



1350 I STREET NW
SUITE 700
WASHINGTON, DC 20005
202-588-5180
NWLC.ORG

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Submitted via www.regulations.gov

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Comments on CMS-3442-P [RIN 0938-AV25], Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting

Dear Administrator Brooks-LaSure:

The National Women's Law Center (NWLC) submits these comments in response to select provisions of the Notice of Proposed Rulemaking (NPRM) issued by the Centers for Medicare & Medicaid Services (CMS), CMS 3442-P, wherein CMS proposes setting a minimum staffing level and requirements for long-term care facilities that receive Medicare and Medicaid funding. We support CMS' intent to create a staffing standard that will help support direct care workers in their efforts to provide the quality care that residents deserve. We also support CMS's intent to increase transparency within long-term care facilities to determine how much of its Medicaid funding is actually spent on residents' needs and direct care workers' compensation.

This proposed rule will begin to hold long-term care facilities, such as nursing homes, accountable for dangerous industry practices including the use of insufficient staffing that puts residents in harm's way. Further, establishing a minimum staffing standard will help advance the quality of direct care jobs in long-term care facilities by ensuring that nursing assistants—who are disproportionately low-paid women of color—have a more manageable and reasonable workload so that they are empowered to do their important jobs sustainably and well.

Since 1972, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC advocates for the improvement and enforcement of our nation's employment and civil rights laws, with a particular focus on the needs of LGBTQI+ people, women of color, and women with low incomes and their families. NWLC also advocates for improvements in our nation's care infrastructure, so families are better supported in caring for their children and their older and disabled family members, and so older adults and disabled people have the agency to determine what kind of care best meets their preferences and needs.

The direct care workforce is made up nearly entirely of women, many of whom are women of color with families to support—and many of whom cannot make ends meet due to the poor quality of their jobs. Establishing industry staffing standards for long-term care facilities is a modest but essential step to ensure that workers, especially low-income women of color, are no

longer subject to some of the exploitative working conditions that put residents at risk and drive people out of the direct care workforce. This proposed rule comes at a critical time when the demand for this work is high, yet wages remain low.

Greater investment as well as structural changes in the Medicare and Medicaid system are needed to ensure that direct care jobs—both in long-term care facilities and in home- and community-based settings—are high-quality, sustainable jobs, and that high-quality care is accessible to all people who need it. We recognize, however, that CMS does not have the ability to make those fundamental changes to our health care system, and we appreciate the Administration’s efforts to work within existing constraints to support nursing assistants, along with residents, in long-term care facilities. In proposing CMS 3442-P, CMS correctly recognizes that the job quality of nursing assistants in long-term care facilities is strongly linked to the quality of care that residents receive—and that strengthening staffing requirements has the potential to improve both job quality and quality of care. In the comments that follow, we detail our support for CMS’s proposal and recommend strengthening certain provisions to ensure the staffing rule can best fulfill that potential.

I. The proposed rule correctly recognizes that better working conditions for nursing assistants will improve the quality and availability of care at long-term care facilities—but a stronger staffing standard is necessary to achieve its stated objectives.

As the population ages and life expectancy for people with disabilities and chronic illnesses increases, there is a growing demand for direct care workers to support older and disabled people in their daily living and meet their medical needs.¹ However, the high demand for and importance of this workforce are not reflected in the compensation direct care workers receive or the quality of life direct care workers experience.

The direct care workforce—including home care workers, residential care aides, and nursing assistants in nursing homes—is mostly comprised of women, many of whom live in or near poverty and rely on public assistance to make ends meet.² Women make up 90 percent of nursing assistants and earn an average wage of \$17.06 per hour.³ As a result, 39 percent of nursing assistants live in low-income households and 40 percent rely on some form of public assistance.⁴ Thirty-six percent of nursing assistants live with children under 18 years old.⁵

The direct care industry relies heavily on people whose labor has been undervalued for generations. Black and Latina women—often also immigrants⁶—are disproportionately represented in the direct care workforce.⁷ Low pay, minimal benefits, and lack of upward mobility in the direct care industry propels women of color—who already face economic barriers

¹ See PHI Nat’l, *Caring for the Future: The Power and Potential of America’s Direct Care Workforce*, 1,6 (2021), <https://www.phinational.org/caringforthefuture/>.

² PHI Nat’l, *Direct Care Workers in the United States: Key Facts*, 1, 2 (2023), <https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-2023/#:~:text=Key%20Takeaways&text=Between%202021%20and%202031%2C%20the,care%20workers%20were%20only%20%2423%2C688.>

³ *Id.* at 20, 24.

⁴ *Id.* at 25.

⁵ *Direct Care Workers in the United States*, *supra* note 2 at 21.

⁶ *Id.* at 21. Twenty-two percent of nursing assistants are migrants (compared to 16 percent of the total US labor force).

⁷ *Caring for the Future*, *supra* note 1 at 14. Nearly 60 percent of the direct care workforce are people of color, Black people making up 33 percent and Hispanic/Latino people making up 18 percent.

due to systemic prejudice—into economic instability, compromising direct care workers’ ability to take care of themselves and their families.

CMS has correctly recognized that the low pay, limited opportunities for advancement, and a lack of training and support drive direct care workers out of the industry and create a cycle of instability. This is particularly true for nursing assistants in long-term care facilities: The most recent study found median annual turnover for nursing assistants in nursing homes in 2017-18 was 100 percent.⁸ Ultimately, this failure to recruit and retain nursing assistants exposes older adults and disabled people to substandard care in long-term care facilities. Staff who are spread too thin are unable to dedicate sufficient time to caring for each resident; new hires are typically less experienced and not as familiar with the needs of particular residents; and turnover begets more turnover due to the heavy workload placed on existing staff, from certified nurse aides (CNAs) to registered nurses (RNs).

- A. *CMS should strengthen the proposed rule by establishing a higher staffing standard that is more consistent with better health outcomes for residents and working conditions for direct care workers.*

In addition to low wages, nursing assistants in long-term care facilities face heavy workloads and long hours. Nursing assistants are often doing physically demanding care tasks—such as transferring people out of bath chairs and mobility aids.⁹ Back injuries, strained muscles, and wounds are commonly reported injuries nursing assistants face. Nursing assistants are nearly eight times more likely to experience workplace injuries than the average worker.¹⁰

The onset of the COVID-19 pandemic shed light on the problematic working conditions in nursing homes and the devastating consequences they can lead to. Workplace injuries for nursing assistants spiked; more than half of those workplace injuries included contracting COVID-19. By September 2020, half of COVID-19-related deaths were made up of the residents and staff at long-term care facilities.¹¹ But as CMS recognizes, studies indicate that long-term care facilities with better staffing levels for nursing fared better during the pandemic and had fewer people die from COVID-19.

In fact, CMS has recognized the link between adequate minimum staffing levels and better health outcomes for residents since at least 2001, as established by a study conducted for CMS by Abt Associates.¹² And in 2022, a blue-ribbon panel convened by the National Academy of Science, Engineering, and Medicine (NASEM) affirmed that increasing overall nurse staffing has been a consistent and longstanding recommendation for improving the quality of care in nursing homes.¹³ Adequate staffing levels are achievable: Average staffing for nongovernmental, nonprofit facilities already meets or exceeds the 4.1 hours per resident day standard identified in the 2001 CMS study by Abt Associates.¹⁴ While for-profit facilities do not yet typically meet this

⁸ Ashvin Gandhi et al, *High Nursing Staff Turnover in Nursing Homes Offers Important Quality Information*, 40 Health Aff. (Project Hope), 384 (2021).

⁹ *Caring for the Future*, supra note 1 at 54.

¹⁰ *Direct Care Workers in the United States*, supra note 2 at 26.

¹¹ Priya Chidambaram, *Key questions about the impact of coronavirus on long-term care facilities overtime* (September 1, 2020), <https://kff.org/report-section/key-questions-about-the-impact-of-coronavirus-on-long-term-care-facilities-over-time-issue-brief/> (last visited Oct 1, 2023).

¹² Centers for Medicare & Medicaid Services, Abt Associates Inc., *Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes* (2001).

¹³ Nat’l Academies of Sciences, Engineering, and Medicine, *The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff* (2022).

¹⁴ *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes*, supra note 12.

standard, this failure is not due to any difference in reimbursement but because of how for-profit facilities choose to allocate their revenue. The Administration should not forego policies that would improve the quality of care simply because one industry segment—for-profit facilities—refuses to address a workforce problem of its own creation.

Instead, CMS should strengthen its proposed nursing home staffing standards for certified nursing assistants—certified nurse aides (CNAs), licensed practical nurses (LPNs), and registered nurses (RNs) who provide direct care to residents. The proposed staffing standard sets a floor for care, not a ceiling; it cannot and does not change nursing homes' obligation under the 1987 Nursing Home Reform Act to provide "nursing services and specialized rehabilitative services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident,"¹⁵ so facilities where more residents have a higher acuity would still be required to staff at a level appropriate to meet the needs of those residents. Nevertheless, setting a higher standard as the floor would increase the likelihood that facilities reach the goal laid out in the original 2001 Abt study: to meet the requirements of the NHRA by identifying "staffing thresholds below which quality of care was compromised and above which there was no further benefit of additional staffing concerning quality."¹⁶

As the pandemic made painfully clear, inadequate staffing is a working condition that harms both residents and workers. A staffing minimum helps establish a more manageable workload for nursing assistants, enabling them to better perform their jobs, while incentivizing employers to establish pay, benefits, and other conditions of employment necessary to attract and retain the requisite number of staff.

We appreciate CMS's recognition that nursing assistants in long-term care facilities will benefit from a minimum staffing standard that enables them to better care for residents without subjecting themselves to increased risk of injury or strain—but the standard in the NPRM will not achieve those goals. For direct care, CMS proposes a minimum staffing standard of a total of 3 hours per resident day (0.55 HPRD for registered nurses and 2.45 HPRD for certified nursing assistants); however, this standard is substantially less than the long-recommended minimum standard of 4.1 HPRD of total direct care. The needs of residents and direct care workers should be central in determining a helpful minimum standard, not speculative cost concerns of long-term care facilities.

Given that people's care needs have intensified over time due to an aging population, we believe the standard in the final rule should in fact exceed 4.1 HPRD. We urge CMS to strengthen the staffing standard in the final rule to at least that—by requiring that the care provided by a CNA be at least 2.8 HPRD per day, and the care provided by a licensed nurse be no less than 1.4 HPRD, including at least 0.75 HPRD provided by an RN.

- B. *The proposed rule appropriately requires a registered nurse to be present at the facility 24/7, but CMS should clarify that only RNs providing direct care would meet this requirement.*

We commend CMS for recognizing that having an RN available 24/7 will help ensure that nursing assistants are supported in meeting the needs of residents, especially given that residents in nursing homes can face complex medical issues.

¹⁵ 42 U.S.C.A. § 1396r.

¹⁶ *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes*, supra note 12.

However, we recommend that the final rule clarify that the mere presence of an RN is not sufficient. RNs performing administrative duties at the facility should not be able to meet this requirement. When direct care is provided by RNs, nursing assistants are better supported, and resident health outcomes are improved.¹⁷

II. CMS should constrain waiver eligibility to ensure that the final rule effectively improves care for residents, better working conditions for nursing assistants, and incentivizes long-term care facilities to make meaningful efforts to recruit and retain direct care workers.

Establishing a staffing minimum has great potential to help workers more effectively care for residents, but expansive waivers can erode that potential. If long-term care facilities are unable to meet staffing requirements that ensure basic quality care for residents, they should not take on new residents until they can demonstrate improvement. Otherwise, facilities will continue to overwork staff and expose residents to harm.

Waivers, to the extent that they exist at all, should be extremely limited. In the final rule, CMS should require facilities applying for a waiver to demonstrate efforts and progress they have made to comply with the rule, including efforts to retain and recruit direct care workers. In addition to a competitive wage, implementation steps could include enhancing benefits, expanding training programs, conducting worker surveys to inform workplace improvements, improving scheduling policies, participating in job fairs and partnerships with schools, or any other activities outlined in their plans. Requiring execution of workforce strategies in addition to recruitment documentation sets a higher bar for facilities to demonstrate they have made every effort to hire and retain staff.

CMS should also ensure that long-term facilities granted a waiver are monitored for the well-being of residents and staff. For example, waiver grantees could be subject to more frequent surveys. Waiver grantees should also be required to publicly display that the facility is exempt from the most current staffing standards so that potential residents and their families can make informed decisions.

III. The proposed rule intends to increase transparency in how Medicaid funds are used by long-term care facilities, but amendments are needed to ensure that the final rule fulfills that intent.

The proposed rule seeks to increase transparency in how Medicaid funds are used by long-term care facilities by allowing people to see what share of Medicaid dollars actually go to direct care—from direct care worker salaries to medical care costs for residents. We commend CMS for recognizing the importance of transparency in the Medicaid reimbursement process. The incongruity between the large cost residents and their families often pay and the low wages direct care workers receive can create confusion and mistrust around how facilities are spending their revenue; in contrast, clarity on industry practices can inform policymakers and consumers while empowering workers and residents to demand better conditions.

The transparency provisions will be more effective, however, if they are more specific. For example, in the final rule, CMS should require facilities to specify how much of their total

¹⁷ Charlene Harrington et al., *Appropriate nurse staffing levels for US nursing homes*, 13 Health Services Insights (2020).

revenue goes to resident care, including requirements to report how much revenue is spent on compensation for direct care workers and support staff, as well as median hourly wages for each category of employees. Data should be disaggregated by job title since wages for different types of direct care workers and support staff are wide-ranging; just posting broad categorical percentages or median hourly wages for a range of job classifications does not provide transparency as to how each type of worker is actually compensated. We also recommend that CMS encourage states to explore ways to track and report racial and gender pay and advancement disparities in nursing facility workforces.

This additional data is critically needed to examine the adequacy of wages in these facilities and their competitiveness relative to competing industries and occupations; identify variation in wage levels between staff groups; assess whether supplemental payments are being appropriately allocated to worker compensation; and study variation across states and over time. Ultimately, greater transparency can support workers and advocates in their efforts to improve both work conditions and quality of care in this sector and can help policymakers and facilities themselves address inequities and improve Medicaid reimbursement policies.

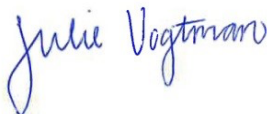
IV. Conclusion

The Administration's prioritization of nursing homes and long-term care facilities represents a commitment to older adults and disabled people by ensuring that they receive quality care. By recognizing the link between the quality of care and the quality of direct care jobs, the Administration also can prioritize the working-class women of color who are the backbone of the direct care workforce. Throughout their lives, people will be both caregivers and recipients of care themselves; all of us should be able to count on being treated with dignity, whether we are caregiving or in need of care.

CMS's efforts to improve standards at long-term care facilities represent an important step to help workers who have been set up for failure and ensure that residents are given the good care to which they are entitled. We urge CMS to accept our recommendations and make sure that the potential of these important efforts is realized for every worker and every resident.

Thank you for your consideration. Please do not hesitate to contact Veronica Faison (vfaison@nwlc.org) if you have any questions or would like further information regarding the issues raised in these comments.

Sincerely,



Julie Vogtman
Director of Job Quality & Senior Counsel



Veronica Faison
Counsel, Income Security and Child Care