



June 27, 2022

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

VIA EMAIL to: [RA-DHLTCRegs@pa.gov](mailto:RA-DHLTCRegs@pa.gov)

Re: Rulemaking #10-224 (Long-Term Care Facilities, Proposed Rulemaking 4) 28 PA Code Chapters 201, 207, 209 and 211 as published in the May 28, 2022, [Pennsylvania Bulletin](#)

Dear Ms. Gutierrez:

On behalf of our 1.8 million members and all older adults throughout the Commonwealth, AARP Pennsylvania appreciates the opportunity to submit comments in response to Rulemaking #10-224. We are pleased that the Pennsylvania Department of Health (the Department) has proposed to update its nursing home licensing regulations as these rules are vital to the health, safety, and well-being of nursing home residents and important to their family caregivers who often assist with providing care and advocacy on their behalf.

**PROCESS COMMENT:**

We understand that this proposed rulemaking is the fourth and last of the packages that will eventually be combined to create a final, comprehensive nursing home regulatory package. We found it quite challenging and cumbersome to review and comment on each package in isolation of the remaining proposed changes. Yet, we believe that given the importance and need for meaningful nursing home reform, it was vital that we comment.

**SUBSTANTIVE COMMENTS:**

**Section 201.19 – Personnel Records**

The Department is proposing to add a paragraph that would require a facility – in the event that an employee has a conviction – to include in the employee’s personnel record a determination of suitability for employment in the position to which the employee is assigned. The Department is not proposing a specific format for this determination and does not believe this requirement will be overburdensome to facilities. Since December 30, 2015 when the Pennsylvania Commonwealth Court’s *Peake v. Commonwealth of Pennsylvania* decision was handed down, AARP Pennsylvania was and continues to be among the stakeholder groups involved in discussions with the state’s elected and appointed officials on ‘fixing’ the Older Adults Protective Services Act (OAPSA). This Court’s decision found that it is unconstitutional for the offenses listed in OAPSA to result in a lifetime employment ban without further evaluation.

Although background checks are still required, the Department of Aging – which is responsible under law for the provisions of OAPSA - issued guidance recommending that “facilities subject to OAPSA requirements consult with an attorney prior to making an employment decision to ensure compliance with the Commonwealth

Court's guidance regarding exercising hiring discretion on a case-by-case basis. This guidance focused on the consideration of factors such as the nature of the crime, facts surrounding the conviction, time elapsed since the conviction, evidence of the individual's rehabilitation, the nature of the requirements of the job and the performance of the individualized risk assessments." In addition to the guidance posted on the Department of Aging's website, the Department issued a statement revealing that "after evaluation and in consultation with the Pennsylvania Office of Attorney General, the Commonwealth has decided not to appeal the Court's order. The Department anticipates action regarding OAPSA."

Today - seven and half years later - no legislative remedy has been achieved, and the Department of Health is proposing a regulation that differs from the guidance issued by the Department of Aging. AARP Pennsylvania believes that background checks help protect consumers and we encourage policymakers to require a comprehensive national background check prior to employment for all long-term care services and supports workers. Individuals who have been convicted of burglary, larceny, sexual crimes, violent crimes, or crimes involving abuse or neglect of vulnerable individuals should be prohibited from employment in all long-term care settings and Pennsylvania's Departments of Health and Aging, along with the General Assembly, must take more immediate action to 'fix' the Peake decision legislatively.

### **Section 211.12 - Nursing Services**

AARP Pennsylvania appreciates the Department's acknowledgment in proposed rulemaking 4 (#10-224) that the myriad of comments submitted, concerns expressed, and conversations held in response to proposed rulemaking 1 (#10-221) resulted in the Department revisiting its approach to enhance the care provided at the residents' bedside. However, despite the increased focus on staffing and its significance over the last 20 years to better resident care in nursing homes, AARP Pennsylvania continues to be disappointed in the lack of progress in addressing this issue. Although the Biden Administration announced earlier this year that the Centers for Medicare & Medicaid (CMS) intends to propose minimum standards for staffing adequacy that nursing home must meet, those proposals will take time to bring to fruition.

Although there is not yet a mandatory federal minimum staffing level, many stakeholders, including AARP, reference findings from the 2001 staffing study commissioned by CMS on this issue.<sup>1</sup> This study found that to prevent harm or jeopardy to residents of nursing homes a minimum of 4.1 nursing hours per resident day (hprd) in total was needed; this is comprised of a minimum of 0.75 RN hprd, 0.55 licensed practical or licensed vocational nurses (LPNs/LVNs) hprd (1.3 hprd for RNs and LPNs/LVNs combined), and 2.8 certified nursing assistants (CNA) hprd. Results from a 2021 Government Accountability Office (GAO) study (based on 2019 data), however, found that three-quarters of SNFs throughout the country did not meet the minimum RN and total nurse staffing that the 2001 CMS staffing study identified as needed to avoid quality problems.<sup>2</sup> This finding highlights AARP Pennsylvania's concern that nursing staffing levels in these facilities may be severely inadequate and additional measures are needed today to increase staffing overall in the nursing home industry.

As Pennsylvania reflects on the over 45,000 deaths from COVID-19, it is important to evaluate the reasons that a significant number (over 14,300) of these deaths occurred in nursing facilities. The COVID-19 pandemic demonstrates the importance of both adequately trained staff and a sufficient number of staff in nursing homes. The goal of minimal staffing requirements should be to increase staffing thresholds to at least the levels determined necessary to ensure adequate care. Minimum staffing requirements are one key part of ensuring

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<sup>1</sup> Centers for Medicare & Medicaid Services (CMS). Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes Phase II Final Report. Baltimore, MD: CMS; 2001.

<sup>2</sup> GAO, Medicare: Additional Reporting on Key Staffing Information and Stronger Payment Incentives Needed for Skilled Nursing Facilities, GAO-21-408 (Washington, D.C.: July 9, 2021).

quality of care. Other factors include appropriate training, the competency of staff, recruitment and retention, turnover, consistent staffing, appropriate adjustment of staffing levels to ensure that residents' needs are met above minimum staffing requirements, and the appropriate mix of staff. Nursing homes lead with "nursing" in their nomenclature because they depend on Registered Nurses and nursing care teams to deliver safe care to their residents. Without an adequate nursing staff, including licensed practical nurses (LPNs), and certified nursing assistants (CNAs) led by a registered nurse around the clock, safe care is not possible.

AARP Pennsylvania urges the Department to act swiftly in fulfilling its promise by taking the steps necessary to make the investments needed to improve nursing home care and ensure resident dignity and safety by improving staffing requirements as proposed in this rulemaking now. Pennsylvania's residents and families deserve to know that any licensed facility they go to will have adequate and safe staffing. Pennsylvania taxpayers have the right to expect that they will get value for the billions of dollars they invest in nursing home care. Recognizing that much more is needed to better protect nursing home residents and ensure they receive the best care possible, it will also be important to communicate the minimum staffing levels in a consumer-friendly manner, so they are understandable for residents, prospective residents, their families, and the general public.

We appreciate the opportunity to submit these comments and stand ready to assist in this important regulatory review process.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Johnston-Walsh". The signature is fluid and cursive, with a large initial "B" and "W".

Bill Johnston-Walsh  
State Director  
AARP Pennsylvania