



The National

**CONSUMER VOICE**

for Quality Long-Term Care

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# **A Guide to Submitting Comments on the Proposed Minimum Staffing Rule**

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October 19, 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



**Sam Brooks**

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



**Toby Edelman**

Senior Policy Attorney  
Center for Medicare Advocacy



**Charlene Harrington**

Professor Emerita  
Department of Social & Behavioral  
Sciences, University of California San  
Francisco

# Agenda

- 1) Overview and background
- 2) The staffing standard
- 3) Timeframes and Exemptions
- 4) Enforcement
- 5) Facility Assessments
- 6) Medicaid Transparency
- 7) How to comment

# ▶ Lots to Cover!

- ▶ Comments are due November 6, 2023
- ▶ Critically important that CMS hears from residents, families, advocates, and others about the importance of a strong staffing standard.
- ▶ Today's webinar designed to provide insight on specific and important issues in the proposed rule.
- ▶ CMS needs to hear your unique voice and experience. Just as important as detailed recommendations.



## **New 2023 CMS proposed minimum staffing levels are shockingly low**



- Proposal set at 3.0 total nursing hours per resident day (HPRD) instead of 4.1 nursing HPRD
  - with .55 RN hours instead of .75 RN HPRD
- Proposal below the level
  - recommended by experts and research
  - the current national average
- We recommend 4.2 total nursing HPRD, .75 RN HPRD, 1.4 licensed nursing HPRD (total can be made up of RNs and LPNs) and 2.8 CNA HPRD minimum.



# 2001 CMS Research Recommended Staffing but Did Not Require



- Minimum staffing hours per resident day (HPRD) for long stay residents to improve outcomes and avoid selected care problems

RN	0.75 HPRD
Licensed practical nurses	0.55
Nursing Assistants	2.80 (Simulation study)
Total nurse staffing	4.10

- Centers for Medicare & Medicaid Services, Abt Associates Inc. *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes. Report to Congress: Phase II Final*. Volumes I–III. Baltimore, MD: CMS, 2001.

# + 2004 Observation Study of Nursing Staffing and Quality of Care

- Observed 2 groups of NHs with higher and lower CNAs
- Higher staffed NHs had significantly lower resident care workloads (7.6 residents per 1 CNA) compared with low staffed NHs (9-10 residents per CNA)
- Higher staffed homes performed significantly better on 13 out of 16 process measures compared to lower staffed homes

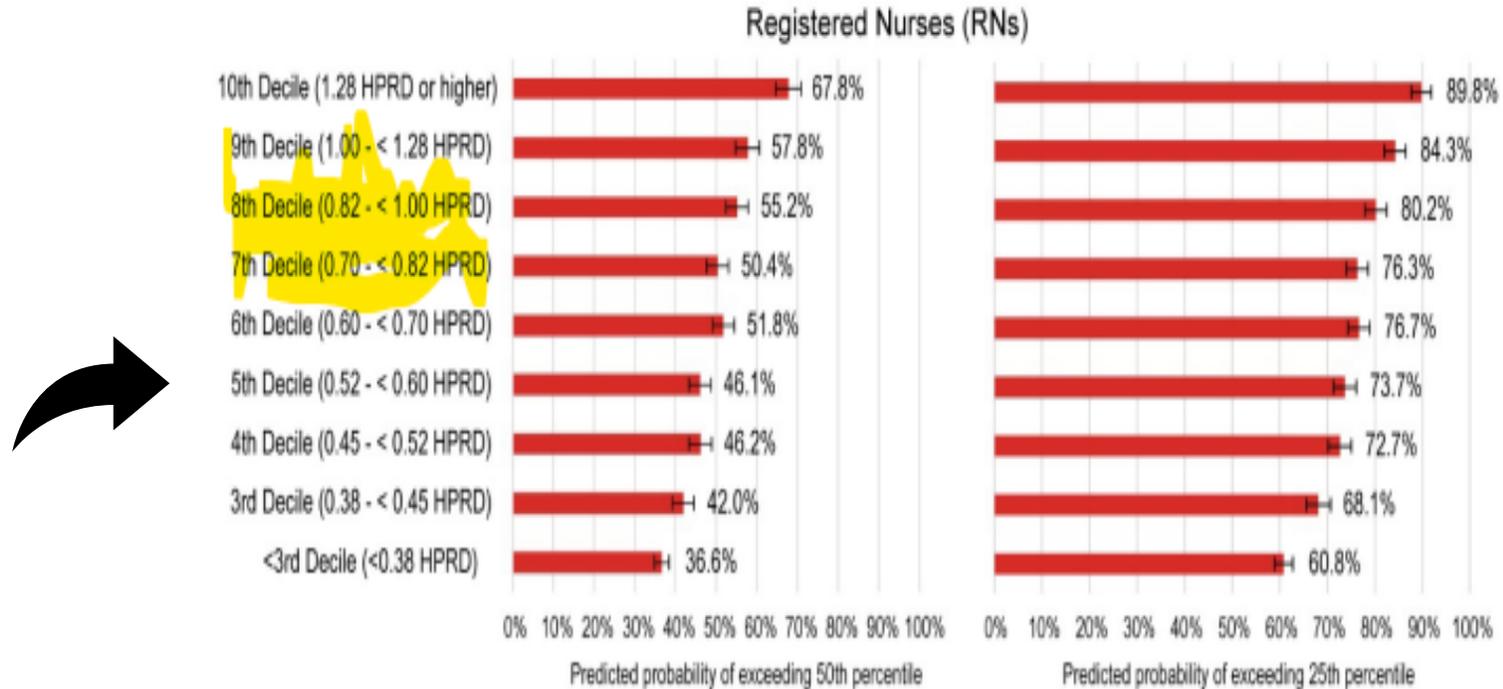
Schnelle, J.F., Simmons, S.F., Harrington, C et al. (2004). Relationship of nursing home staffing to quality of care. *Health Services Research*. 39 (2):225-250

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# NHs with .55 RN HPRD did not meet minimal Quality Standards. Abt Study supports .75 RN hrpd or higher



**Exhibit 4.7: Predicted Probability of Exceeding Minimum Acceptable Quality Standards for Total QM Score Across Case-Mix-Adjusted Nurse Staffing Deciles, by Staff Type**



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>



# Research Shows Higher RN Staffing Protected Residents from Infections & Deaths

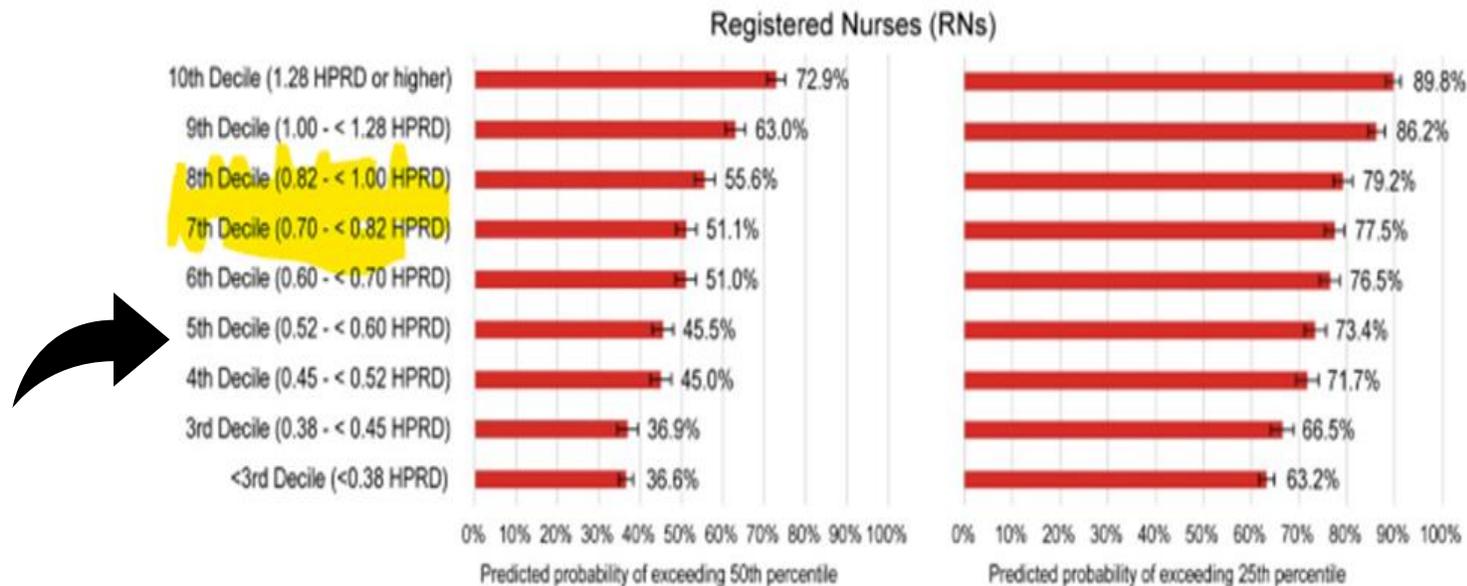


- CA LTCFs with less than .75 RN staffing HPRD were twice as likely to have COVID infections (Harrington et al 2020)
- CT LTCFs – every 20 minute increase in RN staffing reduced infections by 22% and deaths by 26% (Li et al., 2020)
- US LTCFs with 5 star ratings overall, for RN, and total staffing had lower cumulative Covid infections and deaths (Williams et al 2021)

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# NHs with .55 RN HPRD did not meet minimal Safety Standards. Abt Study supports .75 RN hrpd or higher

**Exhibit 4.9:** Predicted Probability of Exceeding Minimum Acceptable Standards for Weighted Health Inspection Survey Score Across Case-Mix-Adjusted Nurse Staffing Deciles, by Staff Type



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>



# 2023 Abt Staffing Study Simulation Model for Licensed Nurses



- Abt simulation model statistically estimated the time to complete 5 tasks and the number of times the tasks must be completed for a set of residents by the combination of RNs and LPNs
- Despite the simulation model being very limited, Abt found
  - 1.4 to 1.7 licensed (4 licensed nurses for 70 residents) nurse HPRD were needed to ensure delayed and omitted clinical care below 10 percent.
  - 1.0 licensed HPRD (3 licensed nurses for 70 residents )resulted in delayed or omitted care of 19 percent, which is unacceptable.
  - Total licensed nurses should be at least a minimum of 1.4 RN and LPN HPRD.
- CMS should have used these findings to set a minimum requirement of 1.4 licensed nurse HPRD

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>



# 2016 Simulation Study for Nursing Assistants



- Based on five ADLs and seven workload categories,
- NA staffing needed to reduce omissions in basic care to below 10%:
  - 2.8 HPRD for low resident acuity
  - 3.6 HPRD for high resident acuity
  - Average NHs have only 2.2 NA HPRD
- Confirmed the 2001 CMS study recommending 2.8 NA hrpd minimum

**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.**



# NHs with higher than 2.45 CNA HPRD were more likely to have higher quality and safety scores



- CMS proposed only 2.45 HPRD of CNA care per day. This is the 1<sup>st</sup> level that they saw improvement but they failed to look at higher levels and the 2.8.
- CNA staffing at 2.8 HPRD and higher substantially improved both safety and quality.
- Schnelle 2016 simulation study showed that CNA staffing of 2.45 HPRD had 15% omitted care

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>



# Total Minimum Staffing Standards

- CMS proposed only 3.0 total HPRD of CNA and RN care.
  - Or alternatively 3.48 total nursing HPRD
- CMS's proposed 3.48 total nursing HPRD is completely inadequate
  - Would result in unacceptable levels of delayed and omitted care and harm to residents.
- CMS should establish a total minimum staffing of 4.2 HPRD. This standard should be composed of 1.4 licensed nurse HPRD (.75 of which must be RN care), and 2.8 CNA HPRD based on the:
  - 2001 Abt staffing study shows the need for .75 RN HPRD and the 2023 Abt staffing statistical analysis
  - 2023 Abt simulation study shows the need for 1.4 licensed nurses
  - Schnelle 2016 simulation study shows the need for 2.8 CNA HPRD





# CMS Proposed Regulations Require 24-Hour Per Day RN Staffing



- We strongly support and recommend:
  - 24-Hour RN for Direct Care in addition to DON and administrative nurses
  - 1 24-Hour RN for Direct Care for every 100 beds
- Harrington, C., Kovner, C., Mezey, M., Kayser-Jones, J., Burger, S., Mohler, M., Burke, B., and Zimmerman, D. Experts Recommend Minimum Nurse Staffing Standards for Nursing Facilities in the U.S. *The Gerontologist*. 2000: 40 (1):5-16.
- Institute of Medicine. *Keeping patients safe: transforming the work environment of nurses*. Washington, DC: National Academy of Medicine, 2004.
- American Nurses' Association. Nursing staffing requirements to meet the demands of today's long term care consumer recommendations from the Coalition of Geriatric Nursing Organizations (CGNO). Position Statement 11/12/14. [www.nursingworld.org](http://www.nursingworld.org)
- Coalition of Geriatric Nursing Organizations (CGNO). Nursing staffing requirements to meet the demands of today's long-term care consumer recommendations, 2013.
- Kolanowski A, Cortes TA, Mueller C, Bowers B, et al. A call to the CMS: Mandate adequate professional nurse staffing in nursing homes. *AJN*. March, 2021: 121 (3):22-25.
- The National Academies of Sciences, Engineering, and Medicine (NASEM), Board on Health Care Services, Health and Medicine Division, Committee on the Quality of Care in Nursing Homes. *The national imperative to improve nursing home quality: honoring our commitment to residents, families, and staff*. 2022. Washington, DC: The National Academies Press. <https://nap.nationalacademies>.

# ▶ 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

# Implementation Times Too Long

- ▶ CMS has little evidence to support allowing facilities in rural areas to take five years to comply with overall standard
  - ▶ 2023 Study showed staffing in both areas almost identical
- ▶ Urban and rural timeframes must be identical
  - ▶ 2 years for the 24/7 RN and 3 years for total standard
- ▶ Must be phased in
  - ▶ CMS should establish reasonable timeframes with benchmark increases in staffing
    - ▶ Residents should not have to wait years to be safe
    - ▶ Prevents facilities from waiting to last minute

# ▶ Waivers

- ▶ CMS will allow some facilities not to comply with minimum staffing standard. Four criteria for waivers and all must be met:
  - ▶ Location
  - ▶ Good faith efforts to hire
  - ▶ Demonstrated financial commitment
  - ▶ Certain exclusions from eligibility for waiver
- ▶ WE OPPOSE ALL WAIVERS
  - ▶ Staffing below the proposed levels in our comments would cause harm to residents
  - ▶ CMS cannot create a two-tier system where some residents are allowed to suffer and be harmed

# 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.

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

# ▶ Location (Suggested Comments)

- ▶ CMS should use the 20% provider to population ratio
- ▶ Eliminate the 20 miles or further away provision
  - ▶ Not based on anything scientific. (Rural and Urban staffing are almost identical)
  - ▶ Rural folks live far away from things!!!
- ▶ Should be based on actual availability of workers, not distance or location.

# 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.

# Suggested Comments on Good Faith Provision

- ▶ The wages should not be “prevailing.” Averages wages for CNAs are abysmal. \$25,748 is median wage for CNA
  - ▶ *Direct Care Workers in the United States, Key Facts*, PHI National, 2023 <http://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-3/>
- ▶ CMS should require higher wages
  - ▶ MIT Living Wage calculator
  - ▶ Prevailing wage + 25%

# Demonstrated Financial Commitment

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

# Demonstrated Financial Commitment Comments

- ▶ Must have explicit and detailed criteria
- ▶ Increased scrutiny on Medicare and Medicaid cost reports
  - ▶ Accountability for related party transactions and other costs not related to direct care
  - ▶ Home office costs, executive salaries, profits
- ▶ 80% of all Medicare and Medicaid dollars go towards direct care
  - ▶ Similar requirements in NY, NJ, and MA
  - ▶ Medicaid Access Rule: Required 80% of payments for Home and Community Based Services to go towards direct care
- ▶ Turnover measure? Reasonable reduction in staff turnover

# Exclusions from Waivers

- ▶ Cannot be Special Focus Facility
  - ▶ Only 88 SFF in the country out of roughly 15,000 nursing homes
    - ▶ This should be expanded to the SFF list
- ▶ 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



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# CONSUMER VOICE

Oct. 19, 2023

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Toby Edelman

# ENFORCEMENT

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- CMS proposes to enforce staffing standards through the standard survey and enforcement system, 88 Fed. Reg., 61365.
- Advocates' concern: survey and enforcement is necessary, but not sufficient, response

# CONCERNS ABOUT USING SURVEY AND ENFORCEMENT SYSTEM

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- Survey and enforcement system fails both (a) to cite deficiencies at all and (2) to properly identify scope and severity (how significant and widespread deficiencies are)
  - Most deficiencies (90+% ) cited as no-harm, so no enforcement results

# GAO REPORTS

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- GAO has reported timidity and weaknesses of survey and enforcement for decades (e.g., *Federal and State Oversight Inadequate to Protect Residents in Homes with Serious Care Violations*, T-HEHS-98-219 (Jul. 28, 1998), *Prevalence of Serious Quality Problems Remains Unacceptably High, Despite Some Decline*, GAO-03-1016T (Jul. 17, 2003); *Some Improvement Seem in Understatement of Serious Deficiencies, but Implications for the Longer-Term Trend Are Unclear*, GAO-10-434R (Apr. 28, 2010); *Nursing Homes: Improved Oversight Needed to Better Protect Residents from Abuse*, GAO-19-433 (Jun. 2019))

# ADVOCACY PROPOSAL

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- CMS propose two requirements for staffing
  - Staffing ratios for RNs and aides (and we hope specific staffing ratios for licensed practical nurses and total nurse staffing in final rule)
  - “sufficient” staff requirement (which has been the standard since 1992 regulations)

# ADVOCATES SUGGEST TWO TYPES OF ENFORCEMENT FOR FAILING TO MEET SPECIFIC RATIOS

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- When facilities quarterly report to CMS through payroll-based journal (PBJ) staffing information indicating they have not met specific staffing ratios (proposed rule: 0.55 HPRD RN, 2.45 HPRD aides), then, automatically,
  - Civil money penalties (CMPs)
  - Denial of payment for new admissions (DPNAs)
    - Rationale: use existing staff to provide care to residents; do not subject additional residents to inadequate staffing levels

# FAILURE TO MEET “SUFFICIENT” STAFFING REQUIREMENT

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- As determined by standard (annual) or complaint survey
- Cite, as appropriate
- Cite range of remedies, as appropriate, including
  - CMPs, DPNAs, monitor, directed plan of correction, temporary management



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- 
- Staffed by attorneys, advocates, communication and technical experts
  - Provides education, legal analysis, writing, assistance, and advocacy
  - Systemic change – Policy and Litigation
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# ▶ 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

# ▶ Facility Assessment

- ▶ No guidance on acuity. Essentially, this amounts to continuing the status quo of “sufficient” staff.
- ▶ Facilities must be told how to staff to acuity or they will not do it.
- ▶ CMS pays nursing homes based on resident acuity.
  - ▶ Patient Driven Payment Model
    - ▶ Facilities assess acuity of residents and CMS pays based on care needs of residents

# Facility Assessment, Continued

- ▶ Acuity staffing should be modeled on the PDPM model
- ▶ 2020 article laid out specific staffing levels based on the acuity levels present in the PDPM model
  - ▶ Harrington, C., Dellefield, M., Halifax, E., Fleming, M., and Bakerjian, D. Appropriate nurse staffing levels for US nursing homes. *Health Services Insights*. 2020: 13:1-14. Jun 29;13:1178632920934785. doi: 10.1177/1178632920934785. eCollection 2020.
- ▶ Extremely concerned that acuity will be left to subjective assessments made by state survey agencies
- ▶ CMS must take a central role in prescribing and enforcing acuity



# Medicaid Payment Transparency

- CMS proposed regulations require Medicaid programs to identify, at the facility level, the percent of Medicaid payments spent on compensation to: (i) Direct care workers; (ii) Support staff.
- While wage and benefit data are useful, comprehensive data on revenues and expenses are also needed
- Unless Medicaid programs provide more comprehensive data on rates and payments as well as expenses, including wages and benefits, CMS will not be able to draw very useful conclusions.





# **CMS Should Implement MACPAC Recommendations for Medicaid Transparency**



- **State Medicaid programs should make NH revenue and cost data for each NH publicly available in a standard format**
- **Each NH should report payments and expenses for:**
  - **Base payments, Supplemental payments, Managed care directed payments, and Beneficiary contributions to share of costs & other revenue**
  - **Provider contributions (tax) to state Medicaid programs**
  - **Expenses for wages and benefits for nursing, ancillary, and support services and all other direct care expenses**
  - **Expenses for depreciation, administration, property, and profits**
  - **Expenses for related-party transactions, real estate, and disallowed costs**
- **Medicaid and CHIP Payment and Access Commission (MACPAC). Principles for Assessing Medicaid Nursing Facility Payment Policies, Chapter 2. March 2023 Report to Congress on Medicaid and CHIP. <https://www.macpac.gov/wp-content/uploads/2023/03/Chapter-2-Principles-for-Assessing-Medicaid-Nursing-Facility-Payment-Policies.pdf>**



# **CMS Should Establish Medicaid Direct Care Spending Requirements to Increase Financial Accountability**



**Direct care spending legislation was enacted in NJ, MA, NY, and PA in 2020-23**

- **NY requires 70% of reimbursement be spent on resident care with 40% on direct care staff and a 5% limit on profits**
- **NJ set direct care ratio of 90% of a facility's aggregate revenue on direct care of residents in 2021**
- **MA set direct care cost at least 75% and with downward rate adjustments for failure in 2021**



# **CMS Should Establish Medicaid Direct Care Spending Requirements For NHs To Ensure Financial Accountability**



**CMS issued a HCBS proposed rule §441.302(k)(3)(i).**

- **At least 80 percent of all payments for services must be spent on compensation for direct care workers**
- **Each State must report to CMS annually on the percent of payments for certain services spent on compensation for direct care workers**
- **CMS must report the information on its website including worker payments**

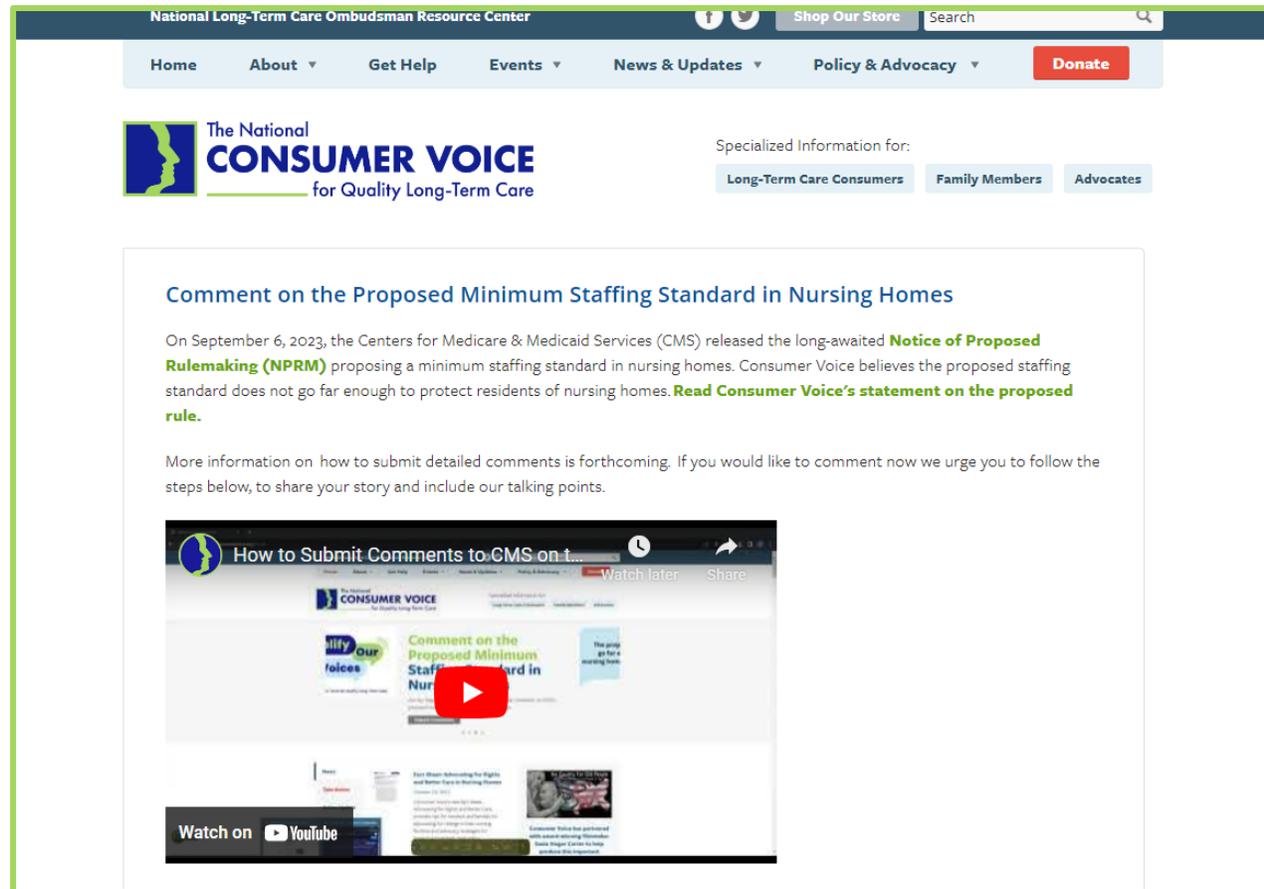
**We recommend that CMS issue similar requirement for NHs so that 80% of NH Medicaid revenues would be spent on direct care services. CMS should limit administration, property, other non-direct care expenses, and profits to 20% of Medicaid revenues.**



# How to Comment

# Visit the Consumer Voice Comment Page

The screenshot shows the website for the National Long-Term Care Ombudsman Resource Center. The header includes the organization's name, social media icons for Facebook and Twitter, a 'Shop Our Store' link, and a search bar. A navigation menu contains links for Home, About, Get Help, Events, News & Updates, Policy & Advocacy, and a red 'Donate' button. The main content area features the organization's logo and the text 'The National CONSUMER VOICE for Quality Long-Term Care'. Below this, there are tabs for 'Specialized Information for:' including 'Long-Term Care Consumers', 'Family Members', and 'Advocates'. The central focus is a large heading: 'Comment on the Proposed Minimum Staffing Standard in Nursing Homes'. To the right of this heading is a light blue speech bubble containing the text: 'The proposed rule does not go far enough to protect nursing home residents from harm.' Below the heading, there is a paragraph of text: 'Use our step-by-step instructions to submit simple comments on CMS's proposed minimum staffing rule in nursing homes.' and a dark grey 'Submit Comments' button. At the bottom of the page, there is a 'News' section with a 'Fact Sheet: Advocating for Rights' and a video thumbnail titled 'No Country For Old People' with the subtitle 'A Documentary Everyone Needs to See'.



- ▶ Visit our [comment page](#)
- ▶ Watch our video with step-by-step instructions
- ▶ Scroll down for instructions on how to comment

**To comment:**

1.) Open the commenting webpage in a new tab: <https://www.regulations.gov/commenton/CMS-2023-0144-0001>

2.) In the comment box, state that:

*The proposed rule does not go far enough to protect nursing home residents from harm.*

**Share your personal story or experience** about the impact of inadequate staffing on you or someone you love.

3.) Use these suggested talking points (feel free to copy/paste):

*In order to protect nursing home residents from harm and to ensure a high quality of life:*

- *Require nursing homes to meet a total staffing standard of 4.2 hours per resident day (HPRD) within the next two years. This total should be made up of at least:*
  - *1.4 HPRD of total licensed nurse care, composed of at least .75 HPRD of registered nurse (RN) care; and*
  - *2.80 HPRD of certified nurse aide care (CNA).*

*RNs, LPNs/LVNs, and CNAs each have important roles in the provision of quality care to residents. A staffing standard should address total direct care for residents. These staffing levels are supported by decades of research and by the 2023 Staffing Study commissioned by CMS last year.*

*These additional requirements are financially feasible because the costs would be less than five percent of the over \$100 billion that nursing homes receive from Medicare and Medicaid annually.*

- *No waivers to facilities that cannot provide a level of care that ensures resident safety.*
- *Restrict admissions when minimum staffing standards are not met.*
- *Reduce the timeframes for implementation, particularly in rural areas, and require phased-in compliance. The 2023 Staffing Study found that staffing in rural homes is almost identical to staffing in homes located in urban areas. Residents in rural homes should not suffer for years before the staffing standard is implemented.*

4.) In the drop-down question, "What is Your Comment About?" identify yourself from the choices.

5.) Complete the remaining questions on the form

6.) Click, "Submit Comment."

**All comments are due by November 6, 2023.**

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SUPPORT

You are commenting on a Proposed Rule by the Centers for Medicare&Medicaid Services

Comment Period Ends: 19 Days

Medicare and Medicaid Programs: Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting

## Write a Comment

Commenter's Checklist

Comment\*

Start typing comment here...

5000

What is your comment about?

Select a Comment Category

Attach Files

You can attach up to 20 files, but each file cannot exceed 10MB. Valid file types include: bmp, docx, gif, jpg, jpeg, pdf, png, pptx, rtf, sgml, tif, tiff, txt, wpd, xlsx, xml.

# What to Write

- ▶ A personal story or experience
- ▶ Reasons why the current standard does not go far enough to protect residents
  - ▶ Consumer Voice's talking points
  - ▶ Information from this webinar

# ▶ Important Points

- ▶ Go to <https://www.regulations.gov/commenton/CMS-2023-0144-0001>
- ▶ Personalize your story
- ▶ Use the Consumer Voice talking points
- ▶ Include information you've learned in this webinar
- ▶ Comment by November 6<sup>th</sup>
- ▶ Make your voice heard!!!!



# Questions



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