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**To:** [DH, LTCRegs](#)  
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**Subject:** [External] Comments on Proposed Rulemaking 10-222 (PA Code Cite: 28 Pa. Code § 201.23 and 207.4; and Chapters 203, 204 and 205)  
**Date:** Monday, November 8, 2021 6:41:34 PM  
**Attachments:** [PHLP 2021-11-08 Comments on LTC Facility Proposed Rulemaking.pdf](#)

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Attached please find the Pennsylvania Health Law Project's comments on the Department of Health's proposed rulemaking 10-222 (PA Code Cite: 28 Pa. Code § 201.23 and 207.4; and Chapters 203, 204 and 205).

Thank you for your consideration of these comments.

Very truly yours,

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(Pronouns: She/Her)

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

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

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Comprehensive reform must include the following important priorities:

- **Systemic Changes to Direct Care Staffing** to increase direct care staffing hours and direct care staffing to resident ratios, as well as to adjust direct care staffing upwards from the minimum as needed to address individuals' assessed needs, overall resident acuity, and other facility-specific factors (such as physical layout features or operation of specialized units).
- **Improvements in Training Requirements** including minimum training hours for direct care and other staff with specific articulated training areas and demonstration of competency.
- **Infection Prevention and Control Requirements** that ensure each nursing home has full-time expert staff on hand to prevent and control infections.
- **Emergency and Pandemic Preparedness Planning Requirements** so that nursing homes must meaningfully plan for how to address emergencies and to prepare for pandemics or other outbreaks.
- **Application for Licensure and for Change of Ownership Procedures** that ensure that the application to operate or purchase a nursing home requires a thorough evaluation of the applicant's experience, expertise, and financial capacity to provide high quality of care.
- **Residents' Rights Improvements** to update regulations that are over 20 years old and don't protect all residents from discrimination or ill treatment.

## PROCESS COMMENT

We understand this proposed rulemaking is two of five that will be combined into a final, comprehensive regulatory package. We have not seen the last three 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

### 1) Chapter 201, § 201.23 Closure of Facility.

Add a new § 201.0 addressing the purpose of the chapter. We recommend that the Department add a purpose statement to Chapter 201 that articulates the purposes of the regulations as follows:

#### § 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.

Revise § 201.23 with considerable changes around facility closure. For too long, the closures of facilities have left residents extremely vulnerable. We believe the Department must take a more proactive approach to ensuring residents' needs are met during closures. For this reason, we recommend significant changes to the closure process to protect residents, strengthen requirements for facilities, and detail more specifically what is expected during the closure. We propose to add what the existing regulations lack, a person-centered process that includes notice, a resident-centered closure

plan, opportunity for input, Department approval of the closure plan, and specifics concerning state monitoring and oversight. We fully endorse the specific language recommendations and comments Center for Advocacy for the Rights & Interests of the Elderly (CARIE) and Community Legal Services (CLS) provided in their mark-ups of the proposed regulations.

We also have the following comments on the Department's recommended changes to § 201.23 and endorse the specific language recommendations and comments regarding these sections provided by CARIE and CLS in their mark-ups of the proposed regulations

- Do not shorten the timeframe in § 201.23(a). We strongly object to 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. The Department's justification is that the federal rules only require 60 days. The state has the authority (i.e., is not preempted) to require 90 days and the Department clearly chose 90 days in the current regulations for good reason. A safe and orderly transfer of all residents takes time and planning. We urge the Department not to take away what in essence is a consumer protection by reducing this time frame to only 60 days.
- Do not delete but, instead, improve § 201.23(b). We encourage the Department to keep and revise § 201.23(b) to require the facility to contact residents and their designated representatives both in writing (as currently required) and in the manner in which the resident and their representative prefer contact. This is not a new concept. The Community HealthChoices managed care organizations (CHC-MCOs) are required to capture and honor the preferred manner of communication of their members. It is part of person-centered care.
- Do not delete § 201.23(c). The Department proposes to delete this on the grounds that the facility is required to submit a plan for closure and orderly transfers. Submitting a plan is not the same as guaranteeing the resident the right to receive sufficient time for an orderly transfer; by deleting the requirement that the facility provide this time to the resident, the Department is eliminating that resident right. The requirement to have a plan is not the same as a requirement to comply with the plan. The deleted language is what

gives the resident the right to require the facility to actually comply with the plan and/or to allow enough time for an orderly transfer.

- 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 ability to pay for salaries and other expenses in accordance with the plan. We urge you not to remove this provision requiring the facility to demonstrate its ability to comply with the plan it has submitted.

## **2) Chapter 203. Application of Life Safety Code for Long-Term Care Nursing Facilities.**

We agree with this deletion as the federal regulations sufficiently cover this content and do not permit states to apply prior versions of the Life Safety Code.

## **3) Chapter 204. Physical Environment and Equipment Standards for Alterations, Renovations or Construction of Long-Term Care Nursing Facilities.**

We have concerns that some of these provisions are ambiguous and, consequently, could prove difficult to enforce. We are also confused as to why some of the sections from Chapter 205 were not carried forward and copied into Chapter 204. We make the following recommendations and endorse the specific language recommendations and comments regarding these sections provided by CARIE and CLS in their mark-ups of the proposed regulations.

- Revise § 204.1(a) to require facilities to comply with the most current FGI Guidelines (not wedding the regulations to the 2018 version). We are comfortable with the adoption of the FGI Guidelines. According to the FGI website: “Pennsylvania uses the FGI Guidelines to review plans for new construction or renovation for hospitals or ambulatory surgical facilities, including endoscopy facilities. The state began accepting voluntary use of the 2018 edition on May 1, 2018 and began mandating compliance with it for new projects beginning November 1, 2018.” In fact, 42 states have adopted some edition of

the FGI Guidelines. Six states have language that allows for application of the most recent edition. We recommend Pennsylvania follow those 6 states (Colorado, Idaho, Kansas, Maine, Mississippi, New York). Since the long-term care facilities regulations have not been updated in over 20 years, we worry about whether the regulations will in fact be revised each time the FGI Guidelines are updated.

- Revise § 204.1(c). While we understand the intent is to only hold the facility to the standards that were in effect at the time the plans for an alteration, renovation or construction were approved, we are concerned that this phrasing suggests that a facility will be considered to be compliant even if it has let its building and facilities deteriorate to the point that they would not meet the standards it previously met. We suggest revising this language to more clearly reflect the Department's intent.
- Complete § 204.2. Portions of § 205.2 were not carried over to § 204.2. The Department should be sure that nothing was lost in its movement of content from one section to another.
- Make § 204.2(d) more precise. We appreciate and support the goal of this subsection to ensure that areas of a facility which have been vacant are determined to be suitable for use or occupancy before being reopened. This subsection needs more detail to make it clearer, however. What does the Department mean by "any part"? And what is meant by not being "occupied or used" during the year or more? Would using the space for storage constitute use? Would it apply to a room that had been left unoccupied for a year? We also believe the regulations should be written so as not to impede facilities from responding rapidly to emergency situations such as the need to use space creatively to cohort during an outbreak of infectious disease. We believe it is in the public interest to ensure that facilities can rapidly respond to situations like a pandemic by allowing an exceptions process to this provision for emergent situations.
- Revise § 204.2(e) for clarity and to protect residents from provider-motivated resident room moves. We have some concern about whether providers may be motivated to move residents around to ensure that no space goes "unused" for a year or more. We believe

this can be mitigated by requiring the facility to provide written notice to the resident, DOH and the local LTCOP when any resident is being moved or admitted into a space that has not been occupied for a month or more. Lastly, we agree with the specific language recommendations on water systems CARIE and CLS provided in their mark-ups of the proposed regulations.

- Be more specific in § 204.3(a). While we appreciate the goal of ensuring residents' wellbeing and recognize that it was carried over from existing § 205.3, we urge you to clarify the language to make its specific intent clearer. Is this a reference to the safety of the geographic area where the facility is located (e.g., not locating a facility in a frequently flooded area)? It may also be helpful to specify the types of health and safety concerns being addressed here.
- Revise § 204.3(c). We question whether the allowance in this subsection for administrators' family members to reside in a newly constructed facility remains appropriate. While this may have been the practice in facilities in the past, it appears to be outdated.
- Clarify that § 204.3 applies to buildings and grounds so that inclusion of §§ 204.3(d) and (e) make sense in this subsection.
- Define or more fully described 'adequate protective measures' as used in § 204.3(d).
- Add to § 204.5 language that was in § 205.20. This section no longer contains the language that was in 205.20 (d) and (e) establishing minimum square footage requirements for resident rooms. Square footage is included elsewhere in the draft regulations, as relates to dining room space, but not here. This may be covered in the FGI, which we do not have access to review. However, unless the FGI sets a requirement that is greater than what is contained in the current regulations, these provisions (which set a low but minimum bar) must be reinserted.
- Revise § 204.5(d) to be more precise as to what constitutes a safety hazard. We are concerned that without a definition of "safety hazard," a facility will have too much leeway to deny the residents' choices

and preferences. At a minimum, the Department should add language that allows the resident (who has capacity) a certain level of risk/informed decision making and language that prevents the facility from using arbitrary or ambiguous reasons as a basis for denying the resident's wishes.

- Revise § 204.5(f) to require education to residents about the right to a locked drawer or cabinet. Language is also needed to require the nursing facility to educate the consumer and/or representative during their first care plan meeting about their right to have a locked drawer or cabinet and the importance in letting staff know when they lose a key, the drawer is broken, or something is stolen.
- Add a new § 204.5(g) prohibiting rooms housing more than two residents. We feel strongly that resident rooms should be single occupancy. Under no circumstances should a resident room house more than two residents and no waivers to this rule should be granted.
- Add a new § 204.5(h) requiring the use of doorbells on resident rooms. Facilities should be required to put a doorbell outside each room. There is little dignity, respect, or privacy in staff just walking into resident rooms unannounced. If residents aren't allowed to lock their door when they are in the room, then a visual reminder in the form of a doorbell that must be used will force staff to treat resident rooms like they should be treated – as personal spaces.
- Revise § 204.11. The existing regulations have this requirement at § 205.23 which was not carried over here and needs to be: “A resident bedroom shall have adjoining toilet facilities and shall be located conveniently near bathing facilities.” As written, these regulations do not require an adjoining toilet. Also, the section with ratios of toilets to residents is missing. It is possible that these issues are covered in the FGI, which we could not access to review.
- Incorporate ventilation requirements in § 204.18. Add the following language to § 204.18: “Facilities should ensure safe ventilation practices and regularly evaluate such practices.” This amendment is consistent with state COVID-19 Health Equity Task Force guidance

at:

[https://www.minorityhealth.hhs.gov/Assets/PDF/COVID19HETF\\_Final%20Recommendations-093021\\_508\\_FINAL%203\\_.pdf](https://www.minorityhealth.hhs.gov/Assets/PDF/COVID19HETF_Final%20Recommendations-093021_508_FINAL%203_.pdf) (See slide 63).

- Add a new § 204.19 to address configurations for infection control. We recommended adding a new section titled, “Configurations for Infection Control” that includes the following language: “(a) Consistent with their Department-approved Emergency, Pandemic, and Disaster Preparedness Plans, facilities may repurpose rooms as necessary for cohorting residents and staff and implementing infection controls during an outbreak of infection. (b) Residents may be moved from their bedroom to another bedroom as part of a cohorting effort related to infection control. Residents retain the right not to be moved unnecessarily and to be moved as few times as necessary to ensure the infection control goals of cohorting.”
- Add a new § 204.20 to address hand sanitization stations. We recommend the addition of a section titled “Hand Sanitization Stations” that would say: “Stations for hand cleaning and sanitizing shall be installed outside every bedroom and at least every 20 feet in hallways and common areas.”

**4) Chapter 205. Physical Environment and Equipment Standards for Long-Term Care Nursing Facilities Alterations, Renovations or Construction Approved Before \_\_\_\_\_ (Editor’s note: The blank refers to the date 6 months after this regulation is published as a final-form rulemaking).**

- Revise § 205.6(b). Times have changed and it no longer seems appropriate for anyone but residents to reside in a long-term care facility. That said, we believe the Department could allow a process to grandfather anyone already living in the long-term care facility as of the effective date of the regulations. After the effective date of the regulations, no new individuals should be allowed to reside in a nursing home if they are not a resident. Anyone grandfathered must be held to satisfy background check requirements similar to those applied to staff. We endorse the specific language recommendations and comments regarding this section provided by CARIE and CLS in their mark-ups of the proposed regulations.

- Do not delete, but rather add to § 205.66(i). We strongly recommend that this section not be deleted, and that the Department add the following language to this section: “HEPA air filtration systems must be installed or mobile HEPA air filtration devices must be employed in existing construction. HEPA air filtration systems and devices must be adequate and rated as appropriate for the size of the spaces in which they are used. Filters for HEPA air filtration systems and devices must be replaced in accordance with manufacturer specifications.”
- Add a new § 205.69 addressing electronics and technology requirements. More and more, residents will need access to the internet to communicate with family and friends, access resources, keep up with current events, engage in activities and remain connected with the outside world. Access to the internet has become essential and is particularly needed to avoid the risk of isolation that institutional settings pose. We therefore recommend a new § 205.69 be added with the following language: “A facility shall have Wi-Fi, broadband, and internet technology as well as devices for the facility, staff, and residents to use in operating the facility and communicating with individuals outside of the facility.”

## OTHER COMMENTS

Since the advocacy organizations in the coalition of which PHLP is a member believe so strongly in the need for comprehensive reform, in November 2020 we drafted and submitted to the Department a complete mark-up of the existing regulations, reflecting the comprehensive changes we believe the Department must make. These recommendations can be found at <https://www.carie.org/wp-content/uploads/2021/01/Cover-Letter-and-NF-Facility-Regulation-Recommendatons.pdf>. We are hopeful that the remaining sections of the proposed regulations and the entirety of the final regulations will reflect the overarching reform that is so desperately needed to improve the nursing home regulations for residents and their loved ones.

PHLP looks forward to reviewing and commenting on the additional upcoming releases of the nursing home regulatory package and reserves

our ability to submit additional comments on the first and second packages in light of those new proposals.

Thank you for giving us the opportunity to comment.

Very truly yours,

/s/

Laval Miller-Wilson

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