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*Delaware Nursing Home Residents  
Quality Assurance Commission*

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**DNHRQAC Legislative/Advocacy Subcommittee Meeting of October 26, 2023**

**@ 1:00 p.m.**

**Virtually via Cisco Webex**

**Anchor Location: The Vero @ Newark – 924 Barksdale Rd Newark, DE 19711**

**FINAL**

Subcommittee members in attendance: Chris Marques, Esquire; Mary Peterson, RN, Dr. Avani Virani, and Cheryl Heiks. A quorum of subcommittee members was in attendance. All subcommittee members attended this meeting virtually.

Subcommittee members absent: None.

Others Present: Margaret Bailey, DNHRQAC Executive Director (in-person) and Maggie Goonan, Public member (virtually).

This meeting was brought to order @ 1:07 pm. Ms. Bailey mentioned DNHRQAC Legislative/Advocacy Subcommittee was created to be able to weigh-in and respond to legislation, regulations and other items related to long term care services and supports in Delaware. In addition, this subcommittee might have an opportunity to weigh-in on Federally proposed items, too.

1. Welcome from subcommittee members

DNHRQAC subcommittee members introduced themselves and provided information regarding their current and past roles relating to Delaware long term care.

This was the third DNHRQAC Legislative/Advocacy Subcommittee Meeting. A series of (3) meetings was scheduled to prepare a response to CMS Proposed Nursing Home Staffing Standards Rule. Once this subcommittee prepares a response to the proposed rule, a copy of the draft response will be forwarded to the entire DNHRQAC membership for review. DNHRQAC scheduled a “Special” Meeting on October 31, 2023, to vote & finalize a response to the proposed rule.

Since the initial subcommittee meeting (October 16, 2023), Ms. Bailey contacted subcommittee members to find out their commitment for the next 2 meetings and reminded them about the tight timeline set forth to prepare and submit a response to the proposed rule. Ms. Bailey conferred with Patrick Smith, Esquire, who represents DNHRQAC, before reaching out to subcommittee members. As a result, three members elected to be removed from this subcommittee due to the small window of opportunity remaining to respond to CMS Proposed Nursing Home Staffing Standard Rule before November 6, 2023.

2. Approval of Meeting Minutes:

A motion to approve the meeting minutes of October 16, 2023 (as written) and October 19, 2023 (one minor deletion). Both motions were seconded.

3. Election of Spokesperson

Ms. Peterson was elected to be spokesperson for this subcommittee. Members voted & approved their selection.

4. Discussion of:

A template, developed by Ms. Peterson, was shared with subcommittee members in advance of the meeting and screen shared during the meeting. It was suggested the template could be used as a starting point as the group collectively crafts a response. Subcommittee members agreed to use the template to further refine the Commission's response to CMS proposed rule.

Subcommittee members agreed the response should identify the sender (DNHRQAC); state why DNHRQAC is commenting and share staffing history in Delaware. Ms. Peterson reminded subcommittee members the CMS response is limited to 5,000 spaces.

Ms. Peterson offered to submit DNHRQAC's response to the CMS Proposed Rule using her email address but is concerned because she already sent a personal response to CMS regarding the proposed rule.

During previous subcommittee meeting, members asked Ms. Bailey to contact Patrick Smith, Esquire, (Deputy Attorney General for DNHRQAC) to find out whether agency responses need to be submitted using a State of Delaware email address, as most subcommittee members are not State of Delaware employees.

Mr. Smith replied "I have looked into this and cannot find any requirement, legally, regarding from which email address the comments need to be sent. I took a look at the links you sent; in the regulations.gov link there are sections where you can identify who you are and if you are speaking on behalf of a group. It may be better to have them sent from a State email, or more official, but I don't think it's a requirement. I would suggest whoever sends to identify whom they are speaking on behalf of."

Subcommittee members reviewed the template paragraph by paragraph adding and striking language regarding the proposed rule.

A. 3.0 HPRD – Subcommittee members compared the proposed HPRD to Delaware Code: 29 Del. C. § 7907, where staffing HRPD has been statutorily mandated for more than 20+ years. Delaware uses a calculation that includes RNs, LPNs, and CNAs. Delaware's mandate has grown twice since 1999.

Ms. Heiks stated that if DNHRQAC is proposing a HPRD higher than what Delaware currently requires, she cannot support it. She added that almost 40% of nursing staff working in Delaware nursing homes is LPNs. Additionally, Ms. Heiks wonders how many facilities are using agency staff to meet Delaware's 3.28 HPRD. Overall, Ms. Heiks shared she is fine with the proposal's goals but would like to see the means be a bit different, including a funding consideration.

Mr. Marques mentioned Delaware does offer exigent circumstances provided a facility has shown good faith efforts. He does not believe this applies to situations such as staff calling out sick. Subcommittee members also discussed waivers and impact on safety and care of residents. Ms. Heiks mentioned waivers should be the exception, not the rule. Mr. Marques added the proposed rule discusses waivers and states there are limited circumstances where a facility can apply for an exemption.

Additionally, Mr. Marques suggested subcommittee members might want to consider adding language in the response that Delaware has a growing concern with agency use and how it equates to quality of care in the nursing homes. It is his understanding that quality increases when you have consistent, repetitive care with someone. He believes agency use doesn't always guarantee the same employee to build a relationship with residents and facility staff normally assigned in a particular building, which can lead to other issues. The majority of subcommittee members agreed to remove language about staffing agencies in the response to the proposed rule

although acknowledging staffing agencies are a concern and perhaps look at implementing some type of restriction another time.

Finally, subcommittee members added that DNHRQAC supports staffing levels (i.e., Eagle's Law). Although DNHRQAC believes a HPRD higher than 3.0 would be more appropriate for care delivery in nursing homes today, DNHRQAC would support at least 3.0 HPRD or higher and the calculation should include: RNs, LPNs, and CNAs.

Ms. Heiks wished CMS looked at other professionals that provide care in nursing homes today like physical therapists, respiratory therapists, activities, etc. Ms. Peterson mentioned that nursing staff provides the majority of care in nursing homes and if Delaware ever gets to a point where an acuity-based staffing level can be implemented, the other professional positions mentioned could be captured.

B. Registered Nurse (RN) on site 24/7 not just available by phone – Currently in Delaware, RNs are required to (physically) be on duty every shift 24/7. Subcommittee members agreed during last meeting they were all in support of RN 24/7. The proposal doesn't specifically mention percentage of time 24/7 RN needs to spend related to direct resident care. Delaware law already states Director of Nursing (DON), Staff Developer & Infection Preventionist's time is not included in the HPRD. The only way any of these 3 staff members would be included in HPRD calculation, there would need to be an exigent circumstance and reported to DHCQ.

Ms. Peterson shared in Delaware, the 24/7 RN is a nurse supervisor who must allocate 25% of time for supervisor duties and other 75% can be devoted to direct resident care.

C. LPNs vs proposed rule – The Federal proposed rule doesn't appear to have flexibility relating to licensed Practical Nurses (LPNs) as Delaware statutorily does in the staffing calculation.

D. Transparency for Medicare and Medicaid expenditures - Subcommittee members asked during a previous subcommittee meeting whether the current payment system is set up to track expenditures or if this part of the rule would impact Division of Medicaid and Medical Assistance (DMMA) or the industry.

Ms. Bailey contacted DMMA at the request of the subcommittee. The response received from DMMA Acting Director, Ted Mermigos "We should be able to provide the indicated transparent data reporting regarding Delaware Medicare and Medicaid spending, provided that all of the specific data requested is information that DMMA uses or collects (e.g., cost reports, wage surveys), or to which we have access in DMES."

Ms. Heiks has not been able to receive an answer from Delaware facilities how transparency for Medicare and Medicaid expenditures listed in the proposed rule will impact them. She also reached out to American Health Care Association (AHCA) but has not heard back.

Subcommittee members discussed the transparency piece in the proposed rule and impact it may have regarding any funding consideration. Members stated estimates for the costs associated with implementing the proposed rule varies, depending on whether you ask the industry or advocates. Subcommittee members agreed and supported the transparency language during a previous meeting.

Two subcommittee members needed to exit this meeting at 2:30 pm due to other meeting commitments.

As a result, subcommittee members agreed (quorum still present) to have Ms. Peterson add/strike what was already decided during this and previous 2 meetings and forward to the group for final comments.

The group decided any subcommittee member who wishes to provide final comments must send to Ms. Peterson by Saturday 11/28/2023 midnight. Once gathered, Ms. Peterson will compile & forward final draft response to Ms. Bailey. Ms. Bailey, in return, will forward draft response to full commission on Sunday 10/29/2023, allowing time for members to review before vote on Tuesday 10/31/2023.

Responses regarding the proposed rule must be submitted to CMS (Federal Registry) by November 6, 2023.

#### 5. Public Comments

No members of the public came forward with any comments during this meeting.

#### 6. Next Meeting

DNHRQAC will be hosting a “Special” Meeting to vote on response to CMS Proposed Staffing Rule on Tuesday October 31, 2023 @ 9:30 pm: Cisco WebEx & Anchor Location: Delaware Community Legal Aid Society, Inc - 20151 Office Circle Georgetown, DE 19947.

#### 7. Adjournment

The meeting was adjourned at 2:52 p.m.

Handouts: 10/26/2023 meeting agenda  
10/16/2023 meeting minutes draft  
10/19/2023 meeting minutes draft