

November 6, 2023

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-3442-P
Mail Stop C4-26-05
7500 Security Boulevard,
Baltimore, MD 21244-1850

SUBMITTED ELECTRONICALLY VIA <http://www.regulations.gov>

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

Dear Administrator Brooks-LaSure:

The American Geriatrics Society (AGS) appreciates the opportunity to submit comments on the Minimum Staffing Standards for Long-Term Care Facilities (LTC facilities) and Medicaid Institutional Payment Transparency Reporting proposed rule.¹ The AGS is a not-for-profit organization comprised of nearly 6,000 physician and non-physician practitioners who are devoted to improving the health, independence and quality of life of all older adults. The AGS provides leadership to healthcare professionals, policy makers, and the public by implementing and advocating for programs in patient care, research, professional and public education, and public policy. The AGS' vision is a nation where we can all have a fair and equitable opportunity to contribute to our communities and maintain our health, safety, and independence as we age. That vision includes ensuring that when we have chronic conditions and disabilities that require an institutional level of care, we have access to high-quality, safe environments where our values, cultures, preferences, and goals of care are honored and can be achieved.

The AGS appreciates that the Centers for Medicare & Medicaid Services (CMS) has proposed to set minimum staffing standards to ensure safe, high quality care in LTC facilities. We agree with CMS that beneficiaries should receive safe, reliable, and quality nursing home care and believe the proposed standards are an important, incremental first step. As CMS is aware, geriatrics professionals play a critical role under Medicare, particularly given the ever increasing demands of caring for older people living with multiple comorbidities. Unfortunately, geriatrics professionals are already in very short supply. The AGS appreciates CMS' continued engagement with those of us dedicated to the care of older adults, and the opportunity to provide input about the potential consequences of the proposed policies around staffing in LTC facilities. We offer comments and recommendations below on the proposals.

¹ 88 Fed. Reg. 61352 (Sept. 6, 2023).

I. The Proposed Minimum Nursing Staffing Standards Should Aim Higher

CMS proposes minimum staffing standards of 0.55 hours per resident day (HPRD) of registered nurses (RNs) and 2.45 HPRD of nursing assistants (NAs) for LTC facilities. The AGS is pleased that CMS proposes to establish a minimum floor for nurse staff personnel and agrees with the agency's assessment that available literature and evidence emphasizes the relationship between nursing home staffing and quality outcomes. We note that 38 states and the District of Columbia already have minimum staffing requirements. We applaud CMS' willingness to propose minimum staffing requirements at the national level and believe that the proposal should be considered an acceptable start in efforts to improve nursing home care.

The AGS believes, however, that higher standards *should be the eventual aim*. The June 2023 Nursing Home Staffing Study Comprehensive Report (the Report),² which CMS commissioned Abt Associates to conduct, offers several levels of possible HPRD standards that are higher and more impactful. While the proposal of 2.45 HPRDs for NAs mirrors the highest option in the Report,³ CMS' proposal of 0.55 HPRDs for RNs is scaled back, falling between the medium and higher options in the Report.⁴ We recommend that CMS finalize a higher minimum HPRD threshold for RNs given the important role they serve and the available evidence that shows quality and safety increase with RN staffing levels. While the agency may be attempting to strike a balance between establishing appropriate and reasonable standards and addressing challenges related to the cost of additional staffing and workforce shortages, the AGS believes a higher minimum staffing requirement is necessary to ensure quality and safety. It also would better keep pace with states that have established minimum staffing requirements, several of which already exceed the proposed standards. Further, higher staffing standards would enhance the quality of the positions that are available to NAs and RNs by lessening the existing burdens on the existing workforce.

We also note (and comment on below) CMS' proposal to afford a lengthy implementation period for LTC facilities to meet these requirements, making it likely that some facilities will not reach the minimum standards for several years. We press CMS to finalize shorter deadlines for compliance given that the proposed standards are relatively low and reflect a minimum safe level. We encourage CMS to consider in the future, ways to incentivize nursing homes to meet these standards on an accelerated timeline. Additional support and resources from CMS should be coupled with accountability for how that support is used.

We also recommend that CMS consider the roles of other licensed nursing personnel in LTC facilities care, in particular, licensed practical nurses (LPNs) and licensed vocational nurses (LVNs). Although CMS proposes that LTC facilities maintain sufficient additional nursing personnel (and other clinical and non-clinical staff), the agency does not explicitly propose a minimum staffing requirement for LPNs/LVNs or a total minimum nursing staff requirement. We believe this is shortsighted and undermines the goals of improved safety and quality in the LTC setting. Leaving staffing levels of these types of nurses to LTC facility discretion without any threshold requirement may inadvertently undermine the role they can

² <https://www.cms.gov/files/document/nursing-home-staffing-study-final-report-appendix-june-2023.pdf>.

³ *Id.* Exhibit ES.4.

⁴ *Id.* Exhibits ES.3 and ES.4

and should play. To address this concern, the AGS recommends that CMS consider specifying minimum standards for LPNs, or recommending a target goal for such staff, to complement the minimum staffing standards for RNs and NAs proposed in the rule.

CMS further proposes that LTC facilities meet these standards regardless of the individual facility's patient case-mix and that facilities would be required to staff above these minimum adjusted baseline levels, as appropriate, to address the specific needs of their unique resident population. We appreciate this additional directive and emphasis that the floor is not expected to be adequate in most cases.

Finally, we recommend that CMS look at high quality nursing homes and share what they are doing. Such findings about staffing from successful care communities would be instructive to all types of LTC facilities. The AGS encourages CMS to foster this type of information sharing and learning to improve quality and safety.

II. The Proposed Hardship Exemption Should Not Undermine the Minimum Staffing Standards

CMS proposes a hardship exemption (up to 1 year and renewable each year) from its proposed minimum staffing requirements (either the 0.55 RN or the 2.45 NA HPRD, or both). The AGS appreciates CMS' recognition that workforce labor shortages in rural and underserved areas and the lingering impact of the COVID-19 pandemic may impact LTC facilities' ability to hire and retain nursing staff. Nevertheless, we urge CMS to ensure that such exemptions do not defeat the minimum staffing floors. As CMS notes in the proposed rule, the proposed hardship exemption would be separate and apart from existing statutory waiver provisions for RN and licensed nursing staff at LTC facilities, and thus, facilities would have multiple ways to seek an exception to the requirements. The agency should grant such exemptions sparingly and for true hardship scenarios so that the adoption of a minimum nurse staffing floor is not undermined.

With regard to the criteria for eligibility for a hardship exemption, we recommend that CMS consider further strengthening them in the final rule. For example, the AGS believes CMS should further expand on how a LTC facility must demonstrate a good faith effort to hire and retain staff and demonstrate financial commitment to continuing to do so. Finally, while the AGS is disappointed CMS proposes such an exemption for the minimum nurse staffing requirements, we applaud CMS' decision not to propose one for the RN onsite requirement.

III. CMS Should Adopt the Proposed Registered Nurse Onsite Requirement

CMS proposes to require LTC facilities to have an RN onsite 24 hours a day, 7 days a week, rationalizing that this will reduce the risk of preventable safety events that may occur even with the proposed minimum HPRD standards and address concerns about the potential absence of RNs that can currently occur during evenings, nights, weekends and holidays.

The AGS agrees and recommends that CMS finalize this proposal. We respectfully request, however, that CMS consider the potential impact of existing statutory waiver provisions on this requirement, so it is not undermined. We appreciate that CMS has not proposed a hardship exemption for the RN onsite requirement, recognizing its importance, but such concerns also exist for waivers.

IV. CMS Should Further Clarify the Proposed Facility Assessment Requirements

CMS makes a number of proposals regarding the facility assessment requirements to work in conjunction with the proposed minimum staffing requirements. While the AGS supports the agency's attempts to dis-incentivize facilities from lowering staffing levels to the required minimum levels rather than continuing staffing that meets the unique care needs of the resident, we fail to appreciate how these particular proposals substantively change what is otherwise required for facility assessments. The AGS suggests that in the final rule CMS further explain the significance of these technical changes and clarifications that it proposes to make to the regulation, to ensure the proposed standards are adequately implemented and understood. We also recommend that CMS provide more granular detail or examples of what facilities would be required to do or address as part of the facility assessment requirements (*e.g.*, how facilities must "include input of facility staff," maximize recruitment and retention).

V. The Proposed Implementation Deadlines Are Too Long

CMS proposes to stagger the implementation dates to allow LTC facilities time to comply with the various requirements specified in the proposed rule. This would be over a 3-year period for LTC facilities located in urban areas and a 5-year period for those in rural areas. Specifically, CMS proposes 2 and 3 years, respectively, for urban and rural LTC facilities for the 24/7 onsite RN requirement and 3 and 5 years, respectively, for LTC facilities in urban and rural areas for the minimum staffing requirement. Other requirements, such as compliance with the facility assessment standards, would take effect 60 days after the final rule is published.

The AGS agrees with CMS that 60-days following the publication of the final rule is an appropriate deadline for urban and rural LTC facilities to implement the facility assessment requirements. We have concerns, however, about the multi-year timeline for the staffing standards.

The AGS is sensitive to the challenges LTC facilities face, particularly rural LTC facilities, but the staggered implementation deadlines are excessive. As we noted above, we believe the minimum standard HPRD proposals should be higher in order to protect individuals currently residing and receiving care in LTC facilities, and we urge CMS not to delay compliance. Even if CMS intends to ease into raising such standards given recruitment challenges and other concerns, we fail to see why the proposed low bar cannot be adopted more rapidly – particularly, when it is designed to ensure quality and safety of older adults who need institutional care. Moreover, the proposal for a yearly hardship exemption from the proposed minimum staffing requirement makes an extended implementation period unnecessary. The agency is not offering a hardship exemption for the RN 24 hours/7 days a week onsite requirement given the concerns around safety and that same reasoning supports more immediate compliance. Accordingly, the AGS urges CMS to consider moving up the implementation deadlines for LTC facilities in urban and rural areas to meet the minimum nurse staffing standards and onsite RN requirement.

VI. Staffing is Only One Element Among Many Needed to Improve Nursing Home Quality of Care

The way the United States finances, delivers, and regulates care in nursing home settings is ineffective, inefficient, inequitable, fragmented, and unsustainable. The failings of the US healthcare system regarding nursing homes are reflected in poor resident outcomes, substantial government spending,

pervasive inequities, and an underpaid and demoralized workforce.⁵ The AGS appreciates CMS' recognition in the proposed rule of the National Academies of Sciences, Engineering, and Medicine's (NASEM) recent report, "The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff."⁶ Given that the report's recommendations were made based on the work of a 17-member committee of experts representing diverse policy, practice, and research perspectives to make "bold but actionable" recommendations to address the long-standing challenges for LTC facilities laid bare by the COVID-19 pandemic, we urge CMS to go further and consider other mechanisms for implementing, advancing, and supporting the recommendations. We also press CMS to find creative ways to work to help impact policy to increase our ability to train individuals to work in the LTC environment (e.g., apprenticeship programs, support for education) to reach our collective goals to improve and provide safe, quality of care.

The AGS appreciates the opportunity to provide the above comments and recommendations. We would be pleased to answer any questions you may have. Please contact Alanna Goldstein, agoldstein@americangeriatrics.org.

Sincerely,



Donna M. Fick, PhD, GCNS-BC, AGSF, FGSA, FAAN
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⁵ J.L. Travers, et al., 2022 NASEM Quality of Nursing Home Report: Moving Recommendations to Action, Journal of the American Geriatrics Society (February 2022).

⁶ 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.