



685 Angela Drive, Greensburg, PA 15601  
(724) 837-6070



August 27, 2021

Ms. Lori Gutierrez  
Deputy Director, Office of Policy  
625 Forster Street, Room 814  
Health and Welfare Building  
Harrisburg, PA 17120

RE: July 31, 2021 proposal to update nursing facility regulations the Department of Health (DOH) published in the Pennsylvania Bulletin a portion of its proposal to update nursing facility regulations

Dear Ms. Lori Gutierrez,

The proposed regulations seek to require nursing homes to increase the requirements for staff from 2.7 Nursing Hours Per Patient Day (NHPPD) to 4.1 NHPPD on each shift. Since the summer of 2015 St. Anne Home Nursing Facility has had difficulty recruiting and hiring nursing staff. It is extremely challenging to compete in terms of compensation and benefits for nursing staff with other healthcare providers such as Doctor's Offices, Hospitals and Health Systems when state Medicaid or Medical Assistance reimbursement has remained flat to decreasing over the last 12 years for nursing facilities like St. Anne Home. St. Anne Home is a Continuing Care Retirement Community, established in 1964, helping older adults regain their independence through our excellent rehabilitation, nursing, personal care services and residential living options. Funding for such an increase in nursing staffing does not exist in the state government, federal government or the private sector as evidenced by the following.

Pennsylvania (PA) has transitioned to a nursing facility funding system for the most vulnerable citizens with little or no assets and income and who qualify for Medical Assistance to Manage Care Organizations who through their actions, driven by PA's funding to them for nursing facility care, have shown little interest in providing reimbursement that matches the today's realities. Currently for second quarter ending June 30, 2021 St. Anne Home receives between \$212.70 to \$212.24 per day from the Managed Care Organizations,

funded by Pennsylvania through the MCOs. Twelve years ago, for the second quarter ending June 30, 2009 St. Anne Home received \$215.02 per day to care for older adults that where eligible for the nursing facility Medical Assistance benefit. **We are reimbursed less today from the Pennsylvania Medical Assistance Program reimbursement system than we were 12 years ago.** St. Anne Home has saved many lives during this pandemic. We have done our best using the limited resources we have to also care and support our front-line staff. Despite this lack of reasonable reimbursement from Pennsylvania we still manage to staff at levels above the current 2.7 NHPPD. St. Anne Home has had the following NHPPD for the last three quarters available from the CMS publicly available Provider data located at CMS.gov - Nursing Homes including rehab services, Provider Information <https://data.cms.gov/providerdata/search?fulltext=Nursing%20homes>

**Quarter Ending March 2021 - 169th highest** total nursing hours per patient day out of 687 NFs in Pennsylvania averaging 4.43189 NHPPD.

**Quarter Ending December 2020 - 234th highest** total nursing hours per patient day out of 688 NFs in Pennsylvania averaging 4.04862 NHPPD.

**Quarter Ending September 2020 - 213th highest** total nursing hours per patient day out of 689 NFs in Pennsylvania averaging 4.04737 NHPPD.

These CMS reported hours above, from required CMS Payroll Based Journal reporting by all nursing facilities, include not only direct nursing care hours but also include nursing staffing administration positions such as the Director of Nursing, Assistant Director of Nursing, Registered Nurse Assessment Coordinators, QA RNs, medical records staff that may be an LPN or CNA, Infection Control Preventionists and other nursing administration related positions. If the 4.1 NHPPD nursing staffing minimum is for only **direct resident care nursing staffing** which excludes these positions mentioned above then there are currently very few of the 687 nursing homes in PA meeting this proposed 4.1 NHPPD threshold.

These staffing levels above were achieved during the worst staffing crisis I have witnesses in my 30 plus years at this nursing facility. Many nursing positions had been filled with Agency nursing staff which can cost 2 to 3 times what the going wage rate is for a Registered Nurse (RN), Licensed Practical Nurse (LPN) and Certified Nurse Aide (CNA). Currently nursing staffing agencies are injecting added and unnecessary costs to nursing homes by serving as middle intermediary entities that services to accelerate nursing staff wage inflation in this staffing crisis that exists. Agency hourly rates for RNs, LPNs and CNAs have been found to be as high as **\$97 per hour for RNs, \$83 per hour for LPNs and \$66 per hour for CNAs** in our Western PA local market. While recent wage surveys conducted in January of 2021 by trade associations representing nursing facilities have found median statewide hourly rates for RNs, LPNs and CNAs to be \$35.52 for RNs, \$25.59 for LPNs and \$16.36 for CNAs. Have these facts been included in the DHS funding estimates?

If the added text to the 211.12 Nursing Services (i) regulation “during each shift” is to mean that the 4.1 hours of direct resident care for each resident is to be equally distributed over the 24-hour period this seems wasteful and of little benefit to most residents who sleep at night. If this new 4.1 minimum number of general nursing care hours is to be provided for each 24-hour period then adding: “during each shift” seems to contradict: “for each 24-hour period”.

This current nursing staff shortage, prior to this proposal to require more nursing staff, and the current financial consequences is not sustainable and has resulted in significant operating losses in nursing facilities across PA. In addition, over the last year we have experienced many staffing agencies that have not be able to provide us with nursing staff.

The added funding estimates need to pay for this higher staffing shared at the recent Wolf Administration press conference on July 21, 2021 by PA Department of Human Services (DHS) are missing:

- the recent wage rate inflation that has occurred and will most likely continue to occur due to the both the overall service worker labor shortage,
- the recent wage rate inflation occurring due to the nursing staff (RN, LPN and CNA) labor shortage where healthcare providers in all areas are bidding up the compensation for scarce nursing staff,
- the premium cost that Nursing Agencies are charging to nursing facilities and other healthcare providers,
- the additional wage inflation that will occur when the 600 plus nursing facilities (NFs) in PA begin to try to staff to be at the new minimum 4.1 NHPPD level,
- the impact of what an increase to the minimum wage rate would do to nursing staff hourly rates. The last time the minimum wage was increased it clearly had a ripple effect of increasing most all other wage rates in a nursing home as I experienced this first hand at St. Anne Home.
- even if DHS includes the average salary costs they are missing the costs to recruit and the cost of benefits.

Private Pay rates for nursing facility care will certainly increase as an attempt to offset this added wage and benefit costs associated with the new minimum 4.1 NHPPD level thus adversely impacting private citizens. Additionally, there is no recognition that private pay rates will increase as a result of this proposal which will result increasing the numbers of individuals that spend down assets thus increasing the Medical Assistance (MA) rolls

This increased minimum 4.1 NHPPD level will further deteriorate the access to quality care. NFs have been closing beds, selling to out-of-state providers with track records of providing bad care, or closing buildings. Recent examples of this include Abramson Center that have sold, and Charles Morris have closed their doors.

Providers that are not able to staff at 4.1 will be less likely to serve residents who are difficult to care for and this will result in a backup in hospitals resulting in higher acute care costs as timely discharges from the hospital into a lower cost level of care such as nursing facilities will not occur.

This proposed regulation adds language that states that a violation of federal regulations will also be a violation of state regulations. This is a significant change in position for the state regulations. In the past, federal regulations had been incorporated but the state regulation did not make the statement that federal violations would also be considered state violations. This could result in both state and federal fines for the same incidences. Federal fines in particular are already very expensive and may not lead to the desired outcome of increasing quality in poor providers. Nursing facility providers should not see duplicative fines and penalties for citations.

This first part of the regulation package only addresses definitions and staffing minimums. Subsequent packages should be released over the next several months but could never be released. I have great concern that releasing these packages in a piece-meal fashion may lead to confusion by providers, regulators, and the general public. There could also be significant discrepancies and lack of clarity utilizing this strategy.

PA DOH should not be able to implement any parts of the regulatory package until all parts are issued and there is a minimum of a 30-day public comment period on the entire regulatory package. Additionally, after the comment period of the full regulatory package they should have to go through the full regulatory review process.

The proposed regulations may violate the Regulatory Review Act in that it incorporates by reference federal guidances or interpretations (State Operations Manual, Chapter 7 and Appendix PP) issued by the Centers for Medicare and Medicaid Services (CMS). These guidances may be changed by CMS at any time without notice or public process. This approach raises both due process and precedential questions and concerns. CMS makes it clear that these guidances or interpretations are only to be referenced by surveyors in assisting them with the survey process, and that they are not statutory or regulatory in nature. By reference to these CMS guidances, DOH regulations could change without going through any sort of process including PA legislative review or oversight as outlined in the Regulatory Review Act.

The proposed regulations state that the 4.1 NHPPD will become effective on the date of publication as final. There is no way to know when this might occur. NFs cannot plan to

increase staffing without notice and time to ramp up. If DHS though the Community HealthChoices Managed Care Organizations and PA state budget can afford to fund this new requirement for the Medicaid NF population there should be least one year from publication of the final regulations to comply with any increase in staffing minimums in order to give nursing homes time to try to meet any new staffing mandate.

Thank you for seriously considering these above comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeffrey S. Long". The signature is fluid and cursive, with a large initial "J" and "S".

Jeffrey S. Long, NHA, MHA, MBA  
President and CEO  
St. Anne Home

Copy To:

**St. Anne Home Board of Directors:**

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