



April 7, 2025

The Honorable Kathy Hochul
Governor
State of New York
The Capitol
Albany, NY 12224

The Honorable James V. McDonald, M.D., M.P.H.
Commissioner
New York State Department of Health
Corning Tower
Albany, NY

Dear Governor Hochul and Commissioner McDonald:

I am writing to you on behalf of the not-for-profit and government-sponsored nursing homes represented by LeadingAge New York. We were shocked and dismayed by the Commissioner's recent determination that less than half of New York's Metropolitan and Non-Metropolitan Statistical Areas ("MSAs and NMSAs") were experiencing a shortage of nurses or certified nurse aides (CNAs) in the last two quarters of 2023. This determination conflicts sharply with the facts that our members are experiencing in the field.

As a result of this inexplicable decision, many, if not most,¹ nursing homes are now facing severe penalties of up to *\$180,000 per quarter* without the ability to seek a reduction. These penalties are purely punitive and will only deplete the resources of facilities that are already facing a 25 percent shortfall between Medicaid rates and costs. Rather than promoting better staffing, they will further diminish the ability of nursing homes to recruit more staff. In order to achieve the mandated hours, nursing homes will either have to reduce occupancy by another 8,400 beds, in addition to the 7,200 beds that are currently being kept empty due to staffing shortages, or hire an additional 1,500 aides and nurses at a cost exceeding \$75 million annually. We ask you to reconsider and reverse your determination that acute shortages of nurses and aides do not exist in most of the State, to allow nursing homes statewide to seek reductions of potential penalties (as they have in prior quarters), and to use a more reasonable methodology for evaluating staffing shortages going forward.

Background

Under State nursing home staffing requirements, homes must provide 3.5 hours of nurse and certified nurse aide (CNA) hours per resident per day (HPRD), including 1.1 HPRD by an RN or LPN and 2.2 HPRD by a CNA. If they fail to meet any one of these requirements, nursing homes are subject to daily penalties of up to \$2,000

¹ It is unclear whether the Department will allow homes that have a declared shortage in one title in their MSA/NMSA to apply for mitigation of penalties in relation to deficiencies in the other titles. Thus, we are unable to determine the precise number that are ineligible for a reduction.

per day for each day they are out of compliance. Notably, if a nursing home meets or even exceeds the 3.5 HPRD overall requirement by exceeding the 1.1 nurse HPRD, but does not meet the 2.2 CNA HPRD, the facility is still out of compliance and subject to penalties. Only nurse and CNA hours are counted for purposes of determining compliance; none of the hours of other direct care staff (e.g., physical, speech, occupational, or recreation therapy staff, feeding assistants, nurse practitioners, or physician assistants) are counted.

These staffing requirements have been in effect since April 1, 2022, and the Department of Health has issued notices of non-compliance in relation to staffing in Quarter 2 of 2022 through Quarter 3 (Q3) of 2023. In every quarter thus far, the majority of nursing homes have been unable to meet all three of the mandated requirements. The Q3 of 2023 notices were issued last week, on April 2, 2025.

In Q3 of 2023, 71 percent of nursing homes statewide failed at least one of the three staffing requirements, including 82 percent of for-profit facilities and 56 percent of not-for-profit facilities. In every MSA and NMSA, most nursing homes failed at least one of the staffing requirements, with the greatest percentage of nursing homes failing the CNA HPRD requirement.

Under the nursing home minimum staffing regulations, a nursing home may seek mitigation of potential penalties only under the following circumstances:

- An acute labor supply shortage in its Metropolitan or Non-Metropolitan Statistical Area;
- Extraordinary circumstances, defined as a declared emergency, natural disaster, or catastrophe that caused physical damage or prevented access into the facility;
- A union dispute.

In the absence of a determination that an acute labor supply shortage exists in a MSA or NMSA, the only grounds for a reduction of penalties are “extraordinary circumstances” or a union dispute. Nearly 90 percent of homes that did not meet the staffing standard for CNAs are in areas deemed not to have an acute shortage of CNAs, and are ineligible to apply for a reduction in penalties. Notably, neither the statute nor the regulation specifies a formula or methodology for determining whether an acute labor supply shortage exists.

The March 14th Acute Labor Supply Shortage Determination

For every quarter until Q3 of 2023, the Commissioner found an acute labor supply shortage statewide in all of the titles covered by the staffing mandate. These determinations appear to have relied on the Governor’s declaration of a health care staffing emergency during the applicable periods. In response to notices for each quarter prior to Q3 of 2023, facilities deemed non-compliant submitted volumes of documents to demonstrate their efforts to recruit and retain staff and promote the health and safety of their residents. The Department has not, to date, responded to these submissions other than to request more information.

Last week,² for the first time, the Commissioner determined that there was no acute labor supply shortage of nurses and certified nurse aides in most MSAs and NMSAs. This change, which applies to compliance findings for Q3 and Q4 of 2023, seems to be based *not* on any empirical improvement in the availability of staff between previous quarters and Q3 of 2023, but rather on the use of a new and previously undisclosed methodology to

² The determination is dated March 14th, but it was not posted to the Department’s website until March 28th.

measure the shortages. For purposes of compliance findings in relation to Q3 and Q4 of 2023, the Department chose to define an acute labor supply shortage as the existence of a “provider-to-population ratio . . . [that is] at least a minimum of *20 percent below the national average* (emphasis added).” The Commissioner’s determination cites for that benchmark a provision of federal staffing regulations that are not currently in effect, and are scheduled to take effect on a phased basis between 2026 and 2029, at the earliest.³

Notwithstanding all of the evidence to the contrary, based on this benchmark, only 5 of the 15 MSAs and NMSAs were deemed to have a CNA shortage or an RN shortage. Not a single MSA or NMSA had a shortage of all three titles. Only 1 MSA (the NY-NJ-PA MSA) had a shortage of LPNs. Surprisingly, rural Livingston, Warren, Washington, and Herkimer Counties, among many other rural counties, had no shortages at all. These findings are utterly inconsistent with the experience of providers in the field.

The Department’s decision to use this benchmark was a discretionary one; it was neither mandated nor disclosed in the statute, regulations, or the response to public comment on the regulations. In our comments on the proposed regulations, LeadingAge New York noted the absence of a definition of “acute labor supply shortage” and the lack of a methodology for determining whether an acute labor shortage exists. In response, the Department merely echoed the regulation, stating:

“the Commissioner shall issue a determination on a quarterly basis as to whether an acute labor supply shortage of nurse aides, certified nurse aides, licensed practical nurses, or registered nurses exists in any Metropolitan or Nonmetropolitan Area of New York State. Such determination shall be made in consultation with the New York State Department of Labor and shall take into account job availability metrics developed by the New York State Department of Labor, which may include but is not limited to the list of job openings in New York State.” (NYS Register, 12/07/2022).

It is unclear whether the Department considered job availability metrics in New York State when developing its methodology. The fact that the Commissioner’s determination references a benchmark from CMS, instead of the State Department of Labor, suggests that the Department did not take into account the list of job openings or other factors listed in the State Register.

As a result of this new benchmark for defining an acute labor supply shortage, the majority of New York’s nursing homes now face severe penalties with no opportunity to seek a reduction, regardless of how hard they tried to recruit and retain sufficient staff and regardless of the unique challenges they may face given funding, payer mix, and/or geographic location. Again, this change in the enforcement posture of the Department is not mandated by law, nor does it appear to be based on the actual experience of nursing homes or observation of nursing home staff availability in the field.

The Benchmark Ignores the Realities of New York’s and the Nation’s Health Care Labor Market

The Department’s decision to allow nursing homes to qualify for a penalty reduction *only* if they are in an MSA or NMSA that had nurse and aide shortages at least *20 percent worse than the national average* ignores the realities of New York’s and the nation’s health care labor markets. First, the national average provider-to-

³ 40876 Federal Register / Vol. 89, No. 92 / Friday, May 10, 2024 / Rules and Regulations.

population ratio used as the benchmark for the determination reflects the nationwide shortage of staff in these titles.⁴ It is unreasonable to deny New York’s nursing homes the opportunity to seek a penalty reduction solely because the workforce shortage in an MSA or NMSA is not 20 percent worse than the nationwide shortage. A nursing home in an MSA or NMSA with a workforce shortage that is merely equivalent to the nationwide shortage would experience significant difficulty meeting the mandated HPRD in the three job titles due to demographic, geographic, economic, and reimbursement factors beyond its control.

In addition, the unique dynamics of New York’s health care labor market are not appropriately captured when a national benchmark is used to measure a shortage. New York has a robust health care system, and health care providers are major employers in many areas. As a result, there may be higher than average numbers of nurses per capita in an MSA/NMSA, for example, compared to the depressed national ratio. However, nursing homes in New York must compete with hospitals, physician practices, FQHCs, ambulatory surgery centers, and insurance companies for these professionals. Moreover, with 75 percent of their days of care paid for by Medicaid and among the largest gaps in the nation between Medicaid rates and costs,⁵ New York’s nursing homes are not able to compete effectively with other employers for staff.

Nursing homes’ ability to recruit certified nurse aides is further complicated by the State’s minimum wage rates. New York has the fifth highest minimum wage in the nation.⁶ In order to compete with retail and fast food establishments for entry level staff, New York’s nursing homes must offer a much higher rate of pay than those in other states. At the same time, as noted above, the shortfall between New York’s nursing home Medicaid rate and costs is larger than most states.

New York’s nursing homes are doing their best to raise wages and offer generous benefits and supports. According to the latest BLS data, the average CNA wage in NY is \$22.13, more than \$3 per hour higher than the national average. LeadingAge New York member nursing homes are also offering free CNA training with pay, scholarships for higher education, life coaching and mentoring, child care, and work-related supports, as well as more conventional benefits such as health insurance and paid vacation. Over 70 percent of New York’s nursing homes are unionized. Average turnover for nursing staff as reported in the 5-star rating system by CMS is 41.8 percent in New York State, materially better than the 48.4 percent national average.

The Labor Supply Determination Will Result in Debilitating Fines that Will Divert Funds from Resident Care

As a result of the Commissioner’s no-shortage determination, many, if not most, nursing homes in the State that have failed to meet all three staffing requirements will be ineligible for penalty mitigation. The imposition of the penalties delineated in the Department’s FAQ document will destabilize facilities. Over 75 percent of not-for-profit nursing homes are already experiencing negative operating margins, many for multiple years.

⁴ The Health Resources and Services Administration projects a shortage of 78,610 full-time RNs in 2025 and a shortage of 63,720 full-time RNs in 2030. The Bureau of Labor Statistics projects 193,100 job openings *per year* for RNs through 2032, while the RN workforce is expected to grow by only 177,440 over 10 years. HRSA, Nurse Workforce Projections, 2020-2035, accessed at <https://bhw.hrsa.gov/sites/default/files/bureau-health-workforce/Nursing-Workforce-Projections-Factsheet.pdf> ; BLS,

“Occupational Outlook, Registered Nurses,” accessed at <https://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-6>.

⁵ “Estimates of Medicaid Nursing Facility Payments Relative to Costs.” Medicaid and CHIP Payment and Access Commission. Jan. 2023, available at <https://www.macpac.gov/publication/estimates-of-medicaid-nursing-facility-payments-relative-to-costs/>.

⁶ New York also requires a higher minimum wage for home care aides than for other workers.

Nearly 50 percent have taken beds off-line or restricted admissions, in order to improve their performance against the staffing requirements. According to Department of Health data, approximately 7,200 beds are unoccupied due to lack of staffing. These reductions in census have diminished revenues, without providing a proportionate reduction in costs. The imposition of steep penalties will only push these facilities closer to the brink.

Notably, the nursing homes that are in compliance with staffing requirements tend to have sources of funding in lieu of, or in addition to, geriatric Medicaid rates. For example, we observe higher levels of compliance among facilities with a high private pay census (such as continuing care retirement communities), government-sponsored facilities (that supplement Medicaid rates with county or State funding), and facilities that receive specialty rates, such as pediatric facilities. Even these facilities are unable to achieve compliance in each title every day of the quarter.

Aside from these unique facilities, the facilities that achieve, or come close to, compliance with the staffing mandates have comparatively worse operating margins and a higher percentage of beds taken offline due to staffing. Of the public and non-profit homes that were compliant with staffing standards and that have complete 2023 financial data, *85 percent had negative margins and 70 percent have taken beds off-line*. In other words, typical geriatric facilities are able to approach compliance with the staffing mandates only by restricting admissions sacrificing their financial viability.

The enforcement of the staffing requirements will have the unfortunate effect of harshly penalizing high-quality facilities, doing their best to staff appropriately and provide quality care to their residents. The following are just a few actual examples of the impact of the determinations and associated penalties:

- Beechwood Homes in Getzville is a 5-Star facility in a non-shortage area with 3.47 HPRD overall in Q3 of 2023. It exceeded the required HPRD for nurses and fell slightly short for CNAs, but will nevertheless face penalties exceeding \$30,000 for the quarter, in the absence of mitigation.
- Wyoming Community Hospital SNF is a hospital-based, 4-star home in Warsaw. While the region is identified as having an RN shortage, the facility's overall staffing was 3.6 and 1.5 for RN/LPNs, but 2.1 for CNAs. As a result of the CNA shortfall, it faces a minimum penalty of \$38,500 for the quarter, even though it exceeded the overall and nurse requirements.
- A 5-Star not-for-profit home in the Bronx, with 3.43 HPRD overall in Q3 of 2023, exceeded the HPRD for nurses, but fell slightly short for aides. Because it is in an MSA with a declared shortage of LPNs only, it faces penalties of \$26,000-\$35,000 for the quarter in the absence of mitigation.

Clearly, if these facilities were able to hire the staff necessary to meet the requirements, they would have done so. It makes no sense to deny facilities an opportunity to demonstrate all that they are doing to meet the requirements and deliver high quality care to their residents. Diverting funds from resident care to penalties will harm residents and reduce the availability of nursing home care in New York State.

We would welcome the opportunity to meet with you and your staff to discuss this further.

Sincerely yours,

A handwritten signature in black ink, appearing to read "S. Barrett". The signature is fluid and cursive, with a large initial "S" and a long, sweeping tail.

Sebrina Barrett
President and CEO

Cc: Angela Profeta
Johanne Morne
Val Deetz