



The National

**CONSUMER VOICE**

for Quality Long-Term Care

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# Unpacking CMS' Proposed Minimum Staffing Standard

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September 13, 2023

# About the Consumer Voice

*The leading national voice representing consumers in issues related to long-term care*

- ▶ **Advocate for public policies** that support quality of care and quality of life responsive to consumers' needs in all long-term care settings.
- ▶ **Empower and educate** consumers and families with the knowledge and tools they need to advocate for themselves.
- ▶ **Train and support** individuals and groups that empower and advocate for consumers of long-term care.
- ▶ **Promote the critical role** of direct-care workers and best practices in quality care delivery.

# Welcome

- ▶ The program is being **recorded**
- ▶ Use the **Q&A feature** for questions for the speakers
- ▶ Use the **chat feature** to submit comments or respond to questions from speakers or other attendees
- ▶ Please complete the **evaluation** questionnaire when the webinar is over.
- ▶ Links to **resources** will be posted in the chat box and will be posted to the Consumer Voice website – [theconsumervoice.org](https://theconsumervoice.org)

# Speakers



**Lori Smetanka**

Executive Director  
National Consumer Voice for Quality  
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**Sam Brooks**

Director, Public Policy  
National Consumer Voice for Quality  
Long-Term Care



**Charlene Harrington**

Professor Emerita  
Department of Social & Behavioral  
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# Agenda

- 1) How we got here.
- 2) What is in the Notice of Proposed Rulemaking (NPRM)?
- 3) 2022 Staffing Study Conducted by Abt and Associates
- 4) Next Steps
- 5) Questions

# How We Got Here

- ▶ Decades of inadequate staffing in nursing homes
- ▶ Culminated in over 200,000 deaths of residents and workers during COVID-19 pandemic
- ▶ Homes with better staffing did better during the pandemic
- ▶ Brought attention to the poor care and conditions in many nursing homes
- ▶ Increased interest from the press, Congress, and the public.

# President Biden's Historic Announcement

- ▶ On February 28, 2022, President Biden issued a list of historic nursing home reforms focusing on staffing, transparency and accountability
- ▶ Central to the reforms was the creation of a minimum staffing standard in nursing homes
- ▶ For the first time, nursing home residents would be entitled to, at a minimum, a certain amount of care each day
- ▶ Residents, families, and advocates rejoiced

# 4.1 HPRD Long Seen as Minimum

- ▶ In 2001, CMS issued a staffing study report that was the product of years of research.
- ▶ Study found that to avoid compromised care residents needed, at least, 4.1 hours of direct care per day (hprd)
  - ▶ .75 hprd Registered Nurse (RN)
  - ▶ 0.55 hprd Licensed Practical Nurse (LPN)
  - ▶ 2.8 hprd Certified Nursing Assistant (CAN)
- ▶ This number is a minimum. Residents with more needs would require more care.
- ▶ Since 2001, the 4.1 hprd has been “gold standard” for minimum staffing.



# ▶ 4.1 is Over Twenty Years Old

- ▶ Residents have higher care needs now.
  - ▶ More individuals staying at home longer and receiving Home and Community Based Services (HCBS)
  - ▶ More residents with mental health issues
  - ▶ More residents with cognitive impairments requiring more care

# CMS Regulatory Process

- ▶ Issued a Request for Information in April 2022.
  - ▶ Consumer Voice along with hundreds of others commentors expressed overwhelming support for minimum standard
- ▶ Staffing Study
  - ▶ Literature Review
  - ▶ Qualitative
  - ▶ Quantitative

# ▶ What has CMS proposed?

- ▶ .55 hours of RN care per day (hprd)
- ▶ 2.45 hprd of CNA care
- ▶ No minimum for LPN
- ▶ Total minimum standard of 3.0 hprd
- ▶ Must still staff to residents' needs (acuity levels)
- ▶ Registered nurse required 24/7

# ▶ 24/7 Registered Nurse on Site

- ▶ Nursing facilities must have a registered nurse (RN) “on site” 24 hours per day, 7 days a week. (42 C.F.R. § 483.35(b)(1))
  - ▶ “Available to provide direct resident care”
- ▶ Current regulations only require an RN to be present eight hours per day.
- ▶ What does available mean?

# ▶ Waivers

- ▶ CMS will allow some facilities not to comply with minimum staffing standard. (42 C.F.R. § 483.35(g) et seq.)
- ▶ Waivers are one year long. No limit on number of waivers
- ▶ Four criteria for waivers and all must be met:
  - ▶ Location
  - ▶ Good faith efforts to hire
  - ▶ Demonstrated financial commitment
  - ▶ Certain exclusions from eligibility for waiver

# Location

- ▶ Supply of health staff not sufficient
  - ▶ Must show that provider-population ratio is 20% or 40% below national average.
    - ▶ Multi-step calculation using data from Bureaus of Labor and Statistics
- ▶ OR, the next closest long term care facility is 20 or more miles away.
- ▶ More on rurality later

# ▶ Good faith effort to hire

- ▶ Must have recruitment and retention plan in accordance with 42 C.F.R. § 483.71(b)(5)
- ▶ Diligent efforts to hire
  - ▶ Offering jobs at PREVAILING wages
  - ▶ Job listings in common recruitment forums, etc.

# Demonstrated Financial Commitment

- ▶ Vague requirement that a facility must document the financial resources it expends annually on nurse staffing relative to revenue



# Exclusions from Waivers

- ▶ Cannot be Special Focus Facility
  - ▶ Only 88 SFF in the country out of roughly 15,000 nursing homes
- ▶ Cannot have been cited in previous 12 months for :
  - ▶ Widespread insufficient staffing with actual resident harm; or
  - ▶ Pattern of insufficient staffing with actual harm; or
  - ▶ Immediate jeopardy related to staffing
- ▶ Failed to submit staffing data (Payroll Based Journal)

# ▶ Waivers Cont'd

- ▶ Consumer Voice opposes all waivers. All residents, regardless of geographical location, are entitled to safe and high-quality care
- ▶ Facilities still allowed to accept new residents, despite failure to be able to safely care for current residents
- ▶ No requirement that facility create better jobs or invest in staff
- ▶ Turnover not a factor

# ▶ Timeframes

## ▶ 24 /7 RN

- ▶ Urban: 2 years from date of final publication of rule
- ▶ Rural: 3 years from final publication of rule

## ▶ Minimum Staffing Standard

- ▶ Urban: 3 years from final publication of rule
- ▶ Rural: 5 years from final publication of rule

# Unacceptable Timeframes

- ▶ Could be seven years before this proposed rule goes into effect in rural areas
- ▶ Abt study found that staffing is almost identical in rural and urban facilities, yet CMS is still proceeding with prolonged rural phase in
- ▶ Only sizeable difference in staffing is LPN, the staffing category CMS is not including in its minimum staffing standard

	# of Facilities	RN	LPN	CNA	Total
Urban	10,973	.67	.91	2.21	3.80
Rural	4,174	.64	.80	2.23	3.66



# **Abt Nursing Home Staffing Study 2023**

**Charlene Harrington, Professor Emerita  
University of California San Francisco**

September 2023



# Abt NH Staffing Study Showed Positive Results of Higher Staffing

- NHs with higher staffing perform better on quality and safety measures with no ceiling on improvement.
- RN staffing has the strongest effect of quality and safety while LPN staffing did not have a consistent relationship.
- Nursing Aides (NA)s had a strong relationship with quality and safety only at 2.44 hprd to 2.93 hprd or higher.
- The results show a potential role for minimum staffing requirements



# Abt NH Study Analyses of Quality Outcomes Were Flawed

- ❑ Abt quantitative analysis used unreliable data
  - ❑ Quality: Quality Measure ratings from Care Compare included self-reported measures (e.g. pressure ulcers) known to be inflated by NHs to improve their scores
  - ❑ Safety: Health Inspection ratings from Care Compare
    - ❑ Survey dates were from Oct 2020-2022, when surveys were infrequent. 34% of NHs were not surveyed within the two previous years by Dec. 2021 and 16% not surveyed by Dec. 2022. Should have used 2019 data
- ❑ **All measures were based on how homes perform compared to each other, and not indicative of high-quality care.**



## Abt NH Study Examined Nurse Staffing

- Study used PBJ data from Q3 of 2021 through Q2 of 2022.
- Abt examined the full range of staffing levels across facilities for RNs, LPNs, NAs, and Total Nursing
- **Abt found that the higher the staffing the higher the quality and safety across all facilities**





# Abt NH Study Examined Only 4 Nurse Staffing Scenarios – excluded high staffing options

Exhibit 4.10 Scenarios  
(In Deciles)

Minimum Required Staffing Level (in HPRD)

	RNs	LPNs	Nurse Aides	Licensed (RN/LPN) Total Nursing	
Low/4th	0.45	0.7	2.15	1.15	3.30
Medium/5th	0.52	0.71	2.25	1.23	3.48
Higher/6th	0.60	0.72	2.35	1.32	3.67
Highest/7th	0.70	0.73	2.45	1.43	3.88
<b>Excluded</b>					
8th	0.82	1.04	2.44	1.84	4.24
9th	1.00	1.14	2.62	2.14	4.76
10th	1.28	1.3	2.93	2.58	5.51



# Abt Focused on Four Nurse Staffing Options for RNs, LPNs, NAs, and Total

- The four options were not based on clinical outcomes but based on cost considerations
- Four options were all below 4.1 total nursing hprd that the 2001 minimum staffing level found to prevent harm or jeopardy.
  - RN levels were all below the 2001 level of .75 RN hprd
  - NA levels were all below the 2001 level of 2.8 NA hprd
  - RN levels were below the .67 RN hprd national average
  - NA levels of 2.45 is slightly above the national average 2.22 NA hprd



# Abt NH Study Options for Setting Nurse Staffing Minimums

## Abt Options

1. Setting minimums for RNs, Licensed Nurses, and Total Nursing
2. Setting minimums for RNs, LPNs, NA, and Total Nursing
3. Setting minimums for RNs and NAs

## CMS regulations arbitrarily propose:

1. Setting minimums for RNs and NAs
2. Alternative for Setting Minimums for RNs, NAs, and Total Nursing at 3.48 hprd – **was not an Abt option**
3. **CMS should have selected Abt option 1 or option 2**



# CMS Proposed Regulations Fail to Set Licensed Nursing Minimum Staffing

- RN levels of .55 hprd are not sufficient to meet the care needs of residents.
- Because LPNs (licensed practical nurses) substitute for RNs, they are needed to provide medications and treatments.
- The Abt study and CMS regulations assume that NHs will retain their existing LPNs and will add RNs and NAs to meet the new requirement
  - Many NHs will convert LPNs to RNs and reduce their total LPN staffing to save money if there is no minimum licensed nurse requirement
  - Some NHs will convert LPNs to NAs to reduce costs if there is no minimum licensed nurse requirement
- CMS must set minimum standards for both licensed nurses and total nursing staff to prevent potential dangerous reductions in licensed nursing





# Abt Study Failed to Use its Own Simulation Model for Licensed Nurses



- Abt conducted a limited simulation model for licensed nurses (RNs and LPNs) to determine the effect of staffing levels on omitted care. The model only estimated 5 tasks out of dozens of tasks and did not estimate the interruptions of care caused by urgent problems and emergencies.
- **Abt's simulation estimated at least 1.4 to 1.7 licensed (RN and LPN) nursing hours were needed to reduce delayed & omitted tasks to less than 5 percent**
- **CMS ignored the simulation model findings in developing its regulations**

*A previous version of this PowerPoint incorrectly stated that the Abt study found that 1 hprd would result in 19% omitted care. 1 hprd would result in 19% delayed care, not omitted care.*



# Abt Study Noted Previous Simulation Models for Nursing Assistants

- Schnelle et al. conducted NH simulation research in 2001 and 2016 and found that **to keep omitted care below 10% daily, facilities needed:**
  - 2.8 CNA hours/resident/day with a low workload to
  - 3.6 NA hours per resident day for a high workload – based on resident acuity (care needs)
- Under the proposed CNA standard of 2.45 hprd, facilities would omit over 20% of care daily in each facility.

Schnelle, J.F., Schroyer, L.D., Saraf, A.A., and Simmons, S.F. (2016). Determining nurse aide staffing requirements to provide care based on resident workload: A discrete event simulation model. *J. American Medical Directors Association*. 17:970-977.



# Simulation Models Show A Need for Higher Total Nursing Minimums

- The Abt Simulation Model found a need for
  - 1.4 to 1.7 licensed nursing hours
- The Schnelle Simulation model found
  - 2.8 to 3.6 NA hrpd depending on acuity
- **Combining these simulation totals, the minimum total nursing hours were:**
  - **4.2 to 5.3 total nursing hprd**
  - **This is more consistent with expert recommendations for higher minimums than the CMS recommended regulations**
    - Harrington, Kovner, et al. Experts recommend minimum nurse staffing standards for nursing facilities in the U.S. *The Gerontologist*. 2000: 40 (1):5-16.
    - Harrington, et al Appropriate nurse staffing levels for US nursing homes. *Health Services Insights*. 2020: 13:1-14.
    - Kolanowski et al.. A Call to the CMS: Mandate adequate professional nurse staffing in nursing homes. *American J. Nursing*. 2021: 121 (3):23-25.





# Abt and CMS Cost Estimates

- Abt used Medicare cost report data using 2021 data
  - Estimated wages/benefits at \$44 for RNs, \$35 for LPNs, and \$21 for NAs
- Abt total costs for setting a standard for Total Nursing, Licensed Nursing and RN hours was \$1.5 to \$5.3 billion
- **Abt and CMS RN costs are over estimated because they assume NHs will maintain all the existing nursing staff and add staff.**
- **However, most NHs will substitute RNs for LPNs (only \$9 more per hr) rather than adding new RNs at \$44 per hour**
- **NHs do not need additional funding for staffing. NHs receive over \$100 billion from Medicare and Medicaid, but often divert money into profits and real estate rather than spending money on resident care**





# Medicaid Transparency Reporting

- ▶ States will be required to report annual Medicaid spending on direct care workers and support staff. (42 C.F.R. § 442.43, et. seq.)
- ▶ Very broad definitions of direct care workers and support staff.
  - ▶ Must be broken down by staff type
- ▶ Accessible to the public on state run website.
- ▶ Simple reporting requirement
- ▶ NPRM states it did not have enough information to implement a direct spending requirement, despite implementing one in the Medicaid HCBS setting.

# ▶ Facility Assessment

- ▶ Adds requirements to existing facility assessment regulations at 42 C.F.R. § 483.71
- ▶ Annual assessments that require facilities to assess resident needs
  - ▶ Staffing plans
  - ▶ Resource allocations
  - ▶ Emergency planning
- ▶ Would go into effect 1 year after publication of final rule

# Comment, Comment, Comment

- ▶ Comments are due on November 6, 2023
- ▶ Consumer Voice will be providing template comments and more materials empowering folks to comment.
- ▶ More webinars and events to come
- ▶ <https://www.federalregister.gov/documents/2023/09/06/2023-18781/medicare-and-medicaid-programs-minimum-staffing-standards-for-long-term-care-facilities-and-medicaid>



# Questions



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