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LeadingAge PA

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Submitted by e-mail to: RA-DHLTCRegs@pa.gov

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

August 30, 2021

Dear Ms. Gutierrez:

Thank you for the opportunity to offer comments on Rulemaking 10-221 (Long-Term Care Facilities, Proposed Rulemaking 1) as published in the July 31, 2021 *Pennsylvania Bulletin*.

LeadingAge PA represents more than 380 providers of senior services from affordable housing and home and community-based services through the continuum to more intensive services including assisted living residences and 200 nursing facilities. Our members employ more than 50,000 staff who provide services to 75,000 residents and clients, many of whom would experience significant negative impacts from the Department of Health's proposed regulations.

Our comments fall into two categories: process issues and operational issues. Initially, we must put our comments into context, first addressing the environment that surrounds the proposed regulations: a pandemic, a workforce crisis and the extremely difficult financial conditions that have many high quality nursing homes contemplating or already taking action towards reducing the numbers of residents they serve or total closure of their building. The proposed regulations have been released at a time when nursing home providers continue to battle a once-in-a-century pandemic during the midst of the most critical workforce shortage they have ever seen. Nursing facilities have been doing the best they can to protect their residents and staff under previously unimaginable conditions. Further, they have been required to finance their operations on an increasingly thin shoestring for seven long years without a rate increase in the Medical Assistance Program that supports about 2/3 of their residents. In spite of their mission-driven commitment to provide high quality care and services to seniors, they are tired, underfunded, and discouraged. Yet, with hundreds of vacant staff positions open and no takers, the Department of Health (DOH) is proposing to increase the minimum staffing requirements by 50%; a demand which is likely impossible for many facilities to meet. While we outline our concerns in detail below, we urge DOH to look at the context of the environment and consider withdrawing these proposed regulations until after the pandemic has subsided.

Process Concerns:

For LeadingAge PA, the first of the five sections of the proposed regulations raises multiple concerns, not the least of which relate to process about the regulatory package and which are outlined in more detail below:

- The regulatory package is divided into five sections and stakeholders have not had the opportunity to review the package as a whole.
- The proposal would incorporate federal guidance that can be changed and therefore become part of the regulation without any input by the stakeholder community, or General Assembly, and no required notification to those subject to compliance.
- The proposed changes would require significant planning, budgeting, and hiring decisions on the part of the regulated community, but are to be effective immediately upon publication as final.
- The regulations propose to cite both state and federal sanctions for the same infraction, which appears duplicative, unnecessary, and overly punitive.
- The cost burden calculations on the commonwealth and nursing homes are elementary and incomplete. It underestimates and seemingly ignores the cost of staff benefits, the costs to hire and train staff, the cost increases to private pay residents who will more quickly spend down to Medical Assistance (and the consequent costs to the Medical Assistance Program), and makes no effort to calculate the costs to counties.
- There are additional federal changes potentially in process that DOH should account for in its proposal.

Release of Regulatory Package in Sections Lacks Transparency and Clarity. The proposed rules are noted to be the first in a series of five related rulemaking packages that DOH expects will eventually update the current nursing facility regulations. This first set of proposed regulations would change definitions that are to be used in upcoming regulatory packages the public has not yet had opportunity to review.

In addition, the staffing minimum of 4.1 Nursing Hours per Patient Day (NHPPD) is proposed, yet the regulated community and other stakeholders are asked to submit comments on this proposed mandate without any knowledge of what the other parts of the Nursing Services section of the regulations will include. In the regulatory analysis prior to the proposed changes, it is referenced that Nursing Services (and many other relevant sections) will not be released until *proposed rulemaking 4*. How can stakeholders comment on a staffing minimum without knowing about requirements for nursing services, staff development, personnel policies and procedures, or the myriad of other related issues that are to be addressed in *proposed rulemaking* 4 – or in one of the other rulemaking packages stakeholders have not yet been allowed to review?

The entire existing state regulations under review relating to nursing facility providers are 48 pages in total, including the interpretive guidelines. Some sections can be stricken and include a reference to federal regulations. These are no more cumbersome than many other regulations that have moved forward in a complete package so that stakeholders can reasonably review and comment on the complete regulatory package. Dividing the regulatory package in this way lacks clarity and does not allow the regulated community or the general public a fair opportunity to review the regulations and provide comment.

LeadingAge PA would respectfully request that DOH combine the regulatory packages into one coherent whole before publishing as proposed. Further, it is of utmost importance that DOH provide opportunity for public comment on the proposed regulations as a whole prior to publishing as final. The regulated community and the public cannot anticipate how the changes to definitions, for example, will impact regulations that have not yet been revealed, nor can they understand how various portions of the regulations will interact with one another.

Regulations Must Provide Opportunity for Comment and Review. The proposed regulations may violate the Regulatory Review Act in that they incorporate by reference the Centers for Medicare and Medicaid Services (CMS) guidances to surveyors found in the 162-page Chapter 7 of the State Operations Manual (SOM) and the 702-page Appendix PP. These guidances can be changed by CMS at any time without notice or a public process. They are not subject to comment and review by the public or to input by the Pennsylvania General Assembly. Further, in S&C Letter 08-10, CMS makes it clear that these guidances or interpretations are only to be referenced by surveyors to assist them with the survey process, and that they are not statutory or regulatory in nature.

It is possible that inclusion of the SOM by reference could violate the Pennsylvania Constitution by delegating rulemaking authority through reference. A similar case was recently adjudicated by the Pennsylvania Supreme Court (Protz v. Workers 'Compensation Appeals Board) where the court ruled that the statutory reference to a guidance or other tool that can be updated or changed is an unauthorized delegation of the Constitutional Authority vested in the General Assembly.

Providers Need Reasonable Time to Budget, Plan, and Hire. The proposed regulations make several significant changes that would require time and planning to implement. In spite of this, the proposal includes an effective date of "immediately upon publication as final". Regulated entities must be afforded a minimum period to comply with the new proposed mandates. This time is necessary to allow nursing homes and their administration to budget, plan for, hire and train the additional staffing to meet the proposed 4.1 nursing hours per patient day (NHPPD) mandate. LeadingAge PA strongly suggests that the DOH review the proposed regulation and offer effective dates no earlier than 18 months after the full set of regulations is published as final.

Regulations Should Not Duplicate Federal Sanctions. The regulations propose to apply both state and federal violations and possible sanctions to the same incidence of noncompliance. This proposal appears to be duplicative, unnecessary, and overly punitive. It remains unclear whether financial penalties are the most effective method of improving compliance for most facilities. This practice often causes more harm than good by taking resources from struggling facilities that could otherwise use those funds to hire additional staff or improve resident care in other ways. LeadingAge PA requests that DOH apply State sanctions to state-only infractions rather than adding to the punishment inflicted by the significant federal Civil Monetary Penalty sanctions. Federal fines are already very expensive without exhibited results of improving quality.

LeadingAge PA would further request that DOH consider education, information, training, and interpretive guidance to encourage compliance. These supports are more effective than sanctions and do not impose financial hardship on a nursing facility that is struggling to comply. LeadingAge PA commends DOH for a program it began planning prior to the pandemic to share promising practices. LeadingAge PA would encourage DOH to reenergize such educational and collaborative efforts to assess their effectiveness before determining that simply duplicating federal sanctions will hold the key to compliance which still may have no positive effect on resident care quality.

The Cost Calculation of the Proposal Must be Improved. The Department of Health has proposed changes that it admits will have unknown costs and does not know who will bear them. For example, DOH notes that the proposed changes will affect counties, but then outlines that it does not have the data to calculate what the cost will be to the counties. In addition, the cost calculation for nonpublic nursing facilities fails to account for the cost of healthcare and other employee benefits for the added staff, the likelihood that salaries may need to be escalated for current staff as new staff members are welcomed to the team, or significant additional costs for recruitment, training, and screening of new staff. Necessarily, some of the costs would be borne by residents paying privately for care, but the calculation also fails to account for the related more rapid depletion of assets that will occur for private-pay residents, and therefore increasing the Medical Assistance rolls. DOH notes that "DHS does not have sufficient data to determine who will bear the burden of the remaining costs not covered by MA, for the MA facilities, but believes that at least some of this amount will have to be borne by the regulated community. " Nonetheless, DOH states, "the Department feels strongly that the increase in quality of life and safety for the approximately 67,500 residents in the impacted long-term care nursing facilities outweighs any additional costs to either the MA program in DHS or the regulated community."

Using arithmetic as simple as that used to calculate the estimated $385.7 million fiscal impact on the MA program provided in this initial package, we must adjust that number upwards to account for the staffing hours needed for individuals in nursing homes not paid for by MA, or approximately $193 million to be passed on to privately paying residents. Then we have to adjust the sum of the cost to MA and private paying residents upward by another 30% to account for staff benefits that would be paid by the employer, bringing the minimum price tag for the proposal to over $770 million. LeadingAge PA recommends a more complete fiscal impact analysis be completed to better project the costs to both the State and to privately paying residents.

Increases to mandatory staffing minimums must be planned carefully so that resources are available long-term to support the mandate. Those who operate facilities – and any business owner or operator for that matter – knows that it is unethical to hire someone without having a reliable, sustainable funding source to pay their salary and benefits. Staff commit themselves to their job, their team, their residents and their employer. The Commonwealth cannot ethically require nursing homes to increase staff without figuring out a way to provide sustainable funding and committing to reimburse providers for those costs.

DOH Must Improve Coordination with Federal Initiatives: In addition to our concerns about the process DOH is using by introducing this regulation in five portions, we are concerned with the lack of coordination with federal nursing facility initiatives. For example, Section 201 of the recently introduced Nursing Home Improvement and Accountability Act of 2021, would require the Secretary of the Federal Department of Health and Human Services (HHS) to conduct a study and submit a report to Congress on the appropriateness of establishing minimum staff-to-resident ratios in nursing facilities. It would be sensible for DOH to await the results of the study prior to the adoption of any additional requirements, rather than to forge ahead with its own staffing minimum. As we note below, CMS declined to establish a single minimum threshold when it last updated the requirements of participation after carefully considering the many studies on the topic. We urge DOH to take the same stance as the federal government.

We are also concerned that DOH has chosen to require all PA nursing homes to comply with the federal requirements for nursing homes certified to receive Medicare or Medicaid. DOH dismisses concerns about the overwhelming nature of these federal regulations by saying it believes it will be better for the residents and that there are only three such facilities in the Commonwealth. DOH neglected to consider that the

residents in these facilities are paying privately for their care and have selected these nursing homes specifically for the services they offer. These are small businesses by any definition: one of the three license-only Pennsylvania nursing facilities (NFs) referenced by DOH is a 30-bed nursing home, another is a 20-bed home. DOH should instead be concerned that these facilities may close their doors rather than change their entire program to meet the voluminous federal regulations and guidance that they simply can't comply with for a number of technical reasons including systems access to federal data sharing portals. DOH has failed to recognize that there are federal requirements such as completion of Minimum Data Sets (MDSs) that are not available to facilities that aren't Medicare and Medicaid certified.

Operational Concerns:

This initial package of five, as proposed by DOH, raises a number of operational concerns for the regulated community and our Commonwealth's public. There are areas of overlap with our process concerns, which we will mention in passing, but reference our process details, in these instances. Our operational concerns include:

- Specific staffing thresholds do not directly guarantee quality outcomes.
- The definition of included staff should be altered to include all staff providing resident care, not simply clinical care- resident wellbeing is a function of adequate clinical care coupled with exceptional person centered programming like music and occupational therapies, games and activities, and meal experiences.
- The workforce in Pennsylvania doesn't exist- the number of working age Pennsylvanians continues to decrease, while the number of individuals over age 65 continues to increase.
- The proposed regulation does not allow for innovation or for career advancement
- The regulated community needs a period of time to come into compliance. Publication of a final regulatory package cannot reasonably expect providers to increase staffing by 50% with no notice.
- 4.1 NHPPD for each shift is not written clearly and can be interpreted in several ways.

Specific Staffing Thresholds Do Not Directly Guarantee Quality Outcomes: A particular NHPPD may not have the anticipated effect of enhancing the quality of care. While some studies have shown correlation between increased staffing and quality care, generally there are significant intangible variables that are not accounted for including: investment in staff training, staff tenure, and employer culture. Additionally, each nursing home has unique features such as acuity of residents, training, competency and tenure of staff, and characteristics of the building. Further, the proposed staffing ratio does not take into consideration abilities to find and hire staff or the needs of the residents.

Staffing should be based, as it is in the federal regulations, on resident care plans and a facility assessment that matches the needs of the residents to the capabilities of the staff, as well as characteristics of the building that may impact staffing needs. All federally certified nursing facilities already must comply with the federal requirement at 42 CFR §483.70(e) to conduct and document a facility-wide assessment to determine what resources are necessary to care for their residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment.

The Definition of Staff Must Include All Staff Providing Resident Care: We would strongly urge the Department to adopt the CMS definition of direct care staff that can be counted toward minimum staffing thresholds. Nursing staff are not the only individuals that provide care and services to nursing facility residents. Just to be clear, we urge DOH to adopt the following definition of Direct Care from federal regulation 42 CFR 483.70– "Direct Care Staff are those individuals who, through interpersonal contact with residents or resident care management, provide care and services to allow residents to attain or maintain the highest practicable physical, mental, and psychosocial well-being. Direct care staff does not include individuals whose primary duty is maintaining the physical environment of the long term care facility (for example, housekeeping)."

Further, the proposed change to the NHPPD minimum threshold is unnecessary. The Department of Health currently has the ability to require additional staff if they deem such action necessary (it is unknown whether this part of the regulations will be retained in the other portions of the regulatory package). In addition, due to the implementation of the Payroll Based Journal (PBJ) reporting of staffing by all nursing homes that participate in Medicare or Medicaid, DOH now has the ability to track staffing on a regular basis, can quickly act to address shortfalls, and has the ability to analyze trends and outcomes. The PBJ data and DOH's Nursing Facility Locator page show that where they can obtain staff, most nursing facilities in PA already staff well above the minimum threshold of 2.7 nursing hours that is currently required, in order to meet the needs of their residents. However, even homes with the highest commitment to robust staffing levels may face difficulties during an illness outbreak, winter storms, holidays, or the tight labor markets we are seeing in most areas of the state.

The Workforce in Pennsylvania Does Not Exist: Given the decrease in the working age population, nursing facilities are already having a very difficult time hiring the staff they need to provide excellent care – a higher mandated level of staffing will put additional pressure on nursing facilities to find and hire people who do not exist in the labor pool. Perhaps the administration should review its Long Term Care Council's April 18, 2019, report - *A Blueprint for Strengthening Pennsylvania's Direct Care Workforce* that sets a goal to "Raise awareness of the important role of the direct care workers in serving older adults and individuals with disabilities and the link between a strong workforce and access to quality of long term services and support". The report recommends that a statewide public awareness campaign be created along with targeted events to both emphasize the need to recruit and retain more workers and the value of these professionals. DOH's lack of acknowledgement of the worst workforce crisis of our time in their proposal demonstrates their seeming lack of touch with the realities of the current situation facing our commonwealth. We suggest that DOH work with the long term care council to implement this provision in the report before mandating a direct care minimum that is unattainable for many nursing homes.

Additionally, DOH fails to acknowledge the lack of nurse aide training programs in Pennsylvania. While the list of approved programs may be long, the reality is that many of these programs have not had an RN instructor for months, rendering the program unable to provide needed training. Additionally, PA has many administrative hurdles for providers to begin or maintain their programs, including reams of paperwork necessary to add an additional site when an organization already has one site approved. Before the Department puts a new and significant staffing mandate in place, we recommend a thorough examination of the availability of training opportunities for such staff.

The Proposed Regulation Does Not Allow for Innovation or for Career Advancement: As we stated in our 2018 comments on staffing to the DOH long term care workgroup, we believe in a multifaceted approach to identify and recruit staff in more innovative ways, retain and support those who enter the field, address the stigma of working in the LTSS field, and allow innovative staffing models and new technologies, including substitutions that make sense. This will take collaboration by many agencies and private entities, but it is necessary to develop the workforce we need now and into the future. It takes a special person to provide care and services to older adults; it takes care and compassion and a willingness to listen and continue learning as advances are made in the field of caregiving.

LeadingAge PA would also strongly recommend that DOH provide more regulatory flexibility in roles and education of direct care workers, who would benefit from career paths such as medication technician. These trained and certified individuals could administer medications for long-term residents with stable conditions.

The Regulated Community Needs a Period of Time to Come into Compliance: As stated earlier, the Department of Health proposes this change to be effective immediately upon publication of the final regulations. Facilities will need time to budget for, hire and train staff, or determine to what extent their operations will be sustainable under this new requirement and potentially make the painful decision to close beds or sell the nursing home. Additionally, due to the lack of Medical Assistance funding associated with this proposal, providers may need to time to retrain individuals such as musical therapists that dramatically improve quality of life for residents with dementia, as these staff will not be counted in the definition of NHPPD, and may be a luxury that facilities can't afford if this proposal goes forward. Again, LeadingAge PA strongly suggests that the DOH review the proposed regulation and offer effective dates no earlier than 18 months after the full set of regulations is published as final.

4.1 NHPPD For Each Shift is Not Written Clearly and Can Be Interpreted in a Couple of Ways: The minimum number of general nursing care hours is written in such a way that some providers seem to believe that 4.1 hours of direct resident care would be required for each shift while others interpret this provision to read that 4.1 hours would be required over any given day. The lack of clarity of this provision is extreme and significant to the interpretation of this section. While we believe that this section is to be interpreted as a provider needing to staff at a minimum of 4.1 hours of direct care for this day, this confusion must be eliminated when the regulations become final. Additionally, if DOH anticipates 4.1 hours per shift, then the fiscal analysis is more severely lacking than the concerns outlined above.

Conclusion

LeadingAge PA concludes that the proposed regulations are not in the public interest for the following reasons:

- DOH has neglected to accurately calculate the costs of the proposal. Additionally, they unfairly burden private pay residents who may or may not need the additional staffing and fail to recognize this in their calculation.
- The proposal incorporates federal guidance that can be changed at any time without notice or public process. This seemingly circumvents the required state public processes, making it impossible to account for future changes in guidance that could contribute to additional costs and may be in conflict with Pennsylvania statutes such as the Health Care Facilities Act.

- It unfairly impacts small businesses, who must now hire and pay new staff and will not receive additional funding to do so.
- It is likely to have devastating impacts on the three non-certified nursing homes, two of which are quite small.
- It adversely affects quality and access to quality care by accelerating the trend of bed or entire facility closures and the sale of nonprofits and other quality homes to large out-of-state providers who often have poor track records of quality.
- It appears to needlessly circumvent reasonable public comment on closely interrelated regulations that are to be issued separately
- It does not provide a reasonable period for the regulated entities to come into compliance.

LeadingAge PA strongly urges DOH to withdraw this proposed regulation and propose a single complete regulatory package that meets the requirements of the Regulatory Review Act. Further, we respectfully recommend that, prior to increasing the minimum staffing threshold, DOH reconvene the Nursing Home Task Force to discuss the workforce shortage and discuss how public/private partnerships could help to highlight long term care as a career as outlined in the Long-Term Care Council's April 2019, *Blueprint for Strengthening Pennsylvania's Direct Care Workforce.* Additionally, we would urge DOH to await the proposed review of nursing homes staffing study from Congress, if enacted, before proposing a staffing minimum. We believe that it is incumbent upon DOH to provide a pathway to increase the availability and competency of potential staff before proposing a staffing minimum that simply cannot be met by many nursing facilities. DOH must also take into account the roles of various agencies, the realities of the current labor market, the fragile financial position of many of our nursing facilities, and the importance of assessing and staffing based on staff competency, resident needs and the characteristics of the building.

LeadingAge PA is concerned that this regulation does not serve the public interest given the lack of information provided about the costs of the proposal and the many factors that are currently contributing to the high likelihood that providers will close beds when they cannot meet the staffing requirement. Where a few residents may benefit from a higher staffing level than they experienced previously, many residents and families will experience disruptions as nursing facilities are sold or wings are closed. Hospital patients may languish in the hospital as discharge planners are unable to find a nursing facility with capacity or willingness to accept new residents. Nursing facilities have already been closing units, entire facilities, or selling to out-of-state providers with poor track records. LeadingAge PA is very concerned that this proposed regulation would have the unintended consequence of exacerbating this trend and therefore resulting in fewer high quality nursing facility providers remaining to serve Pennsylvania's aging population. We reiterate our recommendation to use a more collaborative approach to encourage more working age people to consider LTSS as a field. LeadingAge PA has several workforce initiatives underway and would appreciate the opportunity to work with DOH and other stakeholders to attract new workers into this rewarding field.

The members and staff of LeadingAge PA are always ready to assist you with any issues or questions relating to caring for our seniors. We look forward to working with you so the Commonwealth's seniors have quality long-term care services and supports system if needed.

Please reach out if we can be a resource.

Sincerely,

Adam Marles
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