



DISABILITY RIGHTS PENNSYLVANIA

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VIA EMAIL

August 30, 2021

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

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

Disability Rights Pennsylvania (DRP) is the federally mandated, state designated Protection and Advocacy (P&A) system for persons with disabilities in Pennsylvania, and it has been providing legal and advocacy services to Pennsylvanians with disabilities for over 40 years. We are pleased to be given the opportunity to comment on the Department of Health's (DOH) proposed rulemaking updating the Commonwealth's nursing home regulations.

At the outset, we would like to commend DOH for finally updating the regulations; it has been over 20 years since the Department has made any substantive changes to the regulations, and an update is long overdue. In order to ensure that residents are properly cared for with their health, safety, and social and emotional needs being met, particularly in the Covid era, DOH must bring the regulations in line with what we know to be best practices for long term care facilities.

However, we must note our disagreement with DOH's process for disseminating the proposed changes to the public, as well as its process for

soliciting public comment. DOH is putting forth five separate proposed rule makings between now and December, rather than issuing all of the proposed changes at once. This makes it difficult for stakeholders and the general public to provide meaningful feedback, as no one can understand the full impact of each proposed rulemaking without seeing what is in the entire package. Individual subsections of regulations cannot be read in a vacuum; they must be read collectively. For this reason, we urge DOH to allow commenters to offer feedback pertaining to all five sections throughout the entire commenting process, as they may find their feedback on an earlier section changes once read in conjunction with a later section.

§ 201.2 Requirements: We are pleased to see the Department make 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:

(b), Abuse: DRP disagrees with the Department's decision to eliminate the previously provided definition for abuse because the definitions provided in 42 C.F.R. § 483.5 and the CMS State Operations Manual do not include involuntary seclusion as a form of abuse. Involuntary seclusion, such as by keeping a resident confined to his/her room, either by locking the door or failing to assist a non-ambulatory resident, can have a serious impact on the resident's mental health and psychosocial well-being. The Department should either retain the previous definition for abuse for this reason, or add language to the regulation which explains that in addition to what is listed in the 42 C.F.R. § 483.5 and the CMS State Operations Manual, involuntary seclusion also constitutes abuse. This will ensure clarity for Protective Services and for others who seek to investigate abuses in these facilities.

In addition, we have concerns 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 Protective Services programs. It is extremely problematic to remove state definitions and rely solely on the federal ones if this 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. Accordingly, we recommend that the definitions of these terms be revised (not deleted) to incorporate both the federal and state definitions by cross referencing to both the federal regulations and the state OAPSA and APSA laws.

§ 211.12(i) Nursing Services: DRP supports the increase in direct care staffing levels as it is long past time for minimum direct care staffing levels to be set at 4.1 hours of direct care per resident per day. This has been a consistent recommendation from nursing care experts and CMS for over twenty years. We emphatically support this increase in the minimum direct care staffing level. We note, however, that the change to the number of hours per resident per day reflected in the proposed revision to §211.12(i) alone is not sufficient to ensure sufficient staffing to meet each resident's individual care needs. Other portions of §211 must be revised to ensure that nursing homes can provide quality care for residents.

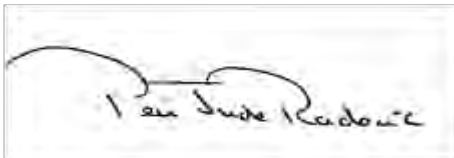
DRP believes this subsection, as currently written, is far too open to interpretation, and fails to explain how the Department plans to ensure compliance. For example, the regulation mandates that a nursing home have "sufficient" numbers of nursing staff to meet residents' needs. What constitutes sufficient staffing will vary from facility to facility, based on census counts and each resident's acuity. As stated, staffing is sufficient if residents' safety and well-being is maintained; this is far too subjective of a standard.

How does the Department intend to measure residents' safety and well-being? How often will it assess safety and well-being to ensure there is sufficient staffing? How does the Department plan to account for ever changing facility censuses? Sufficient staffing might be achieved one month but then, with new admissions, this will no longer be the case. The Department must provide more concrete standards so that it is clear to all stakeholders, and those tasked with monitoring facilities for compliance, when sufficient staffing is achieved. It is our hope that Proposed Rulemaking 4 will include more details about how the Department intends to achieve sufficient staffing in all long term care facilities, such as by making changes to subsections (g) and (h) that increase the nursing staff to resident ratio and require more than two nursing staff to be on duty at any one time.

Finally, as noted earlier, addressing staffing standards, in isolation, is just one step of many needed to improve Pennsylvania's long-term care facilities. Many other portions of Section 211 must also be revised to improve quality care for nursing home residents. We look forward to reviewing the additional and necessary revisions in the next four proposals the Department will roll out in the remaining pieces of the nursing home regulatory package.

We thank you for consideration of our concerns and suggestions. Please contact Jennifer Garman, Director of Government Affairs at 717-236-8110 ext. 327 with questions.

Sincerely,

A rectangular box containing a handwritten signature in black ink. The signature is cursive and reads "Peri Jude Radecic".

Peri Jude Radecic
Chief Executive Officer