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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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RESIDENT COUNCILS OF WASHINGTON,		)
WASHINGTON STATE LONG-TERM CARE		)
OMBUDSMAN PROGRAM through KARY W.		)
HYRE, MICHIGAN CAMPAIGN FOR		)
QUALITY CARE, LOUISE CLARK, DAN		)
FRUICHANTIE, WILBERT SCHROEDER,		)
DOLORES SHAFER, and MIKE SWOPE, on		)
behalf of themselves and all others similarly		)
situated,		)
	Plaintiffs,	)
	v.	)
TOMMY G. THOMPSON, Secretary of		)
United States Department of Health and Human		)
Services,		)
	Defendant.	)
_____		)

Case No. CV 04-1691 TSZ  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT  
NOTE ON MOTION CALENDAR:  
FEBRUARY 18, 2005  
ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION.**

2 In 1987, the federal Nursing Home Reform Law (“Reform Law”) was enacted by  
3 Congress and signed into law by President Reagan. Since its effective date of October 1 1990,  
4 the Reform Law has set important minimum standards, nationwide, for the care provided to the  
5 vulnerable residents of nursing homes.

6 A critical provision of the Reform Law requires that all “nursing or nursing-related  
7 services” be performed either by a licensed health professional (physician, nurse practitioner,  
8 nurse, licensed therapist, etc.), or registered dietician, or by someone who meets the Reform  
9 Law’s standards for a certified nurse aide (CNA).<sup>1</sup> The CNA certification standards include,  
10 among other things, at least 75 hours of training in specified subject areas, successful completion  
11 of a competency examination, and in-service education of at least 12 hours annually.

12 The CNA certification requirements are central to the Reform Law because the great  
13 majority of nursing home care is *not* performed by licensed health care professionals. *See, e.g.,*  
14 55 Fed. Reg. 10,938, 10,942 (1990) (most nursing facility care provided by nurse aides). The  
15 core of nursing home care -- assistance with activities of daily living such as dressing, bathing,  
16 eating, using the toilet, and transferring from bed to wheelchair and back – is performed by  
17 CNAs certified under the Reform Law’s standards. In the words of a Congressional committee,  
18 “[b]ecause nurse aides provide most of the ‘hands-on’ care to nursing facility residents, the nurse  
19 aide training requirements were and continue to be one of the cornerstones of [the Reform  
20 Law].” House Report 101-247, pt. 3, at 459 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2187.

21 This motion concerns the interpretation of “nursing or nursing-related services” in the  
22 Reform Law. For over ten years – from the release of the Reform Law’s final regulations in  
23 September 1991, until the release of proposed “feeding assistant” regulations in March 2002 –  
24 the federal government correctly interpreted “nursing or nursing-related services” to include  
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26 <sup>1</sup> Volunteers are exempted from these requirements. 42 U.S.C. §§ 1395i-3(b)(5)(F)(ii),  
1396r(b)(5)(F)(ii).

1 virtually all hands-on assistance with residents' activities of daily living. On September 26,  
2 2003, however, the Defendant Secretary of the United States Department of Health and Human  
3 Services (hereafter "Defendant" or "Secretary")<sup>2</sup> released final regulations that now allow  
4 "feeding assistants" with as little as eight hours of training to assist residents during meals.

5 The use of "feeding assistants" in nursing homes will degrade the quality of care  
6 provided in nursing homes, by allowing minimally-trained feeding assistants to take over work  
7 that previously would have been performed by CNAs. Plaintiffs all are nursing home residents,  
8 or organizations representing nursing home residents. To protect nursing home quality of care,  
9 Plaintiffs have requested that this Court order rescission of the Defendant's feeding assistant  
10 regulations.

## 11 **II. LEGAL STANDARDS.**

12 Pursuant to the familiar standard for summary judgment, Plaintiffs contend that there is  
13 "no genuine issue as to any material fact." Fed. R. Civ. P. 56 (c); *Celotex Corp. v. Catrett*, 477  
14 U.S. 317, 322 (1986); *Porter v. California Dep't of Corrections*, 383 F.3d 1018 (9<sup>th</sup> Cir. 2004).  
15 Defendant's feeding assistant regulations conflict with the federal Nursing Home Reform Law  
16 and, in relation to Plaintiffs' second cause of action, Defendants' promulgation of the feeding  
17 assistant regulations was based on evidence that in fact does not exist.

18 Injunctive relief is appropriate. "The traditional bases for injunctive relief are irreparable  
19 injury and inadequacy of legal remedies," and a court must "give due regard to the public  
20 interest." *High Sierra Hikers Ass'n v. Blackwell*, 381 F.3d 886, 898 (9<sup>th</sup> Cir. 2004). Here,  
21 injunctive relief is the only way that the quality of nursing home care can be protected, for the  
22 benefit of the plaintiff class. For that reason, issuance of the requested injunctive relief will  
23 advance the public interest.

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26 <sup>2</sup> The Department of Health and Human Services includes twelve separate agencies,  
including the Centers for Medicare & Medicaid Services (CMS). CMS is responsible for  
(among other things) enforcement of the Nursing Home Reform Law.

1 **III. THE FEDERAL NURSING HOME REFORM LAW SETS STANDARDS FOR**  
2 **PROVISION OF HANDS-ON CARE TO NURSING HOME RESIDENTS.**

3 **A. The Institute of Medicine Recommended Improved Training for Nurse**  
4 **Aides.**

5 The federal Nursing Home Reform Law has its origins in a federally-commissioned study  
6 performed by the Institute of Medicine (“IoM”) from 1983 to 1986. The Institute’s book-length  
7 report was published in 1986 and concluded (among other things) that the federal regulation of  
8 nursing homes had “allow[ed] too many marginal or substandard nursing homes to continue in  
9 operation.” Institute of Medicine, *Improving the Quality of Care in Nursing Homes 2* (1986)  
10 (hereafter “Improving Care”);<sup>3</sup> see also *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223  
11 F.Supp.2d 73, 78-79 (D.D.C. 2002) (history of IoM report); see also 56 Fed. Reg. 48,826 (1991)  
12 (IoM report the genesis of Nursing Home Reform Law).

13 In its consideration of needed regulatory criteria, the IoM found that “one of the major  
14 factors affecting quality of care and quality of life in nursing homes is the number and quality of  
15 nursing staff in relation to the facility’s requirements.” *Improving Care* at 101. The IoM found  
16 that most nursing homes employed insufficient numbers of licensed professional nurses and  
17 instead relied on unlicensed nurse aides, who provided as much as 90% of the direct care to  
18 residents. *Id.* at 89-90.

19 Federal law at that time had no standards for nurse aides, and state requirements  
20 generally were minimal. *Id.* at 89-90. Only 17 states required training for nurse aides, and those  
21 training programs followed “no consistent educational model in content, goal, or organization.”  
22 *Id.* at 90. The IoM noted that a majority of states had “no specific training requirements,” and  
23 “[i]n most states, [nurse] aides occupy entry-level positions that have no experience or formal  
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25 <sup>3</sup> Cited excerpts from *Improving the Quality of Care in Nursing Homes* are contained in a  
26 concurrently filed Excerpts from “Improving the Quality of Care in Nursing Homes” In Support  
of Plaintiffs’ Motion for Summary Judgment.

1 educational or training requirements.” *Id.* at 89, 90.<sup>4</sup>

2 To address the problem, the IoM recommended that federal law be revised to establish  
3 federal nurse aide standards. Under the IoM’s recommendation, the nurse aide training standard  
4 would require “a preservice state-approved training program in a state-accredited institution such  
5 as a community college.” *Id.* at 91.

6 **B. The Nursing Home Reform Law Enacted Standards for CNA Certification.**

7 To implement many of the recommendations of the 1986 IoM report, Congress in 1987  
8 enacted the Nursing Home Reform Law, as part of the Omnibus Budget Reconciliation Act of  
9 1987.<sup>5</sup> Pub. L. 100-203, §§ 4201 and 4211. The law was codified at sections 1395i-3 and 1396r  
10 of Title 42 of the United States Code. Section 1395i-3 applies to any facility that accepts  
11 Medicare reimbursement; Section 1396r similarly applies to any facility that accepts Medicaid  
12 reimbursement. Sections 1395i-3 and 1396r are virtual mirror images of each other.<sup>6</sup>

13 Over 97 percent of the nation’s nursing homes are certified to participate in the Medicare  
14 Program, the Medicaid program, or both. HHS, *The National Nursing Home Survey: 1999*  
15 Summary at 7, *available at* [www.cdc.gov/nchs/data/series/sr\\_13/sr13\\_152.pdf](http://www.cdc.gov/nchs/data/series/sr_13/sr13_152.pdf). As a result, the  
16 Reform Law applies to virtually every nursing home resident in the country.

17 The Reform Law made a sea change in federal nursing home law, consistent with the  
18 IoM’s recommendation for a revised federal nursing home law “based on the best professional  
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20 <sup>4</sup> The Federal Register confirms these findings: “Prior to the enactment of [the Reform  
21 Law], there were no Federal requirements concerning training and competency evaluation of  
22 nurse aides. Rather, conditions of participation for Medicare . . . and conditions for coverage for  
23 Medicaid . . . required only that all staff be suitably and appropriately trained.” 56 Fed. Reg.  
48,880 (1991).

24 <sup>5</sup> Because the Nursing Home Reform Law was part of the 1987 budget reconciliation bill,  
the Reform Law also is known as OBRA ‘87.

25 <sup>6</sup> The Reform Law refers to a Medicare-certified facility as a “skilled nursing facility,”  
26 and a Medicaid-certified facility as a “nursing facility.” 42 U.S.C. §§ 1395i-3(a), 1396r. For  
simplicity’s sake, this memorandum refers to each type of facility as a “nursing home.”

1 standards for providing high quality of care and quality of life.” Improving Care at 26. For  
2 example, a fundamental provision of the Reform Law requires that a nursing home “provide  
3 services to attain or maintain the highest practicable physical, mental, and psychosocial well-  
4 being of each resident, in accordance with a written plan of care” prepared by a multi-  
5 disciplinary team headed by the resident’s physician. 42 U.S.C. §§ 1395i-3(b)(2), 1396r(b)(2).  
6 Also, to establish greater professionalism in nursing home care, the Nursing Home Reform Law  
7 requires that a nursing home have a licensed nurse on duty around the clock, and employ a  
8 professional registered nurse at least eight consecutive hours a day, seven days a week. 42  
9 U.S.C. §§ 1395i-3(b)(4)(C)(i), 1396r(b)(4)(C)(i).

10 As particularly relevant in this case – and also as recommended by the IoM -- the Reform  
11 Law establishes federal CNA standards. The standards must be met by any individual providing  
12 “nursing or nursing-related services” in a nursing home, unless the individual is a licensed health  
13 care professional, a registered dietician, or a volunteer. 42 U.S.C. §§ 1395i-3(b)(5)(F),  
14 1396r(b)(5)(F).

15 Under the Reform Law’s CNA standards, a nursing home may not hire a nurse aide for  
16 more than four months unless the aide has completed a state-approved training and competency  
17 evaluation program, or a state-approved competency evaluation program. During those four  
18 months, the aide must be enrolled in a training class. 42 U.S.C. §§ 1395i-3(b)(5)(A)(i)(I),  
19 1396r(b)(5)(A)(i)(I); *see* 42 C.F.R. § 483.75(e)(4).

20 To improve the qualifications of nurse aides, the Reform Law set standards for both  
21 federal and state governments.<sup>7</sup> Vis à vis the federal government, the Secretary was directed to  
22 establish federal CNA training requirements addressing (among other things) qualifications of  
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24 <sup>7</sup> The dates for compliance with these requirements were delayed by subsequent  
25 amendments to the Reform Law. Ultimately, Congress required nursing homes to comply with  
26 CNA training and competency evaluation requirements by October 1, 1990. Pub. L. 101-239,  
§ 6901(b)(1)(A), *codified at* 42 U.S.C. §§ 1395i-3(b)(5)(A), 1396r(b)(5)(A). Federal standards  
for CNA training and competency evaluation programs became effective April 1, 1992,  
following publication of final federal rules on September 26, 1991. 56 Fed. Reg. 48,880 (1991).

1 instructors, procedures for determining CNA competency, and criteria for state approval of  
2 training and competency evaluation programs. 42 U.S.C. §§ 1395i-3(f)(2)(A)(i), (ii),  
3 1396r(f)(2)(A)(i), (ii).

4 In addition, the Secretary was directed to set minimum hours of initial and ongoing  
5 training, with the stipulation that the initial training minimum be set at no less than 75 hours. 42  
6 U.S.C. §§ 1395i-3(f)(2)(A)(i)(II), 1396r(f)(2)(A)(i)(II). Furthermore, the Secretary was directed  
7 to determine the areas to be covered in a training program, with the requirement that those areas  
8 include “at least basic nursing skills, personal care skills, cognitive, behavioral and social care,  
9 basic restorative services, and residents’ rights.” Pub. L. 100-203, §§ 4201, 4211 (codified at 42  
10 U.S.C. §§ 1395i-3(f)(2)(A)(i)(I), 1396r(f)(2)(A)(i)(I)). This language was modified in 1988 to  
11 more carefully identify the need for training in mental health and social services, (Pub. L. 100-  
12 360, Title IV, Subtitle B, § 411(l)(2)(J)) and was strengthened again in 1989, in the Omnibus  
13 Budget Reconciliation Act of that year, when Congress added the requirement that CNA training  
14 include “care of cognitively impaired residents.” Pub. L. 101-239, § 6901(b)(3). As a result,  
15 current statutory language requires that CNAs be trained in “at least basic nursing skills,  
16 personal care skills, recognition of mental health and social service needs, care of cognitively  
17 impaired residents, basic restorative services, and residents’ rights.” 42 U.S.C. §§ 1395i-  
18 3(f)(2)(A)(i)(I), 1396r(f)(2)(A)(i)(I).

19 Congress allowed CNA training programs to be provided only at those nursing homes  
20 with good records. Specifically, the Secretary was directed to prepare standards prohibiting a  
21 nursing home from operating a CNA training program if the facility had received a waiver of the  
22 Reform Law’s nurse staffing standards, or had a history of providing poor care.<sup>8</sup> 42 U.S.C.  
23 §§ 1395i-3(f)(2)(B)(iii)(I), 1396r(f)(2)(B)(iii)(I). The Secretary also was directed to specify that  
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25 <sup>8</sup> Indications of such poor care are (pursuant to the Reform Law) an extended survey  
26 conducted by the agency responsible for inspecting for violations of the Reform Law, and/or the  
imposition of a sizable money penalty or other significant enforcement remedy. 42 U.S.C.  
§§ 1395i-3(f)(2)(B)(iii)(I)(b), (c), 1396r(f)(2)(B)(iii)(I)(b), (c).

1 nursing homes cannot impose any charges for CNA training or competency evaluation, in the  
2 case of trainees that the nursing home has employed or to whom the nursing home has offered  
3 employment. 42 U.S.C. §§ 1395i-3(f)(2)(A)(iv)(II), 1396r(f)(2)(A)(iv)(II).

4 Vis à vis states, the Reform Law required states to identify the CNA training and  
5 competency evaluation programs that had met federal standards, and to provide for ongoing  
6 review and reapproval of training and competency evaluation programs. 42 U.S.C. §§ 1395i-  
7 3(e)(1), 1396r(e)(1). States also were required to establish and maintain registries that listed  
8 individuals who had successfully completed CNA training and competency evaluation programs  
9 and, for those individuals, also listed any documented finding of resident neglect or abuse, or  
10 misappropriation of resident property. 42 U.S.C. §§ 1395i-3(e)(2)(A), (B), 1396r(e)(2)(A), (B).  
11 Nursing homes were required to consult the state registry before hiring any nurse aide. 42  
12 U.S.C. §§ 1395i-3(b)(5)(C), 1396r(b)(5)(C).

13 **C. The Reform Law’s Regulations Established Important Standards for CNA**  
14 **Certification.**

15 In 1990, the Health Care Financing Administration (HCFA)<sup>9</sup> published proposed federal  
16 regulations on various aspects of the Reform Law, including a separate rule addressing CNA  
17 training and competency evaluation. 55 Fed. Reg. 10,938-50 (1990). The final regulations were  
18 published on September 26, 1991, with an effective date of April 1, 1992. 56 Fed. Reg. 48,880-  
19 922 (1991). As is demonstrated in the following paragraphs, the regulations were based on the  
20 understanding that “[n]urse aides have the most significant impact on the quality of life of  
21 residents of nursing facilities and therefore need a broad range of knowledge beyond the ability  
22 to perform specific tasks properly.” 55 Fed. Reg. at 10,941.

23 Pursuant to the final regulations, a CNA training program must be conducted by or under  
24 the general supervision of a registered nurse with at least two years of nursing experience,  
25 including at least one year of experience in long-term care. 42 C.F.R. § 483.152(a)(5)(i). Of the

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26 <sup>9</sup> HCFA changed its name to the Centers for Medicare & Medicaid Services (CMS) in  
2001. 66 Fed. Reg. 35,437 (2001).

1 75 required hours of training, at least 16 hours must be hands-on care performed “under the  
2 direct supervision of a registered nurse or a licensed practical nurse.” 42 C.F.R. § 483.152(a)(3).

3 Nurse aides must receive “[a]t least a total of 16 hours of training . . . prior to any direct  
4 contact with a resident,” with that initial training covering at least “[c]ommunication and  
5 interpersonal skills; [i]nfection control; [s]afety/emergency procedures, including the Heimlich  
6 maneuver; [p]romoting residents’ independence; and [r]especting residents’ rights.” 42 C.F.R.  
7 § 483.152(b)(1)(i)-(v). The complete curriculum (with a minimum of 75 hours) must cover basic  
8 nursing skills, personal care skills (including assisting with eating and hydration), mental health  
9 and social service needs, care of cognitively impaired residents, basic restorative services, and  
10 residents’ rights. 42 C.F.R. § 483.152(b)(2)-(7).

11 CNA certification requires passage of a competency evaluation, which must include an  
12 examination and a demonstration of skills. The examination must address each course  
13 requirement of the 75-hour training program (see previous paragraph). 42 C.F.R. § 483.154(b).  
14 To become certified, the trainee must pass both the examination and the skills demonstration. A  
15 competency evaluation must be administered and graded either by the state itself or a state-  
16 approved entity (which must not be a nursing facility). 42 C.F.R. § 483.154(c), (e).

17 The federal regulations require on-going training. Each nursing home “must complete a  
18 performance review of every nurse aide at least once every 12 months, and must provide regular  
19 in-service education based on the outcome of these reviews.” 42 C.F.R. § 483.75(e)(8); *see* 42  
20 U.S.C. §§ 1395i-3(b)(5)(E), 1396r(b)(5)(E) (regular in-service training required). The in-service  
21 education must consist of at least 12 hours per year, and must address areas of weakness in a  
22 CNA’s performance reviews and, if a CNA cares for residents with cognitive impairments, the  
23 care of the cognitively impaired. 42 C.F.R. § 483.75(e)(8).

24 The regulations provided – as required by the Reform Law – that each state maintain a  
25 publicly-accessible registry of the individuals who have satisfied the CNA requirements relating  
26 to training and/or competency evaluations. The registry must include the date on which the

1 individual first became eligible for listing in the registry, along with any finding of the state  
2 survey agency regarding neglect, abuse, or misappropriation of property committed by the  
3 individual against a nursing home resident. A nursing home is prohibited from hiring a CNA  
4 who has a registry finding of abuse, neglect or misappropriation. 42 U.S.C. §§ 1395i-3(e)(2),  
5 1396r(e)(2); 42 C.F.R. §§ 483.13(c)(1)(ii)(B), 483.156.

6 **D. In the Final Nurse Aide Training and Competency Evaluation Regulations,  
7 HCFA Stated that Single-Task Workers Would Require CNA Certification,  
8 and that Labor Shortages Could Not Justify Waiver of Certification  
9 Requirement.**

10 In the release of the final regulations, HCFA retained its proposed definition of CNA at  
11 42 C.F.R. § 483.75(e): “Nurse aide means any individual providing nursing or nursing-related  
12 services to residents in a facility who is not a licensed health professional, a registered dietitian,  
13 or someone who volunteers to provide such services without pay.” 56 Fed. Reg. at 48,890.

14 Some commenters had expressed concern that the definition in the proposed rule  
15 . . . would encompass licensed nurses, secretaries, physical therapy assistants, or  
16 dietary assistants, as well as other individuals, such as medication aides, activity  
17 aides, and unit aides, who do not perform the complete range of nurse aide duties.  
18 . . . Several commenters requested that the definition be revised to exclude  
19 individuals who do not ordinarily function as nurse aides but provide nurse aide  
20 services to relieve nurse aides, or who perform only one or a few nurse aide tasks.  
21 One commenter asked how the requirements apply to individuals who perform  
22 only a few nurse aide services.

23 56 Fed. Reg. at 48,890. HCFA rejected these requests, stating unequivocally that the Reform  
24 Law required that anyone performing *any* CNA task for *any* period of time, however limited,  
25 comply fully with all CNA training and competency evaluation requirements:

26 The statutory definition clearly indicates that nurse aides are individuals who  
provide nursing or nursing-related services in nursing or skilled nursing facilities.  
If an individual provides these services, regardless of the frequency with which  
they are provided *or the scope of services provided*, the individual must be  
competent to do so to be used by a facility. . . . It is unclear why secretaries or  
dietitians’ assistants would be providing nursing or nursing-related services, but  
if they do, they must meet the nurse aide requirements.

56 Fed. Reg. at 48,890 (emphasis added).

While HCFA declined commenters’ request to define “nursing-related services,” saying  
that adding language to the statutory definition would not be “helpful,” 56 Fed. Reg. at 48,890,

1 HCFA described the term as important to emphasize the direct provision of hands-on services to  
2 residents:

3 We believe, however, that removing “nursing-related services” from the  
4 definition of nurse aide [as a commenter suggested] would greatly decrease the  
5 accuracy of the definition because the term helps to clarify that an individual must  
6 be directly involved in patient care to meet the definition of nurse aide. For  
7 example, an individual who makes unoccupied beds or fills water pitchers would  
8 not necessarily be a nurse aide and therefore may not have to meet the nurse aide  
9 requirements.

10 56 Fed. Reg. at 48,890. In a similar vein, HCFA declined commenters’ request to “provide  
11 waivers to the nurse aide training and competency evaluation requirements for facilities that  
12 have difficulty attracting a sufficient number of nurse aides.” (56 Fed. Reg. at 48,884-85):

13 Sections 1819(b)(5)(A) and 1919(b)(5)(A) of the Act [42 U.S.C. §§ 1395i-  
14 3(b)(5)(A), 1396r(b)(5)(A)] are explicit in the requirement that facilities use only  
15 nurse aides who have completed a [nurse aide training and competency evaluation  
16 program or a nurse aide competency evaluation program] and are competent to  
17 provide nursing and nursing-related services. The intent of the requirement is to  
18 enhance the quality of care provided to residents of facilities by ensuring that  
19 nurse aides are competent to care for residents. We have not provided a waiver to  
20 the statutory requirements for facilities that have difficulty attracting nurse aides  
21 for three reasons. First, we believe it is impossible for a facility to provide quality  
22 care without competent nurse aides. Second, such a waiver would violate  
23 sections 1819(b)(5)(A) and 1919(b)(5)(A) of the Act [42 U.S.C. §§ 1395i-  
24 3(b)(5)(A), 1396r(b)(5)(A)]. Finally, Congress provided for waivers of nurse  
25 staffing in certain circumstances [see sections 1819(b)(4)(C)(ii) and  
26 1919(b)(4)(C)(ii) of the Act [42 U.S.C. §§ 1395i-3(b)(4)(C)(ii),  
1396r(b)(4)(C)(ii)].) The absence of such waiver for nurse aides indicates that  
Congress did not intend for there to be such waivers.

56 Fed. Reg. at 48,885.

#### 19 **IV. DEFENDANT AUTHORIZED USE OF FEEDING ASSISTANTS EFFECTIVE** 20 **OCTOBER 2003.**

21 Defendant’s CMS proposed feeding assistant regulations on March 29, 2002, and  
22 released the final version of those regulations on September 26, 2003. 67 Fed. Reg. 15,149  
23 (2002) (proposed regulations); 68 Fed. Reg. 55,528 (final regulations). The regulations became  
24 effective on October 27, 2003. 68 Fed. Reg. at 55,528.

25 Under the feeding assistant regulations, a state may choose to allow use of feeding  
26 assistants in the state’s federally-certified nursing homes. A feeding assistant may only provide

1 care if the resident has “no complicated feeding problems,” a term which includes, but is “not  
2 limited to, difficulty swallowing, recurrent lung aspirations, and tube or parenteral/IV feedings.”  
3 42 C.F.R. 483.35(h)(3). A feeding assistant must receive a minimum of eight hours of training  
4 in a state-approved training course. 42 C.F.R §§ 483.35(h)(1)(i), 483.160(a).

5 To this point, 28 states have authorized use of feeding assistants in nursing homes. In  
6 addition, an additional three states – Alabama, Arkansas, and Michigan – are developing plans to  
7 authorize use of feeding assistants in the near future. *See State Laws and Policies Relating to*  
8 *Feeding Assistants* (attached to concurrently-filed Declaration of Toby Edelman). CMS has  
9 estimated that, of the 17,000 nursing homes in the country subject to the Nursing Home Reform  
10 Law, about 20% of them ultimately will employ feeding assistants. 68 Fed. Reg. at 55,536.

11 The State of Washington requires that feeding assistant programs comply with a training  
12 curriculum developed by the American Health Care Association, a national trade association of  
13 the nursing home industry. Washington Department of Social and Health Services, Letter to  
14 Nursing Home Administrators re: Dietary Aide Program, NH #2004-004 (Feb. 23, 2004),  
15 available at [www.aasa.dshs.wa.gov/professional/letters/nh/2004/04-004.htm](http://www.aasa.dshs.wa.gov/professional/letters/nh/2004/04-004.htm). Many states  
16 require only eight hours of training, either by setting eight hours as the state minimum, or by  
17 deferring to the federal eight-hour minimum. These states include Iowa, Kansas, Massachusetts,  
18 New Hampshire, North Carolina, and Virginia – each of which has set a state eight-hour  
19 minimum -- and Arizona, Florida, Maine, Minnesota, Nebraska, North Dakota, and  
20 Pennsylvania, each of which has deferred to the federal eight-hour minimum. No state requires  
21 more than 16 hours of training. *See State Laws and Policies Relating to Feeding Assistants.*

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1 **V. DEFENDANT’S FEEDING ASSISTANT REGULATIONS CONFLICT WITH**  
2 **THE NURSING HOME REFORM LAW.**

3 **A. Under Traditional Tenets of Statutory Construction, the Reform Law Does**  
4 **Not Allow the Use of Feeding Assistants in Nursing Homes.**

5 As discussed below, the language, purpose, and structure of the Nursing Home Reform  
6 Law demonstrate a decision by Congress to require that all hands-on nursing home care be  
7 provided exclusively by licensed health professionals, registered dietitians, or CNAs. The  
8 Defendant has no authority to reverse that Congressional decision. Defendant’s feeding assistant  
9 regulations are *not* entitled to deference under the standards of *Chevron U. S. A. Inc. v. Natural*  
10 *Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

11 The *Chevron* test provides for a two-step analysis:

12 Under the first test: If the intent of Congress is clear, that is the end of the matter;  
13 for the court, as well as the agency, must give effect to the unambiguously  
14 expressed intent of Congress . . . . Conversely, at step two of *Chevron*, when  
15 applicable, we recognize that if a statute is silent or ambiguous with respect to the  
16 issue at hand, then the reviewing court must defer to the agency as long as the  
17 agency’s answer is based on a permissible construction of the statute.

18 *The Wilderness Soc’y v. U. S. Fish and Wildlife Serv.*, 353 F.3d 1051, 1059 (9<sup>th</sup> Cir. 2003) (*en*  
19 *banc*) (internal quotation marks and citations omitted); *see also CHW West Bay v. Thompson*,  
20 246 F.3d 1218, 1223 (9<sup>th</sup> Cir. 2001); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9<sup>th</sup>  
21 Cir. 1999). In determining the intent of Congress under the first step, courts must apply  
22 “‘traditional tools of statutory construction,’ and if a court using these tools ascertains that  
23 Congress had a clear intent on the question at issue, that intent must be given effect as law.” *The*  
24 *Wilderness Soc’y*, 353 F.3d at 1059, *quoting Chevron*, 467 U.S. at 843 n.9. As the Ninth Circuit  
25 reiterated in *The Wilderness Soc’y*, “questions of congressional intent ‘are still firmly within the  
26 province of the courts under *Chevron*.’” 353 F.3d at 1059, *quoting Defenders of Wildlife*, 191  
F.3d at 1164. That is, “deference is not owed to an agency decision if it construes a statute in a  
way that is contrary to congressional intent or frustrates congressional policy.” *CHW West Bay*,  
246 F.3d at 1223; *see also Arizona Cattle Growers’ Ass’n v. U. S. Fish and Wildlife*, 273 F.3d  
1229,1237 (9<sup>th</sup> Cir. 2001) (“The Supreme Court ... has ‘explicitly limited’ *Chevron*’s deference

1 ‘to cases in which congressional intent cannot be discerned through the use of the traditional  
2 techniques of statutory interpretation.’ (citation omitted)). Finally, in interpreting statutory  
3 intent, it is a “familiar canon of statutory construction that remedial legislation should be  
4 construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967);  
5 *Hason v. Medical Bd. of California*, 279 F.3d 1167, 1172 (9<sup>th</sup> Cir. 2002).

6 The Ninth Circuit’s recent *en banc* decision in *The Wilderness Soc’y* is analogous to the  
7 case before this court. In *The Wilderness Soc’y*, the Ninth Circuit analyzed the “language,  
8 purpose, and structure” of the federal Wilderness Act and, because the analysis demonstrated a  
9 congressional intent to bar commercial enterprises from a wilderness area, the *en banc* panel  
10 unanimously gave no deference to a federal agency’s decision to the contrary. 353 F.3d at 1062,  
11 1067. Similarly, the language, purpose and structure of the Nursing Home Reform Law  
12 demonstrates congressional intent to require all hands-on nursing home care to be provided  
13 exclusively by licensed health professionals, registered dietitians, and CNAs.

14 Defendant’s interpretation of “nursing or nursing-related” directly contradicts the Reform  
15 Law’s purpose. A significant component of the Reform Law is its upgrading of nursing home  
16 staff, both by requiring more nurse staffing, and by establishing federal standards for CNA  
17 certification. Defendant’s promulgation of the feeding assistant regulations, by contrast, is a  
18 corner-cutting step that inevitably will lead to CNAs being replaced by poorly-trained feeding  
19 assistants.

20 As discussed above, the IoM had found that nursing home care was routinely  
21 substandard, and that a good part of problem was due to the lack of professionalism in the  
22 existing nursing home model. *See supra* at 3-4. In response, the Reform Law increased the level  
23 of health care expertise required in nursing homes. The importance of licensed health care  
24 professionals was recognized. For example, under the Reform Law, a nursing home must have a  
25 licensed nurse on duty at all times, and must employ a professional registered nurse daily for at  
26 least one eight-hour period. 42 U.S.C. §§ 1395i-3(b)(4)(C)(i), 1396r(b)(4)(C)(i).

1 The Reform Law also established certification standards for unlicensed nursing home  
2 staff. As discussed in more detail above (*see supra* at 5-7), CNA certification requires 75 hours  
3 of initial training along with passage of a competency examination. 42 U.S.C. §§ 1395i-  
4 3(b)(5)(A)(i), (f)(2)(A), 1396r(b)(5)(A)(i), (f)(2)(A). Each CNA must receive “regular  
5 performance review and regular in-service education.”<sup>10</sup> 42 U.S.C. §§ 1395i-3(b)(5)(E),  
6 1396r(b)(5)(E). To assure that CNA standards are enforced, each state must maintain a publicly-  
7 accessible registry of CNAs. 42 U.S.C. §§ 1395i-3(e)(2), 1396r(e)(2).

8 By contrast, the Defendant’s feeding assistant regulations demonstrate only a cursory  
9 effort to protect nursing home quality of care. Most noticeably, a feeding assistant may have as  
10 little as eight hours of training. 42 C.F.R. § 483.160(a).

11 Furthermore, supervision may be minimal. As proposed, the regulation would have  
12 required that a feeding assistant work under a nurse’s “direct supervision,” so that a nurse would  
13 be “in the unit or on the floor where the feeding assistance is furnished and is immediately  
14 available to give help, if necessary.” 67 Fed. Reg. 15,149, 15,154 (2002). In the final  
15 regulation, even these minimal protections were eliminated. The final regulation states merely  
16 that a feeding assistant works under a nurse’s supervision and, in the accompanying Federal  
17 Register discussion, the Secretary explains that the supervising nurse need not be on the same  
18 floor or in the same unit as the feeding assistant. 68 Fed. Reg. 55,528, 55,533 (2003).

19 Congress recognized that the quality of nursing home care depends on more than the  
20 **nursing** services provided. Just as important – or, arguably, more important – are the **nursing-**  
21 **related** services because, as explained previously, nursing home residents need substantial  
22 assistance with activities of daily living. To the extent that Defendant has conflated “nursing-  
23 related” with “nursing”, his interpretation is unsupported. The phrases “nursing” and “nursing-  
24 related” are connected by a disjunctive – the word “or” – and “the controlling rules of statutory

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25 <sup>10</sup> Subsequently-promulgated regulations require that the performance reviews be  
26 conducted at least annually, and that the in-service education be comprised of at least 12 hours  
annually. 42 C.F.R. § 483.75(e)(8).

1 construction . . . require that terms connected by a disjunctive be given separate meanings, unless  
2 the context dictates otherwise.” *Tillema v. Long*, 253 F.3d 494, 499 (9<sup>th</sup> Cir. 2001) (in statutory  
3 phrase “judgment or claim” both “judgment” and “claim” must be given meaning) (internal  
4 quotation marks and citations omitted).

5 Furthermore, the Nursing Home Reform Law is a remedial statute, directed explicitly at  
6 improving the care provided to nursing home residents, and at protecting the health and rights of  
7 facility residents. Interpretation of the key phrase “nursing or nursing-related” must be  
8 undertaken with that goal in mind. *Tcherepnin*, 389 U.S. at 336; *Hason*, 279 F.3d at 1172. To  
9 read “nursing-related” as not encompassing feeding assistance would ignore the broad reading  
10 that must follow from a law that was intended to improve residents’ quality of care.

11 **B. Under Defendant’s Interpretation of Reform Law, Much Assistance with**  
12 **Activities of Daily Living Could Be Performed By Nursing Home Employees**  
13 **With No Training Whatsoever.**

14 Defendant’s construction of “nursing or nursing-related services” is unworkable  
15 because it requires that assistance with activities of daily living (such as assistance with eating)  
16 be divided between tasks that are nursing or nursing-related, and those tasks that are not.  
17 Feeding assistants, for example, are to provide assistance only to those residents “who have no  
18 complicated feeding problems.” 42 C.F.R. § 483.35(h)(3)(i). This distinction – between  
19 complicated and uncomplicated problems – is cited by the Defendant in his attempt to claim that  
20 the feeding assistant regulations comply with the Reform Law. 68 Fed. Reg. at 55,530-31.

21 Under the Defendant’s construction, therefore, some assistance with bathing (for example)  
22 would be nursing or nursing-related, and could be performed only by a licensed health  
23 professional or a CNA. On the other hand, other assistance with bathing would *not* be  
24 considered nursing-related, and the Reform Law would allow for that assistance to be provided  
25 by a nursing home employee with *no training whatsoever*. The Reform Law also would not  
26 require that a state maintain a registry for such “assistants”.

As discussed above, licensed nurses perform a very small percentage of the hands-on

1 assistance in a nursing home. *See supra* at 1, 3. Since the implementation of the Nursing Home  
2 Reform Law, beginning on October 1, 1990, the bulk of this vital hands-on assistance has been  
3 performed by CNAs. But, under the Defendant’s construction of “nursing or nursing-related  
4 services,” all that would change. The Defendant’s construction would allow for nursing homes  
5 to hire completely untrained individuals (no doubt, like feeding assistants, at a minimum wage),  
6 and to use those untrained individuals to assist residents in activities including bathing, using the  
7 toilet, dressing, walking, and transferring from bed to chair or vice versa. *See* 68 Fed. Reg. at  
8 55,532 (2003) (feeding assistants expected to be paid minimum wage).

9 It is not hard to envision the end result: among the less conscientious nursing homes, a  
10 dangerous race to the bottom. These nursing homes would cut all available corners by  
11 employing the statutory minimum number of registered and licensed nurses, a handful of CNAs,  
12 and a large contingent of poorly-trained “assistants.”

13 Such a result would be antithetical to the Reform Law’s purpose, and was not intended  
14 by Congress. Given the Reform Law’s careful description of nurse staffing and CNA  
15 certification, Congress did not intend a loophole that could allow substantial amounts of  
16 assistance with activities of daily living to be performed by “assistants” with no training  
17 whatsoever.

18 **C. Because of Defendant’s Unexplained Change of Position, His Interpretation**  
19 **of “Nursing or Nursing-Related” Is Entitled To No Deference.**

20 Another reason that Defendant’s statutory interpretation is entitled to no deference is  
21 Defendant’s unexplained change of position after over ten years of interpreting “nursing or  
22 nursing-related” to require CNA certification for feeding assistants and other single-task  
23 workers. “An agency interpretation of a relevant provision which conflicts with the agency’s  
24 earlier interpretation is entitled to considerably less deference than a consistently held agency  
25 view.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). The new position is entitled  
26 to deference only if “the agency acknowledges and explains the departure from its prior views.”  
*Seldovia Native Association, Inc. v. Lujan*, 904 F.2d 1335, 1346 (9<sup>th</sup> Cir. 1990), *quoting from*

1 *Mobil Oil Co. v. EPA*, 871 F.2d 149, 152 (D.C. Cir.1989).

2 In fact, Defendant, his predecessors and representatives until very recently used the  
3 interpretation advocated by Plaintiffs in this case. When the regulations implementing the  
4 Nursing Home Reform Law were promulgated on September 26, 1991, Defendant's predecessor  
5 stated that CNA certification would be required for the provision of nursing or nursing-related  
6 services "regardless of . . . the scope of services provided." 56 Fed. Reg. at 48,890.

7 Furthermore, documents produced by Defendant disclose that until March 29, 2002 (the date of  
8 the release of the proposed feeding assistant regulations), Defendant consistently interpreted the  
9 Reform Law to prohibit single-task workers such as feeding assistants from providing care to  
10 nursing home residents. Extensive evidence of this consistent interpretation is attached in  
11 Exhibits 1 through 13 in the concurrently-filed Exhibits in Support of Plaintiffs' Motion for  
12 Summary Judgment; examples include:

- 13 ● **April 28, 1993.** Memorandum from the Wisconsin Bureau of Quality Compliance: "We  
14 were recently advised by the Health Care Financing Administration [HCFA] that  
15 individuals whose only duty is to feed residents must meet the nurse aide training and  
16 competency evaluation requirements." Exh.1, p. 3.
- 17 ● **September 21, 1999.** Answer on HCFA website: "HCFA has interpreted assisting a  
18 resident to eat as a nursing related service." Exh. 3, p. 1.
- 19 ● **July 21, 2000.** Letter from HCFA Administrator to Secretary of Wisconsin Dep't of  
20 Health and Human Services: "We believe that current Federal statute does not allow for  
21 the flexibility to use non-nurse aide staff to perform single tasks when those tasks are part  
22 of the required range of activities for nurses or nurse aides. We consider feeding  
23 residents to be among such tasks." Exh. 9, p. 1.
- 24 ● **July 5, 2001.** CMS Survey and Certification Group Memorandum 01-20, addressed to  
25 the ten CMS Regions and to State Survey Agency Directors: "We have identified  
26 transporting residents as the only nursing home service that does not require the use of

1 nurse aides with 75 hours of training . . . .” Exh. 13, p. 1.

2 Notably, Defendant never articulated any legal reasoning for its 180 degree change of  
3 course. In introducing the proposed feeding assistant regulations, CMS simply offered its  
4 conclusory belief

5 that a policy change to allow the use of feeding assistants can be accommodated  
6 under existing statute. There is nothing in the statute governing requirements for  
7 long term care facilities that would preclude the use of these workers and we  
8 believe that there is no conflict with other statutory requirements.

9 67 Fed. Reg. at 15,151 (2002) (citations omitted).

10 In the release of the final regulations, CMS’s discussion was similarly cursory and  
11 results-driven. CMS acknowledged: “Some commenters believed that the proposal is illegal,  
12 that is, there is no basis in the law to support the use of paid feeding assistants.” 68 Fed. Reg. at  
13 55,530 (2003). In response, CMS stated in conclusory fashion that “we do not consider the  
14 kinds of tasks facilities may ask feeding assistants to provide as either nursing or nursing  
15 related.” *Id.* at 55,530-31. In an effort to explain why feeding residents is part of the CNA  
16 training curriculum, CMS claimed that this aspect of the curriculum “was predicated on the  
17 nurse aide having to tend to persons with pronounced eating complications (such as swallowing  
18 disorders) for which specialized training is essential.” *Id.* at 55,531. CMS next stated that the  
19 feeding assistant regulations will allow nursing homes “to use persons who have had a lesser  
20 level of training to assist residents who have no feeding issues that require any specialized  
21 attention.” *Id.* CMS then proceeded directly to its conclusion: “Thus, we do not consider  
22 feeding assistants who may be used by facilities under this rule to be engaged in nursing or  
23 nursing related activities.” *Id.*

24 This would be an insufficient analysis even without the extensive record of the Secretary  
25 and the Secretary’s representatives taking the opposite position. CMS’s argument is faulty, as is  
26 shown by the following distillation:

*CMS claims:*

1) *CNAs are trained in feeding in order to care for residents with pronounced eating*

1           *complications;*

2    2)    *The feeding assistant regulations allow nursing homes to use workers with lesser training*  
3           *in order to care for residents with lesser needs, and therefore;*

4    3)    *Feeding assistants do not perform nursing or nursing-related services.*

5    CMS cites no authority for the false proposition that feeding assistance training for CNAs is  
6    designed solely for the care of residents with “pronounced eating complications.” In fact, the  
7    relevant regulation requires broadly that CNAs be trained in “[a]ssisting with eating and  
8    hydration” and “[p]roper feeding techniques,” and states also that the regulation’s list of personal  
9    care services is not exclusive. 42 C.F.R. § 483.152(b)(3)(v), (vi).

10           In any case, the CNA training curriculum does not establish the parameters of what can  
11           be considered a nursing or nursing-related service. The proper standard is the intent of Congress  
12           and that intent, as developed throughout this Motion, is to require CNA certification for virtually  
13           any hands-on care provided in a nursing home.<sup>11</sup>

14           In no way has the Defendant “acknowledge[d] and explain[ed] the departure from its  
15           prior views.” *Seldovia Native Association, Inc.* 904 F.2d at 1346. For that reason, Defendant’s  
16           current interpretation is entitled to no deference.

17           **D.     Under Step Two of the *Chevron* Test, Defendant’s Regulations Frustrate**  
18           **Congressional Intent and Thus Are Not a Permissible Interpretation of the**  
19           **Reform Law.**

20           As explained above, the language, purpose and structure of the Nursing Home Reform  
21           Law demonstrate that the phrase “nursing or nursing-related services” includes feeding  
22           assistance. Congress enacted this provision of the Reform Law in order to require that virtually  
23           all hands-on care in a nursing home be performed by either licensed health professionals,  
24           registered dietitians, or CNAs.

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25           <sup>11</sup> In both 2000 and 2001, Congress rejected legislation that would have authorized use of  
26           feeding assistants in nursing homes. *See* H.R. 4547, 106<sup>th</sup> Cong. (2000) (single-task workers);  
H.R. 5282, 106<sup>th</sup> Cong. (2000) (same); H.R. 1510, 107<sup>th</sup> Cong. (2001) (feeding assistants); S.  
728, 107<sup>th</sup> Cong. (2001) (same).

1           Because the first step of the *Chevron* analysis indicates that the feeding assistant  
2 regulations are inconsistent with the Reform Law, there is no need to go further: Plaintiffs are  
3 entitled to summary judgment in their favor. *Chevron*, 467 U.S. at 842-43 (court and agency  
4 must comply with congressional intent).

5           In any case, Plaintiffs also are entitled to summary judgment under the *Chevron* test's  
6 second step: "whether the agency's answer is based on a permissible construction of the statute."  
7 *Chevron*, 467 U.S. at 843. In this case, Defendant's construction is impermissible because it  
8 frustrates the intent of Congress. *See, e.g., Akhtar v. Burzynski*, 384 F.3d 1193, 1198 (9<sup>th</sup> Cir.  
9 2004) ("We do not owe deference, however, to agency regulations if they construe a statute in a  
10 way that is contrary to congressional intent or that frustrates congressional policy."); *CHW West*  
11 *Bay v. Thompson*, 246 F.3d 1218, 1223, 1225 (9<sup>th</sup> Cir. 2001). The Reform Law was enacted in  
12 large part to improve the qualifications and competence of the nursing home employees  
13 providing care, but Defendant's feeding assistance regulations will allow nursing homes to  
14 replace CNAs with minimally-trained feeding assistants.

15           **1. Defendant's Feeding Assistant Regulations Will Cause Nursing Home**  
16           **Residents To Receive a Lesser Quality of Care.**

17           **a. Use of Feeding Assistants Will Diminish Quality of Care**  
18           **Across the Board.**

19           A frustrating of congressional intent is evident in how nursing home quality of care will  
20 be eroded by the substitution of feeding assistants for CNAs. Feeding assistants (according to  
21 Defendant's regulations) will be limited in their scope of work to providing feeding assistance  
22 for residents without complicated feeding problems (*see* 42 C.F.R. § 483.35(h)(3)(i)), but this  
23 limitation creates two possible scenarios, either one of which is troubling. One possibility is that  
24 feeding assistants, in an effort to be helpful, will perform tasks for which they are not trained. A  
25 feeding assistant, for example, may try to assist a resident in transferring from wheelchair to bed,  
26 make a mistake, and cause the resident to fall and break a bone. *See, e.g., Jordan v. Stonebridge,*  
*L.L.C.*, 862 So. 2d 181, 182-83 (La. Ct. App. 2003) (nursing home resident's leg fractured in fall

1 during transfer from wheelchair to shower chair, when facility staff member fails to follow care  
2 plan calling for two-person assistance).

3 The other possibility is that feeding assistants will *not* help and that residents will be  
4 monitored by direct-care employees who are incapable of assisting in all but the most trivial of  
5 feeding assistance tasks. In many instances, nursing homes likely will replace CNAs with  
6 feeding assistants as a cost-saving measure. *See, e.g.*, 68 Fed. Reg. at 55,532 (Defendant  
7 explaining that use of minimum-wage feeding assistants will save money). The net result: the  
8 nursing home will save up to 67 hours of training per employee (based on federal standards) and  
9 maybe a dollar or two per hour in wages, but residents will be cared for by feeding assistants  
10 capable of performing just a tiny fraction of the assistance that the residents need.

11 **b. The Reasoning Behind the Regulations Would Allow Much**  
12 **Assistance With Activities of Daily Living To Be Provided By**  
13 **Nursing Home Employees With Little or No Training.**

14 The frustrating of congressional intent further is demonstrated by the fact that (as  
15 discussed earlier) Defendant has interpreted the Reform Law to allow assistance with feeding  
16 and other activities of daily living to be divided between nursing-related tasks and those tasks  
17 that are not nursing-related. *See supra* at 15-16. Although Congress intended, in enacting the  
18 Reform Law, to improve the qualifications of the nursing home employees providing hands-on  
19 care, Defendant’s interpretation of “nursing or nursing-related” in the Reform Law would allow  
20 significant amounts of hands-on assistance to be provided by nursing home employees with no  
21 training whatsoever.

22 **2. The Frustrating of Congressional Intent Is Particularly Pronounced**  
23 **Given that Even CNA Standards Are Inadequate.**

24 Defendant’s adoption of the feeding assistant regulations is especially troubling given  
25 that (as discussed in a November 2002 study by the Defendant’s own Office of Inspector  
26 General) the CNA training standards set by the Reform Law are inadequate to prepare CNAs for  
their demanding work. HHS OIG, Nurse Aide Training, Rep. No. OEI-05-01-00030 (2002)  
(hereafter “HHS OIG, Nurse Aide Training”), *available at*

1 oig.hhs.gov/oei/reports/oei-05-01-00030.pdf. The HHS report concludes that “[n]urse aide  
2 training has not kept pace with nursing home industry needs.” HHS OIG, Nurse Aide Training  
3 at 9.

4 The HHS report notes that 26 states require more than the 75 hours of training required  
5 by federal law, with minimums ranging up to 175 hours. From the states that require only the  
6 75-hour federal minimum, two-thirds of the respondents (the directors of the state CNA training  
7 and competency evaluation programs) stated that 75 hours of training is inadequate.

8 These recent findings by HHS reinforce the Reform Law’s emphasis on improving the  
9 knowledge and skills of the direct care workforce, and indicate the misguided nature of the  
10 feeding assistant regulations. The Reform Law and the HHS report conclude that unlicensed  
11 personnel need comprehensive training, but the feeding assistant regulations allow initial  
12 training to be as low as eight hours.

13 **VI. PROMULGATION OF THE FEEDING ASSISTANT REGULATIONS WAS**  
14 **ARBITRARY AND CAPRICIOUS, IN VIOLATION OF THE ADMINISTRATIVE**  
**PROCEDURE ACT.**

15 Defendant acted arbitrarily and capriciously in promulgating the feeding assistant  
16 regulations. Defendant claimed empirical support – supposed evidence from Wisconsin and  
17 North Dakota – that in fact does not exist. Furthermore, Defendant failed to take into account  
18 the significant body of information showing that nursing homes are lacking certified nurse aides  
19 *not* because training standards are limiting the workforce, but rather because already-certified  
20 nurse aides are choosing to leave the profession. *See, e.g., CHW West Bay v. Thompson*, 246  
21 F.3d 1218, 1223 (9<sup>th</sup> Cir. 2001) (arbitrary and capricious agency action); *Public Citizen, Inc. v.*  
22 *Mineta*, 340 F.3d 39, 55 (2d Cir. 2003) (same).

23 Over twenty years ago, the Supreme Court set out the parameters for evaluating whether  
24 agency action is arbitrary and capricious under 5 U.S.C. § 706(2)(A). Although “a court is not to  
25 substitute its judgment for that of the agency,” the agency is subject to specific requirements:

26 [T]he agency must examine the relevant data and articulate a satisfactory  
explanation for its action including a rational connection between the facts found

1 and the choice made. In reviewing that explanation, we must consider whether  
2 the decision was based on a consideration of the relevant factors and whether  
3 there has been a clear error of judgment. Normally, an agency rule would be  
4 arbitrary and capricious if the agency has relied on factors which Congress has  
5 not intended it to consider, entirely failed to consider an important aspect of the  
6 problem, offered an explanation for its decision that runs counter to the evidence  
7 before the agency, or is so implausible that it could be not ascribed to a difference  
8 in view or the product of agency expertise.

9 *Motor Vehicle Mfrs. Ass'n of U. S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)  
10 (internal quotation marks and citations omitted).

11 The lower courts have vigorously applied these precepts. The Ninth Circuit consistently  
12 has observed that the courts “must determine whether the agency articulated a rational  
13 connection between the facts found and the choice made . . . . Judicial review is meaningless . . .  
14 unless we carefully review the record to ensure that agency decisions are founded on a reasoned  
15 evaluation of the relevant factors.” *Arizona Cattle Growers' Ass'n v. U. S. Fish and Wildlife*,  
16 273 F.3d 1229, 1236 (9<sup>th</sup> Cir. 2001); *see also Ocean Advocates v. U. S. Army Corps of*  
17 *Engineers*, 361 F.3d 1108, 1118 (9<sup>th</sup> Cir. 2004); *Sierra Club v. U.S. Environmental Protection*  
18 *Agency*, 346 F.3d 955, 961, *amended on other grounds*, 352 F.3d 1186 (9<sup>th</sup> Cir. 2003); *Beno v.*  
19 *Shalala*, 30 F.3d 1057, 1074 (9<sup>th</sup> Cir. 1994) (“the record must be sufficient to support the agency  
20 action [and] show that the agency has considered the relevant factors”).

21 **A. Defendant Has No Data To Support Claims Regarding Use of Feeding  
22 Assistants in Wisconsin and North Dakota.**

23 In considering whether an agency’s action was arbitrary and capricious, the “agency’s  
24 action must be upheld, if at all, on the basis articulated by the agency itself.” *Beno v. Shalala*, 30  
25 F.3d 1057, 1074 (9<sup>th</sup> Cir. 1994), *quoting Motor Vehicle*, 463 U.S. at 50 n.42. In this case, CMS  
26 claimed that the use of feeding assistants would attract additional direct care workers in a tight  
labor market, and would free up CNAs to perform other tasks. *See* 68 Fed. Reg. at 55,529,  
55,530. CMS’s justification, however, conspicuously failed to consider any data regarding either  
the real causes of direct-care labor shortages, or the appropriate response to such shortages.  
Instead, CMS relied almost exclusively on the purported experiences of Wisconsin and North

1 Dakota. See 67 Fed. Reg. at 15,151 (proposed regulations); 68 Fed Reg. at 55,529-30 (final  
2 regulations). As explained below, Defendant’s claims regarding Wisconsin and North Dakota  
3 are not supported by any credible evidence, and accordingly Defendant’s action must be deemed  
4 arbitrary and capricious.

5 In the discussion accompanying the final regulations, CMS stated that there was no need  
6 to conduct any type of demonstration or pilot project with feeding assistants, because feeding  
7 assistant programs in Wisconsin and North Dakota already had supplied the necessary  
8 information:

9 We believe that the experience of Wisconsin and North Dakota has provided a  
10 demonstration of the merits of the use of paid feeding assistants. Both States have  
11 reported that in facilities that use feeding assistants, the benefits to residents  
12 include fewer cases of unexplained weight loss and dehydration than in facilities  
13 that do not use feeding assistants, with no reported ill effects.

14 68 Fed. Reg. at 55,530. When commenters suggested that the use of feeding assistants might  
15 lower the quality of care, CMS again cited Wisconsin and North Dakota:

16 We are not aware of any data that would suggest that there is an improvement in  
17 the quality of care when residents are helped to eat by feeding assistants, nor are  
18 we aware of any data that would suggest a decline in quality of care. We are  
19 relying on support for the use of paid feeding assistants that has been provided by  
20 the Wisconsin and North Dakota survey agencies. Neither agency has indicated  
21 that use of feeding assistants has resulted in diminished quality of care.

22 *Id.* at 55,531. Finally, in rejecting another commenter’s request for additional safeguards, CMS  
23 stated that “We believe that the Wisconsin and North Dakota experience indicates that it is safe  
24 to use well-trained feeding assistants who are properly supervised.” *Id.* at 55,533.

25 CMS, in fact, does not have empirical support for the feeding assistant regulations, from  
26 Wisconsin or North Dakota or any other state. In response to *NSCLC v. U. S. Department of  
Health & Human Servs.* (a lawsuit brought after CMS failed to respond to a Freedom of  
Information Act requested related to feeding assistants and other single-task workers), CMS  
produced documents in its possession concerning feeding assistants or other single-task nursing  
home employees. None of those documents contained any empirical support for the use of  
feeding assistants. See Declaration of Eric Carlson in Support of Plaintiffs’ Motion for Summary

1 Judgment, ¶¶ 2-3.

2 In connection with this case, Defendant has produced a purported “Rulemaking Record”  
3 with 9,612 pages. None of those documents contains any empirical evidence from North  
4 Dakota, Wisconsin, or any other state, on the efficacy of feeding assistants.

5 CMS admitted its total dependence on the unsubstantiated allegations of Wisconsin and  
6 North Dakota in a CMS Request for Proposal sent out on June 18, 2004, more than seven months  
7 after the feeding assistant regulations had been promulgated. CMS, Request for Task Order  
8 Proposal (RTOP), No. CMS-04-012/VAC (June 18, 2004) (Exh. 14 ). The Request solicited  
9 proposals for a “Study of Paid Feeding Assistant Programs”; the Proposal contemplates two  
10 phases of the study, each of which will require 18 months.

11 The Request reported that

12 [m]uch of the opposition to [the use of feeding assistants] was based upon  
13 concerns for resident safety and the overall negative effect that this new category  
14 of caregiver will have on the quality of care in nursing homes. The full merit of  
these concerns cannot yet be determined ***since little is actually known about the  
effects of having paid feeding assistants in nursing homes.***

15 Exh. 14, pp. 3-4 (emphasis added). The Request then discussed Wisconsin and North Dakota  
16 briefly, and revealed the “anecdotal” nature of the information received from those states:

17 These states have not provided formal reports of the effects of paid feeding  
18 assistants in nursing homes however; they did provide ***anecdotal comments***  
during the early drafting of the Feeding Assistant Regulation. Both states  
19 informally reported positive effects of their programs. ***At this time there is not a  
formal report or description available of the effect or even extent of use of paid  
feeding assistants in nursing homes.***

20 Exh. 14, p. 4 (emphasis added).

21 It should be noted that CMS relied on the experiences of Wisconsin and North Dakota  
22 even though feeding assistant programs had been prohibited during the years in question. In  
23 fact, HCFA (CMS’s predecessor) had ordered Wisconsin and North Dakota to shut down  
24 operation of any feeding assistant programs. Exhs. 6, 7, 8, 9, 10, 11 & 12.

26 ///

1           **B. Defendant’s Policy Justifications Were Premised on Results-Driven**  
2           **Assumptions.**

3           In developing and justifying the feeding assistant regulations, Defendant failed to  
4 consider the reasons behind the current CNA labor shortages. The regulations assume implicitly  
5 that CNA labor shortages are attributable to the training required for CNA certification.  
6 Actually, nursing facilities currently are able to attract and train enough CNAs. The most  
7 significant problem is that most CNAs leave the profession in relatively short order, driven away  
8 by low wages and poor benefits.

9           In releasing the final feeding assistant regulations, Defendant cited reports for the  
10 proposition that nursing aide shortages existed, while ignoring those reports’ analyses of the  
11 *reasons* for those shortages. 68 Fed. Reg. at 55,529. For example, the report cited in  
12 Defendant’s footnote #2 contains considerable information about astronomical turnover rates  
13 among certified nurse aides: over 67 percent annually in California, 42 percent in New York,  
14 from 88 percent to 137 percent in Ohio, and over 100 percent in North Carolina. Robyn Stone,  
15 with Joshua Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis*  
16 (2001), at 13, *available at* [www.urban.org/pdfs/CareForUs.pdf](http://www.urban.org/pdfs/CareForUs.pdf); *see* 68 Fed. Reg. at 55,529 n.2.  
17 The same report notes that inactive CNAs outnumber active CNAs on the North Carolina nurse  
18 aide registry, and in Florida “only 53 percent of trained [CNAs] were working in health-related  
19 fields one year after certification.” *Id.*<sup>12</sup>

20           Defendant also quoted a report from the General Accounting Office, again to document a  
21 CNA shortage. *See* 68 Fed. Reg. at 55,529 n.3. In that report, the GAO described three “major  
22 themes” to improve CNA recruitment and retention: “(1) improved wages and benefits; (2) the  
23 development of additional training and opportunities for career advancement; and (3) additional

24 \_\_\_\_\_  
25 <sup>12</sup> Much of this same information was recently summarized by Defendant’s own Health  
26 Resources and Services Administration (HRSA). *See* HHS HRSA, Nursing Aides, Home Health  
Aides, and Related Health Care Occupations -- National and Local Workforce Shortages and  
Associated Data Needs 14 (Feb. 2004) (hereafter “HHS HRSA, Workforce Shortages”),  
*available at* [bhpr.hrsa.gov/healthworkforce/reports/nursinghomeaid/nursinghome.htm](http://bhpr.hrsa.gov/healthworkforce/reports/nursinghomeaid/nursinghome.htm).

1 employee supports, including improved work environments, job skills, and social supports.”

2 “Nursing Workforce: Recruitment and Retention of Nurses and Nurse Aides Is a Growing  
3 Concern,” GAO-01-750T, at 15 (May 17, 2001), <http://www.gao.gov/new.items/d01750t.pdf>.<sup>13</sup>

4 In short, Defendant’s cited authorities recognized that CNA shortages are caused in large  
5 part by CNAs leaving the field of work, and recommended that the CNA loss be stanchied by  
6 raising wages, improving career advancement possibilities, and supporting CNAs at work.  
7 Defendant, however, went in an entirely different direction by creating the feeding assistant  
8 category. Feeding assistants are expected to be paid a minimum wage, and will have little  
9 training and few prospects for career advancement. *See* 68 Fed. Reg. at 55,532 (feeding  
10 assistants being paid minimum wage). Defendant cites no support for its assertion that labor  
11 shortages can be remedied by homemakers, retirees and students working as minimum-wage  
12 feeding assistants for short mealtime shifts. *See* 68 Fed. Reg. at 55,529.

13 Defendant’s justification for its feeding assistant regulations shows every signs of a  
14 results-driven analysis. Defendant first decided that it would allow feeding assistants, and then  
15 cobbled together a justification for that decision. There is no basis whatsoever for the  
16 Defendants’ implicit assumption that reduced training standards are what is needed to address  
17 CNA shortages.

18 **C. The Arbitrary and Capricious Nature of Defendant’s Actions Is Shown By**  
19 **the 180 Degree Change of Course In Legal Analysis.**

20 A federal district court in the District of Columbia recently applied the “arbitrary and  
21 capricious” standard to facts that are closely analogous to those presented here. *See The Fund*

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22 <sup>13</sup> Other governmental authorities agree with this analysis of the root causes of CNA  
23 turnover. *See, e.g.*, HHS HRSA, Workforce Shortages at 16-18 (low wages, poor benefits, lack  
24 of respect from management, better job alternatives, and baby boom demographics); GAO,  
25 *Health Workforce: Ensuring Adequate Supply and Distribution Remains Challenging*, Report  
26 No. GAO-01-1042T, at 7 (Aug. 1, 2001), available at [www.gao.gov/new.items/d011042t.pdf](http://www.gao.gov/new.items/d011042t.pdf)  
 (“[I]ow wages, few benefits, and difficult working conditions”); National Governors’  
 Association, NGA Center for Best Practices, *Rescuing the Health Workforce: Options for State*  
 *Action 2* (Jan. 8, 2004), available at [www.nga.org/cda/files/0401RESCUINGHEALTH.pdf](http://www.nga.org/cda/files/0401RESCUINGHEALTH.pdf)  
 (“[I]ow wages, few or non-existent benefits, and job safety”).

1 *for Animals v. Norton*, 294 F. Supp. 2d 92 (D. D.C. 2003), *partial relief from judgment granted*  
2 *on unrelated grounds*, 323 F. Supp. 2d 7 (D. D.C. 2004). The National Park Service had  
3 reversed its previous position after a new administration took office; the new position allowed  
4 snowmobiles and trail grooming in several national parks. Citing the Supreme Court’s *Motor*  
5 *Vehicle* decision, the district court explained that the Park Service bore a heavy burden to justify  
6 its change of course:

7       The Court is faced with the review of an agency decision that amounts to a 180  
8 degree reversal from a decision on the same issue made by a previous  
9 administration . . . . [¶] This dramatic change in course, in a relatively short period  
10 of time and conspicuously timed with the change in administrations, represents  
11 precisely the reversal of the agency’s views that triggers an agency’s  
12 responsibility to supply a reasoned explanation for the change.

13 294 F. Supp. 2d at 105 (internal quotation marks and citations omitted).

14       Here, similarly, Defendant made a 180 degree change of course after a change in  
15 administration. After years of consistently interpreting “nursing or nursing-related services” so  
16 as not to permit single-task workers such as feeding assistants, CMS reversed its position  
17 abruptly in 2002 with the release of the proposed regulations. *See supra* at 15-18.

18       The long and short of the “arbitrary and capricious” issue is that Defendant has no  
19 support for its feeding assistant regulations. In the end, Defendant’s CMS made a 180-degree  
20 reversal in position, without any change in statutory language, based on anecdotal comments  
21 from two states that CMS had found to be in violation of the Reform Law.

22       Defendant has not “articulated a rational connection between the facts found and the  
23 choice made.” *Arizona Cattle Growers’ Ass’n*, 273 F.3d at 1236. Defendant has merely cited  
24 and recited some anecdotes and speculation from two states that were operating illegal feeding  
25 assistant programs. As in *The Fund for Animals*, this was a “dramatic change in course, in a  
26 relatively short period of time and conspicuously timed with the change in administrations,” 294  
F.Supp.2d at 105. Defendant’s adoption of the feeding assistant regulations was arbitrary and  
capricious in violation of 5 U.S.C. § 706(2)(A).

1 **VII. CONCLUSION.**

2 Plaintiffs, and the class they represent, live in nursing homes throughout the country.  
3 The plaintiff class depends upon the nursing home staff – primarily CNAs – for necessary  
4 assistance with activities of daily living such as eating, dressing, using the toilet, and transferring  
5 from bed to chair and back.

6 Use of feeding assistants will degrade the quality of care provided to the plaintiff class.  
7 Defendant’s feeding assistant regulations violate the Nursing Home Reform Law and the  
8 Administrative Procedure Act. Plaintiffs respectfully request that summary judgment be granted  
9 in their favor, and that Defendant’s feeding assistant regulations be ordered withdrawn and  
10 rescinded.

11 DATED: January 24, 2005

Respectfully submitted,

12  
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