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DELAWARE NURSING HOME RESIDENTS QUALITY ASSURANCE COMMISSION

Eagle's Law Waiver Sub-committee

In-person & Virtual Meeting

Cisco Webex

Anchor Location: The Vero @ Newark

924 Barksdale Rd Newark, DE 19711

**Meeting of August 28, 2023**

FINAL

Sub-committee member(s) present: Norma Jones (virtually), Dr. Melissa Winters, PsyD (virtually), Hooshang Shanehsaz, RPH (virtually), Cheryl Heiks (virtually), Jennifer McLaughlin (virtually).

Sub-committee DNHRQAC members not in attendance: N/A

Others Present: Margaret Bailey, DNHRQAC Executive Director (in-person); Rob Smith, DHCQ (in-person); Maggie Noonan, Consumer; Mary Peterson, DNHRQAC; and Myke Sayer, Cadia Healthcare.

1. Call to order

The meeting was called to order at 2:11 PM. Commission members and other's present were identified for the record. A few individuals experienced login challenges; however the issue was resolved.

2. Approval of Previous Meeting Minutes

Subcommittee members voted and approved of the August 1, 2023 minutes draft as written.

3. Discussion of:

Eagles Law Calculation

The Eagle's Law Waiver Subcommittee invited Division of Health Care Quality (DHCQ) representative, Rob Smith and industry provider representative, Myke Sayer, to this meeting to discuss the Eagle's Law calculation. Eagle's Law only applies to Delaware skilled/nursing homes.

Mr. Smith mentioned that currently nursing home staffing ratio's are suspended, also known as Eagles Law, until July 1, 2024. As a result, DHCQ is currently monitoring hours per resident per day (HRPD) relating to skilled/nursing home staffing levels.

Ms. Peterson added that it was her understanding this subcommittee is to look at the law and determine how the commission plans to address waiving any nursing home staffing ratios after 7/1/2024, if that was to be requested.

This Eagle's Law Waiver Subcommittee was established to create a formalized nursing home staffing waiver process & any applicable policies/procedures after July 1, 2024.

"New" Epilogue language was approved by Joint Finance Committee (JFC) members during JFC Mark-up Meeting - May 2023. The "new" epilogue language is able to be viewed in House Bill 195, page 179 section 187 & pdf page # 181 that states:

*Section 187. Long-term care facilities must continue to provide 3.28 hours of direct care per resident 4 per day. However, the staffing ratios required in 16 Del. C. § 1162 are hereby suspended until July 1, 2024.*

Skilled/nursing homes still need to meet the needs of every resident and provide 3.28 hours of direct care. The direct care hours apply to the entire building, not specific units within a particular facility.

Eagle's Law: <https://delcode.delaware.gov/title16/c011/sc07/index.html> appears in 16 Del. C. § 1162.

Mr. Smith shared that Eagle's Law looks at the total number of direct care hours per day for Certified Nursing Assistant (CNA), Registered Nurse (RN) and Licensed Practical Nurse (LPN). The calculation excludes positions such as Director of Nursing (DON), Assistant Director of Nursing (ADON), Registered Nurse Assessment Coordinator (RNAC) and Staff Educator. Infection Control staff is also not addressed in the Eagle's Law calculation.

Eagle's Law staffing ratios are currently broken down into three shifts: day, evening & night.

"When trying to fill a master schedule, facilities must look at projected and actual resident census daily" per Myke Sayre. "The census does fluctuate due to discharges or admissions" per Rob Smith. "Facilities must account to the increase in census and actual census" per Mr. Smith. "It's a juggling game, I suppose" per Rob Smith.

"We know how many nurses/lpn and cnas are on each shift every single day after reviewing payroll" per Rob Smith. "The number of nurses/lpns and cnas working each shift are based on resident census" per Ms. Bailey. "Instead of taking the total number of hours daily (like staffing is calculated now), the total number of weekly hours per (3) shift are broken down per position (nurse vs cna)" and then determine an average, which would in turn, provide a ratio of nurse/lpn to resident and cna to resident ratio" per Rob Smith. This information would be compared to Eagle's Law requirements listed below.

"Before COVID, DHCQ was tracking everything. The Division would breakdown hours and positions (nurses/lpns and cnas) into three shifts, so the **required** ratios per Eagle's Law were determined, as required to meet the minimum" per Mr. Smith.

*"Direct care", as defined in Delaware Code, shall mean an activity performed by a nursing services direct caregiver that is specific to a resident. Direct care activities are as follows:*

- (1) "Hands-on" treatment or care, including, but not limited to, assistance with activities of daily living (e.g., bathing, dressing, eating, range of motion, toileting, transferring and ambulation); medical treatments; and medication administration;*
- (2) Physical and psychosocial assessments;*
- (3) Documentation, if conducted for treatment or care purposes;*
- (4) Care planning; and*
- (5) Communication with a family member or a health-care professional or entity, regarding a specific resident.*

Eagle's Law was established in the late 90's and offers two phases:

1. Phase 1 – Minimum shift staffing ratios to residents need to be met daily. This calculation is not a typically used by Delaware nursing homes.

Day	1:20 RN/LPN, 1:9 CNA
Evening	1:25 RN/LPN, 1:10 CNA
Night	1:40 RN/LPN, 1:22 CNA

2. Phase 2 – Minimum staffing ratios to residents are averaged over a week. This is the preferred calculation used by facilities per Mr. Smith.

Day	1:15 RN/LPN, 1:8 CNA
Evening	1:23 RN/LPN, 1:10 CNA
Night	1:40 RN/LPN, 1:20 CNA

If a facility is considering to move from one phase of Eagle’s Law calculation to another (each phase have different minimum staffing requirements per shift), they would need to contact DHCQ with such request. As a result, this doesn’t typically happen. “It’s not a back and forth and DHCQ has not been contacted as to such a request in a very long time” per Mr. Smith.

Ms. Peterson stated that she believes “ staffing ratios don’t change whether using phase one or phase two of Eagles Law. The direct care staffing ratios remain the same. The difference is whether it’s calculated on a shift per shift daily or averaged weekly basis”. Mr. Smith followed-up with Ms. Peterson’s comment and stated that minimum staffing ratios are different for phase one and phase two and used nurse to resident day shift as an example. Phase one, nurse to resident is 1:20 & phase two, the nurse to resident is 1:15. Ms. Peterson followed up and clarified that in Eagles Law, a facility must meet 3.28 hours of direct care, regardless to which phase a facility is using. Mr. Smith concurred.

Ms. Peterson asked how are facilities able to use phase two if some facilities are not meeting 3.28 hours of direct care. Mr. Smith stated that prior to COVID, there weren’t many Federal or State imposed CMP fines related to staffing.

Ms. Peterson read aloud Eagle’s Law (Del. C Title 16 Chpt 11): “To the extent a nursing facility meets the minimum nurse staff levels of 3.28 hours of direct care and compliance with the minimum shift ratios provided requires more than 3.28 hours of direct care, the Division may permit a nursing facility to alter the shift ratios; provided, however, the alternative shift ratios as determined by the Division shall not, on any shift or at any time, fall below the following alternative minimum shift ratios. If a nursing facility cannot meet the shift ratios due to building configuration or any other special circumstances, they may apply for a special waiver through the Division, subject to final approval by the Delaware Nursing Home Residents Quality Assurance Commission. All nursing facilities shall conspicuously display the minimum shift ratios governing the nursing facility, along with posting requirements. The time period for review and compliance with any alternative minimum shift ratios or ratios pursuant to a special waiver under this subsection shall be 1 day.”

Ms. Peterson additionally asks, “If facilities are not meeting minimum 3.28 staffing hours, how is the Commission going to consider waiving staffing ratios effective July 1, 2024?”

Mr. Sayre mentioned that when Eagle’s Law was created more than 20 years ago, it didn’t include the following type staff positions who are currently providing hands on/direct care in nursing homes:

Physical Therapy  
Occupational Therapy

## Respiratory Therapy

He further added that some Delaware long term care facilities have specialty type units, such as in-house ventilator or dialysis unit that provides a hands-on labor-intensive approach when delivering care.

Ms. McLaughlin mentioned as an Occupational Therapist that has worked in the LTC setting, OT will come in, but in most SNFs, they have multiple Medicare (paying) beds (residents) so the therapist would not be able to assist with all activities of daily living (ADL) for every resident, every day.

Ms. McLaughlin shared that some future considerations if modifying Eagles Law would be to look at residents acuity levels. She further adds acuity levels place a greater demand on cna's, especially for residents receiving therapy services. The cna's need to have the residents up and ready for therapy. Often these individuals have higher medical needs as well as therapy needs. For residents not receiving therapy services but have chronic or medical issues, they may need more care from the nurses & cna's. As a result, Ms. McLaughlin thinks the subcommittee may want to look at how to make the law reflect more than just staffing numbers, but also the resident's acuity levels. Ms. Bailey suggested subcommittee members might want to consider putting together a list of topics for consideration as they are developing an Eagle's Law Waiver (legislative, etc). Some of the care needs requires a physicians order and staff must work within their (medical) practice act. Limiting Medicare beds is something to possibly consider for a facility that cannot meet the minimum staffing ratios, until the issue is resolved.

Dr. Winters mentioned she believes during previous Eagles Law Waiver subcommittee meetings, the reason why the group looked at other types of facility staff positions and the different people who provide services, was to help determine whether it would be appropriate or safe to temporarily waive staffing minimums, not necessarily changing the law. This could be used as part of a remedial plan, if waiver was temporarily granted.

Ms. Heiks suggested this subcommittee may want to consider looking at what positions provided care when Eagle's Law began versus what positions are providing care in today's post-acute environment and make recommendations as to direct care workers.

Mr. Smith added "if there is an increase in staffing ratios, it automatically increases the number of hours per day per resident. There is the minimum staffing ratio (total building), however a facility may have a specialty unit, such as a vet unit that requires more staff. In that case, the numbers are averaged to determine if the minimum has been met. The way the law is written now, it's written for the whole facility and it's an average".

"A facility could staff higher than the minimum requirements, but if it's observed during annual or complaint survey that resident's needs are not being met, a facility will be cited a staffing deficiency" per Mr. Smith.

Mr. Smith shared that in the past, facilities didn't typically submit Exigent Circumstance Forms to DHCQ. Should a staff call out occur or some type of emergency situation happen (snow storm, for example), facilities let the Division know --- after the fact.

Ms. Heiks shared she believes this should be examined through the lens of damage done as a result of the pandemic. Also, looking at the upside-down demographics, there are more people in Delaware that need services vs workforce who can provide the care. She stated this may take time to be resolved.

Ms. Heiks suggested this subcommittee might want to find out what type of individuals are coming into Delaware rehabs or nursing homes in 2023/2024 related to acuity levels. This may assist with recommendations.

Ms. McLaughlin mentioned that Medicare reimbursement used to be driven by therapy services. Now, only one therapy surface needs to be onboard to be considered as having a higher acuity need. She further cautioned the group about just increasing staffing ratios, without seeing how this would impact the quality of care.

Mr. Smith reminded the group that Delaware continues to open more assisted living facilities and therefore utilizing the same pool of nurses and cna's. This is also the case with competing for nurses and cna's in hospitals and home care settings – using the same pool. Ms. Heiks shared that the approval to open an assisted living facilities is quite different than opening a nursing home. Ms. Smith added there are three more assisted living facilities anticipated to open in the coming months.

#### 4. Public Comment

Ms. Bailey shared the Vero @ Newark will be having a Grand Opening Celebration on Thursday September 28, 2023. Please contact The Vero @ Newark for more information: 302.455.7979.

5. Next DNHRQAC Eagles Law Waiver Subcommittee Meeting – Monday September 25 @ 1:00 pm: Anchor Location and Cisco WebEx will be available for all meeting participants.

#### 6. Adjournment

The meeting was adjourned at 3:47 PM.

Attachments: Eagle's Law Waiver Meeting of August 1, 2023 – minutes draft  
Eagle's Law Waiver Meeting of August 28, 2023 – agenda