

# United States Senate

WASHINGTON, DC 20510

February 10, 2023

Chiquita Brooks-LaSure, Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-9911-P, P.O. Box 8016  
Baltimore, MD 21244

Re: Regulations to establish mandatory minimum staffing levels in skilled nursing facilities

Dear Administrator Brooks-LaSure:

We write today to thank the Centers for Medicare & Medicaid Services (CMS) for your attention to the serious staffing crisis in the nation's nursing homes. We appreciate the work that CMS has undertaken to promote safety and quality in nursing homes and applaud the Biden-Harris Administration's commitment to protecting our Nation's seniors. Now, we write to urge CMS to bring this work to completion. In our view, that means continuing the agency's ongoing study to determine the level of staffing that is necessary to ensure safe and high-quality care for nursing home residents, developing an evidence-based and actionable proposal for mandatory minimum staffing levels, and a robust and transparent process – including direct stakeholder engagement – that will allow for further discussion and fine-tuning of requirements before the proposal is finalized.

As you know, the connection between staffing levels and the safety and quality of care is well-established. Studies have shown a correlation between inadequate staffing levels and lower quality of care.<sup>1</sup> More recently, studies have demonstrated that higher nurse staffing ratios mitigated the effect of COVID-19 outbreaks in nursing homes and resulted in fewer deaths.<sup>2</sup> In Section 1819(b)(4)(C)(i) of the Social Security Act, Congress required skilled nursing facilities to “provide 24-hour licensed nursing service which is sufficient to meet nursing needs of its residents,” including the services of a registered nurse at least 8 consecutive hours per day, 7 days a week. To date, CMS regulations have tracked the statutory requirements (42 CFR 483.35), a vague standard that has led to substantial variation in staffing levels across facilities and made them unprepared to deal with a crisis such as the pandemic. A recent Department of Health and Human Services (HHS) Office of Inspector General (OIG) report that examined the high level of COVID-19 infections in nursing homes also pointed to the need for establishment of minimum staffing requirements.<sup>3</sup> In light of these analyses, and the clear problems with

<sup>1</sup> Schnelle, J.F., Simmons, S.F., Harrington, C., Cadogan, M., Garcia, E., & Bates-Jensen, B., Relationship of nursing home staffing to quality of care? Health Services Research, 39 (2):225-250 (2004)

<sup>2</sup> 2022 National Academies of Science report, The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff, p. 70ff.

<sup>3</sup> U.S. Department of Health and Human Services, Office of Inspector General, [Data Brief](#), “More Than a Thousand Nursing Homes Reached Infection Rates of 75 Percent or More in the First Year of the COVID-19 Pandemic; Better Protections Are Needed for Future Emergencies,” January, 2023.

staffing that predated the pandemic, we were pleased to see President Biden last year propose adoption of a minimum staffing standard. We believe that such a standard will help improve care and save lives. Moreover, while many factors, including wages, benefits, and opportunities for professional development, affect job quality and turnover, we believe that creating a robust staffing standard will go a long way towards improving the quality of nursing home jobs, which in turn will help attract more workers and begin to resolve the current workforce shortages in this industry.

We understand that developing a meaningful minimum staffing requirement involves the careful evaluation of complex and nuanced variables, such as variations in acuity levels and case mix, as well as the special circumstances of rural and underserved communities and the staff and resources available to them. We also acknowledge that enforcement of any minimum staffing requirement requires funding for CMS's survey and certification activities, which have not received a funding increase since FY 2015. We are pleased to see CMS undertake a serious study to create a foundation for future recommendations, in line with recommendations from the National Academies of Sciences, Engineering and Medicine. CMS also provided multiple opportunities for the public to weigh in during the pre-rulemaking stage through an expansive Request for Information (RFI) included in the FY 2022 Medicare payment rule, as well as stakeholder listening sessions and individual meetings with industry, consumers, and policy experts. As CMS reported, when summarizing the responses to the RFI, the agency received more than 3,000 comments from a variety of sources, "[O]verall, commenters were generally supportive of establishing a minimum staffing requirement," with many commenters providing stark examples of the impact of inadequate staffing.<sup>4</sup> Given this broad support, CMS should release a proposed minimum staffing requirement, or set of requirements, which can then be further discussed and adjusted before being finalized.

We also urge CMS to take all steps possible to ensure that nursing facilities have the financial resources to comply with, if not exceed, any potential minimum standards. While recent studies suggest that most for-profit nursing home companies remained profitable throughout the pandemic, including homes with high rates of COVID-19 infections,<sup>5</sup> not-for-profit facilities and those that rely heavily on state Medicaid payments may need additional financial support. We believe that the separate rulemaking to strengthen enforcement of the Medicaid "equal access" provision (Section 1902(a)(30)(A) of the Social Security Act) currently underway at CMS offers an important opportunity to move toward this goal by creating a robust system for states to demonstrate that Medicaid rates for nursing homes are adequate to support staffing and wage levels necessary to attract and retain sufficient staff to meet staffing requirements.

Finally, we urge CMS to consider the availability of sufficient workforce for nursing facilities to comply with potential minimum staffing standards. We have heard from nursing facilities in our

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<sup>4</sup> CMS, Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Updates to the Quality Reporting Program and Value-Based Purchasing Program for Federal Fiscal Year 2023, 87 FR 47600.

<sup>5</sup> Kingsley, DE and Harrington, C. COVID-19 had little financial impact on public traded nursing home companies, *JAm Geriatr Soc* 69(8), August, 2021, p. 2099-2102; Kingsley DE, Harrington C. Financial and quality metrics of a large, publicly traded U.S. nursing home chain in the Age of Covid-19. *International J. Health Serv.*, 2022. As the recent HHS OIG report cited above noted (p. 7), for-profit nursing homes "made up a disproportionate percentage of nursing homes with extremely high infection rates" during both major pandemic surges.

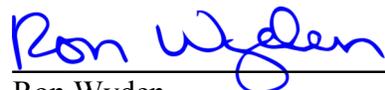
states that are experiencing shortages of direct care staff who remain concerned by the potential that compliance with minimum staffing requirement may not be feasible given the current staffing situation. Therefore, as CMS develops its proposal for mandatory minimum staffing levels, we urge the agency to consider the perspective of facilities located in areas with a more limited workforce as part of a transparent process. We also urge CMS to engage with local stakeholders across the country about what additional support they may need to comply with a meaningful minimum standard.

Thank you for your attention to this letter. We look forward to working with you and nursing facilities in our states to ensure that nursing home residents remain safe and receive high-quality care.

Sincerely,



Robert P. Casey, Jr.  
United States Senator  
Chairman, Special Committee  
on Aging



Ron Wyden  
United States Senator  
Chairman, Committee on  
Finance



Sherrod Brown  
United States Senator



Kirsten Gillibrand  
United States Senator



Richard Blumenthal  
United States Senator



Cory A. Booker  
United States Senator



Elizabeth Warren  
United States Senator