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Submitted by e-mail to: RA-DHLTCRegs@pa.gov; irrc@irrc.state.pa.us

Ann Chronister
Director, Bureau of Long-Term Care Programs
PA Department of Health
625 Forster Street, Room 814
Health and Welfare Building
Harrisburg, PA 17120

October 24, 2022

Dear Ms. Chronister:

LeadingAge PA, an association representing more than 370 mission-driven providers of senior services, appreciates the opportunity to offer comments on final form Rulemaking 10-224 (Long-Term Care Facilities, Rulemaking 4), listed on the Independent Regulatory Review Commission (IRRC) website as IRRC # 3343.

LeadingAge PA appreciates the Department of Health's (DOH's) willingness to collaborate with stakeholders to address the issues raised in response to its proposal to increase the nursing hours per patient day (NHPPD) from 2.7 to 4.1 immediately upon publication of final form regulations in the *Pennsylvania Bulletin*. The initial proposal was not reasonable or attainable, especially given the workforce and fiscal crises nursing homes are facing. We appreciate that DOH has provided until July 1, 2023 to begin to increase the NHPPD to 2.87 and until July 1, 2024 to increase to 3.2. This NHPPD requirement and the per shift requirements in 211.12(f)(1) will still be extremely challenging for many homes. We encourage DOH to provide continued support for workforce initiatives across the state as well as education and technical assistance rather than sanctions wherever possible.

In many communities, the workforce to support these increases does not exist. Therefore, we respectfully request that, in recognition of the workforce crisis in long-term care, DOH work with stakeholders, including other state agencies, to promote entry into the long-term care workforce and to establish career paths to encourage workers to continue in the long-term care field. In the commentary, DOH has committed to this and we look forward to working alongside DOH to achieve this goal. As we have mentioned in previous comments and meetings, LeadingAge PA has several workforce initiatives underway and would be pleased to assist with additional ways of bringing new people into the field. In addition, prescriptive staffing ratios, if adopted, require thoughtful enforcement strategies, appropriate flexibility, consultation with stakeholders, and time for nursing facilities to plan and implement, especially during the current cross-sector workforce crisis. We ask that DOH allow a level of flexibility to providers who are working in good faith to meet the new requirements but are unable due to difficulties in staff recruitment or transient factors such as staff illnesses or community emergencies. We request that DOH collaborate with stakeholders to outline criteria for staffing flexibility, for example, if the nursing home has staffed consistently above the required NHPPD until a large number of staff came down with influenza one week. We would also urge DOH to focus on education and technical assistance rather than sanctions during the first year of implementation

LeadingAge PA appreciates and supports DOH's proposal in section 211.12 Nursing Services to allow a facility to substitute an LPN or RN for a nurse aide, or an RN for an LPN position. However, we would request that DOH add other staff in the minimum staffing thresholds, such as physical therapists, occupational therapists, speech therapists, social workers, and activities professionals, since these professionals are important to the residents' quality of life and well-being. We would therefore strongly urge striking the proposed addition at 211.12(i.1) that states, "Only Direct resident care provided by nursing service personnel shall be counted towards the total number of hours of general nursing care required under subsection (i)." We further believe that the public health, safety, and welfare may be better protected by expanding the definition of direct care staff to align with the Federal definition.

As we have explained in prior comments, the challenging environment that surrounds this rulemaking includes a global pandemic, a workforce crisis, and extremely difficult financial conditions. While facing these challenges, many high-quality nursing homes are contemplating or already taking action towards reducing the number of residents they serve or total closure of their buildings. In March, LeadingAge PA surveyed our membership to understand to what extent members are being forced to take beds "offline" and limit capacity. Survey participants reported a four-fold increase in the number of beds taken offline between 2019-2021, with the top reasons being inadequate staffing (RN/LPN and nurse aides) and inadequate Medical Assistance (MA) reimbursement.

LeadingAge PA appreciates the collaborative effort between stakeholders, the Administration, and the General Assembly to provide nursing facilities with a desperately needed MA rate increase that can help support the increased costs of the new NHPPD requirements. We must remind these stakeholders, however, of the lack of any broad rate increase for nearly a decade, which has required nursing homes to "do more with less" for years, creating distress, fiscal uncertainty, and the need for difficult decisions. We also note that the need to increase staffing to meet the NHPPD requirements and associated ratios envisioned in this final form rulemaking is ongoing, so we must strongly urge the Administration and General Assembly to provide continuing MA funding increases to meet the increased staffing requirements at year two and beyond.

LeadingAge PA continues to have several overarching concerns about the process of this rulemaking, which will likely create a need to work closely with the Department to address issues during the initial implementation of the regulations if they are promulgated. Our primary process concerns are as follows:

- The Department of Health's (DOH's) review of the fiscal impact on facilities continues to lack meaningful analysis of costs on the regulated community and ignores the potential impacts on small businesses and on individuals who require nursing home care. DOH has improved their analysis of the MA costs but has not considered the costs that will be borne generally by the regulated community or by the private pay residents.
- Release of the regulatory package in sections lacks reasonableness, transparency, and clarity. The release of regulations in four packages has made it nearly impossible to understand all of the changes, much less offer comments on the interrelated concepts and definitions that are addressed separately. Further, the definitions section was not available for comment at a time when stakeholders knew to what the definitions would be applied until the regulation was in final form.
- Since the regulatory packages have obscured the proposed changes, DOH has not been able to benefit from stakeholder perspectives on some of the proposals, which are likely to lead to unintended consequences that will need to be worked out in discussions and interpretive guidelines. The path forward will need to include continued collaboration between state government and industry partners to clarify the requirements and how they will be implemented.

- DOH continues to include new Federal requirements for the license-only homes. There has been no indication of a systematic problem with these homes and DOH has not otherwise justified why these homes should be included in Federal requirements of participation for Medicare and Medicaid when these homes do not accept reimbursement from these sources. These homes should be exempt from the updates proposed in this final form rulemaking.

In addition to the general themes noted above, LeadingAge PA has comments and concerns about several specific regulatory changes included in the final form, which we will turn to now. We highlight one in particular:

DOH Should not Circumvent the Legislative Process to Change the OAPSA Requirements

LeadingAge PA has significant concerns about section 201.19(9), which would require, in the event of a conviction prior to or following employment, a determination by the facility of an employee's suitability for initial or continued employment in the position to which the employee is assigned. LeadingAge PA has been involved with discussions with both the Wolf Administration and the General Assembly on modification to the Older Adults Protective Services Act (OAPSA) since the Pennsylvania Commonwealth Court decision in *Peake v. Commonwealth of Pennsylvania, et al., 216 M.D. 2015.* To mandate information regarding criminal convictions seems to be mandating a change to law thus circumventing the legislative process perhaps because the administration has not been successful in negotiating either with the General Assembly or stakeholders. Further, after the *Peake* decision, the PA Department of Aging's advice to nursing facilities was to seek legal counsel if they chose to hire an individual with a criminal conviction. It is troubling that DOH may be asking for information to be included in a personnel file that may be under attorney/client privilege. This requirement creates a liability for providers but offers no protections and no guidance. This requirement at §201.19(9) must be removed from the regulations, but if it is not, it must include liability protections for employers and should work in conjunction with a waiver process through the Department of Aging.

In various sections of 201.18, terms and/or phrases were used that were not well defined and could be interpreted differently by different surveyors. LeadingAge PA appreciates that DOH has addressed the following concerns we expressed:

- DOH has revised the description of 201.18(d.1)(4) to define that the director of nursing services should have knowledge and experience OF THE FACILITY, ITS POLICIES AND PROCEDURES AND RESIDENT NEEDS to compensate for the time the administrator is not in the building.
- In 201.18(d.2), DOH addressed our concern about how the administrator's work schedule shall be publicly posted in the facility by indicating it would be the anticipated biweekly work schedule and would be updated within 24 hours of a change.
- DOH has revised 201.18(e)(2.1) to address our concerns about the description of satisfactory housekeeping in the facility and maintenance of the building and grounds, which could have been widely interpreted based on an individual's personal standards.

Regarding 201.18(b)(2), LeadingAge PA is concerned about the requirement to return any personal property remaining at the facility within 30 days after discharge or death, given that this action is not within the facility's control. It would be sensible for the nursing facility to contact the resident's representative and offer to return any personal property remaining at the facility within 30 days after discharge or death, but as a practical matter, the facility should not be required to return property if no one wants it, nor should it be held responsible if they are unable to contact or make arrangements with the resident's representative within the given time frame. DOH should allow the policies to indicate that the facility will make reasonable

efforts to contact the resident's representative and offer, but it should not require the facility to meet a requirement it cannot control.

Regarding 201.18(e)(3), the requirement for *monthly*, rather than a *periodic* meetings or reports between the administrator, governing body, medical and nursing staff, and other professional and supervisory staff seems overly prescriptive and there was no opportunity until now to review and comment.

LeadingAge PA is disappointed that DOH has determined not to address our concern in 201.18(h). We would recommend that the DOH add the term "business," so that the sentence reads: "The facility shall provide cash, if requested, within one BUSINESS day of the request or a check, if requested, within three BUSINESS days of the request." To safeguard resident cash, most facilities do not have ATM cards or availability to obtain cash except on days that banks are open. LeadingAge PA continues to request that this requirement be modified so it meets banking schedules.

It may be possible to interpret Section 201.19(8) to require both a Pennsylvania State Police report and a Federal Bureau of Investigation (FBI) report. We believe the correct interpretation is that the FBI check is required to be included only if it is required under the Older Adults Protective Services Act, and not otherwise. We are hopeful that DOH will make it abundantly clear to its surveyors and the regulated community that the current requirements only include an FBI check under certain circumstances, such as if a care worker has recently moved to Pennsylvania from out of state. Please see our note above about our significant concern and request to remove the language at 201.19(9).

The new requirements for staff development appear to be reasonable topics such as dementia management and communication skills, however, they are expensive if there are additional hourly requirements, as is discussed as a possibility in the RAF. LeadingAge PA does not find a requirement for additional hours of training in the regulations and would respectfully request that DOH refrain from requiring a specific number of additional hours for the training in the hopes that facilities will be able to incorporate these topics into existing training schedules that engage and quickly educate staff on the appropriate topics. DOH should allow facilities to create a checklist or other means to document that employees have received training on all the topics described. LeadingAge PA would also be interested in discussing with the department what it envisions would be covered under these topics.

LeadingAge PA appreciates DOH's response to our concern in 201.24(e) about exhausting the resident on the day they move to their new home, often following a hospitalization or other serious health issue, to comply with the admissions process within two hours of their admission to the facility. LeadingAge PA appreciates that DOH will allow the resident or the resident representative to receive the orientation and discussion components within 24 hours of admission, if they prefer, without the facility being cited for respecting the resident's preferences.

The 201.29 Resident Rights section in general streamlines and clarifies the requirements by deferring to federal resident rights, which are extensive. There is an addition of 201.29 (p), however, which is unnecessary since it is, with one exception, a duplication of the Pennsylvania Human Rights Act protections for all Pennsylvania citizens, and federally for clients of health care entities that receive federal funding through Section 1557 of the Patient Protection and Affordable Care Act. The protections for persons based on ability to pay are new and should have been considered, like all the others, through either the state or federal legislature. Further, it is unclear how this new right will be implemented and what it will mean in practice. Please remove Ability to Pay from this list.

The final form rule changes several aspects of the role of the Medical Director. It is appreciated that DOH

states in the RAF that it does not believe the additional four hours of continuing medical education (CME) pertinent to the field of medical direction of post-acute and long-term care medicine will be in addition to the Medical Director's requirement for 100 hours of CME. LeadingAge PA will observe whether Medical Directors begin to pass the cost of the new requirement to the nursing facility and would request that DOH agree to work with facilities to address the costs if it becomes an issue for them. Providers have also reported difficulty in finding medical director support in some communities, as the amount of time physicians are willing to spend is very limited. The added responsibilities in section 211.2(d) may compound this difficulty, and it appears DOH has not considered the potential increase facilities must budget in their contracts with medical directors for these additional responsibilities.

The change in section 211.3 Verbal and telephone orders (b) regarding the timeframe to sign a verbal order is still unreasonable because health care clinicians are busier than ever. The current requirement is within seven days. LeadingAge PA appreciates that DOH has changed the deadline in the final form to within 72 hours compared to the proposed deadline of within 48 hours. But even with the increase and allowing for physician delegates, the commonwealth does not have enough medical personnel to care for citizens, rendering this change unreasonable especially since there is seemingly no data to show that the current regulation is not sufficient.

LeadingAge PA would respectfully request that DOH amend the language in 211.12 Nursing Services (i.1) that limits the staff who may be counted in the total number of hours of general nursing care for the minimum thresholds. We would, as we have stated before, respectfully request that DOH align the definition of general nursing care staff with the federal regulations and recognize that many other professionals in addition to nurse aides and nurses improve the quality of care and quality of life of the residents.

In section 211.16, LeadingAge PA appreciates that DOH has modified the proposed requirements for a social worker for all nursing homes to allow in the final form opportunities to accommodate the needs of smaller homes who may more appropriately employ a part-time social worker. LeadingAge PA requests that DOH be attentive to any issues that arise with the smaller homes that may newly seek to employ part-time social workers and be willing to work with LeadingAge PA and its members on solutions.

In conclusion, DOH has addressed some but not all of the concerns LeadingAge PA has expressed. Furthermore, additional changes were made between proposed and final form that may lead to new concerns and issues. Overall, we respectfully request that if the regulations are promulgated, DOH continue to work with the regulated community so that together we can address issues that arise and work toward our shared goal of providing high quality care for our seniors.

The increased staffing ratios, if adopted, will require thoughtful enforcement strategies and continued consultation with stakeholders, especially during the current cross-sector workforce crisis.

If mandatory staffing minimums are increased and the proposed staffing ratios are adopted, it will be essential to assure adequate, ongoing MA funding to support the effort. It is also imperative to allow sufficient flexibility to mitigate punitive action against facilities that are typically compliant or demonstrate significant effort towards compliance. Despite the reduction in NHPPD and proposed ratios from the initial proposed regulations, meeting the increased staffing minimums from the final form package in the current labor environment will still be nearly impossible for many providers. The proposed prescriptive staffing ratios, with requirements for each shift that do not consider the needs or preferences of residents, nor the availability, needs, or preferences of staff, present a substantial risk that nursing facilities will not be able to meet these requirements no matter how hard they try. It is unlikely that the workforce crisis we are experiencing will improve any time soon – and it is likely to worsen as the demographics continue to shift

toward more older adults and fewer people of working age. Therefore, it is important to discuss how DOH will determine compliance and sanction noncompliance.

LeadingAge PA would respectfully request that the determination of compliance with staffing requirements offer flexibility that recognizes the serious workforce crisis that faces nursing facility providers and the difficulty of meeting any additional staff coverage requirements. This flexibility would allow the nursing facility to adjust to call-offs, staff illnesses, or weather emergencies that are beyond their control. Additional factors that could be considered would include demonstrated efforts to recruit the personnel in question, steps implemented to ensure resident well-being such as changing the deployment of staff to ensure resident needs are met, and observations that residents are receiving the services necessary to attain or maintain their physical, mental, and psychosocial well-being at the highest practicable level. DOH should allow some flexibility in meeting any staffing requirements, not only in recognition of the staffing crisis, but also so that staffing can respond to resident needs and preferences, which may not always align with the proposed ratios.

Given the current workforce crisis, these regulations are highly likely to subject nursing facilities to citations and fines. Such enforcement actions would dissipate the funds needed to care for residents, which is an unintended outcome that would not improve care. The DOH should thoughtfully consider the workforce crisis and work with stakeholders to mitigate the impact of enforcement actions and sanctions that are based on inability to recruit an adequate supply of workers to assure that Medicaid and private dollars intended for use at the bedside are not re-directed to cover punitive fines to the detriment of nursing home residents.

In attempting to comply with increased staffing requirements, many high-quality facilities may be forced to limit admissions based on their available staff. The ongoing struggles for nursing homes to compete with acute care settings for skilled and clinical staff remain front of mind for many members. LeadingAge PA respectfully reminds the DOH that an inability to admit additional residents because of prescriptive staffing ratios can cause a cyclical problem of reducing available revenue for the facility for post-acute rehabilitation services. Ongoing inability to admit will cause individuals to remain in hospitals for longer than is needed. While the Department intends to increase quality by increasing staffing, we must be aware of the potential for the unintended consequence of limiting access to care as facilities are unable to hire or make decisions about their available capacity for Medicaid residents. LeadingAge PA requests that DOH be alert and responsive to these potential issues and address them speedily and collaboratively with stakeholders should they occur.

LeadingAge PA appreciates that DOH has chosen to phase in the staffing increases and respectfully requests that if the regulations are promulgated, DOH create a careful pathway during which the DOH meets at least quarterly with provider stakeholders including LeadingAge PA, to allow the opportunity to gain input and make adjustments as adverse outcomes are observed. Further, LeadingAge PA urges the DOH to recognize and assist in efforts to provide the continuing increases in funding needed in the MA Program to support the ongoing costs of this proposal and to assist in efforts to mitigate the ongoing costs to providers and residents that will not be supported by an MA increase. Without the necessary funding to continue to support this proposal in year two and beyond, the increased staffing requirements will compound existing business challenges. Workforce issues, inflation, and wage compression are already hobbling efforts to rebuild census and support full nursing home capacity. This is putting a strain on facilities that will likely increase the risk of reduced capacity or closure, further restricting access to affordable, quality care for elderly Pennsylvanians across the state.

Release of regulatory packages in sections lacks reasonableness, transparency, and clarity and will require

continuing collaboration between DOH and the regulated community to work through issues as they arise.
These final form rules are noted to be the fourth of the series of related rulemaking packages that DOH expects will, if promulgated, update the current state nursing facility regulations. Until now, neither the regulated community nor the public could assess the full scope of changes that are included in this set of final form regulations. Even delivering the four final form rules on the same day and considering them as a set allows the risk of additional confusion as each package requires individual approval by the Independent Regulatory Review Commission (IRRC) and oversight committees in the General Assembly. This could result in incongruous enactment and confusion that will not further DOH's stated goals of improving the quality of care.

In its comments on the first set of DOH's proposed regulatory package, the IRRC requested that the Department consider the significant concerns of the regulated community and the requests to withdraw this proposed regulation and move forward with one comprehensive regulation – or if it continues along this path of issuing separate regulatory packages, to explain why this approach is reasonable. Finally, the IRRC requested that the Department ensure that the regulations and any amendments are consistent across the packages, and that the interrelation and any impacts between the packages are clearly presented for the regulated community. LeadingAge PA agrees with these comments and was disappointed that DOH did not combine the regulatory packages into one coherent whole before publishing again and was further disappointed that they were provided as final form regulations rather than allowing the robust stakeholder comments and department response that would enhance the understanding of various viewpoints and the decisions. It is reasonable and in the public interest that the nursing facility regulations receive public comment in a single regulatory package so that stakeholders have transparency and clarity on how the regulations interact with one another.

Continued collaboration between state government and industry partners is needed to improve quality and access to care for older Pennsylvanians.
Ongoing stakeholder engagement will be crucial as any finalized regulations and sub-regulatory guidance is developed. LeadingAge PA requests that both providers and their associations be included in the development of subsequent sub-regulatory guidance to inform surveyors how to monitor compliance with the new package. The inclusion of existing providers who understand the effects the regulation will have on their nursing homes will be key to DOH receiving effective feedback from the regulated community.

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 should they be needed.

Please feel free to contact me if you have any questions regarding these comments or if we can be a resource to the department.

Sincerely,

Garry Pezzano
President and CEO, LeadingAge PA
gpezzano@leadingagepa.org