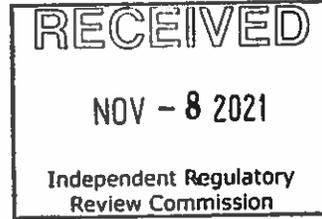


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November 7, 2021

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 10-222 (Long-Term Care Facilities, Proposed Rulemaking 2)  
28 PA Code Sections 201.23 and 207.4, Chapters 203, 204, and 205  
Deadline: November 8, 2021**

Dear Ms. Gutierrez:

Thank you for the opportunity to comment on this proposed rulemaking, the second of five packages that will eventually be combined to make a final, comprehensive regulatory package. I continue to urge the Department of Health to formally commit to accepting comments related to any of the five sections at any time throughout the entirety of the proposed rulemaking process. Otherwise, there will be no way to ensure that all of the proposed changes to the regulations are appropriate.

**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 clinically 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 created in 1996 what later became the Department of Justice's nursing home failure of care 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 to address 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 where I specialize in health law, patient safety and compliance. I also serve as an Adjunct Professor for the Drexel University College of Nursing and Health Professions.

## **Substantive Comments to Long-Term Care Facilities, Proposed Rulemaking 2:**

I have chosen to focus my comments on following sections Chapter 201 and Section 201.23 Closure of Facility.

### **Chapter 201: Purpose**

I recommend that the Department add a “Purpose” statement to 201.0. It is important that the Department set forth the purpose of these regulations in order to clearly express the Department’s intent as the regulating agency for nursing homes. I have proposed the following language that will assist in that regard:

#### **§ 201.0. Purpose**

**The purposes of regulating nursing facilities are as follows:**

- (1) to enhance the health and welfare of Pennsylvania citizens by making the health care and long-term services and supports delivery system responsive and adequate to the needs of its citizens;**
- (2) to assure that new health care services and facilities are efficiently and effectively used;**
- (3) to ensure that health care services and facilities meet and will continue to meet high quality standards;**
- (4) to respect the right that all citizens have to receive quality, humane, courteous, and dignified care;**
- (5) to ensure nursing facility residents can maintain their individuality and make choices about how they want to live;**
- (6) to foster responsible private operation and ownership of health care facilities; and**
- (7) to encourage innovation and continuous development of improved methods of health care delivery to nursing home residents.**

#### **Section 201.23 Closure of Facility**

The process of closing a nursing home has been, and continues to be, a traumatic event to residents and their loved ones as well as to staff. I believe that the Department must take a more proactive approach to ensuring that residents’ needs are met during closures. For this reason, I recommend significant improvements to the closure process in order to protect this vulnerable population. These recommendations are based on current regulations that are in effect in Massachusetts and California.

Specifically, my proposed language mandates a person-centered process that includes notice, a resident centered closure plan, opportunity for input, Department approval of the closure plan, and specific protections concerning state monitoring and oversight.

#### **(b) The notice of intent to close must include the following information:**

- 1. The proposed date of closure;**
- 2. Reasons leading to closure;**
- 3. The facility representative whom residents or their legal representatives, family members, staff or other interested parties may contact with questions they may have regarding the proposed closure;**

4. Notice that a resident and interested parties public information session will be held on the proposed closure at the facility at least 60 days prior to the proposed closure date; and how information regarding the date, time and place of the resident and interested parties public information session will be made available;
5. Notice that interested parties may file comments on the proposed closure and the draft closure plan with the Department up until the date of the resident and interested parties public information session; and
6. Other information as may be specified by the Department.

**(c) The draft closure plan must provide the steps that will be taken to assist residents and their legal representatives in preparing for closure of the facility, and shall include, at a minimum, the following information:**

1. Psychological preparation or counseling of each resident as necessary, and plans for preventing transfer trauma;
2. Efforts to find appropriate alternate placements for all residents in a facility that are capable of meeting all of their needs and including the consideration of the resident's and family's choice of facility;
3. Consultation with each resident or the resident's legal representative and, with the resident's or the legal representative's consent, interested family members regarding placement options and the placement process being considered; and
4. Notification of the times during which family meetings will be held to provide information on the closure process and steps the facility will undertake to ensure the appropriate transfer or discharge of each resident.
5. The steps that will be taken to assist facility staff in preparing for closure.
6. The storage of medical records after closure of the facility.
7. The plan for transfer of resident care plans and personal possessions.
8. When the facility will stop admitting new residents, and the process for readmitting residents who are transferred to the hospital during the closure process.
9. The staff available to assist with the transfer of residents.
10. The staffing plan for providing services during the closure as well as the contingency plan for hiring additional or temporary staff in the event that employees quit before the final closing date.

**(d) At least 90 days prior to the proposed date of closure, the licensee shall provide a copy of the notice of intent to close and draft closure plan to the following:**

1. Each resident of the facility and where applicable the resident's legal representative;
2. The designated family member of each resident;
3. The facility's resident council;
4. The facility's family council;
5. Each staff member of the facility;
6. Every labor organization that represents the facility's workforce during the period of the transfer of ownership;
7. The Office of the State Long-term Care Ombudsman;

- 8. The Office of the Local Long-term Care Ombudsman;**
- 9. The County Commissioners for the county where the facility is located; and**
- 10. The County or Municipal Health Department, if there is one.**
- 11. A representative of the local officials of the city or town where the facility is located.**
- 12. All Community HealthChoices Managed Care Organizations under contract with the Department of Human Services, Office of Long-Term Living.**

**e) Upon receipt of the notice of intent to close a long-term care facility, the Department shall coordinate with the licensee for the scheduling of a resident and interested parties public information session on the proposed closure. The information session shall be held at least 60 days prior to the proposed closure date at a location accessible to residents, family members and facility staff.**

**(f) A licensee intending to close a long-term care facility shall provide notice of the date, time and location of the resident and interested parties public information session to be held on the proposed closure at least 14 days prior to the information session, using a notice approved by the Department.**

- 1. A copy of the draft closure plan and notice of the resident and interested parties public information session shall be posted in the facility and notice of the date, time, and location of the resident and interested parties public information session shall be provided to each person or entity who received the initial notification of intent to close at least 14 days prior to the resident and interested parties public information session.**

- 2. Should a licensee fail to distribute either the draft closure plan or notice of the resident and interested parties public information session in a timely manner, or in a format acceptable to the Department, the resident and interested parties public information session on the proposed closure plan will be rescheduled and the proposed closure date will be extended to allow for a resident and interested parties public information session at least 60 days prior to the proposed closure date.**

**(g) Until the Department has approved a licensee's closure plan, the facility shall not issue a notice of transfer or require any resident to transfer.**

**(h) Upon submission of the draft closure plan, the licensee shall be prohibited from accepting new residents and entering into new admission agreements for new residents.**

**(i) The Department shall complete a review of the draft closure plan and all comments on the proposed closure that have been submitted to the Department by the date of the resident and interested parties public information session, and notify the licensee in writing within 14 days of the information session either its approval or disapproval of the closure plan.**

- 1. If the Department approves the plan, it shall become effective upon the date the Department grants its written approval of the plan.**
- 2. If the Department disapproves a closure plan, the licensee shall resubmit an**

**amended plan, which the Department shall promptly either approve or disapprove, within 10 working days of receipt by the Department of the amended plan. If the Department fails to approve a closure plan, it shall inform the licensee, in writing, of the reasons for the disapproval of the plan.**

**(j) If the Department fails to take action within 20 working days of receipt of either the original or the amended closure plan, the closure plan shall be deemed approved.**

**(k) Upon receipt of the Department's approval of the closure plan and closure date, the licensee shall post in the facility, and provide to each person or entity who received the initial notification of intent to close, notification of the Department's approval of its closure plan and the approved closure date, and notice that the facility will close.**

**(l) All closures shall be completed in an orderly manner in accordance with the closure plan approved by the Department.**

**1. Upon notification of the Department's approval of its closure plan, the licensee shall provide updates to the Department on its closure activity on a weekly basis, or more frequently upon request.**

**2. Copies of all appropriate medical records, resident care plans, and resident possessions shall accompany each resident upon transfer or discharge. Resident possessions shall be transported with dignity and respect, in luggage or clean storage containers, not in trash bags.**

**3. Transfer planning should begin for residents when the closure plan is approved. Residents and their representatives must be provided with choices, including home and community based options, and must be the ones to make the choice in the setting to which they will transfer.**

**(m) Transfers shall take place in an orderly fashion. [Sufficient time shall be given to the resident or the resident's responsible person to effect an orderly transfer.] (Reserved). No more than five residents per day may be transferred unless the facility has demonstrated to the Department that it has sufficient staff and resources for transferring a larger number of residents per day in an orderly fashion and has received approval from the Department.**

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**p) The Secretary may waive or modify all timeframes in extraordinary circumstances where the Secretary has determined that such a waiver is necessary to protect the health and safety of the residents served by the facility or in the event of an involuntary closure. For involuntary closure, all requirements of this section will be followed, however, the Department may need to take direct responsibility or take on joint responsibility with the facility for activities including issuing the notice of intent to close, drafting the closure plan, holding the resident and interested parties public information session, modifying and implementing the closure plan, and safely transferring residents, their records, and their possessions.**

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**(r) The Department will monitor the closure and the transfer of residents. The Department will designate a single point person to oversee the facility's implementation of the approved closure plan. This point person or their designee will be on site daily to monitor closure activities.**

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**(t) If a licensee fails to comply with the requirements of this section, or if the Secretary determines that it is necessary to protect the residents of a facility from physical or mental abuse, abandonment, or any other substantial threat to health or safety, the Department shall take any necessary action to minimize trauma for the residents, including caring for the residents through the use of a temporary manager when the Department determines the immediate relocation of the residents is not feasible based on transfer trauma or other considerations such as the unavailability of alternative placements. The Department shall contact any local agency that may have assessment, placement, protective, or advocacy responsibility for the residents, and shall work together with those agencies to locate alternative placement sites, contact relatives or other persons responsible for the care of these residents, provide onsite evaluation of the residents, and assist in the transfer of residents.**

**(u) The participation of the Department and local agencies in the relocation of residents from long-term care nursing facilities does not relieve the licensee of any responsibility under this section. A licensee that fails to comply with the requirements of this section shall be required to reimburse the Department and local agencies for the cost of providing the relocation services or the costs incurred in caring for the residents through the use of a temporary manager.**

**(v) Failure to comply with the notice provisions, failure to implement an appropriate relocation plan, or transfer of residents prior to the 30-day notice period, may result in the Department may appoint a temporary manager.**

**(w) Failure to ensure appropriate notice to and relocation of all residents may result in a finding of abuse or neglect as defined under the Older Adult Protective Services Act or the Adult Protective Services Act.**

**(x) If the licensee fails to provide the relocation services required in this section, the Department may seek injunctive relief and damages, including restitution to the Department of any costs incurred in caring for the residents through the use of a temporary manager.**

**(y) A licensee who fails to comply with requirements of this section shall be liable for the imposition of civil penalties in the amount of one hundred dollars (\$100) per violation per day for each day that the licensee is in violation of this section, until such time that the violation has been corrected. The civil penalties shall be issued immediately following the written notice of violation. However, if the violation does not present an immediate or substantial threat to the health or safety of residents and the licensee corrects the violation within three (3) calendar days after receiving the notice of violation, the licensee shall not**

**be liable for payment of any civil penalties pursuant to this subdivision related to the corrected violation.**

**(z) A licensee who fails to comply with this section and abandons the facility and the residents in care resulting in an immediate and substantial threat to the health and safety of the abandoned residents, shall be deemed to have forfeited their license and in addition to forfeiture of the license, shall be excluded from licensure in facilities licensed by the Department without the right to petition for reinstatement.**

In addition to the proposed language cited above, I offer the following comments regarding the Department's recommended changes to existing regulations:

- Do not shorten the timeframe in 201.23(a). What is the rationale behind modifying an existing regulation by shortening the timeframe for the facility to notify the Department of a closure of the facility from the current 90-day requirement to the federal minimum of 60 days' notice? It appears that the Department's justification is that the federal rules only require 60 days. The Department has the authority and previously had chosen 90 days for good reason. A safe and orderly transfer of all residents takes time and planning and 90-day notice is appropriate.
- Modify 201.23(b) to require the nursing home to make contact with residents and their designated representatives in writing (as currently required) and in the manner in which the resident and their representative prefer contact. This requirement is consistent with person-centered care.
- Do not delete 201.23(g). The Department proposes to delete (g) because the facility "closure plan must include, among other things, a plan for continuing payment of salaries and other expenses incurred by the facility during the closure process." A closure plan is not evidence of "financial responsibility" and the facility's "ability to pay" salaries and other expenses in accordance with the plan.

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

Sincerely,

David R. Hoffman, JD, FCPP

cc: Independent Regulatory Review Commission at [irrchelp@irrc.state.pa.us](mailto:irrchelp@irrc.state.pa.us)