DISABILITY RIGHTS PENNSYLVANIA

Disability Rights Pennsylvania
301 Chestnut Street, Suite
Harrisburg, PA 17101
1-800-692-7443 (Voice)
1-877-375-7139 (TDD)
www.disabilityrightspa.org

VIA EMAIL

June 27, 2022

Ms. Lori Gutierrez
Deputy Director - Office of Policy
625 Forster Street, Room 814
Health and Welfare Building
Harrisburg, PA 17120

Re: Long-term Care Nursing Facilities Proposed Rulemaking 4: 10-224

Disability Rights Pennsylvania (DRP) is the federally mandated, state designated Protection and Advocacy (P&A) system for persons with disabilities in Pennsylvania, and it has been providing legal and advocacy services to Pennsylvanians with disabilities for over 40 years. We are pleased to be given the opportunity to comment on package four of the Department of Health's (DOH) proposed rulemaking updating the Commonwealth's nursing home regulations. These updates are long overdue and necessary to improve quality in care for residents. Comprehensive reform is necessary to ensure that deficiencies are addressed.

While we are pleased to see DOH has combined the planned fourth and fifth packages into one final package, we nonetheless continue to believe that the Department should have issued all the proposed changes at once. Separate packages have made it impossible for stakeholders and the general public to provide meaningful feedback, as no one can understand the full impact of each proposed rulemaking without seeing it in context with the entire package. Individual subsections of regulations cannot be read in a vacuum; they must be read collectively.

We also note the importance of DOH thinking beyond the federal requirements. There are far too many instances of the Department deleting

regulations simply because they are “duplicative” of federal rules. However, the federal rules are a floor, not a ceiling, and the Commonwealth is free to provide its nursing home residents with greater protections than do the federal requirements. In fact, Pennsylvania has regulations that improved upon federal regulations but now those improvements have been deleted. In many areas, the Department appears to have erred on the side of doing the “bare minimum” by simply allowing the federal regulations to govern. We are concerned that the Department is relying on federal regulations as a substitute for meaningful state requirements. This package is especially concerning given the proposed deletion of sections pertaining to resident rights, admissions and discharges.

Given its aging demographics, Pennsylvania should serve as a leader in this area by demonstrating how states can effectively regulate long term care facilities to provide for optimal outcomes for residents’ safety, health, and well-being. Simply deferring to the federal regulations is not leading. We urge the Department to consider areas in which it might make sense to go beyond the federal requirements and reexamine its decision to eliminate so many of the state requirements that improved upon the federal regulations. We offer our comments on specific sections below.

§ 201.18. Management:

(a): We object to the Governing Body requirement should not be deleted, and request that it be put back into the regulations to remain a requirement if federal regulations change. Requirements related to the Governing Body should also remain, such as the requirements in (d) related to resident care policies and bylaws governing operation of the facility.

(c): We support this change and believe it will help DOH to better monitor facilities for potential adverse impacts that can come about from changes in leadership, ownership, or otherwise. We would urge the Department to establish a formal policy by which it conducts visits to facilities after the report of a change in the information reported in an application for licensure. This will ensure that residents are receiving the appropriate care and that all requirements are being met by the new owners.

(d.1): We support this addition. We are especially pleased with the requirements around administrator sharing in facilities that have fewer than 25 beds. This has established reasonable guardrails that will help ensure

that any administrator sharing between two facilities will not compromise facility operations, and by extension, residents' safety and well-being. It also ensures that residents and staff know where the administrator is if they need to report a concern.

(e): We support the addition of subsection (2.a), which requires administrators to ensure facilities have satisfactory housekeeping services and building and ground maintenance. The pandemic has shed a light on the importance of cleanliness in keeping residents safe and healthy.

(h): We believe facilities that have accepted responsibility for residents' funds should be required to turn that money over to residents almost immediately after such a request is made. Allowing facilities up to three days to issue funds via a check is unacceptable. If a facility has taken on this responsibility, they must be able to demonstrate that they can meet the residents needs, including providing money when requested. Requests for funds, whether they be via cash or check, should be honored within one day of the request.

§ 201.20. Staff development: While we agree with the additions to this section, more is needed. The Department must require more extensive training around the topic of abuse than what is required in 42 C.F.R. § 483.95. The federal regulations do not require training in how to detect abuse, nor in mandatory reporting requirements. In order to prevent abuse and quickly address it when it does occur, employees must know how to detect it in the first place.

In addition, we urge the Department to require training on physical, intellectual, and mental health disabilities, including dementia, and how to best meet the needs of residents with disabilities. Such training could include topics such as assistive technology, physical accessibility, and disability rights and available accommodations when voting.

We believe that in order to be meaningful, any type of required staff development must include assessments for competency. The regulations should mandate that facilities assess all staff and ensure they have a minimum level of competency in all areas covered by the facility's staff development curriculum.

§ 201.21. Use of outside resources:

(b): We disagree with the elimination of this subsection. The Department should affirmatively require facilities to contract with outside entities if they cannot provide residents with a needed service. Without this requirement, residents' health and safety may be at risk.

§ 201.24. Admission policy: We believe the admissions regulations must include explicit non-discrimination provisions, in order to combat on-going problems with structural racism and segregation within the Commonwealth's long term care facilities. We recommend that the Department adopt CARIE's proposed language, found below in red.

> Each facility governing body shall develop and submit to the Department an admissions non-discrimination policy that reflects the facility's plan to implement the following requirements:
>
> (i) A facility shall not discriminate against any potential resident on the basis of payment source.
>
> (ii) A facility shall not discriminate against any potential resident on the basis of race, gender, creed, color, sexual orientation, gender identity or expression, or in violation of the *Pennsylvania Human Relations Act* (PHRA) and applicable federal laws.

(a): We disagree with this deletion. Residents should be free to choose whether or not they want to designate a representative. The regulations should explicitly state that this is a resident choice. Many residents have full capacity to make all or many of their own decisions, and the regulations should not presume that all residents are or will eventually become incapacitated. People can remain free to maintain autonomy and independence if they can and wish to manage their own affairs.

(c): As written, this provides facilities with far too much freedom to deny admission to potential residents on the basis of disability. The standard is subjective, and as drafted will result in individuals making determinations about whether to admit a resident. Given the racial disparities within our long-term care system, this section is concerning as it may lead to greater disparities.

Facilities must comply with all state and federal anti-discrimination laws. We would encourage the Department to adopt the proposed language found in CARIE's comments. CARIE added language to subsection (c), as well as created subsections (c.1) and (c.2). CARIE's proposed language is below in red.

(c) A facility shall provide nursing facility level of care as residents require, in accordance with Section 211.10a Resident Services. A facility shall admit only residents whose individual nursing care and physical needs can be provided by the staff and facility. A facility must have and follow a written policy that outlines what nursing care and physical needs they can and cannot provide. This policy must

1) be pre-approved by the Department and any revisions must be approved by the Department before being implemented

2) compliant with the Americans with Disabilities Act and all other non-discrimination laws and regulations, including provisions in 201.29 (Residents Rights)

3) not discriminate on the basis of payor source

4) be publicly posted on the facility website and within the facility

5) be applied uniformly by the facility

Outside of the facility's written policy, a facility can only deny admissions if a potential resident's acuity exceeds that which a nursing home is required to provide or if a facility is at capacity of available beds.

(c.1) A facility shall retain a log of all referrals, all verbal or written requests or application for admission, and all outcomes of any referrals, requests, or applications for admission. The log shall contain for each referral a patient identifier, and indicate the race, sex, color, national origin of the referral, the date of referral, referring hospital or agency, and date and type of disposition of referral by the facility. This log shall be submitted to the Department annually with the civil rights compliance questionnaire.

(c.2) Any individual denied admission must be provided with a written notice of denial including the basis for the denial, a statement of their right to appeal and the process for appealing, contact information for local legal services to assist with the appeal, and contact information for the appropriate agency that can help them find alternative services.

(e): We welcome the addition of subsection (e). We believe these requirements will help to ensure that residents quickly become acclimated to the facility, its procedures, and staff.

§ 201.25. Discharge policy: We disagree with the Department's decision to delete discharge protections; these should have been strengthened, not deleted, and DOH must reexamine these proposed changes.

Residents do not have adequate protections against unjust and unsafe discharge or transfers to other settings. DOH must establish protections in regulation in order to prevent residents from being arbitrarily and carelessly evicted from a facility. Residents subject to discharge should have due process rights and be provided with notice and the opportunity to be heard. This is an opportunity for Pennsylvania to be a leader and offer its residents protections that far exceed those found in the federal regulations. We urge the Department to adopt CARIE's proposed language around discharges, found below in red.

> Any individual discharged or transferred must be provided with a written notice of denial including the basis for the denial, a statement of their right to appeal and the process for appealing, contact information for local legal services to assist with the appeal, and contact information for the appropriate agency that can help them find alternative services.
>
> Prior to any discharge or transfer, there shall be developed and implemented a centralized, coordinated, individualized discharge plan for the resident who would be discharged or transferred to ensure that the resident has a program of continuing, person-centered care after discharge from the facility and that the setting to which the individual is being discharged or transferred has the capability to meet the resident's needs and preferences. The discharge plan shall be in accordance with each resident's needs and preferences and shall include transfer by the facility of current person-centered service

plans and any advance planning documents or orders related to the resident.

§ 201.26. Power of attorney: DRP believes facility staff should not be serving in the position of substitute decision-maker for residents, as this type of arrangement is ripe for abuse and allows staff to have too much control over a resident's life.

As written, this section is now only about restricting who can serve as a resident's representative. In its explanation of the regulatory changes, the Department states that the term "representative" encompasses parties beyond powers of attorney. That should be made explicit in the regulation, and it should state that powers of attorney, guardians, and healthcare representatives are all examples of "representatives."

§ 201.29. Resident's rights: While residents' rights may derive from multiple statutory or regulatory sources, these rights are meaningless if residents cannot refer to one single statement of what their rights are. Laypeople do not understand the interplay between state and federal law and are unlikely to consult multiple sources in order to ascertain their rights. Most people would look to state regulations to determine their rights as a resident of a Pennsylvania based long-term care facility.

We therefore believe the state regulations should either spell out *all* the rights (even if some of the rights come from federal law), or, at a minimum, refer people to the federal source for the right. As noted by CARIE, "simply deleting previously articulated rights from the state regulations without noting the source of a federal right that exists to replace the previously articulated rights is unfair drafting." Thus, rather than deleting entire subsections of this portion of the regulations, we urge DOH to both cite to the federal regulations and expand upon the protections offered therein.

(a): We support the additions to this subsection. Residents should be involved in creating and implementing all policies related to their rights.

(d): While the federal regulations do require staff to be trained on residents' rights, they do not require annual trainings, nor do they require training by outside organizations. We believe staff should have annual trainings on residents' rights by the LTC Ombudsman Program, as well as annual

trainings on abuse, neglect, and exploitation by Older Adults Protective Services staff.

(g): We urge the Department to retain subsection (g) and improve upon it. We agree with CARIE's comments found below in quotes and adopt them as our own.

> "42 CFR 483.15(c)(7) [says] 'A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.' In our experience, this is not sufficient language to prompt nursing homes to engage in comprehensive, person-centered discharge planning. Discussion of alternatives settings, including possibly even transition back to a home and community-based setting is frequently skipped. Facilities have been known to discharge a resident to a homeless shelter. And, thus far, the state and federal regulations have failed to prevent residents from being given insufficient time, information, or assistance in having a safe and orderly transfer or discharge. We urge the Department to use its authority to expand upon the minimum requirements set by the federal regulations instead of deleting this section."

(i): Information about the Department hot line and local legal services called for in the current iteration of subsection (i) are not expressly listed in the federal regulations, nor is the requirement that the information be physically posted in a prominent location and in large print. This language should be retained in the regulations, not deleted. Posting this information is important for residents to exercise their rights and contact outside advocates for assistance when their rights are being violated.

(l): We urge the Department to explicitly state that, regardless of any delegation of decision-making authority to third parties, facilities must ascertain the resident's wishes and preferences in all circumstances and allow the resident to participate in the care planning process to the maximum extent they are able. This is consistent with the principles of Person Centered Service Plans and principles of self-determination and is particularly important for residents with disabilities.

(n): Although the Americans with Disabilities Act would require facilities to provide residents with information about their rights in alternative formats as needed, we nonetheless believe this should be stated outright in the state regulations. Failing to include it in state regulations risks facilities failing to meet these requirements, and risks residents failing to know their rights or other important information that is being shared.

(p): We strongly support the addition of this language.

§ 201.30. Access requirements: Rather than delete this subsection, we believe the Department should make facilities' obligations to allow visitors, and representatives from government agencies and other entities, such as DRP or a Center for Independent Living, more explicit.

§ 201.31. Transfer agreement: We believe residents should have the right to choose where they receive medical treatment, as would someone living in the community. Facilities should be required to counsel residents about the implications of receiving care at different local hospitals, such as by providing them with information about whether or not the hospitals participate in the resident's health plan. However, the ultimate decision about where to seek care should be left up to the resident unless there is an emergency situation, in which case the facility's transfer agreement would govern.

§ 207.2. Administrator's responsibility:

(b): We do not agree with the deletion of this subsection. Nursing staff should be charged with completing nursing tasks; their time should not be occupied with other duties, particularly in the age of massive staffing shortages. Without subsection (b), we fear nursing staff will be expected to complete an ever-increasing list of tasks, and facilities will use nursing staff to address staff shortages in other departments.

§ 211.2. Physician services:

(c): We support the changes to this subsection. We think requiring the medical director to undergo annual training in areas related to post-acute and long-term care will help ensure that the medical director and those that report to him or her are well versed in best practices for serving residents of long-term care facilities.

§ 211.6. Dietary services:

(b): This section should not be deleted. It is not difficult for facilities to keep a three-day supply of non-perishable food on hand at all times. In the age of climate change and corresponding increases in natural disasters and large storms, we think this requirement should be retained. It is important to ensure resident health and safety in the event of a natural disaster or storm.

§ 211.8. Use of restraints: We strongly disagree with DOH's decision to delete this section and defer to federal regulations that govern restraints, as the federal regulations do not provide enough protections to residents. Removing this section from the regulations would make nursing homes an outlier in how restraints are governed under state law and would be very different from how other disability settings regulate restraint usage. Removing this language risks increasing restraint usage, particularly for residents with more complex needs and is unacceptable. We urge the Department to retain this section and adopt the language proposed by CARIE, found below in red.

(a) Residents have the right to be free of physical, mechanical, and chemical restraints.

(b) Restraints are prohibited unless

(i) authorized in accordance with state and federal law,

(ii) ordered by a physician as appropriate to treat the individual's medical condition,

(iii) consented to by the resident or resident's representative, and

(iv) approved by the resident's person-centered service planning interdisciplinary team as part of the resident's written person-centered service plan and must include a written demonstration that less restrictive alternative means of controlling movement or behavior do not work. The person-centered service plan must outline how and when restraints are approved.

(c) Restraints may not be used for discipline, convenience, or in lieu of staff effort or adequate staffing levels to meet residents' needs.

(d) Locked restraints or any mechanical apparatus or device, such as shackles, straightjackets, cage-like enclosures or other similar devices, employed to restrict voluntary movement of a person that is not removable by that person may not be used.

(e) Restraints may not be used or applied in a manner which causes injury to the resident.

(f) Physical and mechanical restraints shall be removed at least 10 minutes out of every 2 hours during the normal waking hours to allow the resident an opportunity to move and exercise. Except during the usual sleeping hours, the resident's position shall be changed at least every 2 hours. During sleeping hours, the position shall be changed as indicated by the resident's needs.

(g) If restraints are used, a facility shall ensure that appropriate interventions are in place to safely and adequately respond to resident needs.

(h) A signed, dated, written physician order from a physician or physician's delegee authorized under 42 CFR 483.30(e) (relating to physician services), shall be required for a restraint. This includes the use of chest, waist, wrist, ankle, drug or other form of restraint. The order shall include the type of restraint to be used. It shall include the period for which the restraint is being authorized and the circumstances under which the restraints may be used. All other circumstances are prohibited and a violation of the resident's right to be free of restraints.

(i) The physician, or physician's delegee authorized under 42 CFR 483.30(e), shall document the reason for the initial restraint order and shall review the continued need for the use of the restraint order by evaluating the resident. If the order is to be continued, the order shall be renewed by the physician, or physician's delegee authorized under 42 CFR 483.30(e), in accordance with the resident's total program of care.

(j) Every 30 days, or sooner if necessary, the interdisciplinary team shall review and reevaluate the use of all restraints ordered by physicians.

Residents' person-centered services plan shall be updated to reflect the outcomes of these reviews.

(k) Any chemical restraints must be closely monitored to ensure no adverse reactions.

(l) The facility shall document daily all uses of restraints, including dates and times and staff persons involved. These documents shall be stored and made available for inspection by the Department and others authorized to view these records.

§ 211.12. Nursing services: The proposed regulations around staffing ratios and hours of care found in packages one and four are an improvement and must be adopted. However, in addition, the Department must require that facilities ultimately base their staffing on residents' needs. Care hours and ratios should therefore be minimums, and facilities should be required to go above these minimums based on their census and resident acuity levels. We encourage the Department to adopt CARIE's proposed language, found in red below.

> The following minimum nursing and nurse aide staffing ratios and minimum staffing levels are minimums. Actual staffing levels, which shall meet or exceed the minimum levels, must be determined specifically for each facility based on the actual needs of each resident as outlined in their comprehensive assessments and person-centered service plans, as well as in accordance with the facility assessment required in 42 CFR 438.70(e), which facilities shall be required to complete quarterly.

We continue to strongly support the increase in minimum number of hours of direct care per resident per day to 4.1 hours. The Department must retain this requirement in the final version of the regulations. This change is long overdue.

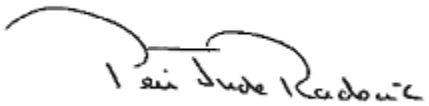
We also recommend the addition of language that requires staffing levels and ratios to *only* count RNs, LPNs, and CNAs who are providing direct care to residents. Ancillary staff cannot and should not be included in the calculation for purposes of compliance with staffing level and ratio requirements.

§ 211.16. Social services:

(a): We fully support the requirement that all facilities must have a social worker on staff. We would encourage the Department to add language requiring the social worker or a designee to meet with each resident and document in their person centered plan the resident's wants and needs as they relate to social services. In addition, language should be added requiring the social worker or a designee to support residents in acquiring technology skills so that they are better able to connect with friends and family outside the facility, particularly in times when contact may be limited, such as during an outbreak of disease.

We thank you for consideration of our concerns and suggestions. Please contact Jennifer Garman, Director of Government Affairs at 717-236-8110 ext. 327 with questions.

Sincerely,



Peri Jude Radecic
Chief Executive Officer