PHCA
PENNSYLVANIA HEALTH CARE ASSOCIATION

June 27, 2022

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

Re: Proposed Rulemaking No. 10-224 (Long-Term Care Nursing Facility Regulations, 28 Pa Code §§ 201.18-201.17, 201.21, 201.24-201.31, 207.2, 209.3, 211.2-211.17)

Dear Deputy Director Gutierrez,

We write today regarding the Department of Health, Long-Term Care Facilities, Proposed Rulemaking 10-224, published in the *Pennsylvania Bulletin* on May 28, 2022.

Please accept these comments on behalf of the Pennsylvania Health Care Association (PHCA), and the more than four-hundred long-term care facilities we represent throughout the commonwealth, including nursing homes, personal care homes and assisted living communities.

This proposed rulemaking is the last of a series of four separate rulemakings that the Department of Health (Department) planned to release.

As we shared in our comments following the previous three proposed rulemakings, this fragmented process has and will continue to create confusion, and make it challenging for commentators and the regulated community to have a clear understanding of the impact of the proposed provisions in their totality.

A perfect example of this is related to the proposed amendments to Section 211.12 (relating to nursing services). This section was amended in both rulemaking number one and this rulemaking number four. In this rulemaking's annex between subsection (h) and the new subsection (i.1), five asterisks are noted. According to the Pennsylvania Code & Bulletin Style Manual, "Ellipses, five asterisks, are used to show existing text that is not proposed to be amended in the rulemaking.". Therefore, unless the reader knows to go back to rulemaking number one to review this section, one could interpret this entry to indicate that the existing promulgated portion of this section will not be amended and the current requirement of 2.7 minimum hours of direct resident care for each resident will be maintained.

Furthermore, this fragmented approach obligates the Department to issue four separate final regulatory packages, which would require the Independent Regulatory Review Commission (IRRC) to vote to approve or disapprove each package separately. Has the Department considered the ramifications of one or more of the four packages not being approved for

promulgation? For example, what contingency has the Department considered if rulemaking number one is approved and rulemaking number four is disapproved?

For these reasons, PHCA, once again, requests that a comprehensive package that includes all proposed amendments from the four proposed rulemakings be published, as proposed, with a new 30-day public comment period. Publishing all four rulemakings as proposed in one comprehensive package will remove the risk of partial approval from IRRC during the final rulemaking process. It will allow stakeholders and the regulated community the opportunity to understand the full impact of the proposed provisions as well as submit comments that are required to be addressed and considered in the development of a final rulemaking package.

On a positive note, PHCA supports the incorporation by reference of the Federal Rules and the elimination of existing duplicate state licensure provisions. In addition, based on our review of the preamble and annex, it appears the Department has abandoned incorporating by reference Appendix PP of the State Operations Manual and has delineated the specific requirements nursing facilities must adhere to in the state regulations. PHCA appreciates and supports these decisions. It is our belief that this approach will help to ensure consistency in the interpretation and application of the provisions and clearly define the requirements nursing facilities are obligated to adhere to.

In addition to the above, PHCA is submitting the following comments on specific proposed amendments.

§ 201.18 (relating to management)

Subsection (c) Governing body to report within 30 days any changes in CHOW information submitted to the Department. Without further information or a definition, it appears to apply to any change in any of the documentation now required to be submitted in support of an application (new and CHOW) and any change to the information in the documentation. The Department should specify what information they want to have updated; otherwise, facilities could be at risk if, for instance, a sister facility in another state received a civil money penalty and the PA facility did not report that to the Department within 30 days.

Subsection (d1) removes the requirement that a nursing facility with 25 beds or less seek an exception to share a nursing home administrator and proposes new language that permits a nursing facility with 25 beds or less to share an administrator if certain conditions are met. PHCA appreciates and fully supports this proposed amendment.

Subsection (h) requires a nursing facility to provide cash, if requested, within one day of the request or a check, if requested, within 3 days. While nursing facilities make every effort to accommodate a resident's request for cash, depending on the timing of the request and the number of requests they receive this provision will be challenging for nursing facilities to fulfill. For example, on weekends the volume of requests for cash can be overwhelming and the nursing facility may not have access to cash on short notice due to posted Business Office Hours. PHCA recommends that the Department consider amending this language to require a

nursing facility to provide a resident with cash within one day, if the amount being requested is $100.00 or less, any amount over $100.00 must be provided within one bank business day.

201.21 Use of outside resources

Facility required to ensure that staff obtained from outside resources are "*physically able to perform duties*." This is ambiguous and may lead to challenges under the Americans with Disabilities Act. Does the Department mean that staff from outside resources are "medically cleared to perform duties" referring to health screenings?

§ 201.24 (relating to admission policy)

Subsection (e) requires the governing body of the nursing facility to establish written policies and procedures related to the admission processes for residents which includes the introduction to at least one member of the professional nursing staff for the unit where the resident will be living and to direct staff assigned to their care; the review by staff of orders prior to introduction; orientation to the facility; a description of facility routines; discussion and documentation of resident's routines and preferences; and provide assistance to the resident to create a homelike environment and settle into their new surroundings. Subsection (f) requires all this to occur within two hours of the resident's admission.

PHCA understands the intent of these proposed requirements and is not opposed to the list of actions to be taken by the nursing facility; what is of concern is the timeframe in which nursing facilities will be required to comply. The transition to a nursing facility can be difficult for a resident and it is important not to overwhelm them with too much information in a short period of time.

Furthermore, nursing facilities cannot control arrival times from discharge locations (i.e. hospitals) of new resident admissions. A resident's time of arrival to a facility, especially if late in the day, will have an impact on their state of mind and ability to absorb a significant amount of information. The priority for a nursing facility and the staff when a new resident is admitted is to conduct a thorough assessment of the resident's needs and preferences. This assessment alone can take up to two hours to complete.

PHCA recommends that the Department consider amending the provisions to require that within two hours of a resident's admission the facility offer a basic welcome to the building; conduct the nursing assessment to determine the resident's care needs and preferences and begin the development of the resident's comprehensive care plan. Then, within 24 hours of the resident's admission, require every department to visit with the resident, provide a detailed orientation, and a description of facility routines. It is important for the resident to feel comfortable and safe, not overwhelmed and anxious. Easing the resident's transition to the nursing facility setting is a much better approach than overwhelming the resident with too much activity and information.

§ 211.2 (relating to medical director)

Subsection (c) adds a new annual training requirement for the nursing facility's medical director. The language requires the medical director to complete at least 4 hours annually of continuing medical education pertinent to the field of medical direction or post-acute and long-term care medicine. PHCA supports this concept that medical directors should have pertinent training; we do, however, have two clarifying questions:

1. Who will be held accountable to ensure that this provision is met and to track the training completed by the medical director? Perhaps, this should be a requirement that falls under the jurisdiction of the Board of Medicine and the Board of Osteopathic Medicine. Furthermore, we would suggest that instead of requiring CME that facilities are not able to provide, the Department might consider changing this to 1 hour of in servicing by the nursing facility within their Quality Assurance Processes.

2. Will there be an approved training site for medical directors?

§ 211.3 (relating to verbal and telephone orders)

Subsection (b) amends the timeframe in which the physician or physician's delegee must date and countersign a verbal or telephone order with the original signature. PHCA is concerned that this change will be challenging for many nursing facilities and asked that the Department consider amending the requirement from 48 hours to 72 hours. This timeframe is more reasonable and achievable by nursing facilities.

§ 211.12 (relating to nursing services)

Subsection (f.1) paragraphs (4) through (5) propose minimum ratios for RNs, LPNs and Nurse Aides. Given the workforce crisis that nursing facilities are facing and inadequate Medicaid reimbursement, PHCA is adamantly opposed to the ratios as proposed.

We understand that the purpose of implementing minimum ratios and the resulting direct care hours per resident is to improve quality of care for residents and improve the work environment of the staff providing that care. However, if the Department moves forward with the ratios, as proposed, the result will not be improved quality of care or improved work environment for the staff; instead, it will be the closure or the sale of high-quality nursing facilities. This will lead to the loss of jobs, as well as access to care, for tens of thousands of Pennsylvanians.

Based on our analysis of the costs to nursing facilities associated with the proposed ratios, we believe the Department has significantly underestimated the costs to the Medicaid Program. It appears the Department determined the cost by multiplying the total ratio cost by the percentage of eligible MA residents in the provider class. The nursing allowable cost allocation for nursing homes as reported in column G, line 1 on schedule C of the MA-11 was, on average,

92% of the total nursing expense as reported in column D, line 1 and this would be a more reasonable percentage to use.

Recognizing the challenges an increase to 4.1 hours of direct care per resident per day proposed in rulemaking number 1 will present to nursing facilities, the Governor brought our organization together with LeadingAge PA and the Service Employees International Union (SEIU Healthcare) to ask us to work together on a compromise position that will address the concerns of the industry and the workers, while moving toward higher staffing minimum standards.

Our three organizations agreed to take on this task. Although we are not in full agreement, we are working to that end and propose the consideration of the following ratios and hours of direct care per resident per day:

- A minimum of one nurse aide per twelve residents during the day and evening shifts and one nurse aide per twenty residents overnight.
- A minimum of one LPN per twenty-five residents during the day shift, one LPN per thirty residents during the evening shift and one LPN per forty residents overnight.
- The PPD that is being consider along with these ratios is 2.87.

These provisions would be implemented in year one of the effective date of the amended provisions, which we propose to be July 1, 2023. The ratios would then increase in year two, which we propose to be effective July 1, 2024.

The ratios under consideration for year two are as follows:

- A minimum of one nurse aide per ten residents during the day shift, one nurse aide per eleven residents on the evening shift and one nurse aide per fifteen residents overnight.
- A minimum of one LPN per twenty-five residents during the day shift, one LPN per thirty residents during the evening shift and one LPN per forty residents overnight.
- The PPD that is being consider along with these ratios is 3.2.

To move forward with an agreement on the above ratios, language must be included in the regulation that permit nursing facilities to structure staffing shifts based on their operations and the needs of the residents they serve. Good faith language must also be included if a nursing facility is not able to meet the proposed ratios, but has demonstrated a good faith effort to comply and residents receive the care and services outlined in their care plan. The proposed language contained in this rulemaking regarding the substitution of a nurse aide with an LPN or RN and an LPN with an RN must be maintained.

More importantly, funding must be allocated in the amount of $294.3 million to increase the rates that are paid to Medicaid-participating nursing facilities for the services they provide to Medicaid residents residing in their facilities. This funding will provide nursing facilities with the means to hire additional staff, increase wages and recruit and retain competent, dedicated staff. Without this investment of funding by the state, nursing facilities will not have the means to comply with any increase in the minimum staffing standard. If this amount of funding is not

provided, PHCA will not be in a position to support a substantial increase in minimum staffing standards.

§ 211.16 (relating to social services)

Subsection (a) requires all nursing facilities, regardless of size, to employ a qualified social worker on a fulltime basis; and subsection (b) eliminates the allowance of a social work consultant. PHCA is concerned that this new requirement will be difficult for smaller nursing facilities to meet, particularly if the facility is in a remote/rural area. It is recommended that the Department consider amendments to this requirement as noted below:

- Nursing facilities with 25 beds or less be permitted to share a social worker. This would be similar to the provision contained in *§201.18 (relating to management)* regarding the sharing of administrators.
- Nursing facilities with 26 to 59 beds be permitted to have a parttime social worker based off of the facility assessment and needs of the residents.
- Nursing facilities with 60 beds or more be required to have a fulltime social worker.

PHCA also recommends that the Department recognize the time a social worker provides direct care to a resident by including these hours in the determination of a facility's direct care hours per resident per day. In both the preamble and the Regulatory Analysis Form, the Department states "These residents require engaged social workers to assist with their care planning and to provide psychosocial support." The Department highlights the importance of the services provided by social workers to the well-being of residents, yet refuses to allow these services to be counted as part of the facilities PPD. We implore the Department to reconsider this decision.

Effective Date of the Regulations.

In the preamble and the Regulatory Analysis Form the Department notes that the effective date and expected date of compliance of the final-form regulation will be upon publication in the *Pennsylvania Bulletin* and intends to set the same effective date for all four rulemaking packages. This is very troubling given the magnitude of the changes being proposed in the four rulemaking packages.

Nursing facilities will need time to first understand the new requirements, determine the steps they must take to come into compliance, then work toward compliance. PHCA recommends that the effective date of the regulations, except the provisions contained in § 211.12 (relating to nursing services) be no sooner than 6 months after publication of the final rulemakings in the *Pennsylvania Bulletin.* The effective date of the provisions contained in in § 211.12 (relating to nursing services) be, as noted above, July 1, 2023 for year one ratios and July 1, 2024 for year two ratios.

We are hopeful that the Department will seriously consider our comments and recommendations to this rulemaking, as well as the three prior proposed rulemaking packages. We would welcome the opportunity to work with the Department to implement a final rule that ensures the health and safety of the residents served in nursing facilities, access to needed nursing facility services and the sustainability of the industry.

PHCA and our members are dedicated to protecting our most vulnerable citizens, and we implore the Department to support us with this mission. Together we can make a difference and improve the lives of our residents.

Thank you for the opportunity to share our comments and concerns. We look forward to working with the Department as these regulations move forward.

If you have any questions, please reach out to me at 717-221-7925 or zshamberg@phca.org.

Sincerely,

Zach Shamberg
President & CEO