

FALSE PREMISES AND FALSE PROMISES

“Feeding Assistants” Are a Step Backwards For Nursing Facility Quality of Care

For additional information, please contact:

Eric Carlson
National Senior Citizens Law Center
(213) 639-0930, ext. 313
ecarlson@nsclc.org

Toby Edelman
Center for Medicare Advocacy
(202) 216-0028, ext. 104
tedelman@medicareadvocacy.org

I. INTRODUCTION.

Under new federal regulations (effective October 27, 2003), a state can authorize nursing facilities to employ poorly-trained “feeding assistants” to provide care for nursing facility residents who cannot eat independently.¹ This is a dramatic change of policy for the federal government: up until this time it has been understood that the federal Nursing Home Reform Law requires that all direct-care nursing facility employees meet the federal standards for a certified nurse aide.

The false premise of the new regulations is that nurse aide training requirements – at least 75 hours of training, completed within the first four months of employment -- are responsible for nursing facilities’ inability to hire adequate numbers of direct-care staff members. In fact, as discussed subsequently in more detail, facilities actually are recruiting and hiring sufficient direct-care staff. The problem arises in poor retention rates – poor wages and working conditions lead nurse aides to leave the health care field entirely.

The false promise is the claim that retirees, homemakers, and students will work as feeding assistants for minimum wage, for shifts of an hour or two at a time, and that these retirees, homemakers, and students will supplement current staff. The reality is that feeding assistants likely will be the same individuals who otherwise would have been nurse aides, and that the feeding assistant category will cause a deterioration of nursing facility quality of care.

The federal Nursing Home Reform Law requires nurse aide certification (including the 75 hours of training) for individuals providing direct-care assistance to nursing facility residents. The federal government has stated on numerous occasions that the nurse aide training requirements are applicable to single-task employees such as feeding assistants but, in an effort to justify the new federal regulations, the federal government has flip-flopped in its legal analysis.

¹ 68 Fed. Reg. 55,528 (2003).

II. BACKGROUND ON CERTIFIED NURSE AIDES.

A. In Order to Establish Reasonable Competence Among Nursing Facility Employees, the Nursing Home Reform Law Sets Moderate But Meaningful Training Standards for Nurse Aides.

1. Nursing Home Reform Law.

The federal Nursing Home Reform Law was enacted in 1987, and its standards for nursing facilities have been in effect since 1990. The Reform Law applies to every nursing facility certified to accept reimbursement from Medicare or Medicaid, or from both.² Because Medicare and Medicaid reimbursement is such an important component of nursing facility finances – together, they pay for over three-quarters of resident days³ – virtually all nursing facilities are certified for one or both programs, and thus are subject to the Nursing Home Reform Law.

Part of the reform in the Reform Law was a move to professionalize nursing facility care. Nursing facilities were to be places of treatment, rather than (as too frequently was the case prior to the Reform Law) waiting-to-die warehouses. A pivotal provision of the Reform Law specifies that a facility must provide care necessary for each resident to “attain or maintain the highest practicable physical, mental, and psychosocial well-being.”⁴ In order to assure personalized care, each resident receives a comprehensive assessment at the time of admission, and that assessment is used by the resident, the resident’s family, and a medical interdisciplinary team to create a resident-specific care plan.⁵

² The Nursing Home Reform Law is located within Title 42 of the United States Code. Section 1395i-3 applies to Medicare-certified facilities; section 1396r (which is virtually identical) applies to Medicaid-certified facilities.

³ See, e.g., Lewin Group, Update to Payer-Specific Financial Analysis Of Nursing Facilities 10 (2003), available at www.ahca.org/research/new_snf_hydraulic_update.pdf.

⁴ 42 U.S.C. §§ 1395i-3(b)(2), 1396r(b)(2).

⁵ 42 U.S.C. §§ 1395i-3(b)(2), (3), 1396r(b)(2), (3).

2. Nurse Aides.

a. Training.

Another facet of increased professionalism was the establishment of standards for the hands-on direct care employees. Under the Reform Law, any person performing “nursing or nursing-related” services is required to be either a licensed health professional (physician, nurse, etc.), a registered dietician, or a certified nurse aide.⁶

No individual can work for more than four months as a nurse aide without first completing a training class and then passing a competency evaluation. During those first four months, he or she must be enrolled in a training class.⁷

Training classes must provide at least 75 hours of training. A training program must be performed by or under the general supervision of a registered nurse with at least two years of nursing experience, including at least one year of experience in long-term care. At least 16 of the training hours must consist of “training in a laboratory or other setting in which the trainee demonstrates knowledge while performing tasks on an individual under the direct supervision of a registered nurse or a licensed practical nurse.”⁸

Prior to any direct contact with a resident, a trainee must receive at least 16 hours of training in at least the following areas:

- ! Communication and interpersonal skills;
- ! Infection control;
- ! Safety/emergency procedures, including the Heimlich maneuver;
- ! Promoting residents’ independence; and
- ! Respecting residents’ rights.⁹

The complete training also must include at least the following six topics, with the specified subparts:

1) Basic nursing skills

- ! Taking and recording vital signs;
- ! Measuring and recording height and weight;

⁶ 42 U.S.C. §§ 1395i-3(b)(5)(F), 1396(b)(5)(F).

⁷ 42 U.S.C. §§ 1395i-3(b)(5)(A)(i)(I), 1396r(b)(5)(A)(i)(I); 42 C.F.R. § 483.75(e)(4).

⁸ 42 C.F.R. § 483.152(a)(3).

⁹ 42 C.F.R. § 483.152(b)(1).

- ! Caring for the residents' environment;
- ! Recognizing abnormal changes in body functioning and the importance of reporting such changes to a supervisor; and
- ! Caring for residents when death is imminent.

2) Personal care skills, including, but not limited to--

- ! Bathing;
- ! Grooming, including mouth care;
- ! Dressing;
- ! Toileting;
- ! Assisting with eating and hydration;
- ! Proper feeding techniques;
- ! Skin care; and
- ! Transfers, positioning, and turning.

3) Mental health and social service needs

- ! Modifying aide's behavior in response to residents' behavior;
- ! Awareness of developmental tasks associated with the aging process;
- ! How to respond to resident behavior;
- ! Allowing the resident to make personal choices, providing and reinforcing other behavior consistent with the resident's dignity; and
- ! Using the resident's family as a source of emotional support.

4) Care of cognitively impaired residents

- ! Techniques for addressing the unique needs and behaviors of individual with dementia (Alzheimer's and others);
- ! Communicating with cognitively impaired residents;
- ! Understanding the behavior of cognitively impaired residents;
- ! Appropriate responses to the behavior of cognitively impaired residents; and
- ! Methods of reducing the effects of cognitive impairments.

5) Basic restorative services

- ! Training the resident in self care according to the resident's abilities;
- ! Use of assistive devices in transferring, ambulation, eating, and dressing;
- ! Maintenance of range of motion;
- ! Proper turning and positioning in bed and chair;
- ! Bowel and bladder training; and
- ! Care and use of prosthetic and orthotic devices.

6) Residents' Rights

- ! Providing privacy and maintenance of confidentiality;
- ! Promoting the residents' right to make personal choices to accommodate their needs;
- ! Giving assistance in resolving grievances and disputes;
- ! Providing needed assistance in getting to and participating in resident and family groups and other activities;
- ! Maintaining care and security of residents' personal possessions;
- ! Promoting the resident's right to be free from abuse, mistreatment, and neglect and the need to report any instances of such treatment to appropriate facility staff; and
- ! Avoiding the need for restraints in accordance with current professional standards.¹⁰

b. Competency Evaluations.

A competency evaluation must include an examination and a demonstration of skills. The examination must address each course requirement of the training program (see above).¹¹

To pass the competency evaluation, an individual must pass both the examination and the skills demonstration. A competency evaluation must be administered and graded either by the state itself or a state-approved entity (which may not be a nursing facility).¹²

c. In-Service Training.

Each nursing facility “must complete a performance review of every nurse aide at least once every 12 months, and must provide regular in-service education based on the outcome of these reviews.”¹³ The in-service education must consist of at least 12 hours per year, and must address areas of weakness in a nurse aide’s performance reviews and, if a nurse aide cares for residents with cognitive impairments, the care of the cognitively impaired.¹⁴

d. State Nurse Aide Registry

Each state must maintain a publicly-accessible registry of the individuals who have satisfied the nurse aide requirements relating to training and/or competency evaluations. The registry must include the date on which the individual first became eligible for listing in the registry, along with any finding of the state survey agency regarding neglect, abuse, or misappropriation of property committed by the individual against a nursing facility resident. A

¹⁰ 42 C.F.R. § 483.152(b)(2)-(7).

¹¹ 42 C.F.R. § 483.154(b).

¹² 42 C.F.R. § 483.154(c), (e).

¹³ 42 C.F.R. § 483.75(e)(8).

¹⁴ 42 U.S.C. §§ 1395i-3(b)(5)(E), 1396r(b)(5)(E); 42 C.F.R. § 483.75(e)(8).

facility is prohibited from hiring a nurse aide who has a registry finding of abuse, neglect or misappropriation.¹⁵

III. HHS AGENCIES REPORT PROBLEMS WITH DIRECT-CARE STAFFING IN NURSING FACILITIES: NURSING AIDES RECEIVE INADEQUATE TRAINING, AND EXPERIENCE LOW WAGES AND POOR WORKING CONDITIONS.

A. Current Nurse Aide Training Procedures Are Inadequate.

Compared to nursing facility residents from past decades, nursing facility residents today are sicker and more vulnerable. Hospital stays are shorter (because of insurance-related pressure to limit the length of stays), and assisted living facilities are attracting and admitting individuals who in the past would have been nursing facility residents.¹⁶

In a recent (November 2002) examination of these issues, the Office of Inspector General of the U.S. Department of Health and Human Services concluded that “[n]urse aide training has not kept pace with nursing home industry needs.”¹⁷ Training was inadequate to prepare nurse aides for care of residents with the increased needs discussed above. Also, training did not address interpersonal skills adequately, and “[t]raining ha[d] not kept pace with nursing home practices and new technologies.”¹⁸

The Office of Inspector General found that 26 states require more than the 75 hours of training required by federal law, with minimums ranging up to 175 hours. From the states that required only the 75-hour federal minimum, two-thirds of the respondents (the directors of the state nurse aide training and competency evaluation programs) stated that 75 hours of training was inadequate. They pointed out that it was difficult to justify a higher minimum to state legislators, when the federal standards implied that 75 hours was adequate.¹⁹

“When asked how nurse aide training programs could be improved,” the Office of Inspector General states, “the overwhelming response provided by our respondent groups was

¹⁵ 42 U.S.C. §§ 1395i-3(e)(2), 1396r(e)(2); 42 C.F.R. §§ 483.13(c)(1)(ii)(B), 483.156.

¹⁶ HHS OIG, Nurse Aide Training, Rep. No. OEI-05-01-00030, 9-10 (2002) (hereafter “HHS OIG, Nurse Aide Training”), *available at* oig.hhs.gov/oei/reports/oei-05-01-00030.pdf.

¹⁷ HHS OIG, Nurse Aide Training at 9.

¹⁸ HHS OIG, Nurse Aide Training at 9-12.

¹⁹ HHS OIG, Nurse Aide Training at 12.

that nurse aides needed more and better clinical exposure.”²⁰ Half of surveyed nurse aides reported “a lack of “hands on” training.”²¹

B. Nurse Aides Have High Turnover, Due to Poor Pay and Working Conditions.

The HHS Health Resources and Services Administration recently reported on the labor market for nurse aides and other health care paraprofessionals. The median wage for nurse aides in a nursing facility was found to be \$8.86/hour, or approximately \$19,000 annually for full-time employment. Health care benefits generally are not provided by the employer.²²

The report found that approximately twenty percent of long-term care paraprofessionals live below the poverty line. “Among single-parent nursing home and home health aides, 30% to 35% receive food stamps.”²³

Not surprisingly, turnover among nurse aides was found to be quite high. Reported turnover rates range from 50% to over 100%.²⁴

The high turnover rates are explained by low wages and poor benefits, as described above. Also, nurse aides often experience a lack of respect from management: for example, “[t]hough the aide has significant knowledge and insight concerning the client’s condition, he or she is often ignored, treated as invisible by the rest of the health care system.”²⁵

The turnover is *not* attributable to nurse aides moving from facility to facility, but instead to nurse aides leaving the health care professions. The report cites the following examples:

- ! In North Carolina, the nurse aide registry showed more inactive than active nurse aides.
- ! In Florida, only 53% of the state’s nurse aides were working in a health-related field one year after certification.
- ! In New Hampshire, 11,000 nurse aides had let their licenses lapse since 1993.²⁶

²⁰ HHS OIG, Nurse Aide Training at 12.

²¹ HHS OIG, Nurse Aide Training at 13.

²² HHS HRSA, Nursing Aides, Home Health Aides, and Related Health Care Occupations -- National and Local Workforce Shortages and Associated Data Needs 9-10 (Feb. 2004) (hereafter “HHS HRSA, Workforce Shortages”), *available at* bhpr.hrsa.gov/healthworkforce/reports/nursingandhomeaide.htm.

²³ HHS HRSA, Workforce Shortages at 10.

²⁴ HHS HRSA, Workforce Shortages at 14.

²⁵ HHS HRSA, Workforce Shortages at 16.

²⁶ HHS HRSA, Workforce Shortages at 14.

The federal report also cites “Better Job Alternatives” as a reason for high turnover rates, although “better” is a relative term. Due to the poor wages and difficult conditions of nurse aide jobs, the better jobs cited are “entry-level positions in fast-food restaurants and retail venues[, which] offer jobs that are safer and less demanding than direct care positions, and . . . pay as well or better.”²⁷

Based on this information, the federal report found that the current shortage of nurse aides is attributable to high turnover. As the report noted, “the problem isn’t necessarily a shortage of certified workers; the problem is job satisfaction. People are leaving the profession at the same (or possibly faster) rate than new CNAs are being certified.”²⁸

²⁷ HHS HRSA, Workforce Shortages at 16.

²⁸ HHS HRSA, Workforce Shortages at 14 (internal quotation omitted).

IV. THE NEW FEEDING ASSISTANT JOB CATEGORY IS BASED ON MEAGER TRAINING, LIMITED SUPERVISION, AND POOR PAY.

A. Only Eight Hours of Training Is Required.

The new federal regulations allow a state (at a state's option) to authorize "feeding assistants" to provide feeding assistance to nursing facility residents who allegedly "have no complicated feeding problems."²⁹

A feeding assistant must complete a state-approved training course of at least eight hours. These eight hours of training must cover at least the following eight topics:

- 1) Feeding techniques;
- 2) Assistance with feeding and hydration;
- 3) Communication and interpersonal skills;
- 4) Appropriate responses to resident behavior;
- 5) Safety and emergency procedures, including the Heimlich maneuver;
- 6) Infection control;
- 7) Resident rights;
- 8) Recognizing changes in residents that are inconsistent with their normal behavior and the importance of reporting those changes to the supervisory nurse.³⁰

The federal feeding assistant regulations do not require a competency evaluation or any in-service training. The regulations do not include feeding assistants on the registry required for nurse aides.

B. No Direct Supervision Is Required.

A feeding assistant must work under the supervision of a registered or licensed nurse, although it is unclear what level of "supervision" might be provided. The proposed regulations (issued in 2002) had required "direct" supervision by a nurse on the same wing or floor, as follows:

Supervision. Works under the direct supervision of a registered nurse or licensed practical nurse. This means that a nurse is in the unit or on the floor where the feeding assistance is furnished and is immediately available to give help, if

²⁹ 42 C.F.R. § 483.35(h)(3).

³⁰ 42 C.F.R. § 483.160(a).

necessary.³¹

The final version of the regulations removes even this limited protection as to the supervision that might be required. Given the reference to use of the “resident call system” (see immediately below), the final regulations suggest that “supervision” by a nurse might mean no more than a nurse is present somewhere in the nursing facility:

- Supervision. (i) A feeding assistant must work under the supervision of a registered nurse (RN) or licensed practical nurse (LPN).
(ii) In an emergency, a feeding assistant must call a supervisory nurse for help on the resident call system.³²

C. Feeding Assistants Are To Be Paid a Minimum Wage.

Feeding assistants likely will be paid minimum wage. In the Federal Register discussion accompanying the feeding assistant regulations, the Centers for Medicare and Medicaid Services (CMS) states:

Medicaid payments for nursing facilities are established by each State. Therefore, it would be up to individual States to determine whether they would need to change their payment rates for those facilities that use feeding assistants and how the rates would be changed. *However, because feeding assistants will likely be paid at a minimum wage, which is less than the wage paid to certified nurse aides, facilities participating in Medicare and Medicaid may incur less cost than if they had hired additional certified nurse aides to perform feeding and hydration duties.*³³

³¹ Proposed 42 C.F.R. § 483.35(h)(2)(ii), at 67 Fed. Reg. 15,149, 15,154 (2002).

³² 42 C.F.R. § 483.35(h)(2).

³³ 68 Fed. Reg. at 55,532 (emphasis added).

V. USE OF FEEDING ASSISTANTS WILL CAUSE A DETERIORATION IN NURSING FACILITY QUALITY OF CARE.

To justify the new feeding assistant regulations, CMS claims that the feeding assistant category will allow retirees, homemakers, and “older students” to provide feeding assistance in short shifts of an hour or two around mealtimes. The retirees, homemakers, and students allegedly will supplement, but not replace, the work done by nurse aides.³⁴

CMS’s rosy claims cannot withstand scrutiny. CMS’s own statements indicate that, in fact, feeding assistants are intended to *replace* nurse aides. As quoted above, CMS indicates that the use of feeding assistants will allow facilities to save on labor costs: “because feeding assistants will likely be paid at a minimum wage, which is less than the wage paid to certified nurse aides, facilities participating in Medicare and Medicaid may incur less cost than if they had hired additional certified nurse aides to perform feeding and hydration duties.”³⁵ Of course, this cost saving only can occur if feeding assistants are used to take the place of nursing aides.

Also, it is extremely unlikely that nursing facilities will be able to hire feeding assistants for shifts of only an hour or two. Such short shifts are not worth the effort for most potential employees.

For these reasons, it is similarly unlikely that facilities will be able to induce retirees, homemakers, and students to work as feeding assistants. There may be a relative handful of retirees, homemakers, and students with a particular interest in serving nursing facility residents, but they certainly are the exception rather than the rule, given the short shifts and poor wages envisioned for feeding assistants. Contrary to CMS’s intimations, retirees, homemakers, and students cannot be a realistic answer for the current labor shortage in long-term care.

Then what is the likely profile for an individual working as a feeding assistant? In practice, feeding assistants likely will be drawn from the same pool of potential employees as nurse aides, except, of course, feeding assistants may have as little as eight hours of training, and that they will be paid less than nurse aides. In many cases, feeding assistants may be hired from temporary agencies, and will have no specific knowledge of the facility or its residents.

Feeding assistants (according to federal regulations) will be limited in their scope of work

³⁴ 68 Fed. Reg. at 55,529.

³⁵ 68 Fed. Reg. at 55,532.

to providing feeding assistance for residents without complicated feeding problems,³⁶ but this limitation creates two possible scenarios, either one of which is troubling. One possibility is that feeding assistants, in an effort to be helpful, will perform tasks for which they are not trained. The other possibility is that feeding assistants will *not* help out and that residents will be monitored by direct-care employees who are incapable of assisting in all but the most trivial of feeding assistance, all for the sake of eliminating 67 hours of training per employee, and saving a dollar or two per hour.

According to CMS, the feeding assistant job category is a response to the labor shortage for nurse aides.³⁷ In fact, the creation of a feeding assistant category will not meaningfully increase the potential pool of direct-care employees because, as discussed above, it is implausible to expect retirees, homemakers, and students to plug the holes in the current system.

The feeding assistant category in fact is counterproductive. As discussed above, the HHS Health Resources and Services Administration has documented that nursing facilities are able to *recruit* enough nurse aides – the problem is in retention of already-hired nurse aides. But if nurse aides already are being paid at near-poverty levels, why create a job category with even poorer wages? And if the nurse aide job is less desirable due to the lack of respect given nurse aides, why create a direct-care job with rock-bottom training standards?

The unstated premise of the feeding assistant job category is that training requirements are limiting the supply of direct-care workers. That premise is false, as shown above. Creating a substandard class of direct-care worker may save money but the savings are illusory, given the deterioration in nursing facility quality of care to be caused by the lowered standards.

VI. FEEDING ASSISTANCE IS NOT NECESSARILY A SIMPLE TASK.

Under the new federal regulations, feeding assistants purportedly are to work only with residents “who have no complicated feeding problems.”³⁸ According to the regulations’ rationale, because the residents involved have no complicated feeding problems, a meager eight hours of training is adequate.³⁹

³⁶ 42 C.F.R. § 483.35(h)(3)(i).

³⁷ 68 Fed. Reg. at 55,529.

³⁸ 42 C.F.R. § 483.35(h)(3)(i).

³⁹ 68 Fed. Reg. at 55,529.

This reasoning fails to recognize the pervasiveness of swallowing disorders and other complications in a nursing facility population. Under the new regulations, the minimally-trained feeding assistants are likely to encounter (or cause) medical emergencies that they may not be able to address or even recognize.

Jeanie Kayser-Jones, R.N., Ph.D., a professor in the Department of Physiological Nursing, School of Nursing, and in the Medical Anthropology Program, University of California – San Francisco, and Director of the UCSF./John A. Hartford Center of Geriatric Nursing Excellence, has conducted extensive research on malnutrition and dehydration in nursing facility residents. She was principal investigator in a four-year study funded by the National Institute of Health to evaluate the social, cultural, environmental, and clinical factors that influence the eating behavior of nursing facility residents.

Many conditions commonly found in nursing facility residents contribute to swallowing disorders, including dementia, cerebral vascular accidents, Parkinson's disease, and neuromuscular disorders such as Huntington's chorea and multiple sclerosis. Indications of swallowing disorders include coughing, choking, increased congestion or secretions after a meal, change in voice quality, retention of food, resistance to being fed quickly, and refusal to open the mouth and/or to accept a large bite of food.

Although an estimated 40-60% of all nursing facility residents have identifiable signs and symptoms of swallowing disorders, Dr. Kayser-Jones found that facilities fail to identify swallowing disorders in three-quarters of the residents who have them. As a consequence of this failure, residents are not positioned properly for eating, are fed inappropriate food and/or liquid consistencies, are given amounts of food that are too large and unmanageable, and are forced to eat too quickly. Residents with swallowing disorders can choke while eating or they can aspirate food and develop aspiration pneumonia, with mortality rates of 40-60%.

A core problem identified by Dr. Kayser-Jones is poor training and supervision. Dr. Kayser-Jones recommends that registered nurses with gerontological nursing degrees assess each resident, and teach certified nurse aides how to feed residents with complex eating problems and how to respond to problematic eating behavior. She also recommends that professional nurses supervise nurse aides directly on-site as they feed residents.

VII. THERE IS NO EMPIRICAL EVIDENCE SUPPORTING FEEDING ASSISTANT PROGRAMS.

CMS claims that the use of feeding assistants is supported by the supposed success of feeding assistant programs in North Dakota and Wisconsin.⁴⁰ But there appears to be no evidence supporting this claim.

In August 2003, the National Senior Citizens Law Center made a request to CMS under the Freedom of Information Act, asking for any and all documents related to the use of feeding assistants and other single-task nursing facility employees. CMS ignored the request, as well as four follow-up telephone calls and a follow-up letter. Finally a lawsuit was filed, on February 12, 2004, and CMS turned over approximately 200 pages on April 20, 2004.

According to CMS, these 200 pages are the only documents held by CMS which relate to feeding assistants and other single-task workers, with the exception of comment letters submitted in response to the proposed feeding assistant regulations, and those CMS-generated documents related to the development of the proposed and final feeding assistant regulations. None of these 200 pages contains any empirical evidence regarding the performance of any feeding assistant or other single-task worker program. In fact, a large number of the documents show that the federal government has recognized that the Nursing Home Reform Law's training requirements (at least 75 hours of training) apply to feeding assistants and other single-task workers. (Those documents are discussed below.)

⁴⁰ 68 Fed. Reg. at 55,529-30.

VIII. THE NURSING HOME REFORM LAW REQUIRES COMPLIANCE WITH THE 75-HOUR TRAINING REQUIREMENT FOR ALL DIRECT-CARE NURSING FACILITY EMPLOYEES, INCLUDING FEEDING ASSISTANTS.

To provide “nursing or nursing-related services” in a nursing facility, a facility employee must be a licensed health professional, a licensed dietician, or a certified nurse aide.⁴¹ As discussed in much more detail earlier in this paper, nurse aide certification requires at least 75 hours of training over the initial four months of employment.

CMS now claims that feeding assistance is not nursing-related:

Our review of the law indicates that there is nothing that would prohibit the use of feeding assistants and we believe that we have the authority and discretion under the law to implement this practice. Although commenters have focused on the language of the statute, at [42 U.S.C. §§ 1395i-3(b)(5)(F) and 1396r(b)(5)(F)] that requires persons engaged in nursing or nursing related care to be trained either as a nurse or nurse aide, we do not consider the kinds of tasks facilities may ask feeding assistants to provide as either nursing or nursing related.⁴²

CMS’s current position is at odds with the language and the philosophy of the Nursing Home Reform Law, which contemplates that nursing services will be performed by nurses, and that “nursing-related” services – the bathing, dressing, transferring, feeding, toileting, etc., that comprise the vast majority of nursing facility services – will be performed by certified nurse aides. CMS’s current position threatens to eviscerate the Reform Law’s training requirements, by allowing aspects of nurse aide work to be taken over by (for example) bathing assistants, dressing assistants, transferring assistants, and toileting assistants.

And, significantly, CMS’s current position is in direct opposition to CMS’s position from as early as 1993 to as recent as July 2001, as shown by documents obtained through the Freedom of Information Act request discussed above. These documents include, in reverse chronological order, the following:

7/5/01 HCFA Memorandum from Director, Survey and Certification Group, to Regions 1 through 10, and State Survey Agency Directors
 (“Due to the shortage of nurse aides, we are evaluating various alternatives that may help alleviate that shortage. We have identified transporting residents as the

⁴¹ 42 U.S.C. §§ 1395i-3(b)(5)(F), 1396r(b)(5)(F).

⁴² 68 Fed. Reg. at 55,530-31.

only nursing home service that does not require the use of nurse aides with 75 hours of training so that those with training are available for resident care that requires their training.”)

- 2/16/01 HCFA Memorandum Re: Request of Senator Byron Dorgan
(North Dakota had “permitted nursing home staff to perform nursing related services without being certified” as nurse aides. A waiver of federal law was not allowed; instead, it was recommended that North Dakota be given time “for ND nursing homes to certify [(as nurse aides)] staff who are performing nursing related services.”)
- 2/5/01 Letter from HCFA Survey Quality and Standards Branch to North Dakota Department of Health and Human Services
(approving “North Dakota’s plan to achieve compliance with the requirement to provide nurse aide training and competency evaluations for workers other than health professionals who provide nursing-related services in nursing homes. . . . I want to clarify that [Medicare and Medicaid law] do not prohibit the use of single tasks aides per se. Any Medicare or Medicaid certified long term care facility that wishes to employ workers to perform a limited number of nursing-related services may certainly do so. What the law requires is that workers who provide any nursing-related service must complete an approved nurse aide training course and be certified as competent to perform all nurse aide tasks.”)
- 1/23/01 Letter from HCFA Region V to Wisconsin Department of Health and Family Services (repeating language from HCFA letter to N.D., as quoted above)
(“I want to clarify that [Medicare and Medicaid law] do not prohibit the use of single tasks aides per se. Any Medicare or Medicaid certified long term care facility that wishes to employ workers to perform a limited number of nursing-related services may certainly do so. What the law requires is that workers who provide any nursing-related service must complete an approved nurse aide training course and be certified as competent to perform all nurse aide tasks.”)
- 7/21/00 Letter from Nancy-Ann Min DeParle, HCFA Administrator, to Joe Lekan, Secretary of Wisconsin Department of Health and Human Services
(“We believe current Federal statute does not allow for the flexibility to use non-nurse aide staff to perform single tasks when those tasks are part of the required range of activities for nurses and nurse aides. We consider feeding residents to be among such tasks.”)
- 4/7/00 Letter from HCFA Region V, to Wisconsin Department of Health and Family Services
(“A person who performs even one of the nursing-related tasks such a[s] feeding or transporting a resident is required to be trained and certified as a nurse aide.”)

- 4/5/00 Letter from Center for Medicaid and State Operations to U.S. Representative Jim Nussle
(Federal statute and regulation “define a ‘nurse aide’ as ‘an individual providing nursing or nursing-related services to residents in a nursing facility, but does not include an individual who is a licensed health professional, or a registered dietitian, or someone who volunteers to provide such services without monetary compensation.’ Feeding of a resident is considered a ‘nursing-related service.’”)
- 3/3/00 Letter from Center for Medicaid and State Operations to Senator Tom Harkin (“Feeding of a resident is considered a ‘nursing-related service.’ Since these requirements are set by statute and regulation, HCFA does not have the flexibility to permit facilities to hire unqualified individuals to perform nurse aide services, nor does HCFA have authority to permit a streamlined, limited-scope training program. HCFA has proposed legislation to limit the training requirements a nurse aide is required to attain for feeding residents in nursing facilities, but this bill has not been enacted.”)
- 9/21/99
(or earlier) HCFA Question and Answer website page
 (“Q. Is it permissible for a licensed nurse to delegate to an unlicensed person the task of feeding a resident in a certified nursing facility?
A. The statute says that those who can provide nursing and nursing related services are: nurses aides, licensed health professionals, or volunteers. HCFA has interpreted assisting a resident to eat as a nursing related service.”)
- 1/3/97 Letter from HCFA, Health Standards and Quality Bureau, to Association of Ohio Philanthropic Homes
 (“In summary, at this time, there is not a way, within the law, for HSQB to accept your proposal to allow other than certified nurse aides, volunteers or health professionals to feed residents. If this is occurring in other States, it is not in concert with the law.”)
- 4/28/93 Memorandum from Wisconsin Bureau of Quality Compliance
 (“We were recently advised by the Health Care Financing Administration that individuals whose only duty is to feed residents must meet the nurse aide training and competency evaluation requirements.”)

That the Nursing Home Reform Law requires nurse aide certification (at least 75 hours of training, competency exams, registry, etc.) is also shown by the fact that Congress in 2000 and 2001 considered and then rejected efforts to amend the federal law to waive nurse aide certification for feeding assistants.⁴³

⁴³ H.R. 4547 and H.R. 5282 (2000), H.R. 1510, S. 728 (2001).

IX. CONCLUSION.

Given the already marginal quality of care provided in too many nursing facilities, it is a step backwards to create a job category that requires only eight hours of training and pays minimum wage. States should decline to adopt the feeding assistant option. As appropriate, persons concerned about this issue should seek invalidation of the regulations in federal court, based on the regulations' violation of the training standards set by the federal Nursing Home Reform Law.