
DELAWARE NURSING HOME RESIDENTS QUALITY ASSURANCE COMMISSION
(DNHRQAC)

Eagle's Law Staffing Ratio Waiver Subcommittee

In-person & Virtual Meeting

Cisco Webex

Anchor Location: Delaware Community

Legal Aid Society, Inc

820 Walker Rd

Dover, DE 19904

Meeting of June 21, 2024 @ 10:00 am

FINAL

Subcommittee members present: Norma Jones; Cheryl Heiks; Lisa Furber, Chair; Mary Peterson, RN and Kori Bingaman, RN, NHA. Subcommittee members attended virtually, except for Lisa Furber who hosted the meeting anchor location. A quorum of subcommittee members was present.

DHCQ representative, Rob Smith, was in attendance.

Subcommittee members not in attendance: Dr. Melissa Winters, PsyD.

Others Present: Margaret Bailey, DNHRQAC Executive Director; Patrick Smith, Esquire, Kevin Andrews, Public Member and Alexis (no last name provided), Public Member.

1. Call to order

This meeting was called to order at 10:05 am.

2. Approval of minutes

Meeting minutes draft of June 7, 2024 was approved as written.

3. Discussion of:

FY 25 Epilogue Language

Ms. Furber shared recent legislation, SB 325 (FY 25 Operating Budget), with meeting attendees.

Section 192:

"Long-term care facilities must continue to provide 3.28 hours of direct care per resident per day. However, the staffing ratios required in 16 Del. C. § 1162 are hereby suspended until ~~July~~ January 1, 2024 2025."

SB 325 was passed in the House & Senate and awaiting the Governor's signature.

Ms. Furber mentioned correspondence was sent to the Joint Finance Committee (JFC) bill sponsors as to reason for extending the nursing home staffing ratios per shift until January 1, 2025. It was shared that DNHRQAC's Eagle's Law Staffing Ratio Waiver Subcommittee has been working on a waiver process since August 2023 due to previously added epilogue language for FY 24 Operating Budget (HB 195):

Section 187:

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

Additionally, it was shared that DHSS was in full support of not extending nursing home staffing ratios per shift as defined in DE Code Title 16. This support was communicated to DNHRQAC and Joint Finance Committee (JFC) members in March 2024.

The response received from JFC regarding the extension of waiving nursing home staffing ratios per shift until January 1, 2025: "We extended the waiver to allow for additional funding to pay for additional workers, so they would not be out of compliance." As a result, it appeared there isn't further opportunity for advocacy regarding the waiver extension. This will therefore change some of the timelines for this subcommittee.

Ms. Bailey asked Ms. Heiks if the 1/1/2025 date could be changed again and if so, what is the process for JFC to do so. Ms. Heiks stated that she isn't asking that the implementation date be a moving target and therefore will not be asking for the implementation date to be extended again. "The only way this could happen is if a law was passed, but that wouldn't happen before January 1, 2025."

Ms. Heiks mentioned the funding component is supposed to be satisfied in January 2025 at the earliest. She added that the industry wants to be able to measure to see whether buildings are missing staff and/or struggling to identify any holes. Ms. Heiks added that she reached out to DHSS Secretary Manning's office to request a statewide staffing analysis for this project and the Federal staffing mandate.

Subcommittee members agreed that DHSS, particularly DHCQ, should notify all licensed Delaware SNFs regarding the delay in the staffing ratio waiver.

Eagle's Law Staffing Ratio Recent Training/Educational Efforts

Ms. Furber shared the most recent training/educational session was held on June 17, 2024 during DHCFA virtual meeting with providers. LeadingAge members were invited, too. Ms. Peterson and Ms. Furber provided training to 35 DHCFA and LeadingAge members and shared the PowerPoint Presentation created by this subcommittee. Ms. Heiks believes the number of participants was low because members had other opportunities to attend other training sessions offered by this subcommittee. During this training effort, some questions were raised and answered about the staffing ratio waiver application and process.

Ms. Bingaman suggested this subcommittee might want to consider offering another training in December 2024 to LeadingAge and DHCFA members, since the waiver application implementation date was moved to 1/1/2025.

Eagle's Law Staffing Ratio Waiver Outreach Efforts

Department of Health and Social Services (DHSS) Communications, DHCFA and LeadingAge previously offered to post the Eagle's Law Staffing Ratio Waiver PowerPoint Presentation (PPP), fillable waiver application/instructions and video on their webpages and social media outlets. The original plan was to post the materials on July 1, 2024. Due to the recent epilogue language granting an extension (1/1/2025), subcommittee members discussed this topic further.

Ms. Furber asked subcommittee members whether it makes sense to post something now on websites about the staffing ratio waiver and consider: 1. When to post 2. What to post 3. What to communicate with industry & DHSS partners 4. Edits to PPP and staffing ratio waiver application materials relating to the new implementation date.

Subcommittee members discussed whether information should be posted about the staffing ratio waiver sooner than later. Ms. Heiks stated the staffing ratio waiver is mandated in DE Code and therefore facilities should be aware so they can prepare for the implementation date.

It was discussed how the delay in staffing ratio requirements per shift (until 1/1/2025) will be communicated to all Delaware SNFs. Subcommittee members agreed that it's DHCQ's responsibility as regulatory body (not DNHRQAC)

to inform all Delaware SNFs regarding the delay. As a result, subcommittee members believe DHCQ should create the announcement and distribute the message to all Delaware SNFs.

A motion was raised for Ms. Furber and Ms. Bailey to determine the appropriate language to appear on webpages relating to the waiver delay. The motion was seconded and after polling members: 4 “yes” and 1 “abstaining”.

Action Items: Ms. Bailey will convey the subcommittees recommendation for DHCQ to provide notice about the implementation delay to all Delaware SNFs. Additionally, Ms. Bailey will connect with DHSS Communications, DHCFA, LeadingAge and Judicial Information Center about webpage and social media announcements due to the new implementation date.

Ms. Bingaman mentioned 3 facilities were identified during previous subcommittee meetings who were continuing to struggle with workforce and meeting the minimum Hours Per Resident Per Day (HRPD). Being in a building and understanding operations, Ms. Bingaman mentioned the facilities identified previously receive most of their revenue from SNF admissions and are still accepting admissions. She asked “what happens between now and 1/1/2025 if facilities such as the 3 identified continue to not meet the required HRPD. Keep in mind, the HRPD does not include what has been determined during a resident assessment of their acuity needs. My concern is facilities that do not meet the State’s minimum and yet continue to accept new admissions.”

Subcommittee members agree that DHCQ needs to look closely at admissions for SNFs that cannot meet the minimum HRPD. Ms. Heiks asked whether DHCQ has the authority to halt admissions until a facility meets 3.28 HRPD. Ms. Peterson stated language in DE Code grants DHCQ authority to act. Members present discussed whether they would like to submit a letter from the subcommittee to DHCQ regarding admissions for facilities that do not meet the State mandated Eagle’s Law 3.28 HRPD or whether to recommend during a future full commission meeting.

Waiver Application Appeals Process

Ms. Furber mentioned there were previous conversations about a waiver application appeal or reconsideration process.

DAG Smith stated the Statute is silent regarding an appeal process. From a legal perspective, he said the CODE does not spell out that an appeal process is available. “If a facility is denied a waiver, it falls on them, the ball is in their court. It’s not up to DNHRQAC to operate under the assumption that an appeals process is available.” He isn’t saying zero recourse, just not for this commission to figure out. “There is no indication that DNHRQAC must break ground on creating an appeals process. It is not stated anywhere and not a good use of the Commissions time.”

Ms. Bingaman mentioned during a presentation at the LeadingAge Annual Conference, three communities asked about an appeal process. Ms. Heiks believes there will be a request for an appeals process. DAG Smith agrees that an appeal process is something the facilities are going to want but does not believe it is up to this commission to break ground. He added that since the commission has already made the decision on an application, it doesn’t make sense to have the same individuals decide on an appeal. Ms. Heiks agrees that an appeal process is not necessarily something the Commission needs to create, the Commission may want to look at who/how this could be handled or provide a recommendation.

Ms. Furber asked subcommittee members if they agree to not discuss an appeals process more at this point based on guidance from DAG Smith so the group can provide an update to the full Commission. A motion was raised to recommend to the full Commission to not develop or consider an appeals process at this time since appeal language does not appear in the Statute. The motion was not carried and no other counter motions were suggested relating to an appeal process.

Ms. Furber stated that it appears more discussion needs to occur regarding an appeals process. Her suggestion is the subcommittee may want to revisit the appeals topic again during a future meeting. This can also be raised during the next full Commission meeting. Ms. Peterson emphasized that not taking the legal advice from our DAG is a bad precedent to set.

Action Item: The subcommittee will provide an update regarding appeals process discussion during the next full Commission meeting and ask for additional input or suggestions.

Incomplete Waiver Applications

Ms. Bingaman asked what the process would be if a facility does not supply enough data with a waiver application. Ms. Furber mentioned there is no limit to the numbers of times a facility can apply. She added that perhaps the subcommittee could review applications to make sure they are complete before providing a recommendation to the full commission. Ms. Furber suggested that perhaps the subcommittee could offer a one-time curtesy and contact facility to provide the missing data. If the facility does not respond, the subcommittee moves forward with the application not completed entirely despite the opportunity to supplement missing information.

DAG Smith shared his thoughts regarding incomplete applications. He would utilize the subcommittee to hold the incomplete application and not share with full commission yet, but rather let facility know they will need to resubmit a complete application. Ms. Heiks mentioned it's a good idea to let facilities know if applications are incomplete, so they have an opportunity to correct and/or resubmit.

Ms. Bingaman mentioned Ms. Bailey forwarded an email yesterday to commission members from CMS that provided guidance for surveyors to use to determine whether a nursing home is in compliance relating to F Tag 838 - "The facility must review and update that assessment, as necessary, and at least annually," the memo said. "The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment." As a result, Ms. Bingaman wondered if any questions were asked on the waiver application about resident assessments and whether staffing has been recently updated to include current residents' needs. It was mentioned that DHCQ would be able to follow-up on F838 for non-compliance, too.

Action Item: Subcommittee may want to consider looking at F838 for future application revisions or training materials since the current interpretation of F838 is not yet in effect and wasn't when the waiver application was developed.

Waiver Decision Pathway/Algorithm

DAG Smith asked if the subcommittee has discussed whether DHCQ will be providing an initial opinion on waiver applications. "One of the Statutes talks about final approval from the Commission and sort of implies the application will procedurally be sent to DHCQ first. Substantively, I am wondering whether DHCQ is going to share their thoughts on a given application." Ms. Furber shared Section B of the waiver application. This section identifies 4 questions that DHCQ will need to complete for each application request. As a result, DAG Smith responded "Ok, so no, you are not asking DHCQ to give their opinion." As a result, DAG Smith stated it appears the application, as written, isn't asking DHCQ to put forth an opinion. Ms. Further added "the application asks DHCQ to provide any information they have and/or think the Commission needs to decide. We have not asked them, as it currently exists, to provide an opinion on whether an application should be approved or denied."

Subcommittee members discussed developing some type of decision tree or pathway for waiver applications and whether a numbering system, scale, flow sheet or another process to help standardize the decision process. Process mapping was also discussed to help create an assessment tool that would provide a consistent, objective review of applications. Subcommittee members asked Ms. Bailey to contact Dr. Winters to see if she has any experience with process mapping processes. DAG Smith offered to see if there are other resources like the Federal Government (CMS Staffing Mandate) who could help guide the group.

Action Items: Ms. Bailey will contact Dr. Winters to see if she can assist with process mapping. DAG Smith will report back to the subcommittee with his findings about other resources to assist with creating a rubric.

4. Public Comment

Kevin Andrews – Why doesn't this Commission that is Judicial based submit more legal challenges or focus on communication relating to the ineffectiveness of DHCQ? An example provided: The 3 buildings that are not currently meeting 3.28 HRPD are still able to do business as usual, with no holds on admissions or

penalties. Finally, Eagle's Law has never been tied to reimbursement payments. It is standard to address residents needs rather than allowing buildings to save money by not using overtime or agency staff. Why are we allowing the industry to add language to circumvent this law? This should be legally challenged as there is no legitimate reason to extend the waiver or shift ratios. What I've heard in listening to the industry, is that they are trying to eliminate Eagle's Law all together. The delay in staffing ratios per shift will bring us closer to the implementation of the Federal staffing mandate.

5. Next Meeting

The next DNHRQAC Eagle's Law Staffing Ratio Waiver Subcommittee will be held on July 12, 2024 @ 10:00 am. In-person and virtual attendance options will be available. Meeting information will be posted on the Delaware Public Meeting Calendar.

6. Adjournment

The meeting was adjourned at 2:35 pm.

Attachments: 6/21/2024 Eagle's Law Staffing Ratio Waiver Subcommittee Meeting agenda
6/7/2024 Eagle's Law Staffing Ratio Waiver Subcommittee Meeting minutes draft