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August 30, 2021

**VIA EMAIL ([RA-DHLTCREGS@PA.GOV](mailto:RA-DHLTCREGS@PA.GOV))**

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

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

Dear Ms. Gutierrez:

The Pennsylvania Health Law Project (PHLP) is one of the few non-profit law firms in the country exclusively focused on health care. We have deep expertise in the local, state, and federal laws and regulations that govern eligibility for and delivery of health care services. We also have a long history advocating on behalf of residents in long term care facilities. The backbone of our work is helping eligible and low-income Pennsylvanians 1) obtain and keep Medicaid and 2) obtain medically necessary services and supports from their Medicaid managed care plan. PHLP counsels and represents Pennsylvanians in every county and opens more than 2,500 cases per year.

The COVID-19 pandemic has spotlighted the challenges facing Pennsylvania's nursing homes and the profound need to update the Commonwealth's long-term care regulations. With the long-term care

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system now in the spotlight the moment has indeed arrived to take meaningful actions to improve nursing homes.

## PROCESS COMMENT

We understand this proposed rulemaking is one of five that will be combined into a final, comprehensive regulatory package. We have not seen the other proposals. For that reason, it is very difficult to review these subsections without the context of the remaining sections. However, given the importance and need for meaningful nursing home reform, we will comment now. We do hope and strongly urge the Department to accept future comments related to any of the five sections at any time throughout the entirety of the proposed rulemaking process.

## SUBSTANTIVE COMMENTS

### *201.2 REQUIREMENTS*

We are pleased to see the Department makes it a violation of state regulations to violate federal regulations. We urge the Department to expressly articulate that it is a violation of state regulations to violate federal regulations or the State Operations Manual interpreting those regulations.

### *201.3 DEFINITIONS*

As noted above, we cannot fully evaluate the impact of changes to the proposed definitions without seeing revisions to the other sections of this title.

Generally, we support the deletion of terms that are not used in the regulations. We also support the reliance on definitions found in the federal regulations, but not where there is a state definition that carries important cross-system meanings. For example, we are concerned about the impact on state enforcement of Protective Services and associated criminal laws that could result from eliminating state definitions in these regulations of abuse, neglect, exploitation, etc. Deleting terms wholesale instead of aligning them with both federal and state laws, we believe, would pose a new and unnecessary challenge for law enforcement and the protective services programs. We urge the Department not to rely solely on the federal ones, especially when that

reliance impacts the ability of protective services programs or law enforcement to pursue state law violations or charge criminal acts of abuse, neglect, and exploitation or if misalignment creates confusion related to reporting and enforcement. We urge the Department to revise and incorporate both the federal and state definitions by cross referencing the federal regulations and the state OAPSA and APSA laws.

We are also concerned that some of the terms being deleted are not definitions but a list of qualifications, which are not found elsewhere in the regulations.

We are glad to see the removal of “locked restraint.” These are inappropriate and unlawful, and we previously recommended the removal of this definition. However, the definition of restraint should remain as it is important to be clear about what is prohibited.

#### *211.12(i) Nursing Services*

We support the Department’s proposal to increase minimum direct care staffing levels from 2.7 to 4.1 hours of direct care per resident per day. This has been a consistent recommendation from nursing care experts and the Centers for Medicare and Medicaid Services (CMS).

Increasing the minimum to 4.1 hours per resident per day is essential to ensure that all nursing home residents in Pennsylvania receive quality care. Kaiser Family Foundation data show that in 2016, nursing homes in 27 states and the District of Columbia already averaged above 4.1 hours of staffing per resident per day.

The US Department of Health and Human Services (DHHS) and top nursing care experts have long recommended minimum staffing levels higher than what Pennsylvania has now. A 2001 DHHS study urged the adoption of a minimum of 4.1 nursing hours per resident day (hprd), broken out as

- .75 RN hours per day
- .55 LVN/LPN hours per day
- 2.8 CNA hours per day

The DHHS study found this minimum number of hours necessary to ensure consistent and timely care to residents. The federal government has not changed its position. In fact, some experts have recommended minimum standards **even higher** than 4.1—i.e., 4.55 hprd—to “improve the quality of nursing home care, with adjustments for resident acuity or case mix.” Harrington C, Kovner C, Kayser-Jones J, et al. *Experts Recommend Minimum Nurse Staffing Standards For Nursing Facilities In The United States*. Gerontologist. 2000. Available at <https://pubmed.ncbi.nlm.nih.gov/10750309/>

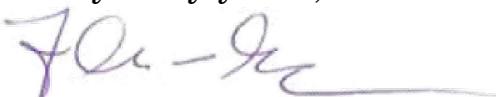
Pennsylvania’s policy makers must make a commitment to improving nursing home care and ensure resident dignity and safety by establishing minimum staffing requirements. Pennsylvania’s residents and families deserve to know that any licensed facility they go to will have adequate and safe staffing.

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As noted above, addressing staffing standards, in isolation, is just one step of many needed to improve Pennsylvania’s long-term care facilities. PHLP looks forward to reviewing and commenting on the additional releases of the nursing home regulatory package and reserving our ability to submit additional comments on this first package in light of those new proposals.

Thank you for giving us the opportunity to comment.

Very truly yours,



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