LONG-STAY RESIDENTS WITH PRESSURE ULCERS (LOWER % BETTER) | 4.1% | 6.9% | 0.59 |
| PERCENTAGE OF LONG-STAY RESIDENTS WITH A CATHETER INSERTED AND LEFT IN THEIR BLADDER (LOWER % BETTER) | 0.3% | 1.4% | 0.21 |
| Percentage of long-stay residents who lose too much weight (lower % better) | 1.9% | 6.4% | 0.30 |
| | | | |
| Worse than State Average for short-stay residents | | | |
| <i>Percentage of short-stay residents who have had an outpatient emergency department visit (lower % better)</i> | 11.1% | 9.7% | 1.14 |
| PERCENTAGE OF SHORT-STAY RESIDENTS WHO NEWLY RECEIVED AN ANTIPSYCHOTIC MEDICATION (LOWER % BETTER) | 2.7% | 1.6% | 1.67 |
| Percentage of short-stay residents who needed and got a flu shot for the current flu season (higher % better) | 48.6% | 83.5% | 0.58 |
| Percentage of short-stay residents who needed and got a vaccine to prevent pneumonia (higher % better) | 36.4% | 81.6% | 0.45 |
| | | | |
| Better than State Average for short-stay residents | | | |
| PERCENTAGE OF SHORT-STAY RESIDENTS WHO IMPROVED IN THEIR ABILITY TO MOVE AROUND ON THEIR OWN (HIGHER % BETTER) | 82.6% | 69.8% | 1.18 |
| <i>Percentage of short-stay residents who were re-hospitalized after a nursing home admission (lower % better)</i> | 15.8% | 20.0% | 0.79 |
| <i>Percentage of short-stay residents who were successfully discharged to the community (higher% better)</i> | 61.3% | 55.6% | 1.10 |
| PERCENTAGE OF SHORT-STAY RESIDENTS WHO REPORT MODERATE TO SEVERE PAIN (LOWER % BETTER) | 5.1% | 9.1% | 0.56 |
| PERCENTAGE OF SHORT-STAY RESIDENTS WITH PRESSURE ULCERS THAT ARE NEW OR WORSENERD (LOWER % BETTER) | 0.0% | 0.8% | 0 |

It is extremely troubling that a facility with a history of poor health inspections and staffing levels is able to secure a 5 star rating for NHC quality measures.⁷³ Furthermore, there should be cause for concern by CMS and DOH as the primary purpose of the MDS is to “serve as the clinical basis of individualized care planning and delivery of person-centered care” in addition to impacting Medicare, and in some cases Medicaid payment rates.⁷⁴

⁷³ See Katie Thomas, “Medicare Star Ratings Allow Nursing Homes to Game the System,” *The New York Times* (Aug. 24, 2014), <http://www.nytimes.com/2014/08/25/business/medicare-star-ratings-allow-nursing-homes-to-game-the-system.html>. See also <http://www.medicareadvocacy.org/dont-be-fooled-by-the-federal-nursing-home-five-star-quality-rating-system/>

⁷⁴ CMS Memo, S& C: 17-06-NH <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-06.pdf>



New York DOH Nursing Home Quality Initiative⁷⁵

The NYS DOH Nursing Home Quality Initiative (NHQI) is an annual quality and performance evaluation project to improve the quality of care for residents in NYS Medicaid-certified nursing homes. The NHQI offers an alternative method of ranking nursing homes to CMS Nursing Home Compare. 2017 rankings are based on the previous calendar year’s performance in Quality (quality measures), Compliance (compliance with reporting), and Efficiency (potentially avoidable hospitalizations) categories.

NHQI: Quality Component (worth 70 points)

Quality measures are calculated from MDS 3.0 data of the 2016 calendar year, NYS employee flu vaccination data, and nursing home cost report data for the percent of contract/agency staff used and the rate of staffing hours per day. The quality component includes 10 quality measures out of the 21 used by CMS NHC. The NHQI highly values these quality measures and they account for ½ of the maximum 100 point score. CMS Nursing Home Compare puts greater weight on the findings of the last three annual survey reports.

NHQI: Compliance Component (worth 20 points)

Is comprised of three areas: CMS’ 5-star quality rating for health inspections, timely submission of nursing home certified cost reports, and timely submission of employee influenza immunization data. The three compliance measures for the 2017 NHQI are shown in the below table:

| Number | Measure | Measure Steward | Data Source and Measurement Period | Scoring Method |
|--------|---|-----------------|--|--|
| 1 | CMS Five-Star Quality Rating for Health Inspections (regionally adjusted) | CMS | CMS health inspection survey scores as of April 1, 2017 | 5 stars=10 points 4 stars=7 points 3 stars=4 points 2 stars=2 points 1 star=0 points |
| 2 | Timely submission of employee influenza vaccination data | NYS DOH | Employee influenza vaccination data submitted to the Bureau of Immunization through HERDS for the 2016-2017 influenza season | Five points for submission by the deadline |
| 3 | Timely submission of certified and complete nursing home cost reports | NYS DOH | Nursing home cost report, 2016 calendar year for calendar filers and 2016 fiscal year for fiscal filers | Five points for timely, certified and complete submission of the 2016 cost report |

⁷⁵ See NYS DOH site: https://www.health.ny.gov/health_care/medicaid/redesign/nursing_home_quality_initiative.htm



NHQI: Efficiency Component (worth 10 points)

Pertains to potentially avoidable hospitalizations. Purpose of this component is to align NHQI with other CMS quality measures. This measure is risk adjusted.

| Number | Measure | Measure Steward | Data Source and Measurement Period | Scoring Method |
|--------|--|-----------------|--|--|
| 1 | Potentially Avoidable Hospitalizations | CMS/NYS DOH | MDS 3.0 and SPARCS, 2016 calendar year | Quintile 1=10 points Quintile 2=8 points Quintile 3=6 points Quintile 4=2 points Quintile 5=0 points |

Any facility that was cited for an immediate jeopardy deficiency between July 1, 2016 and June 30, 2017 is not eligible to be rated in the 2017 rankings.

The total scores are grouped into five tiers, or quintiles. The facilities in the first quintile are the top approximately 20% of NY nursing homes. Emerald South has been ranked as follows:

2017 - 4th quintile,
2016 - 4th quintile, and
2015 - 5th quintile.⁷⁶

CMS Special Focus Facility Designation and Federal and State Enforcement

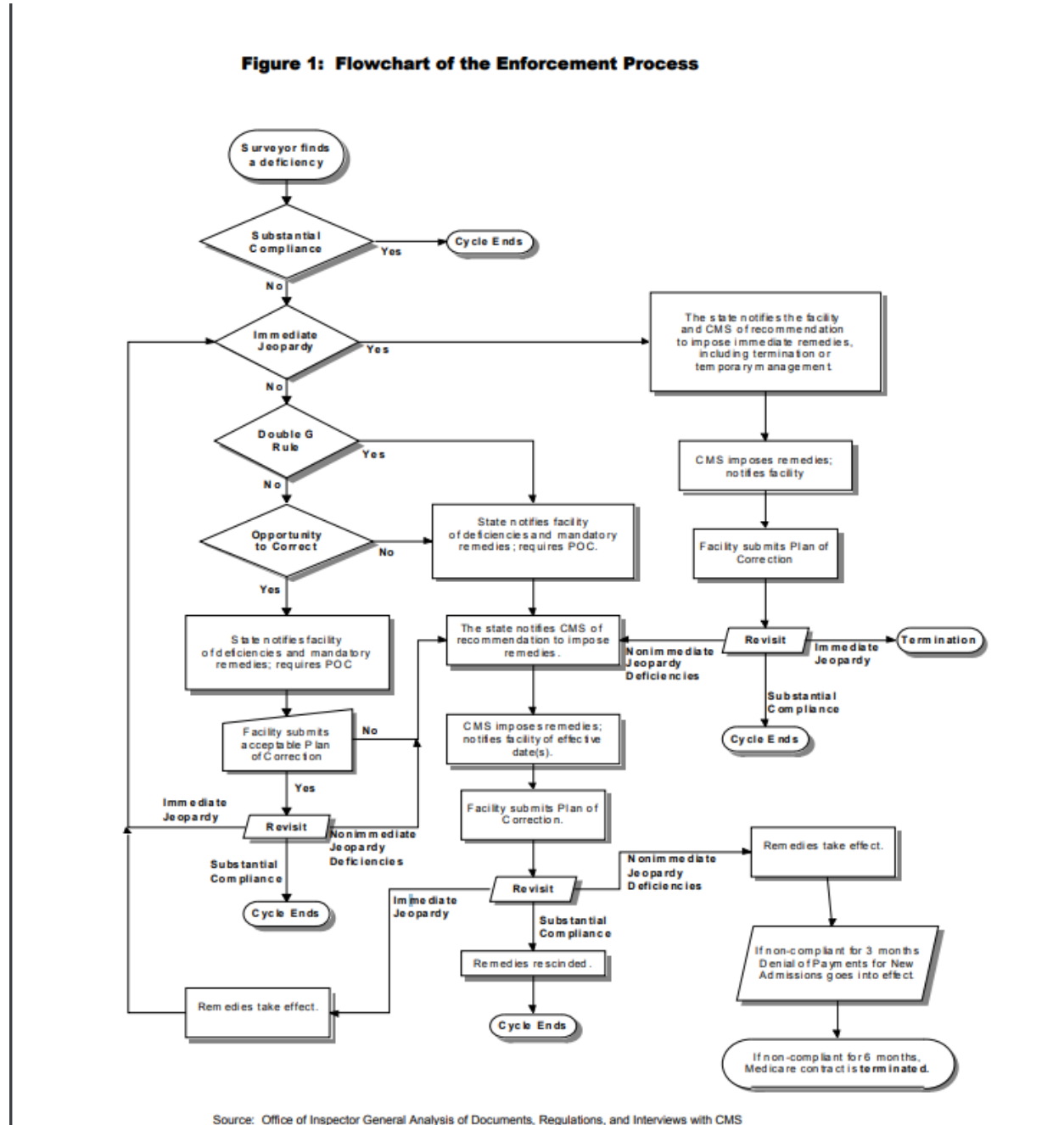
CMS designated Emerald South as a Special Focus Facility (SFF) on June 21, 2018. A SFF designation identifies nursing homes whose quality of care has consistently demonstrated failure to maintain compliance, as well as a history of facility practices that have resulted in harm to residents, as measured by recent survey experience. CMS has the authority to terminate a facility’s participation in the Medicare and Medicaid program. However prior to doing so, CMS has the option to designate the facility as a SFF. CMS requires SFF’s to have two certifications per year conducted by DOH and there must be significant improvements. Otherwise CMS may impose various penalties on the facility.⁷⁷

⁷⁶ For 2017 see https://www.health.ny.gov/health_care/medicaid/redesign/nhqi/2017/quintile_ranking.htm ; For 2016 see https://www.health.ny.gov/health_care/medicaid/redesign/nhqi/2016/quintile_ranking.htm ;for 2015 see https://www.health.ny.gov/health_care/medicaid/redesign/nhqi/2015_nhqi_quintile_ranking.htm.

⁷⁷ See <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/NHs.html> and the special note on DOH Nursing Home Emerald South Profile: https://profiles.health.ny.gov/nursing_home/view/150362#overview

Emerald South is a SFF even though it has a 5 star NHC Quality Measure rating. The Center for Medicare Advocacy, based on the SFFs identified by CMS in August 2016, found that nearly 40% of SFFs had four and five star quality measure NHC ratings.⁷⁸

The below flowchart provides an overview of CMS' various enforcement options and processes:



⁷⁸ T. Edelman, "Don't be Fooled by the Federal Nursing Home Five-Star Quality Rating System" (October 5, 2016), <http://www.medicareadvocacy.org/dont-be-fooled-by-the-federal-nursing-home-five-star-quality-rating-system/>



(Flow chart from OIG report <https://oig.hhs.gov/oei/reports/oei-06-02-00720.pdf>)

Nursing homes in NYS must follow Federal and NYS laws in order to remain in operation (or at least receive Medicare and/or Medicaid payments). Federal enforcement actions (“remedies”) are imposed by CMS when the state survey agency (DOH for NYS) determines there are violations of nursing home law and regulations.⁷⁹ The worse thing that may happen, is CMS terminates the Medicare/Medicaid contract with the facility. This is rare. CMS may also impose a fine (referred to as civil monetary penalty) or deny payment for new Medicare/Medicaid resident admissions.

However, since January 2017, CMS has been taking actions that undermine the federal nursing home regulations and enforcement of the regulations.⁸⁰ For example, effective July 17, 2017, CMS modified the ways civil monetary penalties are calculated. Rather than imposing fines based on the number of days the violation goes unaddressed by the facility, CMS now imposes a one-time fine.⁸¹ As detailed by the New York Times article, “Trump Administration Eases Nursing Home Fines in Victory for Industry,” this move means deficiencies that resulted in fines previously will be reduced.⁸² An example used by that New York Times article:

A nursing home was found deficient for failing to monitor and treat a resident’s wound. The resident later died. CMS, under the prior civil monetary penalty policies, fined that nursing home for \$282,954 which included \$10,091 a day for 28 days. This was from the time the nursing home noticed the problem and retrained staff to avoid similar errors. Under the new CMP policies, the maximum fine for that deficiency would be \$20,965.⁸³

Most recently, effective July 15, 2018, CMS revised its enforcement penalties to implement changes that will result in fewer and less frequent civil monetary penalties.⁸⁴ We expect these policy changes to result in fewer and less frequent civil monetary penalties.

⁷⁹ See 42 CFR 488.406, and State Operations Manual, Chapter 7 for additional information.

⁸⁰ For a detailed discussion on the rollback of nursing home resident protections visit: <http://theconsumervoice.org/news/detail/latest/cms-rollback-of-protections>

⁸¹ Quality, Safety and Oversight (QS) (formerly Survey and Certification-S&C) memo 17-37-NH, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf>

⁸² https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html?_r=1

⁸³ *Id.*

⁸⁴ Quality, Safety and Oversight memo, 18-18-NH <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/QSO18-18-NH.pdf> / See also The National Consumer Voice Policy Break (June 27, 2018) that details the changes such as: If an IJ violation does not result in serious injury, harm, impairment, or death, a civil monetary penalty is optional; (previously all IJ violations resulted in a civil monetary penalty); CMS Regional Offices now have discretion to choose remedies and are advised to consider the extent to which the noncompliance is a result of a “one-time mistake” (previously remedies were chosen based on scope and severity of deficiency); and under certain circumstances, sanctions could be imposed immediately. The revised policy



At the time of this profile, it is unknown whether CMS has imposed civil monetary penalties upon Emerald South or other remedies such as the denial of payment for new Medicare/Medicaid admissions.

At the state level, DOH may impose fines for violations under NYS laws and regulations. DOH may fine the maximum of \$10,000 if the violation directly results in serious physical harm.⁸⁵ Emerald South has previously agreed to pay fines to DOH, in response to DOH findings of regulatory deficiencies on two occasions:

- January 12, 2017 Stipulation and Order NH-17-009
 - o Emerald South to pay \$2,000 to DOH for regulatory violation 10 NYCRR 415.5(h)(4); Environment Comfortable and Temperature Levels. DOH cited the deficiency on January 13, 2016.⁸⁶

- December 19, 2016 Stipulation and Order NH-17-001
 - o Emerald South to pay \$10,000 to DOH for regulatory violation 10 NYCRR 412.12(h)(1); Quality of Care/Accident Free Environment. DOH cited the deficiency on September 6, 2016.⁸⁷

Resources for Nursing Home Residents and Supporters

CELJ offers the following tips for residents, prospective residents, and their families when looking for a nursing home and residing in a nursing home:

1. Develop a relationship with the hospital discharge planner

Hospital discharge planners are under pressure to move patients who no longer need hospital-level care to a lower-level care setting, such as a nursing home. This is a stressful time for the patient and often the patient is not in a position to make an informed choice. Developing a relationship with the hospital discharge planner and explaining the patient's needs (such as geographic location) will assist in the patient and the family making an informed choice of nursing home. If you do not like the selection of nursing homes made available to you by the discharge planner, reach out to area nursing homes for applications.⁸⁸

removes situations that would have previously triggered immediate imposition of remedies. http://wfc2.wiredforchange.com/o/8641/t/0/blastContent.jsp?email_blast_KEY=56984

⁸⁵ NY Pub. Health. Law § 12

⁸⁶ The heating system was down: Survey Event ID YL1011

⁸⁷ See FN 50

⁸⁸ NY Connects, 716-858-8526, <http://www2.erie.gov/nyconnects/>, is a resource available to help select nursing homes and answer question pertaining to long term care facilities.



2. Do your research

While CMS NHC, NYS DOH Nursing Home Profile (which is derived from the CMS NHC information), and NYS DOH NHQI websites offer a wealth of information, these websites are not perfect and each measure has pros and cons. Ask around for people's opinions on a nursing home. Visit the nursing home.⁸⁹

3. Staffing levels

Quality is generally better in nursing homes that have more staff who work directly with residents. It's important to ask nursing homes about their staff levels, the qualifications of their staff, and the rate at which staff leave and are replaced. (NYS does not have minimum nurse staffing levels in nursing homes.)

From the CMS publication, *Your Guide to Choosing a Nursing Home or Other Long Term Care*, ask the following questions:⁹⁰

- Is there enough staff to give me the care I need?
- Will I have the same staff people take care of me day to day or do they change?
- Does the nursing home post information about the number of nursing staff, including Certified Nursing Assistants (CNAs)?
- Are they willing to show me if I ask to see it? (Note: Nursing homes are required to post this information.)
- How many residents is a CNA assigned to work with during each shift (day and night)?

4. Develop a relationship with nursing home staff.

Ask the nursing home who the 'point person' is at the facility for questions and concerns. Knowing who to speak with regarding a concern is the first step in resolving the concern. Address concerns when they arise; do not let them 'fester' as it will only exacerbate the situation.

Be tactful on how a concern is raised. Nursing home staff choose to work in the caregiving field and want to do a good job; they do not want to provide poor care. While some concerns may need to be addressed abruptly and with a sharp tone, in general people respond better when the tone is one of respect.

⁸⁹ Review consumer directed materials such as <http://theconsumervoice.org/uploads/files/family-member/A-Consumer-Guide-To-Choosing-A-Nursing-Home.pdf>

⁹⁰ <https://www.medicare.gov/Pubs/pdf/02174.pdf>



Get to know the nursing home staff who take care of the resident. This includes staff in housekeeping and maintenance.

Know the nursing home's grievance process and whose attention to bring concerns

5. Be proactive: know your rights and who to call!

Read all of the admission paperwork materials. Know the rights of a nursing home resident. Ask for a copy of the baseline care plan; which must be completed within 48 hours. In the initial care plan meeting with the facility, make it known your likes, dislikes and needs. Know what medications you are on and why. Get involved with activities and become an active member of the resident council or family council. If there is no family council, start one.

These are only some of the tips available to the community in selecting and residing in a nursing home. There are many resources out there and CELJ is available to connect you to the resources and informational materials on resident rights. Such resources include:

Long Term Care Ombudsman Program: Resident Advocacy

An advocate and resource for older adults and persons with disabilities who live in nursing homes, assisted living, and other licensed adult care homes. Ombudsmen help residents understand and exercise their rights to good care in an environment that promotes and protects their dignity and quality of life.

The Ombudsman Program advocates for residents by investigating and resolving complaints made by or on behalf of residents; promoting the development of resident and family councils; and informing governmental agencies, providers and the general public about issues and concerns impacting residents of long-term care facilities.

To request Ombudsman Program assistance, call 1-855-582-6769 or visit <https://ltombudsman.ny.gov/> for additional information.

NYS Department of Health: Nursing Home Complaints & Enforcement

DOH is the NYS agency responsible for investigating complaints and incidents in nursing homes which are related to Federal and/or State regulatory violation. All nursing home complaints and incidents are reviewed by DOH through its Centralized Complaint Intake Unit. The complaint is then triaged and investigated. Upon completion of the investigation, DOH will determine whether a facility has failed to meet the Federal and or State regulations (requirements). If a facility has failed to meet a requirement, DOH will issue a citation to the nursing home. Depending on the severity and scope of the violation, DOH will require a plan of correction from the facility and may issue a fine.



When preparing to file a complaint with DOH, it is encouraged that the resident (family/friend) keep track of date(s), staff involved, whether resident is harmed (physical and/or psychological) or has the potential to be harmed, and other information that is important to the complaint. Being organized and providing DOH with documentation should help with the DOH complaint process.

There are two ways to file a complaint with DOH:

1. Nursing Home Complaint Form

The form may be filed online, emailed, faxed, or mailed:

https://apps.health.ny.gov/nursing_homes/complaint_form/complain.action

2. Nursing Home Complaint Hotline

The Nursing Home Complaint Hotline can be called 24 hours per day, seven days per week. There will be a DOH staffer available Monday through Friday from 8:30 am to 4:45 pm to answer the hotline. For non-business hours, a voicemail may be left on the hotline. 1-888-201-4563.

NYS Attorney General-Medicaid Fraud Control Unit (MFCU)

The MFCU is the only law enforcement agency in New York that specializes in investigating and prosecuting abuse and neglect of residents in care facilities. The MFCU's jurisdiction extends to all residential care facilities (such as nursing homes) regardless with the patient/resident is a Medicaid recipient.

To report resident abuse or neglect with the MFCU:

- Complete the MFCU Comment Form: <https://ag.ny.gov/comments-mfcu> ; or
- Call 1-866-697-3444

For additional information on the MFCU visit:

- <https://ag.ny.gov/sites/default/files/pdfs/publications/Residential%2520Care%2520Protecting%2520Patients%2520from%2520Abuse%2520and%2520Neglect%2520091808.pdf>
- <https://ag.ny.gov/medicaid-fraud/contact>

NY Connects: Long Term Care Services & Supports Information

A 'one stop shop' that provides information about available options for long term care in all NYS counties. Answers questions for anyone who needs information on long term care services and supports with the goal to help the caller identify the best available care options. For Erie county contact (716) 858-8526; for all other counties go to <https://www.nyconnects.ny.gov> or contact your local Office for the Aging.



Call for Action to Improve Quality of Care in WNY Nursing Homes

It is important for the community to understand that in NYS, rehabilitation facilities are nursing homes and there should be no difference in the quality of care an individual receives under a “rehabilitation” stay or a “long-term care” stay. No one expects to enter into a nursing home, but the odds of this occurring are increasing.

Many nursing homes in WNY do provide quality and safe care. However, far too many do not. As stand-alone facilities sell to for-profit multi-facility ownership entities, there must be greater oversight and enforcement to ensure they provide safe and quality care to all residents.

In operating a nursing home, owners make a promise to the taxpayer and the government that they will provide safe and quality care in return for Medicare and Medicaid payments. It is a legal and moral obligation to provide such. However too often staff are cut and other measures are taken that impede resident safety to the benefit of the owner. In Emerald South’s case, the operator was transparent in informing the DOH that the facility would remain viable by cutting staff and accepting hard to place residents. Emerald South is now a CMS SFF.

Since 2017, CMS, has been actively taking actions to undermine necessary nursing home resident protections. Fines at the federal and state level are not sufficient to deter bad operators from making substantive changes to improve resident care. Currently these fines are viewed as a ‘cost of doing business.’ In order to be a deterrent, the fines must cost more for non-compliance, than the cost of the facility to be in compliance (i.e. provide safe and quality care).

CELJ supports measures that would improve quality of care in nursing homes including (and not limited to):

- Require minimum staffing levels in nursing homes;
- Limits on the amount of nursing home profits;
- Increased penalties at the State level so that DOH can impose fines greater than \$10,000;
- Greater oversight on the family and business associate relationships between the nursing home operator and the real estate owner; and;
- Stronger regulatory enforcement.

Poor quality care in our nursing homes impacts everyone in the community; it is not solely a nursing home resident issue.