Community Health Commission

CONSENT CALENDAR
March 26, 2024

To: Honorable Mayor and Members of the City Council

From: Community Health Commission

Submitted by: Andy Katz, Chair, Community Health Commission

Subject: Response to Council Referral: Long Term Care Facility Oversight

RECOMMENDATION
Refer to the City Manager and the budget process the (1) establishment of an enhanced Ombudsperson program for oversight of Skilled Nursing Facilities and Residential Care Facilities for the Elderly, and (2) early implementation of the Centers for Medicare & Medicaid Services (CMS) proposal for minimum nursing staffing levels ahead of the three-year period proposed by CMS.

FISCAL IMPACTS OF RECOMMENDATION
Dependent on the available resources for an ombudsperson program, and the ability to support the program with user fees. Minimal resources to draft an ordinance implementing minimum staffing levels.

SUMMARY
The Community Health Commission recommends that the City of Berkeley enact a licensure program for skilled nursing facilities that could collect modest user fees funding an enhanced ombudsperson program, and consider supporting this program from the General Fund in the range of a total 1-2 FTE, also serving Residential Care Facilities for the Elderly. The enhanced ombudsperson program should, among other activities, include regular unannounced visits to facilities and provide services of witnessing, investigating, and documenting resident/patient complaints to encourage quality patient care by ensuring accountability.

The Commission defers to the City Manager for further investigation and comment regarding whether HHCS staff should develop in-house ombudsperson staffing, perhaps in conjunction with its public health nursing services, or if services can be provided with greater care and skill through a partnership with Empowered Aging (the current service provider for Alameda County), or another organization. An enhanced ombudsperson program should also serve Residential Care Facilities for the Elderly, depending on need.

The Commission recommends implementing the proposed Centers for Medicare & Medicaid requirement for minimum staffing for skilled nursing facilities for registered nurse hours of care 3 years ahead of the CMS regulation and recommends such early implementation within 90 days after an ordinance can be drafted and adopted.

BACKGROUND

The City Council referred to the City Manager and the Community Health Commission on December 14, 2021, an assessment of the breadth of regulatory control the City of Berkeley can exert on skilled nursing facilities, and create a process of accountability if complaints are found to be substantiated that threaten, or could potentially escalate to the point of threatening, the wellbeing of patients and/or violate federal, state, or local law; the business license of the offending facility will be suspended until the skilled nursing facility submits a report demonstrating rectification of the situation.

The referral stated that the City has received numerous grievances from concerned community members over the quality of care in certain skilled nursing facilities in Berkeley. Community members complain of neglect, indifference, and harmful, negligent behavior with sometimes tragic consequences.

The referral suggested that the City could establish a licensure enforcement program, citing to the ability for another city government in Colorado reserving the right to suspend a business license "when any activity conducted by the licensee, his or her employee or agent violates any federal, state or local rule, regulation or law." The Berkeley Municipal Code does not have such a revocation provision but clarifies that issuance of a business license does not permit practices that would violate other local, state, or federal laws. Even if the City were to adopt such a provision, implementation would require a robust investigation and hearing procedure to ensure due process and competence of the investigators and hearing examiners, similar to the City's labor standards enforcement and hearings under the rent stabilization program.

More specific to the subject industry, the California Department of Public Health, Center for Health Care Quality ("CHCQ") is responsible for regulatory oversight of licensed health care facilities and health care professionals to ensure the safety and quality of health care. CHCQ operates with over 1,500 employees to license and certify over 14,000 health care facilities and professionals ranging from nurse assistants, home health aides, hemodialysis technicians, and the licensing of nursing home administrators.

The CHC Health Facilities subcommittee met with California Advocates for Nursing Home Reform (CANHR), an organization that advocates for nursing home residents, and is critical of CDPH/CHCQ's performance as a regulator. CANHR offers the public Nursing Home Fact Sheets to educate consumers about their rights, including how to file a complaint with CDPH. CANHR urges notifying the local ombudsperson office, the Division of Medi-Cal Fraud and Abuse, and local legislators of filed complaints. CANHR

also provides resources for referral to attorneys for seeking remedies in the civil justice system. CANHR provided anecdotes of CDPH/CHCQ failing to issue citations for violations or lowering the severity level of citations except for the most egregious. CANHR publishes and archives a "violation of the month," for example, a report of the inappropriate administration of psychotropic drugs to 27 residents at Palos Verdes Health Care Center to control behavior, without a documented clinical rationale, but to make "it easier to provide care," "follow instructions better," and make them "easier to talk to." Despite the multiple violations affecting multiple residents, the facility was given one Class B citation and fined only $2,000. While there are other incidents of patient deaths incurring citations of $100,000 at the Class AA level, advocates assess the enforcement level as inadequate to systemically prevent and discourage violations.

The Public Health Officer Unit commented informally that creating a parallel licensing and enforcement program would be challenging and require significant resources to dedicate expertise and enforcement time. The City would also be in the same complex position of evaluating how to manage potential implications of severe remedies such as license revocation. It is also unknown to the Commission whether this area and degree of regulation is preempted by State law. Costs for nursing home residence care ranges from $4,000 to $24,000 per month, and the average resident monthly cost is $7,140. Collecting significant user fees to provide licensing for a robust enforcement program thoroughly adjudicating complaints could also impact resident affordability, particularly for the lowest-cost facilities that are important for fixed-income seniors.

At the January 25, 2024 meeting, the commission took the following action:

Ayes: Commissioners Smart, Spigner, Katz
Noes: None.
Abstain: None.
Absent from vote: Commissioner Webber
Excused: Commissioners Bechtolsheim, Lee. .
Motion Passed.

Ombudsperson Program

However, a licensure program that could collect user fees funding an enhanced ombudsperson program could mitigate program costs, while providing services that may serve the population best – witnessing, investigating, and documenting resident/patient complaints to encourage quality patient care by ensuring accountability. It appears that a modest licensing fee providing ombudsperson user services could support approximately 1 FTE citywide in addition to funds identified in the budget process, and the CHC defers to the City Manager to identify specific funding scenarios. Alameda County Department of Social Services operates an ombudsman program that is reliant on contracting with Empowered Aging in Oakland, which also operates ombudsperson services for Contra Costa and Solano Counties. However, Empowered Aging is also

reliant on part-time volunteers without any substantial social work or health care training. While a layperson volunteer may be capable of training how to engage residents and help document concerns, the CHC believes that such training and experience is valuable and important to quality patient advocacy services, particularly for complex cases and patients at risk of negligence or abuse. The program operated by Empowered Aging states that they make regular unannounced visits to facilities, investigate resident complaints, improve facility conditions by providing staff trainings, provide information about advanced health care directives and help execute official documents, promote community awareness through educational workshops, and field informational calls from families in distress.

The Commission defers to the City Manager for further investigation and comment regarding whether HHCS staff should develop in-house ombudsperson staffing, perhaps in conjunction with improved funding for public health nursing services, or if services can be provided with greater care and skill through a partnership with Empowered Aging or another organization. The investigation should survey whether there is existing experience within the six facilities within Berkeley, how often unannounced visits occur or can occur with sufficient funding, the quality of such visits, including the role and benefits of nursing care or social work background and expertise, the effort made to thoroughly make contact with residents, and the ability to perform diligent documentation and advocacy in response to a particular complaint. For example, an indicator of quality outreach should include the number of direct patient contacts that empower a patient to follow up with an informal complaint or request for assistance, beyond the possibility of a visit or a general outreach meeting. Patients without independent access to phone, e-mail, or family advocates should be identified and offered more frequent outreach due to this potentially vulnerable situation. Services should include taking of contemporaneous statements from the affected patient and other witnesses, and photographic evidence, to assist in regulatory or civil enforcement actions. Such evidence can make a significant difference in the ability to retain legal counsel or to encourage quality patient care, because the legal standard to show negligence in nursing home abuse cases is a “clear and convincing evidence” standard and not the ordinary “preponderance” standard. Residents should also be provided resources regarding their rights and legal services such as CANHR materials. Finally, the enhanced ombudsperson program should also provide a record to support state regulator determination of staffing adequacy for resident needs where indicated, as described below.

Services with a partner organization should be based on City ability to provide the services, and require results-based reporting based on the above-described expectations. This evaluation may occur in the near-term or may complete after City Council initial review of this approach compared to other approaches.

Inclusion of Residential Care Facilities for the Elderly

Residential Care Facilities for the Elderly (RCFEs) are also known as “Assisted Living” and are licensed by the California Department of Social Services, Community Care Licensing. They are considered non-medical facilities that provide room, meals, housekeeping, supervision, distribution of medication, and personal care assistance with basic activities. There are five licensed facilities in Berkeley according to CDSS, and a few other facilities that may be operating under different license types. Administrators must complete a minimal 80-hour training for certification. They do not have minimum medical staffing requirements. California law requires that facility personnel shall at all times be sufficient in numbers, qualifications, and competency to provide the services necessary to meet resident needs, and to ensure their health, safety, comfort, and supervision.[1] There must be at least one administrator or designated substitute with qualifications adequate to be responsible for the management and administration of the facility on premises 24 hours per day, and the facility must also have at least one staff member trained in CPR and first aid on duty and on the premises at all times.[2] While the default is that Medi-Cal will not pay for RCFE services, Alameda County residents are among the communities exempted by a waiver program and Medi-Cal pays for care services at a rate between $88 - $250 per day depending on the tier of services. The CHC recommends inclusion of RCFEs in an enhanced ombudsperson program, depending on demonstrated need, but at this time recommends that services be based on General Fund support rather than a City license and user fee program until feasibility and impacts on resident costs can be assessed.

Staffing Levels for Skilled Nursing Facilities

While many problems in patient care stem from direct abuse, other problems in the quality of care arise from the systemic understaffing of nursing homes. CMS issued a proposed rule last year that would require nursing homes to provide residents with a minimum of 0.55 hours of care from a registered nurse per resident per day, and 2.45 hours of care from a nurse aide per resident per day. In addition, nursing homes would also be required to ensure a registered nurse is on site 24 hours per day, 7 days per week, and to complete robust facility assessments on staffing needs, which may lead to higher levels of staffing above the proposed minimum standards. California already requires skilled nursing facilities to provide a minimum 3.2 hours of care per patient per day and requires a 24-hour registered nurse, with slightly higher requirements for larger facilities.[3] If this staffing level is not adequate to meet resident needs, the nursing home must employ as many licensed nursing and certified nursing assistants as are needed. In a clearly visible place, a facility must post daily, for each shift, the current number of licensed and unlicensed nursing staff directly responsible for resident care.[4] A 2001 study by the Centers for Medicare & Medicaid Services (CMS) recommended a total of

[1] HSC 1569.269(a)(6), 1569.618(c); CCR 87411, 87468.2(a)(4)
[2] HSC 1569.618(b); HSC 1569.618(c)
[3] Health and Safety Code section 1276.5
[4] 42 USC §1396r(b)(8) , 42 CFR §483.30(e), California Health & Safety Code §1276.65(f)

4.1 hours of nursing care per resident per day.[5] This was further enumerated in subcategories of 0.75 hours provided by a registered nurse, 0.55 hours provided by a licensed vocational nurse, and 2.8-3.0 hours provided by a certified nursing assistant.

Four skilled nursing facilities in Berkeley reported staffing levels to CMS in 2021: Berkeley Pines Skilled Nursing Center, Chaparral House, Elmwood Care Center, and Kyakameena Care Center, with care staffing levels of 3.42, 4.18, 3.79, and 3.59 hours of nursing care per resident per day, respectively. Care by a registered nurse was 0.18, 0.38, 0.43, and 0.28 hours of care per resident per day, respectively, below the proposed CMS standard. Data was not available for Ashby Care Center. The CMS regulation would substantially increase patient access to a registered nurse, but would not affect overall staffing levels. However, the CMS regulation is phased in over three years after it is eventually adopted.

The Commission strongly supports increased staffing levels for skilled nursing facilities that would be adequate to meet the needs of the resident population, but without at this time understanding each facility's budget, is concerned that imposing a cost burden on facilities that are more dependent on inadequate CMS reimbursement rates could impact operations or risk a facility closing when regulated at the city level, as opposed to state level regulation. The Commission does not find this risk with implementing the registered nursing hours of care 3 years ahead of the CMS regulation, and recommends such early implementation within 90 days after an ordinance can be drafted and adopted. The ombudsperson enhancement program should also provide an opportunity to review the staffing reports of each facility in light of ombudsperson site visits and patient reports and should enable ombudsperson reports to CHCQ/CDPH of site-specific inadequate staffing beyond the minimum requirements. The City may review CHCQ/CDPH responsiveness to these reports over time and later consider implementing such a needs-based staffing requirement by ordinance.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

There are no identifiable environmental effects, climate impacts, or sustainability opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

Protection of vulnerable elders. See background discussion.

ALTERNATIVE ACTIONS CONSIDERED

The Commission considered the regulatory approach suggested in the referral, and more robust minimum staffing levels. See report.

CITY MANAGER

[5] https://nap.nationalacademies.org/catalog/10027/crossing-the-quality-chasm-a-new-health-system-for-the

The City Manager takes no position with the content and recommendations of the Commission's Report.

<u>CONTACT PERSON</u>
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Attachments:
1: City Council Referral
2: Fact Sheet: Medicare and Medicaid Programs: Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting

Attachment 1

CONSENT CALENDAR
December 14, 2021

To: Honorable Mayor and Members of the City Council
From: Councilmember Ben Bartlett
Subject: Health Care Facility Oversight

RECOMMENDATION

Refer to the City Manager and the Community Health Commission an assessment of the breadth of regulatory control the City of Berkeley can exert on skilled nursing facilities, and create a process of accountability if complaints are found to be substantiated that threaten, or could potentially escalate to the point of threatening, the wellbeing of patients and/or violate federal, state, or local law; the business license of the offending facility will be suspended until the skilled nursing facility submits a report demonstrating rectification of the situation.

BACKGROUND

The California Department of Public Health (CDPH) mandates that skilled nursing facilities provide 3.5 hours of patient care to each patient per day.[1] For instance, some care facilities in Berkeley are reported to have as few as 6 staffers serving 66 patients, meaning that even if the staff worked around the clock, at most they would be able to offer 2.1 staff hours per patient per day. In 2021 alone, the facility has received 12 complaints, but not a single one has been followed up by an enforcement action[2]. This is just a single example in an egregious pattern of lack of care met with lack of enforcement. In 2019, for example, skilled nursing facilities were found to violate an average of 23 federal and state laws per facility. Yet, in the 77 skilled nursing facilities across California, not a single regulation was enforced. As a result, there has been a history of negligence, mistreatment, and patient abuse within Californian care facilities.[3]

CURRENT SITUATION

The City has received numerous grievances from concerned community members over the quality of care in certain skilled nursing facilities in Berkeley. Community members complain of neglect, indifference, and harmful, negligent behavior with sometimes tragic consequences.

The City must address these hazards by creating internal procedures and policies designed to prevent further harmful acts. Precedence for license revocation policies can be found in other municipalities. For example, Chapter 6 Section 1.80 of Superior, Colorado Municipal Code states that business licenses can be suspended “when any activity conducted by the licensee, his or her employee or agent violates any federal, state or local rule, regulation or law.[4] The City

[1] https://canhrnews.com/guidelines-for-3-5-direct-care-service-hours-per-patient-day-dhppd-staffing-audits/
[2] https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/SearchResult.aspx
[3] https://calmatters.org/health/2021/10/nursing-homes-oversight-california-hearing/
[4] https://library.municode.com/co/superior/codes/municipal_code?nodeId=CH6BULIRE

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of Berkeley could adopt such an ordinance to shutter inept care facilities and deter improper conduct and mismanagement.

Furthermore, to ensure enforcement, the City could mandate that all complaints be forwarded to the Environmental Health Division to be reviewed in a timely manner. This would prevent a backlog of complaints and strengthen City follow-through.

The City of Berkeley needs to enforce strict regulations over the performance and conditions of skilled nursing care facilities to ensure that patients are not stripped of their right to quality care. As stated above, a particularly skilled nursing care facility received 12 complaints in 2021, but there was zero enforcement action taken against them. With this recommendation, there will be a strict standard that skilled nursing care facilities must meet to guarantee that issues are adequately addressed by the City of Berkeley. Furthermore, it provides safeguards to ensure that patients are not neglected by those assigned to look after them.

FINANCIAL IMPLICATIONS

Determine as part of City Manager and Commission response.
Suppose the City can regulate skilled nursing facilities (generally not a City role). In that case, there could be significant financial implications because there is currently no staff assigned to this work in the City.

COMMUNITY CONSULTATIONS

This item was informed by consultations with and complaints raised by community members.

CONTACT PERSONS

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Fact sheet

Medicare and Medicaid Programs: Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting (CMS 3442-P)

Sep 01, 2023 Nursing facilities, Quality, Safety

On September 1, 2023, the Centers for Medicare & Medicaid Services (CMS) issued the Minimum Staffing Standards for Long-Term Care (LTC) Facilities and Medicaid Institutional Payment Transparency Reporting proposed rule, which seeks to establish comprehensive nurse staffing requirements to hold nursing homes accountable for providing safe and high-quality care for the over 1.2 million residents receiving care in Medicare and Medicaid-certified LTC facilities each day.

Ensuring that beneficiaries receive safe, reliable, and quality nursing home care is a critical function of the Medicare and Medicaid programs and a top priority of CMS. The COVID-19 Public Health Emergency (PHE) tragically caused unprecedented illness and death among nursing home residents and workers. The PHE also exacerbated staffing challenges experienced in many facilities and further highlighted disparities in care and outcomes. Despite existing requirements that facilities provide sufficient levels of staffing in LTC facilities, chronic understaffing remains a significant concern.

The proposed rule consists of three core staffing proposals: 1) minimum nurse staffing standards of 0.55 hours per resident day (HPRD) for Registered Nurses (RNs) and 2.45 HPRD for Nurse Aides (NAs); 2) a requirement to have an RN onsite 24 hours a day, seven days a week; and 3) enhanced facility assessment requirements. The proposed rule also includes a staggered implementation approach and possible hardship exemptions for select facilities. This proposed rule results from a multi-faceted approach aimed at determining the minimum level and type of staffing needed to enable safe and quality care in LTC facilities. This effort included issuing a Request for Information (RFI) in the FY 2023 Skilled Nurse Facility Prospective Payment System Proposed Rule, hosting listening sessions and extensive engagement with various interested parties, conducting a 2022 Nursing Home Staffing Study, which builds on existing evidence and research studies using multiple data

sources, and reviewing recent years of Payroll-Based Journal System staffing data. CMS also considered how the proposed minimum staffing requirements would align or interact with ongoing CMS initiatives and programs that impact the LTC community. Information gathered from each of these facets was used by CMS in the development of the proposed requirements that would ensure all nursing home residents are provided safe, quality care.

This proposed rule would also promote public transparency related to the percentage of Medicaid payments for services in nursing facilities and intermediate care facilities for individuals with intellectual disabilities that are spent on compensation to direct care workers and support staff. The Medicaid institutional payment transparency provision is intended to align with a similar transparency provision focused on specific Medicaid home and community-based services in the *Ensuring Access to Medicaid Services* proposed rule (CMS-2442-P), published in the May 3, 2023, issue of the Federal Register.

Additionally, CMS announced a national campaign to support staffing in nursing homes. CMS will work with the Health Resources and Services Administration (HRSA) and other partners to make it easier for individuals to enter careers in nursing homes, investing over $75 million in financial incentives such as scholarships and tuition reimbursement. This staffing campaign builds on other actions through the HHS Health Workforce Initiative, including the recent announcement that HRSA awarded more than $100 million to train more nurses and grow the nursing workforce.

Establishing Minimum Nurse Staffing Standards

Staffing in LTC facilities has remained a persistent concern, especially among low-performing facilities that are at most risk for providing unsafe care. CMS believes that national minimum nurse staffing standards in LTC facilities, the adoption of a 24/7 RN requirement, and enhanced facility assessment requirement (as discussed later in this fact sheet) are necessary at this time to protect resident health and safety and ensure their needs are met.

Therefore, CMS proposes individual minimum nurse staffing standards for LTC facilities of 0.55 HPRD for RNs and 2.45 HPRD for NAs. However, these thresholds are minimums; while these proposed minimum standards, if finalized, would be applied across all LTC facilities, CMS also expects facilities to staff above these minimum baseline levels to address the specific needs of their unique resident population based on the facility assessment and resident acuity levels.

CMS is soliciting comments on alternative policy options that should be considered for establishing minimum nurse staffing standards. Based on the proposed policy presented in this rule, CMS is seeking feedback regarding whether alternative policy options would be

better suited to meet and maintain acceptable quality and safety within LTC facilities, with consideration for external factors affecting staffing.

Specifically, CMS is seeking comment on an alternative total nurse staffing standard of 3.48 HPRD, among other alternatives, within which there would still be 0.55 RN HPRD and 2.45 NA HPRD minimums. Facilities would have to meet the individual standards for RNs and NAs, i.e., 0.55 and 2.45 HPRD, respectively, as well as the 3.48 HPRD, for total nurse staffing to be considered in compliance. Lastly, we seek comments on the benefits and tradeoffs of different standards, evidence, or methodologies states use to establish minimum staffing standards and other key considerations.

Improving the RN On-Site Requirement

LTC facilities provide care for residents with increasing medical complexity and acuity of health conditions who require substantial resources and care provided or supervised by an RN. While the minimum staffing standard proposal described above seeks to build on existing requirements by creating consistent and broadly applicable standards that significantly reduce the risk of unsafe and low-quality care across LTC facilities, the current minimum nurse standards do not reduce the risk of avoidable resident safety events when there is no RN on site, particularly during evenings, nights, weekends, and holidays. Therefore, CMS proposes that LTC facilities must have an RN onsite 24 hours a day, seven days a week, who is available to provide direct resident care. This proposal aims to address these challenges and ensure that residents are receiving safe, quality care by an RN, at all times when needed.

CMS is interested in comments regarding the feasibility of our proposed requirements for each LTC facility to have an RN on site 24 hours a day, seven days a week, including possible alternatives to this proposal.

Strengthening the Facility Assessment Requirement

To help improve the safety of residents, a comprehensive approach to establishing staffing standards is necessary to ensure that facilities are making thoughtful, informed staffing plans and decisions focused on meeting resident needs. As part of that approach, LTC facilities are already required to conduct, document, and review annually and, as necessary, a facility-wide assessment to determine what resources are necessary to care for residents competently during both day-to-day operations and emergencies.

To ensure that facilities are utilizing the facility assessment as intended by making thoughtful, person-centered staffing plans and decisions focused on meeting resident needs, including staffing at levels above the proposed minimums as indicated by resident

acuity, CMS is proposing several updates to the facility assessment as a means of strengthening these requirements, including:

- Clarifying that facilities must use evidence-based methods when care planning for their residents, including consideration for those residents with behavioral health needs;
- Requiring that facilities use the facility assessment to assess the specific needs of each resident in the facility and to adjust as necessary based on any significant changes in the resident population;
- Requiring that facilities include the input of facility staff, including, but not limited to, nursing home leadership, management, direct care staff (i.e., nurse staff), representatives of direct care staff, and staff who provide other services; and,
- Requiring facilities to develop a staffing plan to maximize recruitment and retention of staff consistent with what was described in the President's April Executive Order on Increasing Access to Higher Quality Care and Supporting Caregivers.

Permitting Regulatory Flexibility

CMS aims to hold nursing homes accountable for ensuring that residents receive safe and high-quality care. While we fully expect that LTC facilities will be able to meet our proposed minimum staffing standards, we recognize that in some instances, external circumstances may temporarily prevent a facility from achieving compliance despite the facility's demonstrated best efforts. Moreover, some LTC facilities are still experiencing challenges in hiring and retaining certain nursing staff because of local workforce unavailability, which was exacerbated by the COVID-19 pandemic. Therefore, CMS proposes to allow for a hardship exemption in limited circumstances. LTC facilities may qualify for a temporary hardship exemption from the minimum nurse staffing HPRD standards only if they are able to meet specific criteria demonstrating the following:

- Workforce unavailability based on their location, as evidenced by either a medium (that is, 20 percent below the national average) or low (that is, 40 percent below national average) provider-to-population ratio for the nursing workforce, as calculated by CMS, by using the Bureau of Labor Statistics and Census Bureau data, or the facility is located at least 20 miles away from another LTC facility (as determined by CMS); and
- Good faith efforts to hire and retain staff through the development and implementation of a recruitment and retention plan; by documenting job postings, and job vacancies, including the number and duration of vacancies, job offers made, and competitive wage offerings, and
- A financial commitment to staffing by documenting the total annual amount spent on direct care staff.

Prior to being considered, the LTC facility must be surveyed to assess the health and safety of the residents. Suppose an LTC facility is found noncompliant with the minimum staffing requirements while not meeting the exclusionary criteria (as outlined below). In that case, CMS will determine if the facility is in a workforce unavailability area. If CMS determines the facility is in a workforce unavailability area, the LTC facility's documentation of a good faith effort to hire and retain staff and the LTC facility's documentation of a financial commitment must be submitted to the State or CMS. CMS will then determine if the facility will be granted an exemption from enforcement. CMS will indicate if a facility has obtained an exemption on the Medicare.gov Care Compare website to ensure current and prospective residents and their families are aware that a facility has levels of staffing lower than the standard.

Facilities would not be eligible for an exemption if:

- They have failed to submit their data to the Payroll-Based Journal System;
- They have been identified as a special focus facility (SFF) or
- They have been identified within the preceding 12 months as having widespread insufficient staffing with resultant resident actual harm or a pattern of insufficient staffing with resultant resident actual harm or have been cited at the immediate jeopardy level of severity with respect to insufficient staffing as determined by CMS.

Given the complex health needs of residents living in LTC facilities and to protect resident health and safety, CMS believes that it is important for exempted facilities to continue to maintain compliance with existing requirements to provide services by a sufficient number of staff on a 24-hour basis to all residents in accordance with resident care plans. These requirements are responsive to longstanding concerns related to low staffing levels in facilities on weekends and evenings; further, ongoing RN presence is needed to provide care and monitor resident health. If a facility seeks relief from the 24/7 RN requirement, it would have to follow the applicable existing waiver process, as required by statute and set out in the current regulations.

Staggering Implementation

To give LTC facilities time to achieve compliance with the proposed minimum staffing requirements, CMS proposes that implementation of the final requirements will occur in three phases over a 3-year period for all non-rural facilities. Specifically, we propose for non-rural facilities:

- Phase 1 would require facilities located in urban areas to comply with the facility assessment requirements 60 days after the publication date of the final rule;

- Phase 2 would require facilities located in urban areas to comply with the requirement for an RN onsite 24 hours and seven days/week two years after the publication date of the final rule and
- Phase 3 would require facilities located in urban areas to comply with the minimum staffing requirements of 0.55 and 2.45 hours per resident day for RNs and NAs, respectively, three years after the publication date of the final rule.

CMS acknowledges the unique challenges that rural LTC facilities face, especially as it relates to staffing. We intend to promote safe, high-quality care for all residents regardless of location. We also recognize the need to strike an appropriate balance that considers the current challenges some LTC facilities are experiencing, particularly in rural areas. Therefore, we are proposing a later implementation date for rural facilities. Rural facilities will have three years to meet the proposed 24/7 RN requirement and five years to meet the proposed minimum staffing requirements (HPRD) as outlined below. Specifically, we propose for rural facilities:

- Phase 1 would require facilities to comply with the facility assessment requirements 60 days after the publication date of the final rule;
- Phase 2 would require facilities to comply with the requirement for an RN onsite 24 hours and seven days/week three years after the publication date of the final rule and
- Phase 3 would require facilities to comply with the minimum staffing requirement of 0.55 and 2.45 HPRD for RNs and NAs, respectively, five years after the publication date of the final rule.

Medicaid Institutional Payment Transparency

Millions of Americans, including children and adults of all ages, need long-term services and supports because of disabilities, chronic illness, and other factors. Today, most people who receive Medicaid-funded long-term services and supports are served in the community. However, about 1.5 million people receive Medicaid-funded long-term services and supports in nursing homes and intermediate care facilities for people with intellectual disabilities each year.

As the Biden-Harris Administration works to ensure that older adults, people with disabilities, and families have access to affordable, high-quality care, we recognize that workforce shortages and high rates of worker turnover in nursing facilities and intermediate care facilities for individuals with intellectual disabilities make it difficult for people with disabilities and older adults to have access to high-quality services.

The proposed rule includes provisions that are intended to promote public transparency related to the percentage of Medicaid payments for services in nursing facilities and intermediate care facilities for individuals with intellectual disabilities that are spent on compensation to direct care workers and support staff. The Medicaid institutional payment transparency reporting provisions, if adopted as proposed, would build on proposals in the *Ensuring Access to Medicaid Services* proposed rule in which CMS proposed to require, among other things, that states report to CMS and publicly on the percentage of Medicaid payments for certain home and community-based services that are spent on compensation for direct care workers.

Highlights from this proposed rule include:

- **New proposed institutional payment reporting requirements for states** that would require states to report to CMS on the percentage of Medicaid payments for services in nursing facilities and intermediate care facilities for individuals with intellectual disabilities that are spent on compensation for direct care workers and support staff. These requirements would apply regardless of whether a state's long-term services and supports delivery system is fee-for-service or managed care.
- **Promoting the public availability of Medicaid institutional payment information** by proposing that both states and CMS make the institutional payment information reported by states to CMS available on public-facing websites.

The goals of these proposed requirements are to promote accountability and inform efforts to address the link between sufficient payments being received by the institutional direct care and support staff workforce and access to and, ultimately, the quality of services received by Medicaid beneficiaries.

Comment Submission

There will be a 60-day comment period for the notice of proposed rulemaking, and comments must be submitted to the Federal Register no later than November 6, 2023. For more information on how to submit comments or to review the entire rule, visit the Federal Register https://www.federalregister.gov/public-inspection/current.

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A federal government website managed and paid for by the U.S. Centers for Medicare & Medicaid Services.

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