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November 6, 2023

The Honorable Chiquita Brooks-LaSure
Administrator
Center for Medicare & Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Re: Medicare and Medicaid Programs: Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting [CMS-3442-P; RIN 0938-AV25], 88 Fed. Reg 61352 (September 6, 2023)

Dear Administrator Brooks-LaSure

On behalf of the Michigan Long Term Care Ombudsman (MLTCOP), I have prepared the following comments in response to the CMS-2023-0144-0001. We appreciate the attention and careful consideration nursing home staffing has been given by the Centers for Medicare and Medicaid Services and commend its efforts to mandate minimum staffing standards to assure adequate and timely care and services are readily available to all nursing home residents.

MLTCOP's comments are based on the experiences and challenges faced by nursing home residents. Our comments are reflective of the ongoing inadequate staffing and basic care concerns reported to and directly observed by long term care ombudsman program representatives in many nursing homes across Michigan. We recognize a small percentage of homes already staff at or above the suggested minimum so we strongly believe that CMS is appropriate in mandating minimum staffing requirements for its nursing home providers. Specifically, we provide the following feedback and suggestions for your consideration.

A. Registered Nurse (RN) Requirement

We strongly support the CMS recommendation to require 24-hour per day RN staffing, but we recommend that 24-hour RN coverage should be in addition to the Director of Nursing (DON), Minimum Data Set (MDS) Nurse, and any RN serving in the Infection Control/Preventionist (ICP) position in nursing homes with more than 30 licensed beds. The DON, MDS, and ICP nurses in nursing homes with over 30 licensed beds generally focus their time on completing administrative tasks, resident assessments, managing nursing staff, and overseeing the delivery of nursing services but typically do not provide a significant amount of direct hands-on resident care. In addition, we suggest CMS consider requiring one RN 24-hours a day for every 100 licensed beds in every nursing home participating in the program. With these additional RN requirements, nursing homes are likely to be staffed with experienced and well trained nurses resulting in residents being more likely to receive a higher quality of care than currently experienced in a large majority of nursing homes.

B. Direct Care Nurse Staffing

While we appreciate CMS requesting comments on the recommended hours per resident day (hprd) staffing minimum for RNs and CNAs, we believe this minimum standard if not sufficient to protect the health and safety of residents or meet basic their needs. The proposal did not include licensed practical nurses (LPNs) in the standards for total nursing staff. LPNs often provide the majority of medication administration and treatments including wound care and can provide other services under the supervision of an RN. The role of the LPN is important to the delivery of hands-on care and services to nursing home residents. Therefore, we recommend that CMS consider revising its minimum staffing regulations to include LPNs and to require a minimum of:

- 4.2 total nursing hprd to include:
  - 1.4 total licensed nurses (LNs) hprd including licensed practical nurses (LPNs) with at least .75 RN hprd (excluding the DON, MDS and ICP nurses for nursing homes with more than 30 licensed beds)
  - 2.8 total certified nursing assistant (CNAs) hprd (excluding CNAs serving as medication techs or activity aides which do not provide hands-on care)

We also would support the CMS proposed for 3.48 hprd staffing standards which includes LPNs as an alternative to the 3.0 hprd proposed by CMS if our recommendation for 4.2 hprd is not accepted and implemented.

C. Phase-In Time Periods

We understand the need to allow time to phase in the new staffing requirements, but we oppose the proposed phase-in time periods which extend to 5 years for some rural providers. Instead, we recommend CMS consider the higher staffing standards that we recommend should be phased in within two years for all nursing homes. Too often ombudsmen hear concerns from

residents about wait times for basic needs to be met with some residents accepting this unsatisfactory standard. Too often residents state they understand that staffing is short and are fearful of retaliation for using the call light to frequently or filing a grievance or complaint. Residents should not have to wait 5 years to receive appropriate and timely minimal care to meet their basic needs like toileting or incontinence care, assistance with meals, dressing and grooming, and transferring in and out of bed. All providers should be prepared for the increased staffing requirements and should be working to that end to best serve residents. Data shows that current average staffing levels in rural nursing homes are similar to those in urban locations, so no special exemptions or phase-in time period should be allowed for rural nursing homes. Residents in rural areas should not wait any longer than residents in non-rural areas to receive appropriate care and services through mandatory staffing standards.

D. Exemptions to HPRD

We do not support the recommendation to allow an exemption for the hprd requirements as exemptions normalize inadequate staffing, jeopardize the health and safety of residents, and depress wages.

We understand there may be a need for a short-term exemption for a nursing home with a history of providing adequate staffing (as evidenced by PBJ data and no citations for low staffing) and quality care (only low-level non-harm scope and severity citations). Under these very limited circumstances, a nursing home granted the hprd staffing exemption should be required to voluntarily ban new admissions or the state survey agency should use state enforcement remedies to ban new admissions, until such a time the nursing home can demonstrate adequate staffing to meet residents' needs and staffing standards. We commend CMS for not considering hprd exemptions for providers with a history of staffing concerns, poor care delivery, or harm or abuse to residents to whom they are entrusted to provide care.

We would ask that CMS also consider additional readmission protections for residents to return to the nursing home from the hospital when the provider indicates readmission is not possible due to the provider's inability to maintain appropriate staffing for the existing resident complement. A provider's inability to staff appropriately should not result in a violation of the resident's right to return from the hospital once stable. Violating this residents' right should not be an acceptable solution to meeting staffing standards.

E. Enforcement

We recommend strict enforcement of these standards by the CMS central office including issuing automatic fines and payment denials for any pattern of daily staffing violations reported on the facility payroll-based journal (PBJ) system each quarter. In addition, surveyors should ensure that nursing homes are conducting appropriate facility staffing assessments and are adjusting staffing for acuity and consider imposition of remedies when non-compliance is identified for either of these two requirements. We support CMS utilizing a case-mix adjusted staffing hprd to assess the nursing home's compliance with the minimum staffing standards

when a complaint is received, or non-compliance is identified where staffing is the root cause of the non-compliance regardless of the scope and severity of the citation.

F. Facility Assessments

We support the CMS proposal to enhance the current facility assessment requirements, specifically the inclusion of CNAs in the facility assessment. We recommend that CMS issue detailed guidelines on the amount and type of nursing staff needed for each level of resident acuity. Medicare and many state Medicaid programs pay nursing homes based on resident acuity and yet nursing homes are generally not adjusting staffing based on acuity. CMS should issue guidelines based on those published by nurses[i] and facility leadership must be required to document how they used the acuity guidelines or made reasonable modifications to ensure adequate staffing levels to meet resident acuity in each nursing unit and for the overall nursing home. We recommend that CMS develop strict enforcement with fines and payment denials for violations of facility assessments or the regulations will continue to be ignored by many nursing home providers.

G. Financial Transparency

We recommend that CMS implement the Medicaid transparency recommendations from the 2023 Medicaid and CHIP Payment and Access Commission (MACPAC) report.[ii] The MACPAC recommendations call for state Medicaid programs to make nursing home payment and cost data publicly available in a standardized CMS format. These data should include state annual Medicaid payment rates to nursing homes including base payments, supplemental payments, managed care directed payments, and beneficiary contributions to their share of costs. Medicaid should also report the amount of provider contributions to the non-federal share of Medicaid payments in order to calculate net payments to providers. Medicaid expenditures for care including staffing costs for nursing, ancillary, and support services should be compared to spending on administration, property, and profits. Medicaid should also report details on related party transactions, real estate ownership, and allowable and disallowed costs. In addition, CMS should amend its Medicare nursing home cost reports requirements[iii] to collect more detailed data on related party transactions and real estate ownership transactions, and collect all disallowed payments from nursing homes to ensure great accountability in spending.

H. Social Worker Recommendation

Although not addressed in the current NPRM, we recommend that CMS consider establishing a requirement for a full-time master's or bachelor's prepared social worker to be on staff in every nursing home regardless of the number of licensed beds. Residents are better served by having an experienced, credentialed, and well-trained social worker available to meet their psychosocial needs. Too often a social services designee, although well intended, attempts to address residents' social, emotional, and mental health needs without the appropriate educational background and experience to successfully do so. We recommend that CMS consider requiring a standard for social worker hours per resident per day.

We strongly support higher minimum nurse staffing requirements including LPNs with very limited exemptions and with a 2-year phase-in period. We support strong automatic enforcement of staffing standards, issuing guidelines for staffing acuity adjustments with strict enforcement, and improving financial transparency and accountability. We appreciate CMS considering these steps to protect the health and safety of nursing home residents.

Many of us have waited 30 years for staffing standards to be addressed. Now is the time to set a standard that truly has a positive impact on the lives of nursing home residents, supports appropriate staffing levels to help attract workers back to these critical positions, and serves as the first step changing nursing home culture to create communities where people want to work and where residents live meaningful self-directed lives. CMS has an opportunity to re-write the future of nursing home care by setting staffing standards that propel the industry to focus on quality over profits with the ultimate benefit of high quality care and quality of life for all residents.

Thank you again for the opportunity to provide comments on this historical regulatory change.

Sincerely,

Salli A. Pung

Salli A. Pung

State Long Term Care Ombudsman

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[i] 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.

[ii] 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

[iii] Wasserman, M. et al. Letter to HHS Secretary Xavier Becerra and CMS Director Brooks-LaSure on ensuring ownership and financial transparency. March 21, 2023.