

DELAWARE NURSING HOME RESIDENTS
QUALITY ASSURANCE COMMISSION

Meeting of January 8, 2002
Herman M. Holloway, Sr. Campus, Main Bldg., Room 301
1901 N. duPont Highway, New Castle, DE

MINUTES

Commission Members Present: Patricia Engelhardt; John Fogelgren; Karen E. Gallagher; Rep. Pamela Maier; Bonita Maull; Thomas P. McGonigle, Esq. (Chairman); Phyllis Peavy; and McKinley Wardlaw, Jr.

Commission Members Absent: Carol Berster; Sen. Robert Marshall

Others Present: Sandra Dole; Selma Hayman, Esq.; Sarah E. Thankachan and Joseph M. Letnaunchyn (Delaware Healthcare Association); Yrene Waldron, (Delaware Health Care Facilities Association); Carol Ellis, Director, Catherine McMillan, Deputy Director, and Judith E. Johnston, Ph.D. (DHSS Division of Long Term Care Residents Protection, DLTCRP)

1. Call to order

Chairman McGonigle called the meeting to order at 10:10 a.m. The meeting time was changed from 9:00 a.m. because of a scheduling conflict.

2. Approval of the Minutes of the December 11, 2001 Meeting

The minutes were approved as written.

3. Distribution of Commission Meeting Minutes

Chairman McGonigle said that from this time forward, the draft minutes will only be sent to Commission members for review. At the next Commission meeting, the minutes will be approved or modified. After the minutes have been approved, they will then be provided to the public and interested parties. This will avoid having draft minutes circulating that have not been approved by the Commission. If there is a situation of a possible error after the minutes have been approved, the tape will be checked and a correction will be made, if necessary. The Commission did not have any objections to this plan.

4. Minimum staffing matrix and hours under Phase II of Eagle's Law

Chairman McGonigle stated that, at the suggestion of Mr. Letnaunchyn in the December 11, 2001 Commission meeting, there is a need to discuss the staffing matrix issue and how it fits with the minimum staffing requirement of 3.28 hours per resident per day (PPD) in Phase II of Eagle's Law. For this meeting, the Division of Long Term Care Residents Protection (DLTCRP) was asked to look at the matrix to see what it does and does not do, and, further, to offer some possible solutions so this issue can be resolved to the satisfaction of both industry and this Commission.

Commission members were given three handouts from DLTCRP: 1) "Examples for Phase 2 Minimum Staffing Hours and Ratios" (11/26/01), using six facilities with various numbers of residents; 2) "Eagle's Law Phase 2 & Phase 1" (prepared by Carol Berster on 11/28/01 and modified by DLTCRP 1/4/02), comparing the RN, LPN, and CNA coverage needed for all the facilities included under Eagle's Law; and 3) "Examples of Difference in Nursing Staffing Requirements for Phase 1 vs. Phase 2 of Eagle's Law" (11/26/01), using facilities with various numbers of residents. Carol Ellis, Director of DLTCRP, reviewed the information in the handouts. Ms. Ellis said that DLTCRP thought there would need to be a statutory change to address the fact that the matrix and the PPD do not necessarily match. There may not be any set of numbers that would make the ratios and PPD match in every circumstance. There does not seem to be flexibility in the law as presently written. In response to Chairman McGonigle's question, Ms. Ellis said she would interpret the law as requiring facilities to meet both the matrix and the PPD.

Chairman McGonigle suggested that the industry might argue that the law requires that Medicaid reimburse at a level consistent with the requirements of this law. Therefore, if a facility is getting Medicaid to meet the 3.28 PPD of Phase II, but meeting the ratios matrix would require facilities to go over this PPD and if Medicaid does not fund it, then the facility could argue that it is not required to meet that matrix. Chairman McGonigle suggested that DLTCRP consult with its Deputy Attorney General to determine what enforcement approach would be taken if a facility meets the 3.28 PPD but does not meet the matrix. In the short term, this could resolve the issue absent a legislative change, which might not happen soon. Ms. Ellis agreed.

Chairman McGonigle stated that no facility should be under any illusion that it is not required to meet the 3.28, absent a waiver. There is no argument in terms of meeting the 3.28. There may be an issue to the extent that the matrix requires staffing above and beyond what has been funded by the General Assembly. Chairman McGonigle mentioned that as a regulatory authority, DLTCRP might be able to come up with different matrices to add some flexibility to the law. This issue does not lend itself to an easy solution, but he thought it was necessary to know what approach DLTCRP will take from an enforcement perspective. Chairman McGonigle requested that at the next meeting Ms. Ellis let the Commission know what has developed concerning this issue, and he offered to join her conversation with the Deputy Attorney General. Replying to a question from Rep. Maier, Chairman McGonigle said that the problem is that in some situations, depending on the size of the facility, meeting the matrix requires the facility to staff above the 3.28. There was some additional discussion.

Ms. Waldron commented that Carol Berster's model assumes 100% occupancy and 8-hour shifts for CNAs and nurses. Most facilities have 8-hour shifts for nurses but not for CNAs. The model takes neither building configuration nor acuity into account. Ms. Waldron added that the models do not address facilities under 80 beds, of which there are quite a few, and they are the ones struggling with the matrix. Ms. Waldron said providers are most concerned about the number of nurses who will be needed to meet the matrix in Phase II. The pool of nurses needed is non-existent.

Chairman McGonigle said he had assumed that requests were made of Medicaid to fund above the 3.0 requirement in Phase I in order to meet the matrix and that those requests were rejected--that they were funded only at the 3.0 level. Ms. Ellis said that the Medicaid cost reports are due in June, so it will not be known until June what facilities are claiming they have actually spent either above or below the amount that has been appropriated.

Chairman McGonigle said that if in fact Medicaid makes the decision to reimburse facilities above 3.28 to meet those situations in which the matrix requires staffing at levels higher than 3.28, there is not a problem with respect to the possibility of an inconsistency in the law between the matrix and PPD. However, if the requests for reimbursement are rejected, that may present a problem.

Mr. Letnaunchyn commented that the conversation has been about Medicaid dollars, but the staffing requirement is for all residents, and Medicaid is only 50%-60% of the population, on average.

Chairman McGonigle said the issue before the Commission is whether there is an inherent problem in the law with respect to the matrix, the 3.28, and the funding. The issue might not be able to be addressed until we find out how Medicaid plans to deal with these issues of reimbursement, i.e., if Medicaid will reimburse the ratios and hours. Also, in terms of enforcement, if there is a decision that the industry is not required to meet the matrix because Medicaid does not fund it, the waiver requests would be irrelevant.

5. Assisted Living Regulations - DLTCRP staff

Chairman McGonigle said he believed these regulations to be the most critical that this Commission has looked at so far, because unlike long-term care, only the State is involved in enforcement and, also, this is a growth industry. Commission members were sent a copy of the draft revision of the assisted living regulations before the meeting and were given a copy of the Uniform Assessment Instrument at the meeting. He asked that the Division give a presentation at this meeting, with discussion by the Commission at the next meeting.

Ms. Ellis gave an overview of the changes between the current regulations and the proposed revision. This will be the first time that every facility will be required to use the same document to assess individuals. A continuing problem has been that facilities have admitted individuals for whom they really cannot provide care. In talking about the list of problems/conditions excluded from assisted living, Ms. Ellis said that they wanted to take into consideration that Delaware Psychiatric Center will no longer be available to take people who are acting out. Also, what to do with people with dementia is one of the biggest issues, not just for assisted living, but also in skilled care.

In response to a question about resident waivers, Ms. Ellis explained that the Division would be monitoring the waivers to make sure they do not exceed 90 days. Regarding medication management, Ms. Ellis said that this is an area in which surveyors have considerable concerns. Some residents come into a facility with the understanding that they can self-administer medication, but they are not really capable of doing this.

Following questions and comments on the draft regulations, Ms. Ellis reviewed the Uniform Assessment Instrument (UAI). In answer to a question regarding facilities implementing the UAI, Ms. Ellis said that when DLTCRP visits a facility, particularly at the annual survey, surveyors will look at the assessments and how they match with the individual's care and services. Ms. Ellis said that the UAI should accurately reflect the individual's capabilities and problems, so the assisted living facility can decide if it can or cannot provide the necessary care for this individual. Ms. Ellis said each individual must be evaluated before coming into a facility. A registered nurse fills out the UAI. The Division's intent is to hold the individual who does the assessment responsible for accuracy.

Chairman McGonigle asked Ms. Ellis for a brief summary of the process used to develop the UAI draft and the draft revised assisted living regulations. Ms. Ellis stated participants included several staff from the Division, three assisted living facility administrators, a representative from Division of Services for Aging and Adults with Physical Disabilities, and others who comprised a stable group meeting over many months. After this process, the draft was mailed to all assisted living facilities followed by meeting with the administrators in Dover to discuss both the draft revised regulations and UAI. The next step is public hearings. Ms. Ellis was asked if there was input from residents or families in developing the drafts. She said the Division had not gotten to the public comment period yet.

Ms. Peavy asked if there was a section in the UAI that would indicate that an individual should go to the memory impairment unit. Ms. Ellis said that there are some items on the instrument, but no one trigger mechanism. Selma Hayman said that the law might require that facilities give individuals being transferred from one room or unit to another 30-day notice and a hearing. Chairman McGonigle suggested that the Division look into this. Regarding behavioral problems, Ms. Gallagher commented that staff are not always trained to recognize that a disabled person with uncontrollable facial expressions and physical gestures should not be interpreted as a behavioral problem. Answering a question about facilities promising and advertising more care than they can give, Ms. Ellis said that disclosure is addressed under General Requirements.

Chairman McGonigle asked the Commission to review the regulations and discuss them again at the February meeting. These regulations are critical, given the fact that these will be the only regulatory oversight of this industry.

6. Nursing home visit guidelines and Commission brochure

Chairman McGonigle said there are now two brochures, one pertaining to visiting facilities and one a general Commission brochure. The drafts were handed out at the meeting. Ms. Peavy explained that one brochure could be given to the facilities and one could be used for the general public. Chairman McGonigle asked the members to review the drafts before the February meeting. If they are all right, the Commission can approve them then.

7. Required reports under Eagle's Law

Dr. Johnston said a report due in May 2002 from the Commission has to evaluate whether 25% of a nursing supervisor's time spent on supervision is adequate and appropriate. Chairman McGonigle said that the Commission would need help in preparing this report. Ms. Ellis suggested Dr. Rhodes as a possible consultant for this project. The source of funding would be the trust fund. Chairman McGonigle asked Ms. Ellis to see if Dr. Rhodes would be interested in working on this. He said he would speak with absent Commission members before a decision is made. If Dr. Rhodes is not available, the Commission will make other plans.

Chairman McGonigle said that the Commission's annual report could probably be done in-house. The due date is not given, but he wanted the report prepared this year.

8. Letter from State Council on Persons with Disabilities regarding proposed legislation to employ resident assistants to provide basic hygiene and support services (HB 277).

Chairman McGonigle said that Rep. Maier is the lead sponsor for HB 277, and she should be present during any discussion. Since she had to leave the meeting, discussion would occur at the next meeting. Ms. Engelhardt gave a brief summary of the bill. She said the bill would require people to be trained and then be able to feed, hydrate and do unspecified hygiene tasks for residents.

Ms. Engelhardt, giving her objections to the bill, said she feels it compartmentalizes care, CNAs will be left with the heavy work, it allows people to be paid less because they will be trained less, and they might be asked to do other tasks that they are not trained for, and possibly jeopardize patients' care. Ms. Peavy said this bill is not specific in terms of training received, and terms are not defined as they are in the Illinois law, which this bill was modeled after. Ms. Waldron said this bill was proposed because a Federal pilot project was being planned. However, this might not be necessary now because the Centers for Medicare & Medicaid Services (CMS) has announced that it will have a rule to permit paid feeding assistants. Chairman McGonigle asked Ms. Waldron to get more information for the next Commission meeting and if it is a moot point, it will be removed from the agenda. Commission members were given a handout of a memo dated December 12, 2001 addressed to Citizen Advocacy Groups regarding CMS' plan concerning paid feeding assistants.

9. Old/other business

Waiver requests for Phase II of Eagle's Law as of January 7, 2002 – Dr. Johnston explained and summarized the Commission's packet of handouts, which included the nine waiver requests received by the Commission to date, along with some basic information on the requests. Chairman McGonigle said facilities will have to show exigent circumstances and a time line for compliance. The Commission will evaluate the waivers and issue decisions on these waivers at the next meeting. The facilities requesting waivers should probably be invited to the Commission's February meeting to answer questions. Ms. Ellis suggested that if the Chairman is contemplating going into executive session, Deputy Attorney General Ann Woolfolk should be present. Chairman McGonigle agreed.

Regulations for Group Homes for Persons with Mental Illness – Ms. Engelhardt asked the status of the issue of advisory committees being included in the proposed revised regulations. Ms. Ellis said that she had asked Ms. Woolfolk about this, and the issue was referred to Deputy Attorney General Phebe Young.

Eagle's Law Phase I Costs – Ms. Engelhardt asked Ms. Waldron if the Commission could have the supporting information for Ms. Waldron's comment during the public comment period at the December 11 meeting that the cost of Phase I of Eagle's Law had doubled from \$5 million to \$10 million. Ms. Waldron said her Association was trying to meet with the Governor on this and until then, supportive information would not be available to the Commission. She said that after Phases I, II and III cost estimates were given to the Legislature, many changes were made in SB 115 and, subsequently, in SB 135. The bill was not re-costed. When asked, Ms. Waldron said if she sees the Governor before the next Commission meeting, she will ask her Board if it is all right to share the information with the Commission.

Chairman McGonigle said that, presumably, facilities have sought reimbursement for the higher costs. He said that if facilities are assuming that they will get reimbursement, the issue is not about not getting paid. He asked Ms. Waldron if the reason she stated that the cost is double is that there is an assumption that facilities are going to be reimbursed at those higher levels. Ms. Waldron agreed, saying when the statute says that all costs associated with this bill will be reimbursable, that is the assumption made.

Advertisement by Harbor Health Care – Ms. Maull asked about a Harbor Health Care ad in the newspaper for certified and non-certified nursing assistants. Ms. Waldron said that while the facility cannot use non-certified assistants yet, the facility is trying to offer them employment before someone else hires them.

Public Meetings on Survey Results – DLTCRP staff gave the Commission the January 2002 schedule for public meetings on the survey reports.

10. Public comment

Ms. Waldron commented on the Commission's brochures and suggested changing the term "nursing home" to "long term care facility." Ms. Waldron asked about the time line for facilities to get waiver requests in. Chairman McGonigle said that waiver requests must be received no later than the notice requirements for the next meeting, which is seven days. In addition, the requests will be taken in order of receipt, and the Commission will review as many as possible at the meeting. The request has to abide by the statute and clearly show exigent circumstances. Ms. Waldron will notify facilities to get their requests in 15 days before the February 12th Commission meeting.

11. Next meeting

The next meeting will be held on Tuesday, February 12, 2002. The meeting will start at 10:00 a.m., if the absent members agree with the change from 9:00 a.m.

12. Adjournment

Chairman McGonigle adjourned the meeting at 12:05 p.m.