LEADINGAGE PA RAISES CONCERNS OVER ANTICIPATED FEDERAL STAFFING REQUIREMENTS FOR NURSING HOME PROVIDERS WITH U.S. SEN. BOB CASEY

MECHANICSBURG, Pa. (March 1, 2023) – LeadingAge PA, an association representing more than 370 aging services providers, including many who operate nonprofit nursing homes, sent a letter to U.S. Senator Bob Casey Jr. outlining their concerns about a proposed federal staffing requirement by the Centers for Medicare and Medicaid Services (CMS) for skilled nursing providers. Senator Casey, chairman of the Special Committee on Aging and majority member of the Committee on Finance, recently sent a letter, along with senate colleagues, to CMS Administrator Chiquita Brooks-LaSure in support of a federal staffing minimum.

Here are notable excerpts from LeadingAge PA's letter, signed by president & CEO, Garry Pezzano, and co-signed by over 50 mission-driven nursing home operators:

"We agree that there has been an undeniable workforce crisis in recent years. However, establishing a federal minimum staffing requirement is not the most appropriate way to address this issue and would likely prove to be a detriment to quality that further restricts access to care for those who need it most. Before any staffing mandate can be reasonably considered, we must recognize that providers are in crisis and residents' access to care is at risk, due in large part to historic underfunding and a workforce crisis that pre-dated the pandemic."

"As you indicated, not-for-profit facilities and those that rely heavily on state Medicaid payments do in fact require additional funding to meet these challenges and offset the increased costs and inflation that have arisen out of the pandemic. A minimum staffing standard, which fails to take into account the individual nuances of each state and community, only further exacerbates these financial challenges and will likely lead to additional closures and a reduction of beds available to serve our nation's older adult population."

"While we understand the impulse of needing to do something after the tumultuous years and disastrous consequences inflicted by COVID-19, we cannot point the finger at nursing

facilities who showed remarkable resilience and innovation while dealing with an unparalleled crisis with limited support and resources. Rather than imposing a minimum that further punishes them for consequences outside of their control, we need to come together with support and innovation that will allow for growth and sustainability."

"In 2022, as updated state nursing facility regulations were in development, Pennsylvania's government and industry stakeholders were able to come together and negotiate relatively reasonable staffing standards tied to a long overdue increase in funding for Medicaid-certified nursing facilities, along with a mutual acknowledgement and agreement of the need for additional investment moving forward to offset historic underfunding and rising costs… A federal mandate would not only undo this important work which was completed in Pennsylvania last year, but would also rob other state governments, providers, and stakeholders of the opportunity to come together in a similar fashion to reflect upon the unique needs of their own state."

(Note: The full letter follows.)

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About LeadingAge PA

LeadingAge PA is a trade association representing 370+ high-quality, mission-driven aging services providers across the commonwealth. These providers serve more than 75,000 older Pennsylvanians and employ over 50,000 dedicated caregivers on a daily basis. Services our members offer include Life Plan Communities/Continuing Care Retirement Communities, skilled nursing communities, assisted living residences, personal care homes, home and community-based services, and affordable senior housing. LeadingAge PA advocates on behalf of our members at the state and local levels to influence positive change and affect a healthy vision for the delivery of quality, affordable and ethical care for Pennsylvania's seniors. For more information, visit www.LeadingAgePA.org.

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February 28, 2023

The Honorable Robert P. Casey, Jr.
United States Senator
Chairman, Special Committee on Aging
Majority Member, Committee on Finance
United States Senate
393 Russell Senate Office Building
Washington, DC 20510

Re: Anticipated CMS proposal of federal minimum staffing mandate in skilled nursing facilities

Dear Senator Casey,

Regarding your recent letter submitted to Administrator Brooks-LaSure at the Centers for Medicare and Medicaid Services (CMS) on February 10, we would like to thank you for your recognition that obtaining the perspective of nursing facilities and engaging with industry stakeholders about what support they need is a critical part of addressing the workforce crisis our nation is facing in long-term care. As an association representing more than 370 mission-driven providers of senior services in Pennsylvania, LeadingAge PA appreciates the opportunity to write to you in partnership with our members regarding the anticipated proposal of a federal minimum staffing mandate for skilled nursing facilities by CMS.

We appreciate your attention to this matter and hope we can build on our shared goal of ensuring that nursing home residents remain safe and receive high-quality care. We agree that there has been an undeniable workforce crisis in recent years. However, establishing a federal minimum staffing requirement is not the most appropriate way to address this issue and would likely prove to be a detriment to quality that further restricts access to care for those who need it most. Before any staffing mandate can be reasonably considered, we must recognize that providers are in crisis and residents' access to care is at risk, due in large part to historic underfunding and a workforce crisis that pre-dated the pandemic.

As you indicated, not-for-profit facilities and those that rely heavily on state Medicaid payments do in fact require additional funding to meet these challenges and offset the increased costs and inflation that have arisen out of the pandemic. A minimum staffing standard, which fails to take into account the individual nuances of each state and community, only further exacerbates these financial challenges and will likely lead to additional closures and a reduction of beds available to serve our nation's older adult population.

As we continue to work together toward a path forward in addressing these needs, please take into consideration our below concerns with the potential imposition of a national staffing minimum being established by CMS:

- **Medicaid funding is insufficient.** Nursing facilities have been grossly underfunded under the Medicaid program for decades, a deficit that was even further intensified by the increased costs imposed on facilities as a result of the COVID-19 pandemic. LeadingAge PA's members support best staffing practices and provide high-quality care, but resources continue to be stretched to

the limit with inadequate state funding. Largely dependent upon publicly set Medicaid rates, most nursing facilities cannot simply raise wages to attract more staff.

- A January 2023 report from the Medicaid and CHIP Payment and Access Commission (MACPAC) showed that almost half of states' average Medicaid base rates across the country were lower than 86% of nursing home costs in 2019 (and costs have since been further inflated due to the impact of the pandemic).[1]
- According to an independent report commissioned by LeadingAge PA, Pennsylvania's nursing homes were underfunded by nearly $1.2 billion in Medicaid in 2019-2020.[2] Last year's Medicaid rate increase (the first across the board increase in nearly a decade) was a good first step in addressing this shortfall in our state, but the gap remains and has grown even further by the increased staffing mandate implemented in Pennsylvania since the report, requiring providers to continue to wrestle with increased costs.

Given the grossly underfunded Medicaid program which supports millions of beneficiaries in nursing homes across the country, enforcing a staffing standard will lead to increased costs and a reduction in bed availability from already underfunded organizations. If this happens, quality will suffer, and access to care will be further eroded.

- **The workforce does not exist.** As you acknowledged in your letter, we need to "consider the availability of sufficient workforce for nursing facilities to comply with potential minimum staffing standards." This concern is not limited to rural areas but impacts most providers across the country. LeadingAge members have reported that, on average, 20% of their direct care and nursing job postings draw no applicants. Due to many factors, including a decreased working age population and the exacerbating effects of the pandemic, nursing facilities are struggling to find the staff they need. A higher mandated staffing level will only put additional strain on nursing facilities to find and hire people who do not exist in the labor market. Administrative hurdles and limited access to training programs have also limited our ability to build a robust workforce, despite the willingness and desire of providers to host these career development programs.

- **Access to Care – A mandate would lead to more closures and taking beds offline.** If providers are unable to meet the established staffing minimum, even if it is only slightly higher than their current staffing levels, they will be forced to close beds or face paying a penalty. While an increased minimum may benefit a few residents at select facilities operating below that threshold, many more residents will face disruption as their current home is sold or wings are shuttered. In order to sufficiently staff their facilities, many providers must resort to utilizing costly agency staff at rates that are massively unsustainable. Given the choice between paying these exorbitant rates and taking beds offline, many providers are forced to choose the latter in order to keep their facility in operation. Rather than positively impacting the few bad actors, good actors will be forced out of business or reduce capacity. In a survey of LeadingAge PA

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[1] Medicaid and CHIP Payment and Access Commission. (2023, January). *Estimates of Medicaid Nursing Facility Payments Relative to Costs.* [Issue Brief]. Retrieved Feb. 24, 2023 from https://www.macpac.gov/wp-content/uploads/2023/01/Estimates-of-Medicaid-Nursing-Facility-Payments-Relative-to-Costs-1-6-23.pdf

[2] LeadingAge PA and RKL. (2022, March). *Report finds PA nursing homes Medical Assistance underfunded by nearly $1.2B.* [Press Release]. https://www.leadingagepa.org/news/senior-services-news/news-item/2022/03/01/report-finds-pa-nursing-homes-medical-assistance-underfunded-by-nearly-1.2-billion-dollars

members with licensed nursing beds, the amount of nursing beds pulled offline grew fourfold from 2019 to 2021. As a result, hospital patients will remain in limbo as discharge planners are unable to find nursing facilities with capacity to accept admissions for post-acute care, a trend we are already observing. This mandate would further limit the ability of high-quality providers to serve the aging population and force closures or sales to entities with poor track records. If this continues, older adults will not be able to find homes to care for them when they need it most.

- **The crisis is worsened by predatory staffing agencies taking advantage of nursing facilities who are desperate for staff.** In states without appropriate protections in place, the impact of federal staffing mandates will be inequitably applied. For example, nursing facilities in Pennsylvania may have a harder time complying with a federally set staffing mandate due to the absence of rate caps which allows temporary staffing agencies to charge grossly unreasonable rates, whereas a state with appropriate rate caps in place might be better positioned to meet the requirements at a reasonable cost. These individualized considerations and protections must be assessed at the state level before a state determines an appropriate staffing minimum for its own providers. A sweeping federal mandate simply cannot factor in those nuances in an equitable way.

- **A "one size fits all" approach is counterintuitive to quality care, and specific staffing thresholds do not guarantee quality outcomes.** While some studies have shown a possible correlation between increased staffing and quality care, generally there are significant intangible variables that are not accounted for. Resident acuity, staff training availability, employer culture, staff tenure, and physical characteristics of the building all play a major role in quality outcomes. The existing federal requirements for a facility assessment[3] and resident care plans[4] more appropriately provide assurance that staffing levels will meet the needs of residents and allow them to "maintain the highest practicable physical, mental, and psychosocial well-being of each resident" as is currently required[5]. These regulations are intended to allow providers to tailor their staffing patterns to the unique needs of each facility while still protecting the needs of each resident. The existing regulations are more than sufficient to ensure that providers staff at appropriate levels (the majority of states are currently staffing at an average that is well above any state-imposed required minimum) and protect against bad actors. Surveyors are already well-equipped to hold poor providers accountable if their staffing levels are impeding quality care or putting residents at risk of harm. Payroll Based Journal (PBJ) reporting also provides a window into actual staffing levels and allows states to monitor levels, quickly act to address shortfalls, and analyze trends and outcomes.
    - In Pennsylvania, PBJ data and the Department of Health's Nursing Facility Locator page show that where they can obtain staff, most nursing facilities in Pennsylvania already staff well above the minimum threshold of 2.7 nursing hours that is currently required in order to meet the needs of their residents. However, even homes with the highest

[3] 42 CFR 483.70(e)
[4] 42 CFR 483.21
[5] 42 CFR 483.24

commitment to robust staffing levels may face difficulties during an illness outbreak, winter storms, holidays, or the tight labor markets we are seeing in most areas of the state.

- In looking at PBJ staffing submission data, the "State US Averages" report available on the CMS website shows no clear correlation between quality measures from states with higher average staffing to states with lower average staffing.[6] For example:
  - The percentage of long stay residents who have depressive symptoms varies widely and not in conjunction with each state's daily nurse staffing hours.
  - Washington D.C., which has the highest minimum staffing hours requirement at 4.16 nursing hours per resident per day, also has the highest percentage of long stay residents with pressure ulcers compared to other states.
  - Out of 50 states plus D.C. reporting, New York is ranked 47th for total nurse staffing hours per resident per day, despite having one of the highest state-mandated staffing minimums at 3.56.
  - Idaho, despite having one of the lowest state-required staffing minimums at 2.46, has one of the highest actual reported HPRDs at 4.27.

  While this cursory review is not comprehensive, it does indicate that a correlation is not clear and additional considerations must be taken into account. There is currently no reliable evidence that demonstrates a true correlation between staffing and quality in light of the many other contributing factors.

Nursing facilities are in crisis and are doing the best they can despite the hand they've been dealt, yet they continue to be villainized

As we look toward solutions to these problems with the ultimate goal of improving quality and promoting resident safety, we must be careful not to buy into the narrative that nursing facilities are to blame for the tragic consequences of the pandemic. It would be a disservice to not acknowledge the efforts and successes of millions of hardworking and caring staff, administrators, and mission-driven owners who have fought to keep their residents safe and well-cared for despite the increased challenges of recent years.

Many of the factors which contributed to the recent staffing decline, which were out of the control of providers, include high COVID-19 exposure risk, personal protective equipment (PPE) shortages, staff burnout, quarantine requirements after exposure, and closure of day cares, schools, and adult day centers (which disproportionately affected female and minority workers, who make up the majority of the direct care workforce).[7] Other anecdotal contributing factors include a lack of respect and appreciation for the profession and poor career advancement opportunities.

While facing these challenges, nursing facilities still showed their integrity and dedication to quality and safety in tangible ways. Despite staffing levels decreasing overall, staff hours per resident per day

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[6] Centers for Medicare & Medicaid Services (CMS). (2023, February). *State US Averages*. (xcdc-v8bm). [Report]. Retrieved Feb. 23, 2023 from https://data.cms.gov/provider-data/dataset/xcdc-v8bm.

[7] Werner RM, Coe NB. Nursing Home Staffing Levels Did Not Change Significantly During COVID-19. Health Aff (Millwood). 2021 May;40(5):795-801. doi: 10.1377/hlthaff.2020.02351. PMID: 33939511; PMCID: PMC9594992. Retrieved Feb. 23, 2023 from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9594992/.

(HPRD) have stayed steady. A 2022 study found that "the total number of hours of direct care nursing declined in nursing homes during the COVID-19 pandemic, as did the average nursing home census. When [researchers] accounted for changes in census, the number of nurse staff hours per resident day remained steady or, if anything, increased slightly during the pandemic."[8]

Nursing facilities' commitment to maintaining (even increasing) staffing ratios throughout the pandemic, despite decreasing staff availability and increased costs, shows their dedication to and understanding of the need for appropriate staff levels to meet the needs of the residents in their building safely. Rather than operate at unsafe levels, they have continued to fulfill that intrinsic commitment, even at the cost of taking beds offline when necessary or in many cases closing the facility. Their responsibility and care is evident in these statistics, but it comes at a detriment to access as a whole through reducing overall census.

The inability of facilities to hire an adequate workforce is also not due to a lack of effort on their part. A study looking at staffing levels in nursing homes during the coronavirus pandemic concluded that "considerable staffing challenges suggest a potential need for policy action to ensure adequate staffing levels during nursing home outbreaks to protect resident health."[9] While this is a worthwhile acknowledgement, imposing a minimum staffing mandate is not the most appropriate policy solution to address these challenges. This same report recognized that total staffing in facilities consistently declined after a COVID-19 outbreak, "despite facilities taking substantial measures to bolster staffing through increased hiring and the use of contract staff and overtime." The mass exodus of staff in recent years had more to do with the factors tied to a once-in-a-lifetime pandemic than it did with the quality of and capability of providers.

While we understand the impulse of needing to do something after the tumultuous years and disastrous consequences inflicted by COVID-19, we cannot point the finger at nursing facilities who showed remarkable resilience and innovation while dealing with an unparalleled crisis with limited support and resources. Rather than imposing a minimum that further punishes them for consequences outside of their control, we need to come together with support and innovation that will allow for growth and sustainability. During the pandemic crisis, they needed (and often did not receive) clear guidance, funding, and supplies to help protect their employees and maintain a safe work environment. As we now begin to move forward from the pandemic, they need funding and policies that will help them recover, not arbitrary requirements tied to penalties (imposed for factors largely out of their control) which will further exacerbate their financial distress.

Pennsylvania has already successfully negotiated reasonable staffing requirements tied to a necessary funding increase

In 2022, as updated state nursing facility regulations were in development, Pennsylvania's government and industry stakeholders were able to come together and negotiate relatively reasonable staffing standards tied to a long overdue increase in funding for Medicaid-certified nursing facilities, along with a mutual acknowledgement and agreement of the need for additional investment moving forward to

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[8] Werner RM, Coe NB. Nursing Home Staffing Levels Did Not Change Significantly During COVID-19.

[9] Shen K, McGarry BE, Grabowski DC, Gruber J, Gandhi AD. Staffing Patterns in US Nursing Homes During COVID-19 Outbreaks. JAMA Health Forum. 2022 Jul 22;3(7):e222151. doi: 10.1001/jamahealthforum.2022.2151. PMID: 35977215; PMCID: PMC9308062. Retrieved Feb. 23, 2023 from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9308062/.

offset historic underfunding and rising costs. While there still remains work to be done in many other areas to help support bolstering the long-term care workforce (funding alone will not alleviate the workforce crisis!), this was a crucial first step which allowed the state and providers to come together to work toward our shared goal of improving quality and promoting access to care. A federal mandate would not only undo this important work which was completed in Pennsylvania last year, but would also rob other state governments, providers, and stakeholders of the opportunity to come together in a similar fashion to reflect upon the unique needs of their own state.

The effort in Pennsylvania is a testament to the fact that all states are unique, and a proper approach to addressing quality and workforce issues cannot be a blanket mandate established at the federal level. In Pennsylvania alone, we still have work to do in addressing protections related to temporary staffing agencies, removing barriers to quality training programs and licensing, improving career pathways, and more. All states need to consider their own status on these and other issues, and work to ensure that any mandate in place is realistic and achieves its intended purpose in light of these nuances without placing undue burden on providers.

There are more appropriate areas the government can focus on, with greater impact, before considering sweeping mandates

We are grateful for the attention that has been given to this issue by you and your Senate colleagues. Your care and concern for our nation's older adults is evident, and we thank you for your commitment to making improvements on their behalf. As you continue to seek ways to provide that support and help alleviate some of the issues discussed above, there are many areas we believe would have a much more profound impact, and arguably must be addressed, prior to any consideration of a federal staffing mandate. This starts with providing adequate reimbursement and additional funding to support more focused workforce initiatives. This must be a multi-pronged approach.

Because the workforce shortage was a problem that reared its head long before the pandemic, due in large part to the increasing age of our population and the proportionate decrease of working age adults, industry representatives and state workgroups have already conducted immense research and developed strategies for effective solutions. We need to pursue these efforts, which involve and empower providers, prior to resorting to sweeping mandates. Examples of two suggested initiatives are linked here for your reference:

- The Pennsylvania Long-Term Care Council's April 18, 2019 report, A Blueprint for Strengthening Pennsylvania's Direct Care Workforce,[10] recommends the creation of a statewide public awareness campaign to emphasize the need to recruit and retain more aging services workers and the value of these professionals.

[10] Pennsylvania Long-Term Care Council. (2019, April). *A Blueprint for Strengthening Pennsylvania's Direct Care Workforce.* Pennsylvania Department of Aging. https://www.aging.pa.gov/organization/PennsylvaniaLongTermCareCouncil/Documents/Reports/LTCC_Blueprint%20for%20Strengthening%20Pennsylvania%E2%80%99s%20Direct%20Care%20Workforce_April2019.pdf

- A 2022 toolkit, the Direct Care Workforce Policy and Action Guide,[11] outlines different approaches states can use to offer better support in a sustainable, long-term way using administrative, legislative, and funding efforts in parallel, such as providing vouchers for safe and reliable childcare for direct care workers or offering affordable and accessible trainings, tied to financial incentives and career advancement, to help support professionalization of the direct care workforce.

As we get back on our feet after the pandemic, we need to explore these types of solutions and see them through in order to give these common sense approaches a chance to make an impact before jumping to arbitrary staffing mandates on a national level. Common themes worthy of support include efficient and accessible training and competency programs, workforce immigration pipelines, faster turnaround times for staff licensing and test center coordination, and developing and incentivizing modern career pathways, as well as efforts to professionalize the workforce, elevate the social value of direct care workers, and improve data collection, monitoring, and evaluation.

As you indicated in your letter, many factors, including wages, benefits, and opportunities for professional development, affect job quality and turnover and must be considered as we work to resolve the workforce crisis in this industry. These are the types of conversations we need to continue to have as we work toward realistic solutions, but we cannot make providers the enemy of this work. As we await publication of the study commissioned by the White House this Spring, we must continue to engage and do what we can from our respective positions to truly understand what type of support this sector needs to obtain sufficient staffing and promote quality. Thank you for embracing the significance of that.

LeadingAge PA is ready and able to assist throughout this process. Our members, many of whom have signed below, are also engaged and ready to share their experiences and needs. When industry and government come together, good things can happen, and we look forward to being a part of that partnership as we work toward improving quality and access to care in sustainable ways.

Please don't hesitate to reach out if I can be of assistance on these and other issues.

Sincerely,

Garry Pezzano
President and CEO, LeadingAge PA
gpezzano@leadingagepa.org

[11] Roman, C., Luz, C., Graham, C., Joseph, N., & McEvoy, K. (2022). *Direct Care Workforce Policy and Action Guide.* Milbank Memorial Fund. https://www.milbank.org/wp-content/uploads/2022/05/DirectCareWorker_Toolkit_final.pdf