14-483-6
Cletter # 6

PENNSYLVANIA ASSOCIATION OF COUNTY AFFILIATED HOMES

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Original: 2414

September 9, 2004

Gail Weidman
Division of Long Term Care Client Services
P.O. Box 2675
Harrisburg, PA 17105

REF: _____

RE: DPW Regulation #14-483 (#2414) Metropolitan Statistical Area (MSA)

Dear Ms. Weidman:

The Pennsylvania Association of County Affiliated Homes (PACAH) is writing in support of the Department of Public Welfare's (DPW) proposed rulemaking regarding the Metropolitan Statistical Area (#14-483). PACAH represents all 55 county and county affiliated nursing facilities in the Commonwealth, and is an affiliate organization of the County Commissioners Association of Pennsylvania.

The proposed rulemaking will amend the method by which the Department establishes the peer groups used to set net operating prices under the case-mix payment system. A problem has developed because the federal Office of Management and Budget published in June 2003 revised definitions of Metropolitan Statistical Areas, which is one of the criteria used to establish how nursing facilities receive their Medicaid funding under the Pennsylvania case-mix payment system. As we understand the situation, that leaves the Department of Public Welfare with two options, one to conform to the new definitions or to utilize the previous MSA group classifications. In either case, a change to the existing case-mix regulations must occur.

It is our understanding that conforming to the new definitions will result in many more nursing facilities experiencing a negative impact on their rates and an overall reduction in the amount of funds available for the case-mix payment system. In addition, this change would occur on July 1, 2004, which is halfway into the calendar fiscal year in which many of our facilities operate. Therefore, PACAH supports the proposed regulation change by DPW that will allow the peer group prices to be established using the prior OMB regulations.

Unfortunately, DPW does not believe they are permitted to release July 2004 rates to nursing facilities until a decision is reached on which method they will be using to

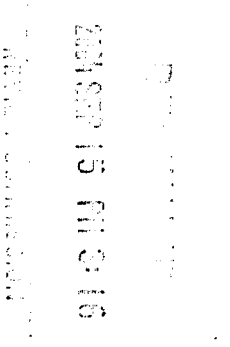
determine these classifications. This will lead to an unacceptable delay in nursing facilities receiving their rates and we urge DPW to move quickly to resolve this situation.

PACAH appreciates the opportunity to comment on these proposed regulations. If you need additional information, feel free to contact me.

Sincerely,

Michael J. Wilt
Executive Director

Cc: Independent Regulatory Review Commission



14-485-8
Cletter #8

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September 9, 2004

Department of Public Welfare
Division of Long Term Care Client Services
Attention: Gail Weidman
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Harrisburg, PA 17105-2675

REF: _____

RE: COMMENTS AND OBJECTIONS TO
PROPOSED RULEMAKING – 55 Pa. Code Chapter 1187
"Metropolitan Statistical Areas" – 34 Pa.B. 4465 (August 14, 2004)
Our Matter Nos. 340-02, 465-03, 486-03, 125-04, 236-04

Dear Ms. Weidman:

This responds to the Department's invitation for interested persons to submit written comments, suggestions, or objections to the proposed rulemaking on "Metropolitan Statistical Areas". As you know, our Firm, on behalf of interested nursing facility providers clients located in Armstrong and Mercer Counties, has already provided the Department and the Secretary of Public Welfare with advance comments and objections to the Department's proposal, including our May 11, 2004 comments on the Notice published at 34 Pa.B. 1863. We incorporate those previous comments by reference, and write to continue our objections to the Department's proposed rulemaking on behalf of our client nursing facility providers in Armstrong, Mercer and Pike Counties, as well as other nursing facility providers located throughout the Commonwealth.

1. The Proposed Change is Completely Unnecessary to Accomplish What The Department Itself Has Announced as its Objective. If the Department, as it states in the Proposed Rulemaking, intends to "preserve the status quo", there is no need to amend the current regulations at all. In the Proposed Rule, the Department states that OMB Bulletin No. 03-04 (June 6, 2003) "makes it impossible for the Department to apply the existing language of § 1187.94(1) in classifying nursing facilities", after which the Department proposes to adopt a rule which effectively defines OMB Bulletin No. 99-04 as the very thing that the Department's currently effective regulations require the

Department to use. If OMB Bulletin No. 99-04 is "the most recent MSA group classification published by the Federal Office of Management and Budget, as required by the current regulations, then the publication of OMB Bulletin No. 03-04 can have no effect on the Department's ability to implement the current regulations and cannot be a basis for any need to change the current regulations. The Department's rationale for the need for proposed change to the current regulations does not make any sense and supports change only because the current regulations can incorporate the OMB changes.

2. OMB Bulletin No. 03-04 Does NOT "Eliminate" MSA Group Levels. The MSA Group Level criteria are defined by OMB's 1990 standards and have not been repealed or eliminated. Under OMB's 2000 standards, OMB no longer includes such Group Levels classifications (A-D) when it publishes the updated MSA's. The Group Level classifications can be incorporated by reference to known population data, publicly available from the Census Bureau, and the 1990 standard criteria.

3. The Department is Precluded by Federal and State Standards from Amending Its Methods for Setting Payment Rates Retroactively. The Proposed Regulation does not amend § 1187.95, which required that the Prices for FYE June 30, 2005 be set prior to July 1, 2004, the proposed effective date for the proposed change to § 1187.94. The Centers of Medicare & Medicaid Services (CMS), the federal agency that supervises the Department's compliance with federal requirements for the administration of the Medicaid Program, advised the Department by a State Medicaid Directors Letter dated December 10, 1997, that the Federal Medicaid Act requires any changes in payment rates or payment methodologies to be published **prior to** the effective date of such changes. Under the prospective payment system established by the Department's regulations and pursuant to the mandate of 62 P.S. § 443.1(3), providers' rights to payment under the Department's existing regulations and State Plan for Medical Assistance vested on July 1, 2004 and cannot now be changed retroactively by the Department as proposed in this rulemaking. Since the proposed change to the Department's method for setting payment rates was not made prior to July 1, 2004, it cannot be effective as of July 1, 2004. Armstrong, Mercer, and Pike Counties' right to their new MSAs' has already vested as of June 6, 2003, the date of OMB's publication on the new MSA's in the *Federal Register*, as explicitly required by DPW's own regulations in existence as of June 6, 2003.

4. The Department is Perfectly Able to Implement the OMB Bulletin No. 03-04 MSA changes within Currently Regulatory Language. Department regulations at 55 Pa. Code § 1187.2 define MSA Group and Metropolitan Statistical Area as: "A statistical standard classification designated and defined by the Federal Office of Management and Budget following a set of official published standards". OMB Bulletin No. 03-04 is a set of official published standards updating the Metropolitan Statistical Areas in the Commonwealth, including the incorporation of Armstrong County into the Pittsburgh MSA, the incorporation of Mercer County into the Youngstown, OH MSA, and the incorporation of Pike County into the Newark, NJ MSA. The OMB standards for classifying Metropolitan Statistical Areas into Levels A-D are defined in prior official OMB publications. The application of the Level A-D standards to the updated MSA's involves nothing more complicated that checking the updated MSA's to determine whether it continues to retain the same Level classification or that it now qualifies for a different higher or lower Level classification. In the case of Armstrong County's incorporation into the Pittsburgh MSA, the Level classification for the Pittsburgh MSA does not change from that assigned in prior years. In the case of Mercer County's incorporation into the Youngstown, OH MSA, the Level classification for the Youngstown, OH MSA does not change from that assigned in prior years. In the case of Pike County's incorporation into the Newark, NJ MSA, the Level classification for the Newark, NJ MSA does not change from that assigned in prior years. The Department's assertion of impossibility to excuse recognition of the June 6, 2003 OMB MSA changes simply cannot be reconciled with the record, does not reflect consideration of any alternative method(s), and is based on the faulty premise that OMB eliminated its definitions of group levels.

5. The Department's Failure to Implement the Updated OMB MSA's in Grouping Providers Undercuts The Department's Reliance on the MSA's as a Basis for the Statistical Validity of its Grouping Methodology and Its Recognition in Rulemaking for the Case-Mix System that MSA variations in cost were a significant factor. Since the Department began utilizing OMB MSA's as a basis for grouping nursing facility providers for rate setting determinations, the Department has incorporated OMB's changes to the counties constituting the Pennsylvania MSA's. Department officials, including former Acting Secretary and Deputy Secretary for Medical Assistance Radke, stated that the Department wanted to have an independent agency outside the Department determine which counties should be included in MSA's based on independently collected data. The Department's suggested proposal would eliminate the statistical relationship between provider geography, MSA population size, and provider

cost that the Department relied on when it determined to continue the use of the MSA classification system for peer grouping when it established the in Chapter 1187 case-mix regulations. *See:* Department Responses to Comments in the rulemaking for Chapter 1185, the earlier version of Chapter 1187 (attached). The Department also has used that relationship to support the statistical validity of its peer grouping method of rate-setting in prior litigation involving Erie County and Beaver County. The Department's suggested proposal in the Notice would ignore changes in the economic realities of county costs as reflected by the OMB's shifts in Pennsylvania MSA's, based on independently collected Census data.

6. The Department's Analysis of Adverse Impact on Most Providers is not based on the database that the Department must use to set rates effective July 1, 2004 (Year 10) and the Department has refused to make that database available for public confirmation and analysis as part of the rulemaking process. We have previously noted that the Department's prior Notice on this proposed change requests everyone to just trust the Department and is based on analysis of outdated rate setting data, while the Department has refused to make the database that must be used to set rates effective as of July 1, 2004 available for public review and impact analysis. Despite many requests and representations that the Department would provide the data, the Department has still not made the Year 10 database available. We previously confirmed with the Department that, applying the Year 8 database on which the Department's notice is based, many providers would realize increased rates from the use of the updated OMB MSA's and that the net increase in Medical Assistance Program costs would be less than $80,000.00. The Department's Fiscal Impact analysis in the proposed rulemaking is misleading and flawed as a result.

The Department **knows as a fact** that making the change proposed and not implementing the updated OMB MSA's as the Department has historically done in the past has a significant adverse fiscal impact on nursing facility providers in Armstrong, Mercer and Pike Counties. The Department has received detailed impact analyses from providers in those counties on the subject which it has chosen to ignore them and conceal them in the proposed rulemaking, thereby defeating the purpose of proposed rulemaking and reasonable public comment mandated by State and Federal law.

7. The Department should implement the updated OMB MSA's because they represent the best statistical proxy available for grouping similarly situated nursing facility providers according to their actual costs of care consistent with the mandate that the Department's rates for nursing facility providers be cost related (62 P.S. § 443.1). Research conducted by the Federal Government on available methods to differentiate among providers for variable costs has concluded that the OMB MSA's are the best available method. *See summary of the research at:* 69 F.R. 49027-49028 (August 11, 2004). Federal Medicare regulations differentiate rural from urban area nursing facility providers based on the OMB MSA designations (42 CFR § 413.333). By proposing not to implement the updated OMB MSA's, the Department is denying providers located in areas that have undergone significant changes in their economies (such as those located in Armstrong, Mercer and Pike Counties) rate recognition of those changes and are instead choosing to determine rates knowingly using statistical groups that do not reflect current economic realities.

For FY 2005, the Medicare Program, after considering the negative impact that implementing the OMB MSA changes would have on hospital payment rates, determined that it would be unfair and inappropriate to ignore the changes in economic realities reflected by the June 6, 2003 OMB MSA updates in setting rates for those providers whose rates would increase as a result of the updated MSA's. In order to deal with those providers that would be adversely impacted, the Medicare Program analyzed and developed transition rules to moderate the adverse impacts. The Department's August 14, 2004 proposed rulemaking does not consider such relevant factors or possible alternatives (even alternatives the Department previously used to resolve similar concerns with Beaver County) or make any effort to determine whether different alternatives might exist that could even result in savings to the Medical Assistance Program.

8. The Department's Proposed Rulemaking Adversely Impacts Rates and the fairness and rationality of the rate-setting process for Nursing Facility Providers Located In Armstrong, Mercer and Pike Counties. If the rates for nursing facility providers in Armstrong, Mercer and Pike Counties were based on their updated OMB MSA's for the fiscal year beginning July 1, 2004, the Department knows as a fact that most such rates will be higher than if they are based on the outdated OMB MSA from Bulletin 99-04. The Department has no rational basis reasonably related to cost-based rate setting for using outdated MSA's to determine provider payment rates. The grouping method used

for rate determinations must have some rational relationship to provider costs. In the proposed rulemaking, the Department is abandoning all pretense to statistical validity in order to maintain the status quo and making no analysis at all of how continuation of outdated MSA's distorts provider rates as of July 1, 2004 and thereafter. The incorporation of Armstrong County into the Pittsburgh MSA would result in moving Armstrong County nursing facility providers from Peer Groups 11 and 12 to Peer Groups 2 and 3. The incorporation of Mercer County into the Youngstown, OH MSA would result in moving Mercer County nursing facility providers from Peer Groups 8 and 9 to Peer Groups 5 and 6. The incorporation of Pike County into the NYC-Newark, NJ MSA would result in moving Pike County nursing facility providers from Peer Group 6 to Peer Group 3.

A sense of the impact which the Department's proposed rulemaking will have for Armstrong County and Mercer County providers can be gleaned from comparing the Peer Group Prices for Peer Groups 2, 3, 5, 6, 8, 9, 11 and 12, which the Department recently posted on its Medical Assistance Program Provider Information Website for FYE June 30, 2004, which are as follows:

	Resident Care Price	Other RRC Price	Administrative Price
Armstrong County Providers			
Peer Group 2	90.56	35.67	16.62
Peer Group 11	76.78	33.48	13.24
Peer Group 3	89.14	37.98	16.72
Peer Group 12	72.68	32.78	12.64
Mercer County Providers			
Peer Group 5	86.10	33.30	14.74
Peer Group 8	81.94	37.41	13.89
Peer Group 6	82.64	36.16	15.18
Peer Group 9	69.38	32.17	13.29
Pike County Providers			
Peer Group 3	89.14	37.98	16.72
Peer Group 6	82.64	36.16	15.18

The impact analysis that the Department developed based on Year 8 indicated that the increased payments for providers in these three counties from implementation of the June 6, 2003 OMB MSA changes totaled approximately **$1,157,057**, of which $657,051

was allocated to Armstrong County facilities, $459,452 to Mercer County facilities, and $40,554 to Pike County facilities.

9. The Department's proposed rulemaking fails to address alternative changes to the rules that have already been submitted for Department review. The Department previously received suggested alternative changes to the current regulations that would recognize the changes in economic conditions that resulted in the incorporation of Pike, Mercer, and Armstrong County into larger MSA's and also provide for transitional relief such as that used by the Medicare Program. The Department does not refer to these previously submitted alternatives in the proposed rulemaking. One such alternative proposed that the rule changes read as follows:

> **Amend 55 Pa. Code § 1187.94(1)(i) to read as follows:**
> The Department will use the MSA group classifications published by the Federal Office of Management and Budget (OMB) in OMB Bulletin No. 99-04 to classify each nursing facility into one of three MSA groups (i.e., Level A, B, or C) or one non-MSA group; except facilities in any county that, as of April 1, 2004, was defined by OMB to be located in and not combined with a MSA other than the one with which it was classified in OMB Bulletin No. 99-04, shall be assigned to the MSA group classification of such other MSA in OMB Bulletin No. 99-04.
> [This results in recognizing the changes to MSA's in OMB Bulletin No. 03-04 for Armstrong, Mercer and Pike Counties, but not the shifts to "lower" MSA Groups for Columbia, Lebanon, or Somerset Counties]
>
> **Amend 55 Pa. Code § 1187.95(a)(3) to read as follows:**
> If a nursing facility changes bed size after prices have been set and prior to the following April 1, the prices and rates for the facility will continue to be based on the nursing facility's bed size prior to such changes until June 30 after the changes but the nursing facility shall be reassigned to a peer group based on the changes in bed certification for price and rate setting as of July 1 after the changes. If a nursing facility changes bed size after prices have been set but after the following April 1, the prices and rates for the facility will continue to be based on the nursing facility's classification prior to such changes until June 30 of the following calendar year but the nursing facility shall be assigned to a peer group based on the changes in bed certification for price and rate setting as of July 1 thereafter.
> [This eliminates references to changes in MSA Group from the regulation]

The Department also failed to consider an alternative that provides for MSA reclassification of rural nursing facilities to urban MSA Groups similar to the reclassification systems authorized by Congress in BIPA 2000 to deal with atypical labor-related costs for hospitals and nursing facilities participating in the Medicare Program. Such a reclassification system could significantly dampen the alleged negative impact posited in the Department's proposed rulemaking, since most of the negative impact of the update impacts the rural provider Peer Groups in the model publicly shared by the Department using the Year 8 NIS Database.

We continue to suggest that the Department convene a workgroup of provider and Department technical staff to develop the most equitable method, using the Year 10 NIS Database, to both recognize the changes in economic realities represented by the June 6, 2003 OMB MSA updates and minimize disruptive shifts in reimbursement rates. In order for providers and the public to have any meaningful opportunity for comment and review of the proposal rulemaking, however, we again state that the Department must release the Year 10 NIS database because, without public access to that Database, there can be no meaningful review and comment with respect to the proposed rulemaking; and, the Department's refusal to provide such data represents a clear denial of due process that would warrant injunctive relief.

Please note that these comments are being submitted on behalf of our nursing facility clients and preserves their rights to contest the proposed changes to the regulations when and if implemented, including the right to request injunctive relief prohibiting implementation of these flawed regulations.

Thank you for this opportunity to comment on the proposed rulemaking. We respectfully submit that, on the basis of our comments, the proposed rulemaking should be withdrawn. We note that the Secretary of Public Welfare currently has before her request(s) to define the impact of OMB Bulletin No. 03-04 under current regulations.

We submit that the better method to resolve both those pending matters and providers concerns with the proposed rulemaking is a negotiated rulemaking during which affected parties, after receipt of the relevant database for FYE June 30, 2005, can work in concert with the Department to achieve a full and fair, as well as properly informed, resolution, which complies with law and due process.

Very truly yours,

CAPOZZI & ASSOCIATES, P.C.

Louis J. Capozzi, Jr., Esquire

Attachment.

cc: Client Contacts
Robert E. Nyce, IRRC Executive Director
Senate and House Legislative Committees

DEPARTMENT OF PUBLIC WELFARE
NURSING FACILITY SERVICES
CASE-MIX PAYMENT SYSTEM

14-408

COMMENT AND RESPONSE DOCUMENT

Response

The Department does not agree with the suggested change. The definition refers to eligibility for MA only.

X. **Comment**

MDS—Minimum data set for nursing home resident assessment and care screening—A commentator suggested changing the definition to the following: " 'MDS' The MDS—Minimum Data Set—is one of three components of the Federal required Resident Assessment Instrument (RAI). The RAI includes the MDS, the Resident Assessment Protocols, and Utilization Guidelines. The MDS is a minimum set of screening and assessment elements, including common definitions and coding categories, needed to perform a comprehensive assessment of a long term care facility resident."

Response

The Department agrees with the commentator's ideas. The definition has been changed in final regulations.

Y. **Comment**

MSA—Metropolitan Statistical Area—A commentator asked if the Office of Management and Budget published new MSA regions, would the Department utilize these new MSAs immediately or at what time.

A commentator asked clarification of the application of the definition to PMSAs within CMSAs.

Another commentator stated the Department should further define at §1185.84 the MSAs and non-MSAs which were to be utilized.

Response

The Department will use the most recent statistical area classification as published by the Federal Office of Management and Budget (OMB) on or before April 1. Further specificity of MSAs has been included at §1185.84.

Primary Metropolitan Statistical Areas (PMSAs) are components that make up a Consolidated Metropolitan Statistical Area (CMSA). Each CMSA is broken into two or more PMSAs.

Z. **Comment**

Movable property—A commentator stated that the definition should include that the value of movable equipment would be based on a modeling formula. Another commentator asked for clarification of the definition and if movable property included items connected to the electric utility.

Response

The Department agrees that the effective date of implementation of the case-mix payment system will not be January 1, 1994. The system will be implemented following publication of final regulations.

Data which are used for the classification of residents have been collected by facilities for over three years. The Department has provided CMI information to each facility for three picture dates over a period of nine months. The Department believes that facilities have had sufficient feedback.

Section 1185.84

Peer grouping.

A. **Comment**

There were many comments proposing that a peer group with fewer than seven nursing facilities should be collapsed into the adjacent peer group with the same bed size. Appropriate language for the adjustments was suggested by the commentators. The commentators stated that bed size appeared to be more predictive of costs than MSA, especially for very large homes.

Several commentators suggested that if a peer group with 120 - 269 beds had fewer than seven facilities, the facilities should be collapsed into the adjacent peer group closer in number of beds to the facility's number of beds, but also within the same MSA. Other commentators suggested placing facilities in peer groups of less than seven facilities in their own peer group or remain in peer groups of less than seven. Another commentator felt the Department should assign county facilities to peer groups according to PA Bulletin 869 which allowed SMSAs of less than three county facilities to be located in the next higher SMSA group.

One commentator suggested that in a peer group with 120 - 269 beds, there should be an exceptions process and the facility should demonstrate which peer group it would most appropriately fit.

Response

The final regulations have been changed to reflect that a peer group with fewer than seven nursing facilities will be collapsed into the adjacent peer group within the same bed size. The final regulations further specify the "adjacent" peer group, when there is a choice of two peer groups with which to merge.

For peer groups with 120 - 269 beds, the Department does not believe that it is appropriate to have an exceptions process for peer grouping nor to assign facilities on a facility-by-facility basis to the peer group each facility is most close to in bed size.

B. **Comment**

Several commentators suggested that special rehabilitation facilities (SRFs) should be placed in a separate peer group. The commentators stated that characteristics of the residents living in the special rehabilitation facilities were radically different from any other nursing home category.

Response

The regulations have been changed to reflect a separate peer group for SRFs regardless of the number of SRFs in the peer group. The Department currently recognizes three SRFs in the Commonwealth.

The Department believes that the SRFs do, in fact, serve a different type of population than other nursing facilities. The Department has been studying these facilities and the appropriateness of their inclusion in the nursing facility program.

The decision to place the SRFs in a separate peer group is considered a short-term solution to an issue that the Department will continue to study.

C. **Comment**

Several commentators suggested that hospital-based facilities should be placed in a separate peer group. The commentators stated that regardless of case mix, hospital-based facilities had higher costs than freestanding facilities and to place hospital-based facilities in peer groups with other nursing facilities would create an inequitable distribution of the state's resources.

Response

The Department does not agree with the commentator that a separate peer group should be established for hospital-based facilities. The Department does agree with the commentator that after costs are adjusted for case-mix, hospital-based facilities have substantially higher costs than freestanding facilities.[1] The higher costs are due to higher wages, more staff and to cost allocation methods. The Department does not believe that these higher costs are a legitimate basis for rate differentials. It should also be noted that the additional participation requirements for hospital-based nursing facilities have been deleted at §1185.22.

D. **Comment**

A few commentators suggested that county homes, for profit and non-profit homes should be placed in separate peer groups because those homes have distinct characteristics. One commentator stated that residents in county homes were more often in need of greater care and objected to mixing their costs with other facilities in the region to establish "net operating costs."

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[1]Lewin/ICF, "Synthesis of Medicaid Reimbursement Options for Nursing Home Care," Report to Health Care Financing Administration, 1991.

Response

The Department does not agree that county homes, for profit and non-profit nursing facilities should be placed in separate peer groups. The primary characteristic that distinguishes these facilities is type of ownership. The Department does not believe that paying higher rates for identical services is a legitimate basis for rate differentials.

E. **Comment**

One commentator suggested that a separate peer group for institutions that specialize in serving the deaf/blind population, should be created. The commentator stated that a separate peer group would take into account the needs of facilities which served people with disabilities.

Response

The Department does not agree that a separate peer group should be established for this type of institution. The Department believes the case-mix payment system recognizes the differences among deaf/blind residents in resource utilization.

F. **Comment**

One commentator suggested that peer groups be developed for Medicare-certified buildings and non-certified buildings.

Response

The Department does not agree that separate peer groups should be developed for Medicare-certified and non-certified facilities. All facilities participating in the MA program are MA-certified for nursing facility care.

G. **Comment**

Many commentators stated that since the county facilities were not placed in a separate peer group, the requirements for county share payments (10% of the Federal share) and invoice processing fees ($3 per invoice) should be eliminated. One commentator stated that "many County homes' philosophy is to accept the less 'desirable' residents, with traditionally lower acuity levels, to continue the added burden of mandatory county contribution and the invoicing fee, on top of a lower acuity level, is unfair and discriminatory."

Response

The requirement that county facilities pay a percent share and invoice processing fee is in the Public Welfare Code and cannot be changed by regulation. Legislation is required to change this requirement.

H. **Comment**

Several commentators suggested that facilities that change bed size and/or MSA should be reassigned to the appropriate peer group on an annual basis at the time of rate setting rather than upon rebasing.

Response

The Department concurs. The appropriate change has been made in the final regulations at §1185.85(b).

I. **Comment**

One commentator suggested the Department should consider waivers to groups based on geographical factors affecting facility costs. The commentator stated that there appears to be no basis for presuming statistical relationships among providers based on classification by OMB "A, B, C, or NON" groupings. Another commentator suggested that the Department reconsider the number and types of geographical groups utilized.

Response

The Department believes that there is a relationship between geography and facility costs. The Department does not agree that a waiver process should be established for exceptions to this peer grouping characteristic.

J. **Comment**

One facility was concerned about their ability to forecast and adjust their operation. The commentator stated they would be subject to the operational performance of every facility within their peer group.

Response

The Department believes that peer grouping is appropriate in the case-mix payment system. The current MA nursing facility payment system relies on peer grouping and ceilings. Therefore, facilities are currently subject to the operational performance of other facilities within their peer group.

K. **Comment**

One commentator, referring to §1185.84(a), requested that the term "metropolitan" be inserted between the words "on" and "statistical" such that it would read "based on metropolitan statistical area classification."

Response

The terminology used in the Chapter 1185 regulations is that used by the U.S. OMB.

L. **Comment**

One commentator questioned, at §1185.84(a)(3) of the proposed regulations, whether the term "bed complement" included post-moratorium beds.

Response

The ". . .bed complement of the nursing facility on the final day of the reporting period. . . ." refers to certified beds which includes all nursing facility beds certified for nursing facility services.

M. **Comment**

One commentator questioned the correlation of the expenditure of resources to the designated facility peer groupings.

Response

The Department does not understand the context of the term "resources" intended by the commentator. The term is used in relation to the resident classification system regarding the resource utilization of each resident classification group. Facility peer groups are different from resident classification groups.

N. **Comment**

A commentator wrote: "I also understand that in the new sub groups nursing homes will become part of that if Joes [*sic*] Nursing Home down the road which always works short and smells bad sends in a lower cost report on Medicaid that our rate will go down to that level of reimbursement."

Response

The net operating rate paid to facilities is based on the costs of the median facilities adjusted for the appropriate percentage factors, appropriate case-mix indices and limitations. The facilities are not paid rates based on the costs of the lowest cost facility in the peer group.

Section 1185.85
General principles for rate setting.

A. **Comment**

A commentator stated that the proposed rules did not contain provisions for outlier payment in special cases. The commentator further stated that the Department should clarify the relationship between these rules and general regulations in the Pa. Code relating to waivers.

Response

The Department does not intend to have outlier payments for special cases under the case-mix payment system. The RUG-III resident classification system recognizes the resource utilization of ventilator residents and residents with dementia, the two types of residents referenced by the commentator.

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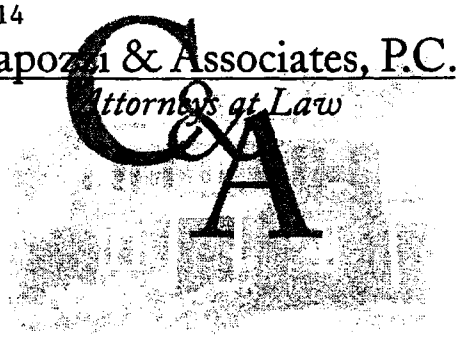

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Of Counsel:
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September 9, 2004

Department of Public Welfare
Division of Long Term Care Client Services
Attention: Gail Weidman
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Harrisburg, PA 17105-2675

REF: _____

RE: COMMENTS AND OBJECTIONS TO
PROPOSED RULEMAKING – 55 Pa. Code Chapter 1187
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Our Matter Nos. 340-02, 465-03, 486-03, 125-04, 236-04

Dear Ms. Weidman:

This responds to the Department's invitation for interested persons to submit written comments, suggestions, or objections to the proposed rulemaking on "Metropolitan Statistical Areas". As you know, our Firm, on behalf of interested nursing facility providers clients located in Armstrong and Mercer Counties, has already provided the Department and the Secretary of Public Welfare with advance comments and objections to the Department's proposal, including our May 11, 2004 comments on the Notice published at 34 Pa.B. 1863. We incorporate those previous comments by reference, and write to continue our objections to the Department's proposed rulemaking on behalf of our client nursing facility providers in Armstrong, Mercer and Pike Counties, as well as other nursing facility providers located throughout the Commonwealth.

1. The Proposed Change is Completely Unnecessary to Accomplish What The Department Itself Has Announced as its Objective. If the Department, as it states in the Proposed Rulemaking, intends to "preserve the status quo", there is no need to amend the current regulations at all. In the Proposed Rule, the Department states that OMB Bulletin No. 03-04 (June 6, 2003) "makes it impossible for the Department to apply the existing language of § 1187.94(1) in classifying nursing facilities", after which the Department proposes to adopt a rule which effectively defines OMB Bulletin No. 99-04 as the very thing that the Department's currently effective regulations require the

Department to use. If OMB Bulletin No. 99-04 is "the most recent MSA group classification published by the Federal Office of Management and Budget, as required by the current regulations, then the publication of OMB Bulletin No. 03-04 can have no effect on the Department's ability to implement the current regulations and cannot be a basis for any need to change the current regulations. The Department's rationale for the need for proposed change to the current regulations does not make any sense and supports change only because the current regulations can incorporate the OMB changes.

2. OMB Bulletin No. 03-04 Does NOT "Eliminate" MSA Group Levels. The MSA Group Level criteria are defined by OMB's 1990 standards and have not been repealed or eliminated. Under OMB's 2000 standards, OMB no longer includes such Group Levels classifications (A-D) when it publishes the updated MSA's. The Group Level classifications can be incorporated by reference to known population data, publicly available from the Census Bureau, and the 1990 standard criteria.

3. The Department is Precluded by Federal and State Standards from Amending Its Methods for Setting Payment Rates Retroactively. The Proposed Regulation does not amend § 1187.95, which required that the Prices for FYE June 30, 2005 be set prior to July 1, 2004, the proposed effective date for the proposed change to § 1187.94. The Centers of Medicare & Medicaid Services (CMS), the federal agency that supervises the Department's compliance with federal requirements for the administration of the Medicaid Program, advised the Department by a State Medicaid Directors Letter dated December 10, 1997, that the Federal Medicaid Act requires any changes in payment rates or payment methodologies to be published **prior to** the effective date of such changes. Under the prospective payment system established by the Department's regulations and pursuant to the mandate of 62 P.S. § 443.1(3), providers' rights to payment under the Department's existing regulations and State Plan for Medical Assistance vested on July 1, 2004 and cannot now be changed retroactively by the Department as proposed in this rulemaking. Since the proposed change to the Department's method for setting payment rates was not made prior to July 1, 2004, it cannot be effective as of July 1, 2004. Armstrong, Mercer, and Pike Counties' right to their new MSAs' has already vested as of June 6, 2003, the date of OMB's publication on the new MSA's in the *Federal Register*, as explicitly required by DPW's own regulations in existence as of June 6, 2003.

4. The Department is Perfectly Able to Implement the OMB Bulletin No. 03-04 MSA changes within Currently Regulatory Language. Department regulations at 55 Pa. Code § 1187.2 define MSA Group and Metropolitan Statistical Area as: "A statistical standard classification designated and defined by the Federal Office of Management and Budget following a set of official published standards". OMB Bulletin No. 03-04 is a set of official published standards updating the Metropolitan Statistical Areas in the Commonwealth, including the incorporation of Armstrong County into the Pittsburgh MSA, the incorporation of Mercer County into the Youngstown, OH MSA, and the incorporation of Pike County into the Newark, NJ MSA. The OMB standards for classifying Metropolitan Statistical Areas into Levels A-D are defined in prior official OMB publications. The application of the Level A-D standards to the updated MSA's involves nothing more complicated that checking the updated MSA's to determine whether it continues to retain the same Level classification or that it now qualifies for a different higher or lower Level classification. In the case of Armstrong County's incorporation into the Pittsburgh MSA, the Level classification for the Pittsburgh MSA does not change from that assigned in prior years. In the case of Mercer County's incorporation into the Youngstown, OH MSA, the Level classification for the Youngstown, OH MSA does not change from that assigned in prior years. In the case of Pike County's incorporation into the Newark, NJ MSA, the Level classification for the Newark, NJ MSA does not change from that assigned in prior years. The Department's assertion of impossibility to excuse recognition of the June 6, 2003 OMB MSA changes simply cannot be reconciled with the record, does not reflect consideration of any alternative method(s), and is based on the faulty premise that OMB eliminated its definitions of group levels.

5. The Department's Failure to Implement the Updated OMB MSA's in Grouping Providers Undercuts The Department's Reliance on the MSA's as a Basis for the Statistical Validity of its Grouping Methodology and Its Recognition in Rulemaking for the Case-Mix System that MSA variations in cost were a significant factor. Since the Department began utilizing OMB MSA's as a basis for grouping nursing facility providers for rate setting determinations, the Department has incorporated OMB's changes to the counties constituting the Pennsylvania MSA's. Department officials, including former Acting Secretary and Deputy Secretary for Medical Assistance Radke, stated that the Department wanted to have an independent agency outside the Department determine which counties should be included in MSA's based on independently collected data. The Department's suggested proposal would eliminate the statistical relationship between provider geography, MSA population size, and provider

cost that the Department relied on when it determined to continue the use of the MSA classification system for peer grouping when it established the in Chapter 1187 case-mix regulations. *See:* Department Responses to Comments in the rulemaking for Chapter 1185, the earlier version of Chapter 1187 (attached). The Department also has used that relationship to support the statistical validity of its peer grouping method of rate-setting in prior litigation involving Erie County and Beaver County. The Department's suggested proposal in the Notice would ignore changes in the economic realities of county costs as reflected by the OMB's shifts in Pennsylvania MSA's, based on independently collected Census data.

6. The Department's Analysis of Adverse Impact on Most Providers is not based on the database that the Department must use to set rates effective July 1, 2004 (Year 10) and the Department has refused to make that database available for public confirmation and analysis as part of the rulemaking process. We have previously noted that the Department's prior Notice on this proposed change requests everyone to just trust the Department and is based on analysis of outdated rate setting data, while the Department has refused to make the database that must be used to set rates effective as of July 1, 2004 available for public review and impact analysis. Despite many requests and representations that the Department would provide the data, the Department has still not made the Year 10 database available. We previously confirmed with the Department that, applying the Year 8 database on which the Department's notice is based, many providers would realize increased rates from the use of the updated OMB MSA's and that the net increase in Medical Assistance Program costs would be less than $80,000.00. The Department's Fiscal Impact analysis in the proposed rulemaking is misleading and flawed as a result.

The Department **knows as a fact** that making the change proposed and not implementing the updated OMB MSA's as the Department has historically done in the past has a significant adverse fiscal impact on nursing facility providers in Armstrong, Mercer and Pike Counties. The Department has received detailed impact analyses from providers in those counties on the subject which it has chosen to ignore them and conceal them in the proposed rulemaking, thereby defeating the purpose of proposed rulemaking and reasonable public comment mandated by State and Federal law.

7. The Department should implement the updated OMB MSA's because they represent the best statistical proxy available for grouping similarly situated nursing facility providers according to their actual costs of care consistent with the mandate that the Department's rates for nursing facility providers be cost related (62 P.S. § 443.1). Research conducted by the Federal Government on available methods to differentiate among providers for variable costs has concluded that the OMB MSA's are the best available method. *See summary of the research at:* 69 F.R. 49027-49028 (August 11, 2004). Federal Medicare regulations differentiate rural from urban area nursing facility providers based on the OMB MSA designations (42 CFR § 413.333). By proposing not to implement the updated OMB MSA's, the Department is denying providers located in areas that have undergone significant changes in their economies (such as those located in Armstrong, Mercer and Pike Counties) rate recognition of those changes and are instead choosing to determine rates knowingly using statistical groups that do not reflect current economic realities.

For FY 2005, the Medicare Program, after considering the negative impact that implementing the OMB MSA changes would have on hospital payment rates, determined that it would be unfair and inappropriate to ignore the changes in economic realities reflected by the June 6, 2003 OMB MSA updates in setting rates for those providers whose rates would increase as a result of the updated MSA's. In order to deal with those providers that would be adversely impacted, the Medicare Program analyzed and developed transition rules to moderate the adverse impacts. The Department's August 14, 2004 proposed rulemaking does not consider such relevant factors or possible alternatives (even alternatives the Department previously used to resolve similar concerns with Beaver County) or make any effort to determine whether different alternatives might exist that could even result in savings to the Medical Assistance Program.

8. The Department's Proposed Rulemaking Adversely Impacts Rates and the fairness and rationality of the rate-setting process for Nursing Facility Providers Located In Armstrong, Mercer and Pike Counties. If the rates for nursing facility providers in Armstrong, Mercer and Pike Counties were based on their updated OMB MSA's for the fiscal year beginning July 1, 2004, the Department knows as a fact that most such rates will be higher than if they are based on the outdated OMB MSA from Bulletin 99-04. The Department has no rational basis reasonably related to cost-based rate setting for using outdated MSA's to determine provider payment rates. The grouping method used

for rate determinations must have some rational relationship to provider costs. In the proposed rulemaking, the Department is abandoning all pretense to statistical validity in order to maintain the status quo and making no analysis at all of how continuation of outdated MSA's distorts provider rates as of July 1, 2004 and thereafter. The incorporation of Armstrong County into the Pittsburgh MSA would result in moving Armstrong County nursing facility providers from Peer Groups 11 and 12 to Peer Groups 2 and 3. The incorporation of Mercer County into the Youngstown, OH MSA would result in moving Mercer County nursing facility providers from Peer Groups 8 and 9 to Peer Groups 5 and 6. The incorporation of Pike County into the NYC-Newark, NJ MSA would result in moving Pike County nursing facility providers from Peer Group 6 to Peer Group 3.

A sense of the impact which the Department's proposed rulemaking will have for Armstrong County and Mercer County providers can be gleaned from comparing the Peer Group Prices for Peer Groups 2, 3, 5, 6, 8, 9, 11 and 12, which the Department recently posted on its Medical Assistance Program Provider Information Website for FYE June 30, 2004, which are as follows:

	Resident Care Price	Other RRC Price	Administrative Price
Armstrong County Providers			
Peer Group 2	90.56	35.67	16.62
Peer Group 11	76.78	33.48	13.24
Peer Group 3	89.14	37.98	16.72
Peer Group 12	72.68	32.78	12.64
Mercer County Providers			
Peer Group 5	86.10	33.30	14.74
Peer Group 8	81.94	37.41	13.89
Peer Group 6	82.64	36.16	15.18
Peer Group 9	69.38	32.17	13.29
Pike County Providers			
Peer Group 3	89.14	37.98	16.72
Peer Group 6	82.64	36.16	15.18

The impact analysis that the Department developed based on Year 8 indicated that the increased payments for providers in these three counties from implementation of the June 6, 2003 OMB MSA changes totaled approximately **$1,157,057**, of which $657,051

was allocated to Armstrong County facilities, $459,452 to Mercer County facilities, and $40,554 to Pike County facilities.

9. The Department's proposed rulemaking fails to address alternative changes to the rules that have already been submitted for Department review. The Department previously received suggested alternative changes to the current regulations that would recognize the changes in economic conditions that resulted in the incorporation of Pike, Mercer, and Armstrong County into larger MSA's and also provide for transitional relief such as that used by the Medicare Program. The Department does not refer to these previously submitted alternatives in the proposed rulemaking. One such alternative proposed that the rule changes read as follows:

> **Amend 55 Pa. Code § 1187.94(1)(i) to read as follows:**
> The Department will use the MSA group classifications published by the Federal Office of Management and Budget (OMB) in OMB Bulletin No. 99-04 to classify each nursing facility into one of three MSA groups (i.e., Level A, B, or C) or one non-MSA group; except facilities in any county that, as of April 1, 2004, was defined by OMB to be located in and not combined with a MSA other than the one with which it was classified in OMB Bulletin No. 99-04, shall be assigned to the MSA group classification of such other MSA in OMB Bulletin No. 99-04.
> [This results in recognizing the changes to MSA's in OMB Bulletin No. 03-04 for Armstrong, Mercer and Pike Counties, but not the shifts to "lower" MSA Groups for Columbia, Lebanon, or Somerset Counties]
>
> **Amend 55 Pa. Code § 1187.95(a)(3) to read as follows:**
> If a nursing facility changes bed size after prices have been set and prior to the following April 1, the prices and rates for the facility will continue to be based on the nursing facility's bed size prior to such changes until June 30 after the changes but the nursing facility shall be reassigned to a peer group based on the changes in bed certification for price and rate setting as of July 1 after the changes. If a nursing facility changes bed size after prices have been set but after the following April 1, the prices and rates for the facility will continue to be based on the nursing facility's classification prior to such changes until June 30 of the following calendar year but the nursing facility shall be assigned to a peer group based on the changes in bed certification for price and rate setting as of July 1 thereafter.
> [This eliminates references to changes in MSA Group from the regulation]

The Department also failed to consider an alternative that provides for MSA reclassification of rural nursing facilities to urban MSA Groups similar to the reclassification systems authorized by Congress in BIPA 2000 to deal with atypical labor-related costs for hospitals and nursing facilities participating in the Medicare Program. Such a reclassification system could significantly dampen the alleged negative impact posited in the Department's proposed rulemaking, since most of the negative impact of the update impacts the rural provider Peer Groups in the model publicly shared by the Department using the Year 8 NIS Database.

We continue to suggest that the Department convene a workgroup of provider and Department technical staff to develop the most equitable method, using the Year 10 NIS Database, to both recognize the changes in economic realities represented by the June 6, 2003 OMB MSA updates and minimize disruptive shifts in reimbursement rates. In order for providers and the public to have any meaningful opportunity for comment and review of the proposal rulemaking, however, we again state that the Department must release the Year 10 NIS database because, without public access to that Database, there can be no meaningful review and comment with respect to the proposed rulemaking; and, the Department's refusal to provide such data represents a clear denial of due process that would warrant injunctive relief.

Please note that these comments are being submitted on behalf of our nursing facility clients and preserves their rights to contest the proposed changes to the regulations when and if implemented, including the right to request injunctive relief prohibiting implementation of these flawed regulations.

Thank you for this opportunity to comment on the proposed rulemaking. We respectfully submit that, on the basis of our comments, the proposed rulemaking should be withdrawn. We note that the Secretary of Public Welfare currently has before her request(s) to define the impact of OMB Bulletin No. 03-04 under current regulations.

We submit that the better method to resolve both those pending matters and providers concerns with the proposed rulemaking is a negotiated rulemaking during which affected parties, after receipt of the relevant database for FYE June 30, 2005, can work in concert with the Department to achieve a full and fair, as well as properly informed, resolution, which complies with law and due process.

Very truly yours,

CAPOZZI & ASSOCIATES, P.C.

Louis J. Capozzi, Jr., Esquire

Attachment.

cc: Client Contacts
Robert E. Nyce, IRRC Executive Director
Senate and House Legislative Committees

DEPARTMENT OF PUBLIC WELFARE
NURSING FACILITY SERVICES
CASE-MIX PAYMENT SYSTEM

14-408

COMMENT AND RESPONSE DOCUMENT

Response

The Department does not agree with the suggested change. The definition refers to eligibility for MA only.

X. **Comment**

MDS—Minimum data set for nursing home resident assessment and care screening—A commentator suggested changing the definition to the following: " 'MDS' The MDS—Minimum Data Set—is one of three components of the Federal required Resident Assessment Instrument (RAI). The RAI includes the MDS, the Resident Assessment Protocols, and Utilization Guidelines. The MDS is a minimum set of screening and assessment elements, including common definitions and coding categories, needed to perform a comprehensive assessment of a long term care facility resident."

Response

The Department agrees with the commentator's ideas. The definition has been changed in final regulations.

Y. **Comment**

MSA—Metropolitan Statistical Area—A commentator asked if the Office of Management and Budget published new MSA regions, would the Department utilize these new MSAs immediately or at what time.

A commentator asked clarification of the application of the definition to PMSAs within CMSAs.

Another commentator stated the Department should further define at §1185.84 the MSAs and non-MSAs which were to be utilized.

Response

The Department will use the most recent statistical area classification as published by the Federal Office of Management and Budget (OMB) on or before April 1. Further specificity of MSAs has been included at §1185.84.

Primary Metropolitan Statistical Areas (PMSAs) are components that make up a Consolidated Metropolitan Statistical Area (CMSA). Each CMSA is broken into two or more PMSAs.

Z. **Comment**

Movable property—A commentator stated that the definition should include that the value of movable equipment would be based on a modeling formula. Another commentator asked for clarification of the definition and if movable property included items connected to the electric utility.

Response

The Department agrees that the effective date of implementation of the case-mix payment system will not be January 1, 1994. The system will be implemented following publication of final regulations.

Data which are used for the classification of residents have been collected by facilities for over three years. The Department has provided CMI information to each facility for three picture dates over a period of nine months. The Department believes that facilities have had sufficient feedback.

Section 1185.84

Peer grouping.

A. **Comment**

There were many comments proposing that a peer group with fewer than seven nursing facilities should be collapsed into the adjacent peer group with the same bed size. Appropriate language for the adjustments was suggested by the commentators. The commentators stated that bed size appeared to be more predictive of costs than MSA, especially for very large homes.

Several commentators suggested that if a peer group with 120 - 269 beds had fewer than seven facilities, the facilities should be collapsed into the adjacent peer group closer in number of beds to the facility's number of beds, but also within the same MSA. Other commentators suggested placing facilities in peer groups of less than seven facilities in their own peer group or remain in peer groups of less than seven. Another commentator felt the Department should assign county facilities to peer groups according to PA Bulletin 869 which allowed SMSAs of less than three county facilities to be located in the next higher SMSA group.

One commentator suggested that in a peer group with 120 - 269 beds, there should be an exceptions process and the facility should demonstrate which peer group it would most appropriately fit.

Response

The final regulations have been changed to reflect that a peer group with fewer than seven nursing facilities will be collapsed into the adjacent peer group within the same bed size. The final regulations further specify the "adjacent" peer group, when there is a choice of two peer groups with which to merge.

For peer groups with 120 - 269 beds, the Department does not believe that it is appropriate to have an exceptions process for peer grouping nor to assign facilities on a facility-by-facility basis to the peer group each facility is most close to in bed size.

B. **Comment**

Several commentators suggested that special rehabilitation facilities (SRFs) should be placed in a separate peer group. The commentators stated that characteristics of the residents living in the special rehabilitation facilities were radically different from any other nursing home category.

Response

The regulations have been changed to reflect a separate peer group for SRFs regardless of the number of SRFs in the peer group. The Department currently recognizes three SRFs in the Commonwealth.

The Department believes that the SRFs do, in fact, serve a different type of population than other nursing facilities. The Department has been studying these facilities and the appropriateness of their inclusion in the nursing facility program.

The decision to place the SRFs in a separate peer group is considered a short-term solution to an issue that the Department will continue to study.

C. **Comment**

Several commentators suggested that hospital-based facilities should be placed in a separate peer group. The commentators stated that regardless of case mix, hospital-based facilities had higher costs than freestanding facilities and to place hospital-based facilities in peer groups with other nursing facilities would create an inequitable distribution of the state's resources.

Response

The Department does not agree with the commentator that a separate peer group should be established for hospital-based facilities. The Department does agree with the commentator that after costs are adjusted for case-mix, hospital-based facilities have substantially higher costs than freestanding facilities.[1] The higher costs are due to higher wages, more staff and to cost allocation methods. The Department does not believe that these higher costs are a legitimate basis for rate differentials. It should also be noted that the additional participation requirements for hospital-based nursing facilities have been deleted at §1185.22.

D. **Comment**

A few commentators suggested that county homes, for profit and non-profit homes should be placed in separate peer groups because those homes have distinct characteristics. One commentator stated that residents in county homes were more often in need of greater care and objected to mixing their costs with other facilities in the region to establish "net operating costs."

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[1]Lewin/ICF, "Synthesis of Medicaid Reimbursement Options for Nursing Home Care," Report to Health Care Financing Administration, 1991.

Response

The Department does not agree that county homes, for profit and non-profit nursing facilities should be placed in separate peer groups. The primary characteristic that distinguishes these facilities is type of ownership. The Department does not believe that paying higher rates for identical services is a legitimate basis for rate differentials.

E. **Comment**

One commentator suggested that a separate peer group for institutions that specialize in serving the deaf/blind population, should be created. The commentator stated that a separate peer group would take into account the needs of facilities which served people with disabilities.

Response

The Department does not agree that a separate peer group should be established for this type of institution. The Department believes the case-mix payment system recognizes the differences among deaf/blind residents in resource utilization.

F. **Comment**

One commentator suggested that peer groups be developed for Medicare-certified buildings and non-certified buildings.

Response

The Department does not agree that separate peer groups should be developed for Medicare-certified and non-certified facilities. All facilities participating in the MA program are MA-certified for nursing facility care.

G. **Comment**

Many commentators stated that since the county facilities were not placed in a separate peer group, the requirements for county share payments (10% of the Federal share) and invoice processing fees ($3 per invoice) should be eliminated. One commentator stated that "many County homes' philosophy is to accept the less 'desirable' residents, with traditionally lower acuity levels, to continue the added burden of mandatory county contribution and the invoicing fee, on top of a lower acuity level, is unfair and discriminatory."

Response

The requirement that county facilities pay a percent share and invoice processing fee is in the Public Welfare Code and cannot be changed by regulation. Legislation is required to change this requirement.

H. **Comment**

Several commentators suggested that facilities that change bed size and/or MSA should be reassigned to the appropriate peer group on an annual basis at the time of rate setting rather than upon rebasing.

Response

The Department concurs. The appropriate change has been made in the final regulations at §1185.85(b).

I. **Comment**

One commentator suggested the Department should consider waivers to groups based on geographical factors affecting facility costs. The commentator stated that there appears to be no basis for presuming statistical relationships among providers based on classification by OMB "A, B, C, or NON" groupings. Another commentator suggested that the Department reconsider the number and types of geographical groups utilized.

Response

The Department believes that there is a relationship between geography and facility costs. The Department does not agree that a waiver process should be established for exceptions to this peer grouping characteristic.

J. **Comment**

One facility was concerned about their ability to forecast and adjust their operation. The commentator stated they would be subject to the operational performance of every facility within their peer group.

Response

The Department believes that peer grouping is appropriate in the case-mix payment system. The current MA nursing facility payment system relies on peer grouping and ceilings. Therefore, facilities are currently subject to the operational performance of other facilities within their peer group.

K. **Comment**

One commentator, referring to §1185.84(a), requested that the term "metropolitan" be inserted between the words "on" and "statistical" such that it would read "based on metropolitan statistical area classification."

Response

The terminology used in the Chapter 1185 regulations is that used by the U.S. OMB.

L. **Comment**

One commentator questioned, at §1185.84(a)(3) of the proposed regulations, whether the term "bed complement" included post-moratorium beds.

Response

The ". . .bed complement of the nursing facility on the final day of the reporting period. . . ." refers to certified beds which includes all nursing facility beds certified for nursing facility services.

M. **Comment**

One commentator questioned the correlation of the expenditure of resources to the designated facility peer groupings.

Response

The Department does not understand the context of the term "resources" intended by the commentator. The term is used in relation to the resident classification system regarding the resource utilization of each resident classification group. Facility peer groups are different from resident classification groups.

N. **Comment**

A commentator wrote: "I also understand that in the new sub groups nursing homes will become part of that if Joes [*sic*] Nursing Home down the road which always works short and smells bad sends in a lower cost report on Medicaid that our rate will go down to that level of reimbursement."

Response

The net operating rate paid to facilities is based on the costs of the median facilities adjusted for the appropriate percentage factors, appropriate case-mix indices and limitations. The facilities are not paid rates based on the costs of the lowest cost facility in the peer group.

Section 1185.85
General principles for rate setting.

A. **Comment**

A commentator stated that the proposed rules did not contain provisions for outlier payment in special cases. The commentator further stated that the Department should clarify the relationship between these rules and general regulations in the Pa. Code relating to waivers.

Response

The Department does not intend to have outlier payments for special cases under the case-mix payment system. The RUG-III resident classification system recognizes the resource utilization of ventilator residents and residents with dementia, the two types of residents referenced by the commentator.

14-483-5
Cletter #5

Original: 2414

315 North Second Street / Harrisburg, Pennsylvania 17101 / (717) 221-1800 / FAX (717) 221-8687

"The future of long term care"

PHCA
PENNSYLVANIA HEALTH CARE ASSOCIATION

8

September 8, 2004

RECEIVED
DIVISION OF LTC
CLIENT SERVICES

SEP 09 2004

Ms. Gail Weidman
Pennsylvania Department of Public Welfare
Division of Long Term Care Client Services
P.O. Box 2675
Harrisburg, PA 17105

REF: _____

Re: Proposed Rulemaking Metropolitan Statistical Area 34 Pa.B. 4465

Dear Ms. Weidman:

The Pennsylvania Health Care Association ("PHCA") represents over 200 nursing homes across the Commonwealth that care for more than 15,000 individuals who qualify for Pennsylvania's Medical Assistance ("MA") program each day. We respectfully submit these comments in response to the proposed rulemaking by the Department of Public Welfare (the "Department") concerning the use of "Metropolitan Statistical Areas" or "MSAs" in calculating nursing facility payment rates, as described in the Notice of Proposed Rulemaking published at 34 Pa.B. 4465 (August 14, 2004).

PHCA endorses the Department's proposed approach to address the current inconsistency between the state requirement to classify nursing facilities using federal Office of Management and Budget ("OMB") MSA classifications and the classification system OMB has adopted based upon the most recent census. While there is no simple solution to overcome this inconsistency, use of the updated MSA classifications would create significantly greater disruption and undue hardship in the nursing home provider community concerning the impact on the MA case mix reimbursement formula than the Department's proposed approach. Consequently, PHCA strongly supports approval and implementation of the Department's proposal.

We appreciate the Department's ongoing efforts to make appropriate changes to the Medical Assistance program, as well as the continuing opportunity to work with the Department on issues of importance to some of the Commonwealth's most frail and vulnerable citizens, and the provider community that serves them.

Sincerely,

Alan G. Rosenbloom
President and CEO

Louis J. Capozzi, Jr., Esquire
Daniel K. Natirboff, Esquire

Donald R. Reavey, Esquire
Doreena C. Sloan, Esquire
Daniel J. Pedersen, Esquire
Michael B. Volk, Esquire
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Bruce G. Baron, Research Coordinator
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14-483-4
C Letter #4

Original: 2414

September 3, 2004

The Honorable Estelle B. Richman
Secretary of Public Welfare
Department of Public Welfare
Room 333 Health & Welfare Building
P.O. Box 2675
Harrisburg, PA 17105-2675

REF: _____

RE: PETITION FOR RELIEF
1 Pa. Code § 35.18; Rule 21 of Final Standing Practice Order;
Request that the Secretary Not Implement the Proposed Freeze
On MSA Groups (April 3, 2004, 34 Pa.B. 1863, and August 7, 2004, 34
Pa.B. 4465) - 55 Pa. Code, Chapter 1187 AND COMMENTS,
SUGGESTIONS, AND OBJECTIONS FOR PROPOSED RULE
CHANGES
Our Matter No. 236-04

Dear Secretary Richman:

This Petition is being filed on behalf Hometown Nursing & Rehabilitation Center and Shenandoah Manor Nursing Center, our clients, each a nursing facility participating as a provider in Pennsylvania's Medical Assistance Program and located in Schuylkill County, Pennsylvania. This Petition for Relief requests that the Department withdraw its proposals to amend 55 Pa. Code § 1187.94(1).

The Department has proposed to amend the regulation effective July 1, 2004. We are requesting the Department to withdraw the proposal as inconsistent with the cost-based underpinnings of Medical Assistance Program payments for nursing facility care and services (62 P.S. § 443.1). The problem addressed in the proposed rulemaking affects every nursing facility provider in Pennsylvania except those in Peer Groups 13-14 (whose rates are not based on differences in MSA's or size), as recognized in the Department's Notices, because changes in the counties making up Peer Groups 1-12 affect the costs used to determine the net operating components of the rates for providers in those Peer Groups and, as a result, can result in increases or decreases to the Peer Group Prices and Limited Prices for those providers.

The Department, however, has historically made such changes in the past in compliance with the Department's acknowledgment, repeated when the Department developed the present case-mix system, of the relationship between provider costs and MSA assignments. Freezing the current MSA Groups, which are based on provider cost data that is more than ten (10) years old, is inconsistent with the design of the case-mix system and undercuts the statistical validity of the grouping methodology, which may skew price- and rate-setting for providers. Freezing out-of-date Peer Groups also deprives providers with atypical labor-related costs any opportunity for reclassification and fails to consider relevant factors supporting a reclassification process such as those on which Congress based its authorization of a reclassification process for Medicare skilled nursing facility providers in Section 315 of BIPA in 2000. Such a reclassification system could significantly dampen the negative impact posited in the Department's proposed rulemaking from implementation of the OMB's update of MSA's, since most of the negative impact of the update impacts the rural provider Peer Groups (11 & 12) in the data model publicly shared with us by the Department using the Year 8 NIS Database.

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We also believe that it is inappropriate for the Department to propose to eliminate possible increases in rates due to changes in economic conditions and costs without making public the affected database and information on how the Department's proposal will affect provider rates in comparison with how provider rates would change were the Department to implement the OMB MSA changes. To date, the Department has refused to make available for public review and analysis the Year 10 NIS database that the Department currently has in its possession and is required by its own regulations

to use to set rates for the period from July 1, 2004 through June 30, 2005 (Year 10). There is simply no way the public or providers can meaningfully comment on the Department's proposed changes to the regulations with respect to the OMB MSA changes without prior access to the Year 10 NIS database. Only by reference to the Year 10 NIS database can anyone, including the Department, assess the fiscal impact on the MA Program or on providers of different alternatives or solutions to the "problem" asserted by the Department in its proposed rulemaking. We suggest that the Department convene a workgroup of provider and Department technical staff to develop the most equitable method, using the Year 10 NIS Database, to both recognize the changes in economic realities represented by the OMB MSA updates and minimize disruptive shifts in reimbursement rates.

We do not understand why the Department cannot implement the OMB changes under its existing regulations, since the OMB previously defined the system for determining whether the population of an MSA may be labeled as A, B, C, or D, and the population information for each of the MSA's is a matter of public record. In addition, only six (6) Pennsylvania counties (Armstrong, Columbia, Lebanon, Mercer, Somerset, and Pike) have changes to their prior MSA assignments; and, the Pittsburgh MSA to which Armstrong County shifts was and remains qualified as an "A"; the Youngstown OH MSA to which Mercer shifts was and remains qualified as a "B"; the Newark, NJ MSA to which Pike shifts was and remains qualified as an "A"; and the non-MSA area to which Columbia and Somerset may shift was and remains the non-MSA area. The shift of Lebanon County into a separate MSA can be resolved by Lebanon County remaining part of the Greater Harrisburg MSA because OMB finds them still connected.

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Department's method for setting payment rates was not made prior to July 1, 2004, it cannot be effective as of July 1, 2004 consistent with these State and Federal guidelines.

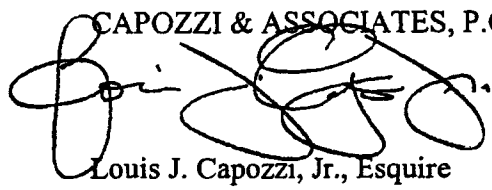
We therefore request that you withdraw the proposal to change the regulations by freezing the current MSA Group and that you issue an interpretation of general applicability using the current regulations instead. A proposed form of Order is attached. In addition, we request that you order the Bureau of Long Term Care Programs to immediately make available for public review and analysis the Year 10 NIS database.

Please let us know if you require any additional information or documentation to schedule this matter for hearing and determination. We submit that a determination of this Petition for Relief prior to the Department's publication in the *Pennsylvania Bulletin* of proposed or final rates for FYE June 30, 2004 or FYE June 30, 2005 is appropriate.

We are also sending a copy of this Petition to Gail Weidman, the person designated in the proposed rulemaking to receive comments, to also constitute our clients' comments to, suggestions about, and objections to, the proposed rulemaking.

Respectfully submitted,

CAPOZZI & ASSOCIATES, P.C.



Louis J. Capozzi, Jr., Esquire

cc: Kirk R. Reichart
Gail Weidman, Division of Long Term Care Client Services,
Robert E. Nyce, Executive Director, Independent Regulatory Review Commission
Senator Howard Mowery, Jr., Senate Public Health & Welfare Committee
Senator Vincent J. Hughes, Senate Public Health & Welfare Committee
Senator James J. Rhoades
Representative George T. Kenney, Jr., House Health & Human Services Committee
Representative Frank Oliver, House Health & Human Services Committee

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF PUBLIC WELFARE

Re: Petition for Relief
Seeking Withdrawal of April 3, 2004 Notice at 34 Pa.B. 1863, and August 14, 2004 Proposed Rulemaking at 34 Pa.B. 4465, relating to changes in 55 Pa. Code § 1187.94(1), relating to MSA Groups

ORDER

AND NOW, this _____ day of _____, 2004, pursuant to the Petition for Relief, concerning the Department's April 3, 2004 Notice at 34 Pa.B. 1863, and the Notice of Proposed Rulemaking of August 14, 2004 at 34 Pa.B. 4465, requesting that such Notices be withdrawn, finding merit in the Petition, the Petition is hereby GRANTED and the proposed rulemaking is hereby withdrawn without prejudice to later renewal or amendment.

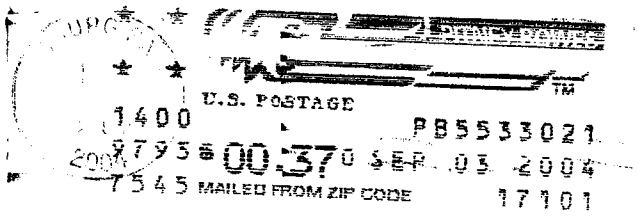
The Bureau of Long Term Care Programs shall immediately make available for public review and analysis an electronic spreadsheet of the Year 10 NIS database as of June 30, 2004; and, shall schedule open meetings during the months of September and October 2004 with providers and provider representatives to discuss and develop alternative proposals for possible amendments to 55 Pa. Code Chapter 1187 relating to changing the method of determining the membership of Peer Groups used to collect data to determine Peer Group Prices and/or to determine individual provider rates, including criteria for reclassification of counties based on atypical labor-related costs such as those used to reclassify hospitals in the Federal Medicare Program. The results of these open meetings shall be reported to the Deputy Secretary for Medical Assistance Programs for consideration in proposing amendments to the regulations with respect to the determination of the membership of Peer Groups, which proposed amendments shall be published in the *Pennsylvania Bulletin* prior to November 1, 2004.

_____
ESTELLE B. RICHMAN
Secretary of Public Welfare

FINAL ADMINISTRATIVE
ACTION AND DATE OF MAILING

_____

Capozzi & Associates, P.C.
Attorneys at Law
2933 North Front Street
Harrisburg, PA 17110



Gail Weidman
Division of Long Term Care Client Services,
Department of Public Welfare
P.O. Box 2675
Harrisburg, PA 17105-2675

17105#2675

Louis J. Capozzi, Jr., Esquire
Daniel K. Natirboff, Esquire

Donald R. Reavey, Esquire
Doreena C. Sloan, Esquire
Daniel J. Pedersen, Esquire
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Joseph M. Murphy, Esquire

Bruce G. Baron, Research Coordinator
Robert G. Sobanski, Reimb. Analyst
Karen L. Fisher, Paralegal
Dollie D. Himes, Paralegal
Susan Courchesne, Paralegal

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Of Counsel:
Steven T. Hanford, Esquire

Original: 2414

2004 SEP -7 A 10:34

September 3, 2004

The Honorable Estelle B. Richman
Secretary of Public Welfare
Department of Public Welfare
Room 333 Health & Welfare Building
P.O. Box 2675
Harrisburg, PA 17105-2675

RE: PETITION FOR RELIEF
1 Pa. Code § 35.18; Rule 21 of Final Standing Practice Order
Request that the Secretary Not Implement the Proposed Freeze
On MSA Groups (April 3, 2004, 34 Pa.B. 1863, and August 14, 2004, 34 Pa.B. 4465) - 55 Pa. Code, Chapter 1187 AND COMMENTS, SUGGESTIONS, AND OBJECTIONS FOR PROPOSED RULE CHANGES
Our Matter No. 236-04

Dear Secretary Richman:

This Petition is being filed on behalf Hometown Nursing & Rehabilitation Center and Shenandoah Manor Nursing Center, our clients, each a nursing facility participating as a provider in Pennsylvania's Medical Assistance Program and located in Schuylkill County, Pennsylvania. This Petition for Relief requests that the Department withdraw its proposals to amend 55 Pa. Code § 1187.94(1).

The Department has proposed to amend the regulation effective July 1, 2004. We are requesting the Department to withdraw the proposal as inconsistent with the cost-based underpinnings of Medical Assistance Program payments for nursing facility care and services (62 P.S. § 443.1). The problem addressed in the proposed rulemaking affects every nursing facility provider in Pennsylvania except those in Peer Groups 13-14 (whose rates are not based on differences in MSA's or size), as recognized in the Department's Notices, because changes in the counties making up Peer Groups 1-12 affect the costs used to determine the net operating components of the rates for providers in those Peer Groups and, as a result, can result in increases or decreases to the Peer Group Prices and Limited Prices for those providers.

The Department, however, has historically made such changes in the past in compliance with the Department's acknowledgment, repeated when the Department developed the present case-mix system, of the relationship between provider costs and MSA assignments. Freezing the current MSA Groups, which are based on provider cost data that is more than ten (10) years old, is inconsistent with the design of the case-mix system and undercuts the statistical validity of the grouping methodology, which may skew price- and rate-setting for providers. Freezing out-of-date Peer Groups also deprives providers with atypical labor-related costs any opportunity for reclassification and fails to consider relevant factors supporting a reclassification process such as those on which Congress based its authorization of a reclassification process for Medicare skilled nursing facility providers in Section 315 of BIPA in 2000. Such a reclassification system could significantly dampen the negative impact posited in the Department's proposed rulemaking from implementation of the OMB's update of MSA's, since most of the negative impact of the update impacts the rural provider Peer Groups (11 & 12) in the data model publicly shared with us by the Department using the Year 8 NIS Database.

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Respectfully submitted,

CAPOZZI & ASSOCIATES, P.C.

Louis J. Capozzi, Jr., Esquire

cc: Kirk R. Reichart
Gail Weidman, Division of Long Term Care Client Services,
Robert E. Nyce, Executive Director, Independent Regulatory Review Commission
Senator Howard Mowery, Jr., Senate Public Health & Welfare Committee
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Senator James J. Rhoades
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Representative Frank Oliver, House Health & Human Services Committee

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF PUBLIC WELFARE

Re: Petition for Relief
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ESTELLE B. RICHMAN
Secretary of Public Welfare

FINAL ADMINISTRATIVE
ACTION AND DATE OF MAILING

original: 2414

11199

2004 SEP 16 PM 3:16

14-483-10
C Letter # 10

Quality Life Services
120A Lakeside Drive, Worthington, PA 16262
(724) 445-3076
Fax: (724) 445-3186
www.QualityLifeServices.com

September 2, 2004

Pennsylvania Department of Public Welfare
Department of Medical Assistance

Re: Comment to recent proposed regulation change for determination on MSA change for nursing home reimbursement.

The proposed change to the Commonwealth's policy regarding determining how Counties will be grouped for their Medical Assistance Reimbursement is most harmful to the quality of care for our residents and the quality of life for their care givers. Since the inception of the MSA reimbursement methodology in Pennsylvania we have been struggling on an uneven field to remain financially solvent while meeting the social, emotional, and physical needs of our residents. We have been bordered by three counties that are in the highest MSA reimbursement area while we have been grouped into the lowest cost MSA. Now the US census has determined that the workforce of Armstrong County and these other three counties are interwoven. The cost of acquiring and maintaining the number and quality of staff needed to provide the care and services our residents need and deserve is directly related to the wage scales of these other three surrounding Counties. If the Department of Public Welfare enacts their proposed rule change every resident in an Armstrong County nursing home will be adversely affected.

For us to be able to attract and retain the best possible care givers we must be able to pay comparable wages. For us to be able to meet the resident's needs in a timely and fulfilling manner we must have adequate numbers of quality staff. Unless we receive appropriate reimbursement we can not answer both needs. One of these two needs will go unmet and inevitably the people of Armstrong County will be required to suffer.

If the current method of determining MSA remains the cost to the Commonwealth is nominal as is the cost to the Counties that are currently in this higher wage scale area. The cost to the smaller rural Counties if the proposed policy change is implemented would be immense and unbearable.

We thank you in advance for your time and consideration as we attempt to have all people in our Commonwealth treated equally and fairly.

Yours truly,

Kenneth R. Tack
Chief Executive Officer

ARMSTRONG COUNTY PA

The Best Thing Next To Pittsburgh

COMMISSIONERS:
PATRICIA L. KIRKPATRICK
RICHARD L. FINK
JAMES V. SCAHILL

ARMSTRONG COUNTY HEALTH CENTER
ADMINISTRATOR
NANCY D. DRAGAN

14-483-3
C Letter #3

Original: 2414

September 3, 2004

RECEIVED
DIVISION OF LTC
CLIENT SERVICES
SEP 07 2004

RECEIVED
SEP 08 2004
PROGRAM ANALYSIS
AND REVIEW SECTION

Ms. Gail Weidman
Department of Public Welfare
Division of Long Term Care Client Services
P.O. Box 2675
Harrisburg, PA 17105-2675

REF: _____

Dear Ms. Weidman:

This letter is written to comment on the Armstrong County Health Center's opposition to the publication in the Pennsylvania Bulletin Volume 34 dated August 14, 2004 regarding [55PA. Code CH. 1187] Metropolitan Statistical Area. The facility is located at 265 South McKean Street, Kittanning, PA 16201.

The case mix payment systems regulations specify that in setting the net operating prices the Department will classify each nursing facility participating in the Medical Assistance Program into one of twelve mutually exclusive peer groups based on Metropolitan Statistical Area group classification and the nursing facility's certified bed complement.

The regulations further state that "the Department will use the most recent MSA group classification as published by the Federal Office of Management and Budget, OMB".

On June 6, 2003 the OMB published new Federal MSA definitions. DPW is now proposing to change the State Plan to maintain the historical MSA groups.

The Armstrong County Health Center strongly opposes this proposal. Currently, with 130 beds, Armstrong County Health Center has the potential to lose, depending on the peer group it would fall into, approximately $200,000 - $500,000 per year by being kept at the rural MSA designation.

The close proximity to Pittsburgh creates a competitive job market especially for professional and licensed personnel at the nursing facility. The Department's suggested proposal ignores changes of economic realities to our facility.

265 SOUTH McKEAN STREET, KITTANNING, PENNSYLVANIA 16201
724-548-2222 FAX: 724-548-1103

It would seem to me if the majority of nursing facility providers would be adversely affected as you stated in the bulletin, the fiscal impact to the State would be positive. I would hope there can be another solution to this issue such the Department of Public Welfare considering a draft regulation, which would preserve the existing MSA's but allow for "grandfathering" the facilities that were placed in a different MSA as a result of the June 6, 2003 OMB regulation.

Thank you for the opportunity to voice my opposition on behalf of the Armstrong County Health Center.

Sincerely yours,

Nancy Dragan

Nancy D. Dragan, RN, NHA
Administrator

NDD:nb

John XXIII HOME

2250 Shenango Freeway • Hermitage, PA 16148
(724) 981-3200 • Fax: (724) 981-1677 • www.johnxxiiihome.org

Original: 2414

2007 SEP -3 AM 8:22

The Honorable Estelle B. Richman
Secretary of Public Welfare
Department of Public Welfare
Room 333 Health & Welfare Building
P.O. Box 2675
Harrisburg, PA 17105-2675

RE: PETITION FOR REGULATORY RELIEF
1 Pa. Code § 35.18; Rule 21 of Final Standing Practice Order
Request that the Secretary Not Implement the Proposed Freeze
On MSA Groups (April 3, 2004, 34 Pa.B. 1863, and August 14, 2004, 34 Pa.B. 4465) - 55 Pa. Code, Chapter 1187 AND COMMENTS, SUGGESTIONS, AND OBJECTIONS FOR PROPOSED RULE CHANGES.

Dear Secretary Richman:

Our nursing facility is a participating provider in Pennsylvania's Medical Assistance Program and is located in [name of] County, Pennsylvania. This Petition for Regulatory Relief requests that the Department withdraw its proposals to amend 55 Pa. Code § 1187.94(1).

The Department has proposed to amend the regulation effective July 1, 2004. We are requesting the Department to withdraw the proposal as inconsistent with the cost-based underpinnings of Medical Assistance Program payments for nursing facility care and services (62 P.S. § 443.1). The problem addressed in the proposed rulemaking affects every nursing facility provider in Pennsylvania except those in Peer Groups 13-14 (whose rates are not based on differences in MSA's or size), as recognized in the Department's Notices, because changes in the counties making up Peer Groups 1-12 affect the costs used to determine the net operating components of the rates for providers in those Peer Groups and, as a result, can result in increases or decreases to the Peer Group Prices and Limited Prices for those providers.

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Respectfully submitted,

Kirk L. Hamilton, FHA
Administrator

cc: Gail Weidman, Division of Long Term Care Client Services,
Department of Public Welfare, P.O. Box 2675, Harrisburg, PA 17105-2675
Wm. Russ McDaid, Public Policy Officer, PANPHA, 1100 Bent Creek Boulevard,
Mechanicsburg, PA 17050
Robert E. Nyce, Executive Director, Independent Regulatory Review Commission,
333 Market Street (14th floor), Harrisburg, PA 17101
Senator Howard Mowery, Jr., Senate Public Health & Welfare Committee
Senator Vincent J. Hughes, Senate Public Health & Welfare Committee
169-C State Capital, Harrisburg, PA 17120
Representative George T. Kenney, Jr., House Health & Human Services Committee
Room 108, Ryan Office Building, State Capitol, Harrisburg, PA 17120
Representative Frank Oliver, House Health & Human Services Committee
Room 34, East Wing, State Capitol, Harrisburg, PA 17120

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF PUBLIC WELFARE

Re: Petition for Regulatory Relief
Seeking Withdrawal of April 3, 2004 Notice at 34 Pa.B. 1863, and August 14, 2004 Proposed Rulemaking at 34 Pa.B. 4465, relating to changes in 55 Pa. Code § 1187.94(1), relating to MSA Groups

ORDER

AND NOW, this _____ day of _____, 2004, pursuant to the Petition for Regulatory Relief, concerning the Department's April 3, 2004 Notice at 34 Pa.B. 1863, and the Notice of Proposed Rulemaking of August 14, 2004 at 34 Pa.B. 4465, requesting that such Notices be withdrawn, finding merit in the Petition, the Petition is hereby GRANTED and the proposed rulemaking is hereby withdrawn without prejudice to later renewal or amendment.

The Bureau of Long Term Care Programs shall immediately make available for public review and analysis an electronic spreadsheet of the Year 10 NIS database as of June 30, 2004; and, shall schedule open meetings during the months of September and October 2004 with provider and provider representatives to discuss and develop alternative proposals for possible amendments to 55 Pa. Code Chapter 1187 relating to changing the method of determining the membership of Peer Groups used to collect data to determine Peer Group Prices and/or to determine individual provider rates, including criteria for reclassification of counties based on atypical labor-related costs such as those used to reclassify hospitals in the Federal Medicare Program. The results of these open meetings shall be reported to the Deputy Secretary for Medical Assistance Programs for consideration in proposing amendments to the regulations with respect to the determination of the membership of Peer Groups, which proposed amendments shall be published in the *Pennsylvania Bulletin* prior to November 1, 2004.

ESTELLE B. RICHMAN
Secretary of Public Welfare

FINAL ADMINISTRATIVE
ACTION AND DATE OF MAILING

#14-483-2
C-Letter #2

Kittanning
CARE CENTER

Original: 2414

RECEIVED
DIVISION OF LTC
CLIENT SERVICES

SEP 03 2004

RD# 1 Box 27C
Route 422 East
Kittanning, PA 16201
T (724) 545-2273 F (724) 543-1423
www.grane.com

September 1, 2004

REF: _____

The Honorable Estelle B. Richman
Secretary of Public Welfare
Department of Public Welfare
Room 333 Health & Welfare Building
P.O. Box 2675
Harrisburg, PA 17105-2675

RECEIVED
SEP 07 2004
PROGRAM ANALYSIS
AND REVIEW SECTION

RE: PETITION FOR REGULATORY RELIEF
1 Pa. Code § 35.18; Rule 21 of Final Standing Practice Order
Request that the Secretary Not Implement the Proposed Freeze On MSA Groups (April 3, 2004, 34 Pa.B. 1863, and August 14, 2004, 34 Pa.B. 4465) – 55 Pa. Code, Chapter 1187 AND COMMENTS, SUGGESTIONS, AND OBJECTIONS FOR PROPOSED RULE CHANGES

Dear Secretary Richman:

Our nursing facility is a participating provider in Pennsylvania's Medical Assistance Program and is located in Armstrong County, Pennsylvania. This Petition for Regulatory Relief requests that the Department withdraw its proposals to amend 55 Pa. Code § 1187.94(1).

The Department has proposed to amend the regulation effective July 1, 2004. We are requesting the Department to withdraw the proposal as inconsistent with the cost-based underpinnings of Medical Assistance Program payments for nursing facility care and services (62 P.S. § 443.1). The problem addressed in the proposed rulemaking affects every nursing facility provider in Pennsylvania except those in Peer Groups 13-14 (whose rates are not based on differences in MSA's or size), as recognized in the Department's Notices, because changes in the counties making up Peer Groups 1-12 affect the costs used to determine the net operating components of the rates for providers in those Peer Groups and, as a result, can result in increases or decreases to the Peer Group Prices and Limited Prices for those providers.

The Department, however, has historically made such changes in the past in compliance with the Department's acknowledgement, repeated when the Department developed the present case-mix system, of the relationship between provider costs and MSA assignments. Freezing the current MSA Groups, which are based on provider cost data that is more than ten (10) years old, is inconsistent with the design of the case-mix system and undercuts the statistical validity of the grouping methodology, which may skew price-and rate-setting for providers. Freezing out-of-date Peer Groups also deprives providers with atypical labor-related costs any opportunity for

reclassification and fails to consider relevant factors supporting a reclassification process such is those on which Congress based its authorization of a reclassification process for Medicare skilled nursing facility providers in Section 315 of BIPA in 2000. Such a reclassification system could significantly dampen the negative impact posted in the Department's proposed rulemaking from implementation of the OMB's update of MSA's, since most of the negative impact of the update impacts the rural provider Peer Groups (11 & 12) in the data model publicly shared by the Department using the Year 8 NIS Database.

The Medicare Program recently determined to implement the OMB MSA changes for inpatient hospital providers for FY 2005 because they found it would be inappropriate to deny providers wage index adjustments based on real changes in labor market costs as defined by OMB MSA changes (69 FR 28250-28252, May 18 2004; 69 FR 48915, August 11, 2004). The very same conclusion and analysis supports the use of updated OMB MSA changes in determining Pennsylvania's payment rates for nursing facilities as well as provision for reclassification of rural providers to urban MSA grounds based on atypical labor-related costs. Freezing out-of-date Peer Groups also precludes later realignments based on later updates to the OMB MSA assignments, as well as good cause reclassifications of facilities or counties such as those currently permitted for wage index adjustments for Medicare hospital rates. We submit that the Department's cost-based mandate, is best met where the Department retains flexibility in the rate- and price-setting process, just as the Medicare Program does, rather than through freezing outdated grouping methods.

We also believe that it is inappropriate for the Department to propose to eliminate possible increases in rates due to changes economic conditions and costs without making public the affected database and information on how the Department's proposal will affect provider rates in comparison with how provider rates would change were the Department to implement the OMB MSA changes. To date, the Department has refused to make available for public review and analysis the Year 10 NIS database that the Department currently has in its possession and is required by its own regulations to use to set rates of FYE June 30, 2005 (Year 10). There is simply no way the public or providers can meaningfully comment on the Department's proposed changes to the regulations with respect to the OMB MSA changes without prior access to the Year 10 NIS database. Only by reference to the Year 10 NIS database can anyone, including the Department, assess the fiscal impact on the MA Program or providers of different alternatives solutions to the problem asserted by the Department in the proposed rulemaking. We suggest that the Department convene a workgroup of provider and Department technical staff to develop the most equitable method, using the Year 10 NIS Database, to both recognize the changes in economic realities represented by the OMB MSA updates and minimize disruptive shifts in reimbursement rates.

We do not understand why the Department cannot implement the OMB changes under its existing regulations, since the OMB previously defined the system for determining whether the population of an MSA may be labeled as A, B, C, or D, and the population information for each of the MSA's is a matter of public record. In addition, only six (6) Pennsylvania counties (Armstrong, Columbia, Lebanon, Mercer, Somerset, and Pike) have changes to their prior MSA assignments; and, the Pittsburgh MSA to which Armstrong County shifts was and remains qualified as an "A"; the Youngstown OH MSA to which Mercer shifts was and remains qualified

as a "B"; the Newark, NJ MSA to which Pike shifts was and remains qualified as an "A"; and the non-MSA area to which Columbia and Somerset may shift was and remains the non-MSA area. The sift of Lebanon County into a separate MSA can be resolved by the Department interpreting Lebanon to remain a part of the Greater Harrisburg MSA because OMB finds them still connected.

We therefore request that you withdraw the proposal to change the regulations by freezing the current MSA Group and that you issue an interpretation of general applicability on the application of the current regulations instead. A proposed form of Order is attached. In addition, we request that you order the Bureau of Long Term Care Programs to immediately make available for public review and analysis the Year 10 NIS database.

Please let us know if you require any additional information or documentation to schedule this matter for hearing and determination. We submit that a determination of this Petition for Regulatory Relief prior to the Department's publication of proposed or final rates for FYE June 30, 2004 or FYE June 30, 2005 is appropriate.

We are also sending a copy of this Petition to Gail Weidman, the person designated in the proposed rulemaking to receive comments, to also constitute our comments to, suggestions about and objections to the proposed rulemaking.

Respectfully submitted,

Ross J. Nese
President
Kittanning Care Center, LLC

RJN:del

Cc: Gail Weidman, Division of Long Term Care Client Services,
Department of Public Welfare, P.O. Box 2675, Harrisburg, PA 17105-2675
Wm. Russ McDaid, Public Policy Officer, PANPHA, 1100 Bent Creek Boulevard,
Mechanicsburg, PA 17050
Robert E. Nyce, Executive Director, Independent Regulatory Review Commission,
333 Market Street (14th Floor), Harrisburg, PA 17101
Senator Howard Mowery, Jr., Senate Public Health & Welfare Committee
Senator Vincent J. Hughes, Senate Public Health & Welfare Committee
169-C State Capital, Harrisburg, PA 17120
Representative George T. Kenney, Jr., House Health & Human Services Committee
Room 108, Ryan Office Building, State Capitol, Harrisburg, PA 17120
Representative Frank Oliver, House Health & Human Services Committee
Room 34, East Wing, State Capitol, Harrisburg, PA 17120
[Local State Senators]

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF PUBLIC WELFARE

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ESTELLE B. RICHMAN
Secretary of Public Welfare

FINAL ADMINISTRATION
ACTION AND DATE OF MAILING

Grane Healthcare

209 Sigma Drive
Pittsburgh, PA 15238-2826

Ms. Gail Weidman
Division of Long Term Care Client Services
Department of Public Welfare
P.O. Box 2675
Harrisburg, PA 17105-2675

17105-2675