



November 6, 2023

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244

RE: CMS–3442–P - Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting

Dear Administrator Brooks-LaSure:

The American Academy of Nursing (Academy) is pleased to offer the following comments in response to the September 6, 2023, proposed rule that seeks to establish staffing standards for nursing home facilities and payment transparency reporting in Medicaid. For 50 years, the Academy has been advancing health policy and practice through the generation, synthesis, and dissemination of nursing knowledge. Academy Fellows are inducted into the organization for their extraordinary contributions to improve health locally and globally. With more than 3,000 Fellows, the Academy represents nursing's most accomplished leaders in policy, research, administration, practice, and academia.

The Academy's vision of *healthy lives for all people* is foundational to our mission of improving health and achieving health equity by impacting policy through nursing leadership, innovation, and science. The Academy is committed to supporting policies that increase accessibility to all forms of health care, promote patient centered as well as culturally safe and supportive care, and build capacity to support nurses and other providers. To that end, our comments will focus on the following areas in the proposed rule:

- Improving the Registered Nurse (RN) On-Site Requirement;
- Establishing Nurse Staffing Standards;
- Strengthening the Facility Assessment Requirement;
- Implementation and Waivers; and
- Transparency of Medicaid Nursing Home Information.

Improving the RN On-Site Requirement

The Academy commends the Centers for Medicare and Medicaid (CMS) for proposing that a RN be on-site 24 hours a day, seven days a week in nursing homes. In the 2022 report, *The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff*, the National Academies of Science, Engineering, and Medicine (NASEM) recommended nursing homes should have "onsite direct-care RN coverage (in addition to the director of nursing) at a minimum of a 24-hour, 7-days-per-week basis with additional RN coverage that reflects resident census, acuity, case mix, and the professional nursing needs for residents as determined by the residents' assessments and care plans."¹ This recommendation for 24/7 on-site RN coverage was first included in the National Academy of

¹ National Academies of Sciences, Engineering, and Medicine. 2022. *The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff*. Washington, DC: The National Academies Press.
<https://doi.org/10.17226/26526>

Medicine's 1996 report on *Nursing Staff in Hospitals and Nursing Homes* and in subsequent reports on nursing home quality. The absence of continual RN coverage has long been recognized by the profession, and is supported by the evidence, as insufficient to ensure the professional nursing needs of residents are met and that there is professional nurse surveillance and oversight of the care provided by certified nurse aides (CNAs) and licensed practical nurse (LPNs).^{2,3,4} The positive impact of RN oversight has been well established and was confirmed by the recent Abt Associates report prepared for CMS entitled *Nursing Home Staffing Study Comprehensive Report*.

While the proposed rule acknowledges the role of RNs in comprehensive admission assessments, it is important to note that nursing assessments are not confined to when a resident is admitted but are vital for assessing significant changes in condition across all shifts and 7 days a week. Timely assessments of change in resident condition, as well as assessing fall related injuries, skin integrity, infections, delirium—are fundamental to preventing adverse outcomes, including hospitalizations, and preventing harm to residents. Nursing assessments, along with the oversight of care provided by LPNs and CNAs are important elements in achieving quality of care and resident safety. The current requirement of 8 hours a day leaves residents without timely assessment and intervention, and consequently, vulnerable to harm.

The Academy strongly supports CMS's proposed change of the RN on-site requirement from 8 hours per day to 24 hours per day, seven days a week as it will improve the quality of care in nursing homes. The proposed rule requested comment on whether the Director of Nursing (DON) should be included in the 24/7 on-site RN requirement. **The Academy recommends that the DON should not be included in the 24/7 on-site requirement and additionally urges the final rule to also not include RNs that primarily have administrative duties in this requirement.**

Establishing Nurse Staffing Standards

Research has shown that insufficient nursing staff can negatively impact residents in nursing homes.⁵ The recommendation to increase RN staffing and overall nurse staffing in nursing homes has been a consistent recommendation for improving the quality of care in nursing homes. Unfortunately, the same staffing regulations have been in place for more than three decades, even as the types of residents and the complexity of their needs have changed dramatically over that same period. The proposed rule recommends 0.55 RN hours per resident day (HPRD) and 2.45 CNA (totaling 3.0 HPRD), which could be considered inadequate and unsafe.⁶ CMS also requested feedback on increasing the total nurse staffing standard to 3.48 HPRD. The Abt Associates Staffing study found that in the second quarter of 2022, the average nurse staffing level in U.S. nursing homes was 3.76 HPRD.² The study also found that these staffing levels also varied across nursing homes, with 10 percent of nursing homes with staffing levels at or below 2.79 nurse HPRD and 10 percent with levels above 4.88 HPRD. It also indicated potential quality and safety benefits associated with increased nurse staffing in nursing homes. Extensive research

² Abt Associates. Nursing Home Staffing Study Comprehensive report. Report prepared for the Centers for Medicare & Medicaid Services, June 2023. <https://edit.cms.gov/files/document/nursing-homestaffing-study-final-report-appendix-june-2023.pdf> <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>

³ White, E. M., Aiken, L. H., & McHugh, M. D. Registered nurse burnout, job dissatisfaction, and missed care in nursing homes. *Journal of the American Geriatrics Society*, 2019: 67(10), 2065-2071

⁴ Harrington, C., Ross, L., Chapman, S., Halifax, E., Spurlock, B., and Bakerjian, D. Nursing staffing and coronavirus infections in California nursing homes. *Policy, Politics, & Nursing Practice*. 2020: 21 (2) 174-186

⁵ Harrington, C., Dellefield, M. E., Halifax, E., Fleming, M., & Bakerjian, D. (2020). *Appropriate nurse staffing levels for U.S. nursing homes*. Health Services Insights, 13, 117863292093478. <https://doi.org/10.1177/1178632920934785>

⁶ Nursinghome. (2023, October 11). LTCCC alert: A 3.0 staffing minimum is not enough - NursingHome411. <https://nursinghome411.org/alert-staffing-q1-2023/>

supports the link between higher direct caregiver staffing levels and improvements in resident clinical outcomes.⁷

We recognize the importance CMS's commitment to establishing minimum staffing standards for nursing homes to improve resident safety and promote high-quality care for residents and their families because of the wide variability noted above. However, the Academy is concerned that the agency is proposing a nursing staff standard of HPRD where more research is needed. The Committee involved in the NASEM report found that the current minimum staffing standards likely do not reflect the needs of the current population of nursing home residents and that more research is needed on both the minimum and optimal staffing standards to meet the needs of today's nursing home population.¹ NASEM also found that more information is needed for all types of nurses, including advanced practice registered nurses (APRNs)⁸, RNs, LPNs, and CNAs as well as other staff who support the health and well-being of nursing home residents. The proposed rule did note that there was insufficient information for the agency to include LPNs in setting a minimum nurse staffing standard. **The Academy urges CMS follow the NASEM report recommendation to identify and rigorously test specific minimum and optimum staffing standards for nursing home direct-care staff (e.g., APRNs, RNs, LPNs, CNAs, therapists, recreational staff, social workers, and other direct-care providers), including weekend and holiday staffing, based on resident case mix and the type of staff needed to address the care needs of specific populations.¹ With this information, we further recommend CMS quickly address staffing standards that includes all licensed nurses in nursing homes to more accurately reflect the new staffing requirements and account for case mix.**

The Academy recommends that *only* those RNs and other licensed nursing staff whose primary role is to provide direct care be included in the calculation for 'direct care providers' total HPRD. We believe that nursing staff occupying administrative roles are generally 'unavailable' for direct resident care. The administrative responsibilities required to manage a complicated organization leave little or no time for direct care work. Including RN administrators in staffing calculations *assumes* availability of administrators on a permanent and ongoing basis which is not realistic.

Strengthening the Facility Assessment Requirement

The Academy commends CMS for continuing to work to improve the safety of residents, through a comprehensive approach to establish standards to ensure that facilities are making thoughtful, informed plans and decisions focused on meeting resident needs. Additionally, we appreciate CMS for recognizing that input from all facility staff and not just direct care staff is vital to a comprehensive assessment of the resources needed to ensure high quality care. While licensed nursing staff are familiar with the unique needs of their patients, they also provide information on volume and the provision of quality care safely on a daily basis. Nursing staff as well as other employees in these facilities can also provide information needed related to the additional training, competencies, and skills; culturally safe and supportive care as appropriate; and leveraging technology to ensure the safety of care for the residents.

The Academy recommends that CMS adopt goal two of the 2022 NASEM report¹ to ensure that nursing homes have a well-prepared, empowered, and appropriately compensated workforce. President Biden's Executive Order on Increasing Access to Higher Quality Care and Supporting Caregivers requires facilities to develop a staffing plan to maximize recruitment and retention of staff.⁹ To achieve this goal, the CMS

⁷ Horn, S. D., Buerhaus, P. I., Bergstrom, N., & Smout, R. J. (2005). RN staffing time and outcomes of Long-Stay Nursing Home residents. *American Journal of Nursing*, 105(11), 58–70. <https://doi.org/10.1097/0000446-200511000-00028>

⁸ APRNs include certified nurse-midwives (CNMs), certified registered nurse anesthetists (CRNAs), clinical nurse specialists (CNSs) and nurse practitioners (NPs).

⁹ Executive Order on Increasing Access to High-Quality Care and Supporting Caregivers. The White House.

<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/18/executive-order-on-increasing-access-to-high-quality-care-and-supporting-caregivers/>

must recommend that nursing homes fully assess their impact on the quality of care through routine collection and reporting of data related to training, expertise, and staffing patterns. Moreover, more research on systemic barriers and opportunities to improve recruitment, training, and the advancement of all nursing home workers should be conducted to better understand the influence of racial and ethnic disparities among long-term care workers.¹ We encourage the CMS to promote diversity within the nursing home profession to improve health equity and provide high-quality care for residents. This will lead to nursing homes utilizing the facility assessment and prioritizing patient/resident characteristics and needs when developing staffing plans and requirements.

As CMS finalizes this proposed rule, the agency will need to ensure that guidelines for the facility assessment are more specific than what is currently proposed. Doing so will allow CMS that ability to better enforce what is the agency is proposing. For example, one specific guideline would be a requirement for the staffing plan to be approved by the DON and not the Administrator as part of the assessment. Additionally, case mix is an important determinant of both total direct care staffing levels and the skill mix of nursing staff. **We recommend that CMS provide clear guidance on the facility assessment and implement a rigorous audit of the actual implementation of case mix adjusted staffing for the staffing plan as part of the assessment.** Incorporating these specific guidelines will ensure CMS' goal of ensuring the staffing plan and assessment plan are based on need and not as a cost-cutting measure.

Implementation and Waivers

We appreciated CMS recognizing that implementing the three main components of the proposed rule related to the assessment of the nursing home, 24/7 on-site RN requirement, and a minimum staffing plan will take time for nursing homes to implement. For non-rural facilities, these components must be completed within 60 days for the assessment, two years for the 24/7 on-site assessment, and three years for the minimum staffing standard in the proposed rule. For rural facilities, CMS proposes 60 days, three years, and five years for the three phases. Due to the unique challenges nursing homes face, we appreciate the agency's rationale, especially as it relates to difficulties of both recruitment and retention of nursing staff in rural locations for a longer timeline to implement the three phases. **However, ensuring all residents have access to safe high-quality care is imperative and the Academy recommends that CMS expedite the phases for all nursing homes once CMS has rigorously tested specific minimum and optimum staffing standards for nursing home direct-care staff.**

CMS has an essential, ongoing responsibility to oversee nursing homes and shares with State agencies the responsibility for ensuring that nursing homes meet requirements for quality and safety.¹⁰ The agency proposes to grant exemptions or waivers to facilities that meet several criteria outlined in the proposed rule. These waivers would be granted for a one-year period and could be extended for annual exemptions after the initial waiver. The Academy appreciates CMS proposing stringent criteria to qualify for the waiver, however we urge the agency to be extremely cautious when granting exemptions to nursing homes. We are concerned that these waivers could be continuously extended without ensuring the facility is quickly striving for compliance with the standards. **We recommend CMS hold nursing homes accountable during these exemptions and take the necessary enforcement actions as outlined in 42 CFR §488.406 until they come into compliance.**

Transparency of Medicaid Nursing Home Information

The Academy applauds CMS for proposing greater transparency on salaries and benefits for nursing home employees. The Academy supports this broader approach to improving Medicaid transparency and recommend that CMS adopt the recommendations from the March 2023 Medicaid and CHIP

¹⁰ HHS-OIG. (2021, June 16). Nursing Homes | HHS-OIG. <https://oig.hhs.gov/reports-and-publications/featured-topics/nursing-homes/>

Payment and Access Commission (MACPAC) Report to Congress, which calls for making payment and expenditure information publicly available in a standardized format annually. Specifically, MACPAC calls for CMS to “collect and report facility-level data on all types of Medicaid payments to nursing facilities, including resident contributions to their cost of care; data on the sources of non-federal share of spending necessary to determine net Medicaid payment at the facility level; and comprehensive data on nursing facility finances and ownership necessary to compare Medicaid payments to the costs of care for Medicaid-covered residents and to examine the effects of real estate ownership models and related-party transactions.”¹¹ **We support CMS’ proposal to specify requirements for States to report on compensation for direct care workers and support staff as a percentage of Medicaid payments nursing facility services. We also support the proposed definition of direct care workers to include all licensed nurses as well as ensuring this data is reported in a consistent manner across all fifty states. While we agree with CMS’ rationale that it will take time to implement this proposal, we urge the agency to shorten the proposed timeline of four years for implementation. Additionally, connecting this data to quality outcomes and health disparities could identify efficient and economically operated nursing home facilities with adequate staff to meet residents’ care needs.**

The Academy thanks CMS for the opportunity to provide comments on the proposed rule on the Medicare and Medicaid Programs, Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting. If we can be of any assistance or provide more information to you or your staff, please do not hesitate to contact the Academy’s Chief Policy Officer, Christine Murphy, at cmurphy@aannet.org or 202-777-1174.

Sincerely,



Linda D. Scott, PhD, RN, NEA-BC, FNAP, FAAN
President
American Academy of Nursing

¹¹ Medicaid and CHIP Payment and Access Commission. (2023, March). *Report to Congress on Medicaid and CHIP*. https://www.macpac.gov/wp-content/uploads/2023/03/MACPAC_March-2023-Report-WEB-Full-Booklet_508.pdf