**MEMORANDUM**

To: Subcommittee on Health Members and Staff
From: Committee on Energy and Commerce Majority Staff
Re: Health Subcommittee Hearing on October 25, 2023

---

The Subcommittee on Health will hold a hearing on Wednesday, October 25, 2023, at 2:00 p.m. (ET) in 2123 Rayburn House Office Building. The hearing is entitled "Supporting Access to Long-Term Services and Supports: An Examination of the Impacts of Proposed Regulations on Workforce and Access to Care."

## I. Witnesses

- **Sarah Schumann**, Vice President of Operations, Brookside Inn
- **Mary Killough**, Vice President of Operations and Government Relations, AccentCare
- **Shelly Hughes**, Certified Nurse Aide
- **Lori Smetanka**, Executive Director, The National Consumer Voice for Quality Long-Term Care
- **Patti Killingsworth**, Former Chief of LTSS, TennCare; Chief Strategy Officer, CareBridge Health

## II. Background

Long-term services and supports (LTSS) refer to a broad array of vital services often needed by seniors and people with disabilities to meet their day-to-day needs. The need and scope of services may range significantly from person to person, but can generally be categorized into institutional care, primarily in the form of nursing home care, and home and community-based services (HCBS), which includes everything from home care to employment services.

An estimated six million Americans rely on regular access to LTSS. That number is expected to rise by another million by end of the decade,[1] as over half of all the Americans turning 65 this year are expected to need LTSS at some point later in life.[2] Of these six million, most rely on some form of public payer for their care, with Medicaid accounting for about 44% of all LTSS spending (about $207 billion in annual spending)

---

[1] Congressional Budget Office, "How CBO Analyzes the Costs of Proposals for Single-Payer Health Care Systems That Are Based on Medicare's Fee-For-Service Program", 2020. https://www.cbo.gov/system/files/2020-12/56811-Single-Payer.pdf.

[2] Assistant Secretary for Planning and Evaluation, "Long-Term Services and Supports For Older Americans: Risks and Financing, 2022", 2022. https://aspe.hhs.gov/sites/default/files/documents/08b8b7825f7bc12d2c79261fd7641c88/ltss-risks-financing-2022.pdf.

and Medicare accounting for about 20% of all LTSS spending (about $92 billion in annual spending), while others rely on private insurance or out-of-pocket care.[3] Additionally, countless others rely on varying degrees of family caregiving in lieu of, or in addition to, paid services.

In order to meet this demand, there are an estimated 4 million professional, paid caregivers working in nursing homes and HCBS. Additionally, as many as one in five Americans have provided some level of care to a child or adult with a disability in the past year in addition to, or in lieu of, paid care.[4] However, the total number of available LTSS providers falls short of the needed demand, with hundreds of thousands of Americans on waiting lists just for Medicaid coverage of HCBS. Many are either relying on loved ones for support, paying out-of-pocket for care, or foregoing vital services that would otherwise keep them integrated in their communities.[5]

The shortage of providers has only grown worse in recent years, with the total number of LTSS providers declining by as much as two hundred thousand fewer LTSS providers relative to pre-pandemic projections for the industry.[6] Reasons for this exodus from the workforce are multifaceted and range from burnout and the pursuit for higher-paying jobs with additional career opportunities. While these trends and challenges predate the pandemic, the industry faced turnover rates as high as 42 percent in 2019,[7] and they have only worsened since 2020, threatening to exacerbate the shortages of care for beneficiaries.

To address the needs of the LTSS workforce, states have taken actions in recent years to increase Medicaid reimbursement rates for providers, with such rate increases occurring in states ranging from Texas (a $900 million increase in 2023[8]) to New York (a $200 million increase in 2023). Such state actions come on top of the nearly $200 billion already spent by states on Medicaid coverage for LTSS[9] and state Medicaid spending

---

[3] Congressional Research Service, "Who Pays For Long-Term Services and Supports?", 2023. https://crsreports.congress.gov/product/pdf/IF/IF10343.

[4] Administration for Community Living, "Recognize, Assist, Include, Support, & Engage (RAISE) Family Caregivers Act: Initial Report", 2021. https://acl.gov/sites/default/files/RAISE-InitialReportToCongress2021_Final.pdf.

[5] KFF, "A Look At Waiting Lists For Home And Community-Based Services From 2016 to 2021", 2022. https://www.kff.org/medicaid/issue-brief/a-look-at-waiting-lists-for-home-and-community-based-services-from-2016-to-2021/.

[6] "Peterson-KFF Health Systems Tracker, "How Has Health Sector Employment Recovered Since The Pandemic?", 2023. https://www.healthsystemtracker.org/chart-collection/what-impact-has-the-coronavirus-pandemic-had-on-healthcare-employment/#Cumulative%20%%20change%20in%20health%20sector%20employment%20by%20setting,%20February%202020%20-%20June%202023.

[7] Human Services Research Institute and NASDDDS, "National Core Indicators Staff Stability Survey Report", 2019. https://legacy.nationalcoreindicators.org/upload/core-indicators/2019StaffStabilitySurveyReport_FINAL_1_6_21.pdf.

[8] Kimberly Marselas, McKnights Long-Term Care News, "$900 Million Medicaid Boost Promises Relief After Decade-Long Drought", 2023. https://www.mcknights.com/news/900-million-medicaid-boost-promises-relief-after-decade-long-drought/.

[9] Congressional Research Service, "Who Pays For Long-Term Services and Supports?", 2023. https://crsreports.congress.gov/product/pdf/IF/IF10343.

consistently accounting for one of the largest, if not these largest, spending items in state budgets.[10]

The Biden administration has proposed two regulations aimed at addressing the perceived issues facing the LTSS workforce. The first, "Medicaid Program; Ensuring Access to Medicaid Services" (or the Access Rule) (88 FR 27960), which, among other provisions, would require a minimum of 80 percent of all Medicaid reimbursements for HCBS care to be directly spent on the compensation of the workforce and would limit no more than 20 percent of reimbursements to be applied to administrative and overhead costs (commonly referred to as the 80/20 Rule). The second, the "Medicare and Medicaid Programs: Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payments Transparency Reporting" (or the Minimum Staffing Rule) (88 FR 61352) would set minimum staffing standards for the registered nurses (RNs) and nurse aides (NAs) that must be onsite in a nursing home in any given week.

The implications of the rules would be significant, both in terms of the additional costs that the rules would impose on the private sector, states, and the federal government and in terms of the implications that the rules will have on access to care. In regards to the Minimum Staffing Rule, the costs alone are staggering, with the Centers for Medicare and Medicaid Services (CMSDC) Office of the Actuary (OACT) estimating that the proposed rule would cost federal payers and private actors as much as $40 billion (with over $26 billion of these costs coming directly from state and federal spending in Medicaid) over the next ten years to come into compliance with the law.[11] Similarly, the proposed 80/20 Rule would impose millions in unfunded mandates on providers and states, with no answer for how to make up these costs.[12] In both situations, the rules would require significant increases in state spending in Medicaid, at a time when, as previously noted, maxed-out, state budgets are already dominated by Medicaid spending.

While the costs of these proposed rules are projected to be high, the outcomes for beneficiaries and providers are questionable. As many as 80 percent of all nursing homes will likely fail to comply with the Minimum Staffing Rule with current staffing levels, and many facilities will likely fail to find the necessary numbers of staff needed to come into compliance given the overall shortage of staff and the large number of hospitals and nursing homes that will be seeking to hire from the same relatively smaller pool of potential staff, raising questions about the ability of facilities to meet current patient censuses and continue to provide their current levels of care.[13] Similarly, State Medicaid Directors cite significant challenges for states and HCBS agencies in complying with the 80/20 Rule, including the costs of complying with such a requirement and the likelihood

[10] MACPAC, "MACStats", 2023. https://www.macpac.gov/wp-content/uploads/2023/10/EXHIBIT-5.-Medicaid-as-a-Share-of-States-Total-Budgets-and-State-Funded-Budgets-SFY-2021.pdf.
[11] (88 FR 61352)
[12] (88 FR 27960)
[13] KFF, "What Share Of Nursing Facilities Might Meet Proposed New Requirements For Nursing Staff Hours?", 2023. https://www.kff.org/medicaid/issue-brief/what-share-of-nursing-facilities-might-meet-proposed-new-requirements-for-nursing-staff-hours/.

that smaller and rural practices will be unable to meet the requirements and stay open.[14], The State of California stated in comments that the State is "highly concerned about unintended short-term impacts to the provider market and to costs and beneficiary access to care."[15]

According to data provided by CMS and outside stakeholders, there is little reason to believe they will lead to significant gains in beneficiary care. Notably, a key study that formed the basis for the proposed Minimum Staffing Rule found "no obvious plateau at which quality and safety are maximized or 'cliff' below which quality and safety decline", meaning that varying levels of staffing have not been found to correlate with safety and quality of care.[16] Relatedly, stakeholders found through analyses of state payment policies that an array of states had pass through rates closer to 70% and that compliance with the rule would force states to cut HCBS waiver slots by as much as 28.6%, meaning terminations of care for those already receiving supports or dramatic increases in wait times for vital services.[17]

A healthy LTSS workforce is indispensable to ensuring that the nation's seniors and people with disabilities can receive the care that they need. The Committee intends to examine the current state of the LTSS workforce and the proposed regulations to better understand the challenges ahead and ways to preserve access to care.

## III. Staff Contacts

If you have questions regarding this hearing, please contact Seth Gold of the Committee staff at 202-225-3641.

---

[14] National Association of Medicaid Directors, Comment Letter, 2023. https://medicaiddirectors.org/wp-content/uploads/2023/07/NAMD-Comments-Access-Rule-FINAL.pdf.

[15] California Department of Health Care Services, Comment Letter, 2023. https://www.regulations.gov/comment/CMS-2023-0070-1806.

[16] Abt Associates, "Nursing Home Staffing Study", 2023. https://www.cms.gov/files/document/nursing-home-staffing-study-final-report-appendix-june-2023.pdf.

[17] The Arc of the United States, Comment Letter, 2023. https://www.regulations.gov/comment/CMS-2023-0070-1080.