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# LONG TERM CARE COMMUNITY COALITION

*Advancing Quality, Dignity & Justice*

August 29, 2021

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Re: Rulemaking 10-221 (Long-Term Care Facilities, Proposed Rulemaking 1)

To Whom It May Concern:

The Long Term Care Community Coalition (LTCCC) is a nonprofit, non-partisan organization dedicated to improving quality of care, quality of life, and dignity for elderly and disabled people in nursing homes, assisted living, and other residential settings. We provide expert insights on regulatory standards, government accountability, and industry finances to both policymakers and the public. The following comments are based on over thirty years' experience providing independent and credible analyses of nursing home care, staffing, and financing.

We strongly support the proposed update to Pennsylvania's nursing home licensing regulations, specifically, the requirement that facilities provide at least 4.1 hours of direct care staff time per resident per day. Especially in light of the humanitarian crisis that Pennsylvania nursing home residents and families experienced during the COVID-19 pandemic, which was greatly exacerbated by the nursing home industry's longstanding and widespread failure to voluntarily provide sufficient staffing, the rule's update to facility staffing requirements are much needed and long overdue.

Following are some of the key, evidence-based reasons why these staffing standards are necessary, reasonable, and practicable. Our discussion is divided into the following categories:

- **4.1 Hours Per Resident Day Is the Minimum Staffing Necessary to Keep Residents Safe** (page 2)
- **Financial Implications of Sufficient Staffing - Funding is NOT the Problem** (page 3)
- **Nursing Home Income is High, With Virtually No Accountability for How Public Funding is Spent** (page 4)

## 4.1 Hours Per Resident Day Is the Minimum Staffing Necessary to Keep Residents Safe

A landmark federal study, published in 2001, identified 4.1 hours of nursing staff time per resident per day (HPRD) as necessary to meet the clinical needs of the typical nursing home resident. That number has, essentially, been the benchmark for close to two decades.[1] While 4.1 HPRD or higher does not guarantee high quality care or decent living conditions, staffing below 4.1 HPRD is an indicator that a facility's residents are at higher risk of abuse and neglect, and that the public may not be getting the level of services that we are paying the nursing home to provide.

Since it has been close to 20 years since the 2001 study was undertaken, further study on staffing would be useful. However, the results would inevitably indicate that more than 4.1 HPRD is needed. Why?

- The 2001 study did not assess how much nursing staff is needed to meet the quality of life and basic dignity needs that every human being has and which providers are paid – and contractually agree – to provide;
- The study was not focused on measuring the staffing levels necessary to provide the quality of care specifically required by federal regulations; and
- The facilities selected for the study were not required to be providing "high quality of care."

Unsurprisingly, other studies have indicated that 4.1 HPRD is a low baseline. In 2000, several experts found that "[m]inimum total number of direct nursing care staff is 4.13 hr per resident day. Total administrative and direct and indirect nursing hours is 4.55 hr per resident day. Staffing must be ADJUSTED UPWARD for residents with higher nursing care needs."[2]

A 2016 study, focused only on nurse aide (CNA) care staffing needs, found that residents need 2.8 to 3.6 HPRD of CNA care, on average, to keep rate of care omissions below 10%.[3] That is approximately 20% higher than the CNA time identified in the 2001 federal study.[4]

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[1] Abt Associates (Prepared for the Centers for Medicare and Medicaid Services), *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes*, Report To Congress: Phase II Final (December 2001). Available at https://theconsumervoice.org/uploads/files/issues/CMS-Staffing-Study-Phase-II.pdf.

[2] Harrington, C., et. al., "Experts Recommend Minimum Nurse Staffing Standards for Nursing Facilities in the United States," *The Gerontologist,* Vol. 40, No. 1, 5-16 (2000). [Emphasis in original.]

[3] Schnelle, J., et. al., "Determining Nurse Aide Staffing Requirements to Provide Care Based on Resident Workload: A Discrete Event Simulation Model," *JAMDA* 17 (2016) 970e977.

[4] The 2001 Abt study identified an upper range of 2.8 CNA HPRD. We subtracted 2.8 from the upper range of the 2016 Schnelle study, 3.6, resulting in .8 which is 22% of 3.6.

## Financial Implications of Sufficient Staffing - Funding is NOT the Problem

### Private Enterprises Continue to See PA Nursing Homes as Valuable & Profitable

We continue to see private, for-profit companies buying up nursing homes in Pennsylvania. In 2015, *The New York Times* reported on the "bull market" for nursing homes, noting that "[s]ale prices of nursing homes averaged $76,500 per bed last year — the second consecutive year of record-breaking prices….[5] We do not believe that these individuals, for-profit companies, LLCs, etc… are gobbling up nursing homes in Pennsylvania so that they can lose money as a result.

### One-Third of Medicare Short-Term Rehab Residents are Harmed

A 2014 Office of Inspector General study, *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*,[6] found that an astonishing one-third of residents who went to a nursing home for short-term care were harmed within an average of 15.5 days, and that almost 60% of that harm was preventable and likely attributable to poor care.

This is particularly striking because Medicare reimbursement rates are extremely high. The non-partisan Medicare Payment Advisory Commission (MedPAC) has reported that nursing homes are overpaid by the Medicare program and have enjoyed margins exceeding 10% for more than 15 consecutive years.[7] Why can't nursing homes take care of these highly profitable patients? What are the implications for our elderly residents, particularly the majority of residents who have dementia?

## Nursing Home Income is High, With Virtually No Accountability for How Public Funding is Spent

Nursing home providers and trade associations claim that Medicaid rates are inadequate and less than the cost of actual care, which then leads providers to leverage other payor sources, such as Medicare and private pay. The industry also blames low Medicaid rates for substandard care, low staffing, and poor wages. However, recent studies suggest that for-profit facilities have maximized profits for owners and investors while skimping on resident care.

- Medicaid rates have steadily increased in the past decade, rising 12.6% since 2012, according to the National Investment Center for Seniors Housing & Care (NIC).
- Nursing homes received an average of $214 per resident per day in Medicaid funding in 2019, a 2.2% increase from 2018.

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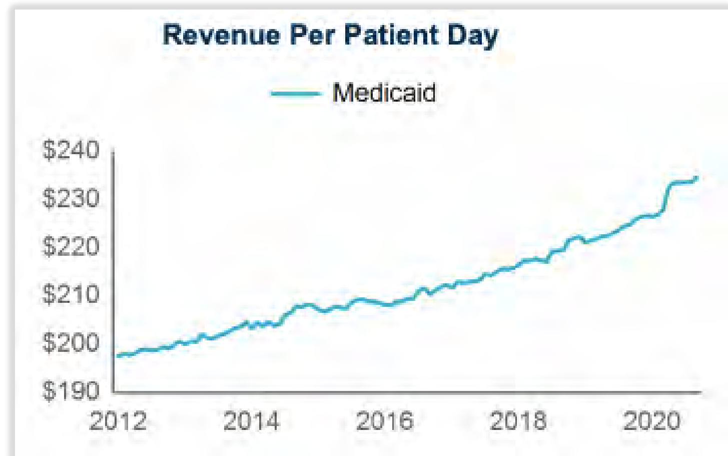
[5] Thomas, Katie, "In Race for Medicare Dollars, Nursing Home Care May Lag," *The New York Times* (April 14, 2015). Available at https://www.nytimes.com/2015/04/15/business/as-nursing-homes-chase-lucrative-patients-quality-of-care-is-said-to-lag.html.

[6] Available at https://oig.hhs.gov/oei/reports/oei-06-11-00370.asp. Six percent of those who were harmed died, and more than half were rehospitalized.

[7] See http://www.medpac.gov.

- An NIC report with data through September 2020 shows a national average reimbursement rate of $235, though this $21 increase from 2019 is likely a COVID-related boost.
- Although industry leaders claim that nursing homes are losing money on Medicaid residents and blame closures and financial struggles on low reimbursement rates, typical nursing home profits are in the 3 to 4 percent range, according to Bill Ulrich, a nursing home financial consultant.
- In addition to these stated profits, most nursing homes "outsource a wide variety of goods and services to companies in which they have a financial interest or that they control." This practice, called related-party transactions, can be used to "siphon off higher profits, which are not recorded on the nursing home's accounts," giving the false impression that a nursing home has low profits or is losing money. The money doled out in these related-party transactions is effectively hidden, since state Medicaid cost reports generally only account for the nursing home operating company of record, and do not include profits going to the management, property, parent, staffing, and other companies that have the same owners or investors.




Source: NIC MAP Data Service

**Lack of Accountability.** Bolstered by government funding, providers are raking in profits while facing limited accountability for how they utilize Medicaid funds. Though not illegal, operators too often utilize Medicare and Medicaid funds by using public reimbursement to cover company salaries, administrative costs, and other non-direct care services. Without transparency and accountability, determining the extent to which Medicaid rates cover the costs of care for Medicaid nursing home residents is simply not possible. Providers must be held accountable for their finances in order to safeguard residents from owners and operators who prioritize profits by cutting back on essential nurse staffing to levels that are, too often, dangerous for both residents and caregivers.

> **"Just enough is spent on Medicaid residents to keep state inspectors satisfied, while, at the same time, Medicare patients are not given the full value of their insurance coverage."**
>
> – Will Englund and Joel Jacobs, *The Washington Post*

**Medicaid & COVID.** As a result of the COVID-19 pandemic, nursing homes have received additional Medicaid reimbursement to assist with PPE, testing, staffing, and other expenses. For example, in Washington state, home to the first major nursing home outbreak, the Medicaid rate increased $29 per resident per day in May, retroactive to February 1, 2020. Although the steep increase was temporary and dropped in July, the rate remains a $5 increase from the pre-COVID rate. These additional Medicaid reimbursement rates are on top of the hundreds of thousands of dollars and more that nursing homes have received in federal government funding throughout the pandemic. It is in the public interest to know how facilities have used the increased Medicaid funding through the COVID pandemic. This funding should be used for providing resident care and not for profits and administrative costs.

> **Over $21 billion – more than $1.5 million each on average – in emergency assistance was distributed to America's nursing homes so far during the COVID-19 pandemic**
>
> – CMS

- On March 18, 2020 the Families First Coronavirus Response Act boosted the federal government's Medicaid match by 6.2 percentage points and thus increased reimbursements for long-term care.
- On March 27, 2020 the Coronavirus Aid, Relief, and Economic Security Act (CARES) were passed, providing a total of $175 billion in Provider Relief Funds to prevent, prepare for, and respond to the coronavirus.
- On August 7, 2020, HHS announced a $5 billion distribution to nursing facilities.
- As of September 2020, nursing homes had received over $21 billion in emergency assistance including direct relief and fully forgivable loans.
- In September, HHS issued guidance that prohibited providers "from using PRF payments to become more profitable than they were pre-pandemic"
- In October 2020, HHS issued guidance explicitly reversing the September policy thus allowing nursing homes to compensate for lost revenues
- HHS announced $333 million and $523 million performance-based distributions in October and December 2020, respectively, to nursing homes that "have shown results in their tireless work to keep their residents safe from the virus"

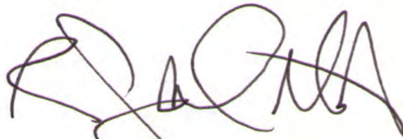
**Conclusion.** Nursing homes do, in fact, receive frequent increases in funding, including Medicaid reimbursement. Though Medicaid pays for the majority of nursing home services, there is virtually no transparency or accountability in respect to how facilities actually use these funds. In the absence of federal limits on diverting public funds to hide profits in contracts with related parties or in inflated administrative costs, the industry's argument that it does not

receive enough money to provide sufficient staffing and good care is inaccurate (if not fraudulent). If nursing homes are not mandated to invest in decent staffing, most of them will not do so voluntarily.

The growth of for-profit ownership in nursing homes over the years, including significant investment by private equity firms and real estate investment trusts (REITs), makes it clear that nursing homes are profitable businesses which, in the absence of government standards and quality assurance, too often sacrifice resident safety in order to maximize profits. The reasonable staffing requirement proposed by the Department of Health would improve the integrity of the nursing home system and, most importantly help to ensure a safer and more humane life for both vulnerable residents and those who provide them with essential care and services.

In short, while a minority of nursing homes will do the right thing and provide appropriate staffing on their own, state action is required to ensure that *all* nursing homes that voluntarily choose to be certified under Medicaid and Medicare fulfill their promises to Pennsylvania's tax-payers, seniors, and families.

Sincerely yours,



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