



August 26, 2021

Lori Gutierrez
Deputy Director - Office of Policy
625 Forster Street, Room 814
Health and Welfare Building
Harrisburg, PA 17120
VIA EMAIL to: RA-DHLTCRegs@pa.gov

**Re: Rulemaking 10-221 (Long-Term Care Facilities, Proposed Rulemaking 1)
28 PA Code Chapters 201-203 and 211**

Dear Ms. Gutierrez:

Thank you for the opportunity to comment on the proposed regulations addressing nursing homes that were published in the Pennsylvania Bulletin on July 31, 2021.

Background

My firm, David Hoffman & Associates, PC, is a national consulting firm dedicated to ensuring regulatory and clinical compliance and patient/resident safety and, to that end, has served as a Federal and State Monitor for nursing homes that are under Quality Corporate Integrity Agreements with the HHS-Office of Inspector General and state Attorneys' General Offices. Additionally, the firm consults with long-term care providers to assist them in achieving clinical and regulatory compliance. Prior to starting my firm in 2005, I served as an Assistant United States Attorney for the Eastern District of Pennsylvania and, in 1996, started the Department of Justice's Nursing Home Initiative. Before joining the DOJ, I served as Chief Counsel for the Pennsylvania Department of Aging and in that role, among other responsibilities, was instrumental in implementing the Older Adults Protective Services Act addressing elder abuse and worked closely with the State's Long-Term Care Ombudsman Program.

I am also a Practice Professor of Law at the Kline School of Law at Drexel University and the students in my class, "Regulating Patient Safety", join me in submitting these comments.

Process Comments:

We understand that this proposed rulemaking is one of five packages that will eventually be combined to create a final, comprehensive regulatory package. While it is extremely challenging to review and comment on this first regulatory package in isolation of other proposed changes, we believe that given the importance of this Department initiative, it is important to do so.

Substantive Comments:

Section 201.3 Definitions

While we understand the Department's desire to match the state nursing home regulations with applicable federal regulations, we are concerned that the "incorporation by reference" of federal regulations and guidance for surveyors violates the regulatory review process. Is it the Department's position that various relevant federal definitions currently in effect will be adopted as of the date of approval of the proposed regulations? What about future changes to these definitions by CMS? Will future definitional changes be automatically adopted as having the force of law in Pennsylvania? If so, doesn't this entire process by-pass the regulatory review procedures mandated by Pennsylvania law?

Additionally, there are state law definitions that apply under the Pennsylvania Older Adults Protective Services Act that are materially different from federal regulations. The Department's adoption of the current federal regulations, Chapter 7 of the State Operations Manual, and Appendix PP-Guidance to Surveyors, will conflict with relevant state law definitions and will create confusion in the nursing home provider community. **Therefore, we recommend that the Department ensure alignment in definitions from a state law perspective and make clear that the legal obligations required of nursing facilities under Chapter 7 of the Older Adults Protective Services Act, 35 P.S. Section 10225.101-10225.5102 and implementing regulations, remain unchanged. Additionally, the Department must re-evaluate the legality and appropriateness of, from a public policy perspective, adopting by reference definitions contained in federal regulations and manual guidance to state surveyors.**

211.12(i) Nursing Services:

Minimum staffing levels must be raised to achieve better continuity of care in the nursing home setting. We support the Department's position that nursing home staffing levels be set at 4.1 hours of direct care per resident per day (not per shift as currently drafted in the proposed regulations). This standard is consistent with studies and recommendations that have been made for decades. **We note, however, that the change to the number of hours per resident per day reflected in the proposed revision 211.12(i) alone is not sufficient to ensure that each resident's individual care needs are met. Other portions of the regulations must be revised to ensure that nursing homes can meet the needs of this frail and vulnerable population.**

We recommend a multidimensional revision to Chapter 211 that:

- 1) Raises the minimum direct care staffing hours to 4.1 while prohibiting any concomitant decrease in ancillary staff hours.
- 2) Requires total direct care staffing hours for the facility to be adjusted based on facility needs and overall resident acuity as determined by **monthly** completion of the relevant sections of the facility assessment tool described in 42 CFR 483.40 (e) that pertain to resident acuity.

We also recommend that the Department of Health:

- 1) Work with the Department of Human Services (DHS) to evaluate the adequacy of Medicaid rates to ensure that they support this staffing level increase. We acknowledge that the rise in staffing level will impact costs and we support increasing Medicaid reimbursement as necessary to support this change.

- 2) Develop meaningful and effective strategies to address the staffing shortages facing the nursing home industry. At the press conference announcing these regulations, Acting Secretary Beam noted that the Department of Health is working diligently on strategies to address workforce shortages. We recommend coordination with the Department of Education in increasing availability and support of nurse aide training programs as well as directing funds such as American Rescue Plan Act dollars towards ensuring that the required 4.1 hours per resident per day is achievable.

Thank you for the opportunity to comment on the first package of nursing home regulations and we look forward to reviewing and commenting on the remaining packages of proposed changes to these regulations.

Sincerely,

David R. Hoffman, JD, FCPP and
The Students of Professor Hoffman's "Regulating Patient Safety" class
Kline School of Law at Drexel University

cc: Independent Regulatory Review Commission at irrchelp@irrc.state.pa.us