Title 64 Series 13
Department of Health and Human Resources
Office of Inspector General
Office of Health Facility Licensure and Certification
NURSING HOME LICENSURE RULE

**Summary of Public Comments**

**Comment**
§64-13-4.4.4. The LTCOP suggests deleting the underlined language in Proposed Rule 4.4.4. That language mixes the right of the resident, and others, to access survey and inspection results with the department's obligation to release them. Proposed Rule 4.4. delineates a *nursing home's* responsibility for confidentiality and access to records/information. A nursing home resident should not be required to make a written request before being permitted to review a survey report. The nursing home should instead make those reports readily available for review at any time. Suggest deleting the phrase "*Upon written request*" in the first sentence and "*The director shall treat any inspection or complaint report as public information from the time an acceptable plan of correction is submitted. Before releasing an inspection or complaint report considered to be public information, the director shall delete any confidential information regarding a resident that reasonably permits identification of the resident.*" from Proposed Rule 4.4.4. and incorporating that language into Proposed Rule 14.2.10. which describes the director's obligation to make survey and inspection reports available.
**Response**
The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

**Comment**
§64-13-4.13.3.a. We propose restoring the original language relating to documentation in §4.13.3.a., and removing the proposed changes. The proposed changes place a potential impossibility upon a facility to know the availability of appropriate resources at a subsequent facility. These are determinations unique and known to a receiving facility and sometimes not readily known to the discharging facility.
The original language already imposes a requirement upon the discharging facility to document the reason for the transfer or discharge, and maintains the overall intent in the rule to expressly state the reason in writing.
The Department has reviewed this comment and no changes were made in response. The rule provision is consistent with the requirements of the federal regulations.

**Comment**
§64-13-4.13.3.a. The LTCOP supports Proposed Rule 4.13.3.a. which requires that, prior to involuntary discharge based on inability to meet a resident's needs, a nursing home maintain documentation describing the specific needs it is unable to meet and how the receiving nursing home is better equipped to meet those needs.
**Response**
The Department has reviewed this comment. This comment is general in nature and offers no specific areas for amendment.

**Comment**
§64-13-4.14.3. The LTCOP supports the addition of "sexual orientation" to the list of groups specifically protected from discrimination. LGBT seniors experience widespread discrimination in healthcare and the addition of this language would help assure that they have equal access to nursing home services.
**Response**
The Department has reviewed this comment. This comment is general in nature and offers no specific areas for amendment.

**Comment**
§64-13-5.3.7. We propose making several changes (mostly stylistic) to address potential confusion.

- Move the entire new proposed paragraph from 5.3.7. to before 5.3.6. and renumbering.
- Insert the words "Electronic Communications" at the beginning of the proposed new language to be consistent with the headings used in the other sub-paragraphs.
- Strike the word "privacy" from the proposed language as duplicative with the overall section heading.

By moving the proposed language up one level, it allows the final conclusory paragraph (5.3.6.) to cover all the foregoing sections, including the new proposed language. This will allow for greater clarity to facilities to determine the accommodations and access consistent with other privacy issues.
**Response**
The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

**Comment**
§64-13-7.4.2.d. The LTCOP suggests deleting the last sentence of Proposed Rule 7.4.2.d. "*The discharge summary shall contain a dated physician signature.*" This language is duplicative of Proposed Rule 7.4.2.d.1.
**Response**
The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

**Comment**
§§64-13-8.13.2.c. and 8.13.2.g. The LTCOP supports the addition of Proposed Rule 8.13.2.c. thru 8.13.2.g. The inappropriate use of anti-psychotic medication has been recognized as a nationwide problem and impacts residents with dementia disproportionately. The House Ways and Means Committee issued yet another report confirming this earlier this week – Under-Enforced and Over-Prescribed: The Antipsychotic Drug Epidemic Ravaging America's Nursing Homes Although West Virginia's nursing homes have made progress in reducing their use, West Virginia can and should do better in assuring that these medications are only used when clearly needed for established medical conditions and only after residents, or their appropriate legal representatives, provide informed consent. The proposed changes will further these goals by strengthening the protections against the inappropriate use of anti-psychotic medications.
**Response**
The Department has reviewed this comment and no changes were made in response. The rule provision is consistent with the requirements of the federal regulations.

**Comment**
§§64-13-8.14.1. and 8.14.2.b. The LTCOP supports the retention of the current language "A nursing home shall have sufficient nursing personnel to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care," but recommends that the minimum nurse staffing ratio be increased from "2.25" or "*3.25*". the 2.25 ratio has been in place for many years. During that time, the complexion of care of nursing home residents has changed. Residents are much sicker and require more

hands-on care than they did when the 2.25 ratio was first established. Today's nursing home residents have higher care needs. That contrast could not be starker that it is now. Families/friends have been prevented from entering resident care areas in nursing homes for months. There is no end in sight. Many of those family/friends routinely do things for residents that complement, or even replace, some of the care that the nursing homes provide. When our residents lost those complementary caregivers, their needs did not decrease proportionally. In many cases, their needs increased because of the effects of social isolation. Residents rely on staff now more than ever. Our residents are much sicker and require more hands-on care than they did when the staffing ratio was established. Nursing home care during the pandemic requires more staff. Our staffing ratio must reflect reality. If not now, when?

**Response**

The Department has reviewed this comment. This comment is general in nature and offers no specific areas for amendment.

**Comment**

§64-13-8.20.2.b. The LTCOP suggests the addition of language that the infection control program also consider and address psychosocial harm related to isolation. One of the lessons learned from the pandemic is that although isolation has an important role in the prevention/reduction of the spread of disease, the use of isolation itself causes significant harm to our residents, including but not limited to, depression, malaise, physical decline, loss of appetite, weight loss, apathy, and loss of will to live. It is critically important to recognize and address the harm even necessary isolation causes residents. Suggest the following "Determines what procedures, such as isolation, shall be applied to a resident. *Isolation shall only be used to the extent that is medically necessary to protect the resident and others. The nursing home shall maintain documentation of medical necessity and the measures it has instituted to prevent and minimize psychosocial and other adverse effects of isolation in the resident record.*"

**Response**

The Department has reviewed this comment. This comment is general in nature and offers no specific areas for amendment.

**Comment**

§§64-6-13-8.13.2., 8.21., and 8.22. It is our understanding that proposed changes to the following items will not apply to federally-licensed nursing homes, and only intended to mirror federal regulations for non-federally licensed facilities.

- Antipsychotic drugs (§8.13.2.)
- Trauma-informed care (§8.21.)
- Pain management (§8.22.)

In light of such, the Association will withhold comment. However, to the extent this is intended to apply to all nursing homes and/or contradict existing federal requirements, then the Association would request an opportunity to submit comments.

**Response**

The Department has reviewed this comment. This comment is general in nature and offers no specific areas for departments.

**Comment**

§64-13-8.14. The WVHCA supports the decision to not amend or change the existing staffing ratio contained in the rule. With the current uncertainty that the healthcare community faces regarding workforce availability, we don't believe now is the time to place additional staffing requirements on our facilities.

Like other businesses and industries in our state, our members struggle with workforce availability and retention issues on a regional and statewide basis. The current staffing ratio accounts for these regional disparities, while maintaining and appropriate and safe minimum standard. An arbitrary increase in the current rate, as has been proposed in prior years, will disrupt the current balance, and likely lead to fewer available beds for seniors in need of care.

However, as an association, we share a desire to expand and grow the workforce availability and increase retention across the entirety of the health care continuum.
To assist in this desire, the West Virginia Health Care Association, along with other healthcare providers, successfully advocated during the 2020 legislative session for passage of a statewide study of healthcare workforce issues. The bill (HB4434) directs the State Department of Commerce to analyze the workforce challenges, and report back to the legislature with its findings. It is hoped this study will provide important data and insight to guide plans and strategies to increase workforce in health care industries statewide.
**Response**
The Department has reviewed this comment. This comment is general in nature and offers no specific areas for amendment.

**Comment**
§§64-13-10.10.6. For multiple reasons, we propose striking the new language in its entirety. First, the proposed language may improperly establish/interfere with doctor-patient relationship. It imposes a duty upon a facility medical director to personally care for a patient, even though it may be out of the doctor's specialty. The existing language in the rule contemplates a "coordination" and oversight, but this proposed language significantly changes the relationship to require personal care of a resident when a patient's doctor is "unavailable".
The absence of a definition of "unavailable" also presents difficulty and potentially interferes in the doctor-patient relationship. For instance, is unavailable a temporal question (i.e. doctor not answering the phone for 15 minutes)?
**Response**
The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

**Comment**
§64-13-10.10.6. The LTCOP supports the addition of Proposed 10.10.6. The proposed new language will address the dilemma presented in several situations over the past few years when the attending physician resigned from the resident's care and the medical director refused to provide coverage leaving both the resident and the nursing home at a loss. Proposed 10.10.6. addresses that situation by clearly stating that the medical director is responsible for providing or arranging for another provider to provide, medical services to residents when their attending physician is unavailable.
**Response**
The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

**Comment**
§§64-13-11.1.5.b. and 11.2.4.b. Since the proposed language is identical in both sections to reflect prompt notification. The inclusion of "upon receipt" for all labs may impose an unintended consequence of contacting the physician at all hours of the night for routine/normal lab work.
However, we recognize the need to expeditiously notify a physician of abnormal or critical testing. Hence, we would propose the following rewrite:
<u>11.1.5.b. Promptly notify the physician of the findings, unless such test was expressly ordered expedited/critical by the physician in which case the physician shall be notified upon receipt of the findings;</u>
**Response**
The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

**Comment**

§64-13-15.9.3. The LTCOP suggests deleting Proposed Rule 15.9.3. as duplicative and unnecessary. Proposed Rule 15.9.3. directs the reduction of civil money penalties assessed under this rule when a civil money penalty for the same deficiency has also been assessed by the federal Centers for Medicare and Medicaid Services (CMS). However, Proposed Rule 3.2.3.b. exempts federal certified nursing homes from provisions of this rule addressed in applicable federal regulations. The proposed exemption eliminates the possibility of civil money penalty assessment for the same deficiency under both the federal and state rule. Therefore, Proposed Rule 15.9.3. is unnecessary and should be deleted.

**Response**

The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

Ms. April Robinson, General Counsel
WV DHHR
One Davis Sq. Suite 100, East
Charleston, WV 25301

July 31, 2020

RE: LTCOP Comments to the Proposed Nursing Home Licensure Rule (64 CSR 13)

Dear Ms. Robinson

Please consider these comments to the Proposed West Virginia Nursing Home Licensure Rule (64 CSR 13) on behalf of the West Virginia Long-term Care Ombudsman Program (LTCOP).

## Resident Rights

**Proposed Rule 4.4.4**. The LTCOP suggests deleting the underlined language in Proposed Rule 4.4.4. That language mixes the right of resident, and others, to access survey and inspection results with the department's obligation to release them. Proposed Rule 4.4. delineates a *nursing home's* responsibility for confidentiality and access to records/information. A nursing home resident should not be required to make a written request before being permitted to review a survey report. The nursing home should instead make those reports readily available for review at any time. Suggest deleting the phrase "*Upon written request*" in the first sentence and "*The director shall treat any inspection or complaint report as public information from the time an acceptable plan of correction is submitted. Before releasing an inspection or complaint report considered to be public information, the director shall delete any confidential information regarding a resident that reasonably permits identification of the resident.*" from Proposed Rule 4.4.4. and incorporating that language into Proposed Rule 14.2.10. which describes the director's obligation to make survey and inspection reports available.

**Proposed Rule 4.13.3.a.** The LTCOP supports Proposed Rule 4.13.3.a. which requires that, prior to involuntary discharge based on inability to meet a resident's needs, a nursing home maintain documentation describing the specific needs it is unable to meet and how the receiving nursing home is better equipped to meet those needs.

**Proposed Rule 4.14.3**. The LTCOP supports the addition of "sexual orientation" to the list of groups specifically protected from discrimination. LGBT seniors experience widespread discrimination in healthcare and the addition of this language would help assure that they have equal access to nursing home services.

## Plans for Care and Medical Records

**Proposed Rule 7.4.2.d**. The LTCOP suggests deleting the last sentence of Proposed Rule 7.4.2.d. "*The discharge summary shall contain a dated physician's signature.*" This language is duplicative of Proposed Rule 7.4.2.d.1.

## Quality of Care

**Proposed Rule 8.13.2.c. thru 8.13.2.g**. The LTCOP supports the addition of Proposed Rule 8.13.2.c. thru 8.13.2.g. The inappropriate use of anti-psychotic medication has been recognized as a nationwide problem and impacts residents with dementia disproportionately. The House Ways and Means Committee issued yet another report confirming this earlier this week - Under-Enforced and Over-Prescribed: The Antipsychotic Drug Epidemic Ravaging America's Nursing Homes. Although West Virginia's nursing homes have made progress in reducing their use, West Virginia can and should do better in assuring that these medications are only used when clearly needed for established medical conditions and only after residents, or their appropriate legal representatives, provide informed consent. The proposed changes will further these goals by strengthening the protections against the inappropriate use of anti-psychotic medications.

**Proposed Rules 8.14.1. and 8.14.2.b**. The LTCOP supports the retention of the current language "A nursing home shall have sufficient nursing personnel to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care," but recommends that the minimum nurse staffing ratio be increased from "2.25" to "*3.25*". The 2.25 ratio has been in place for many years. During that time, the complexion of care of nursing home residents has changed. Residents are much sicker and require more hands-on care than they did when the 2.25 ratio was first established. Today's nursing home residents have higher care needs. That contrast could not be starker that it is now. Families/friends have been prevented from entering resident care areas in nursing homes for months. There is no end in sight. Many of those family/friends routinely do things for residents that complement, or even replace, some of the cares that the nursing homes provide. When our residents lost those complementary caregivers, their needs did not decrease proportionally. In many cases, their needs increased because of the effects of social isolation. Residents rely on staff now more than ever. Our residents are much sicker and require more hands-on care than they did when the staffing ratio was established. Nursing home care during the pandemic requires more staff. Our staffing ratio must reflect reality. If not now, when?

**Proposed Rule 8.20.2.b**. The LTCOP suggests the addition of language that the infection control program also consider and address psychosocial harm related to isolation. One of the lessons learned from the pandemic is that although isolation has an important role in the prevention/reduction of the spread of disease, the use of isolation itself causes significant harm to our residents, including but not limited to, depression, malaise, physical decline, loss of appetite, weight loss, apathy, and loss of will to live. It is critically important to recognize and address the harm even necessary isolation causes residents. Suggest the following "Determines what procedures, such as isolation, shall be applied to a resident. *Isolation shall only be used to the extent that is medically necessary to protect the resident and others. The nursing home shall maintain documentation of medical necessity and the measures it has instituted to prevent and minimize psychosocial and other adverse effects of isolation in the resident record.*"

## Administration and Human Resources

**Proposed 10.10.6**. The LTCOP supports the addition of Proposed 10.10.6. The proposed new

language will address the dilemma presented in several situations over the past few years when the attending physician resigned from the resident's care and the medical director refused to provide coverage leaving both the resident and the nursing home at a loss. Proposed 10.10.6. addresses that situation by clearly stating that the medical director is responsible for providing or arranging for another provider to provide, medical services to residents when their attending physician is unavailable.

**Enforcement and Due Process**

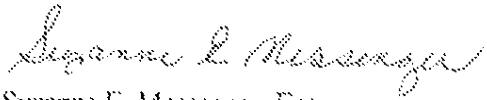
**Proposed Rule 15.9.3.** The LTCOP suggests deleting Proposed Rule 15.9.3. as duplicative and unnecessary. Proposed Rule 15.9.3. directs the reduction of civil money penalties assessed under this rule when a civil money penalty for the same deficiency has also been assessed by the federal Centers for Medicare and Medicaid Services (CMS). However, Proposed Rule 3.2.3.b. exempts federal certified nursing homes from provisions of this rule addressed in applicable federal regulations. The proposed exemption eliminates the possibility of civil money penalty assessment for the same deficiency under both the federal and state rule. Therefore, Proposed 15.9.3. is unnecessary and should be deleted.

**Conclusion**

The West Virginia Long-term Care Ombudsman Program appreciates the opportunity to provide comments on the proposed rule and appreciates your consideration of these comments. In addition to its statutory purpose, the rule provides West Virginia specific protections to all nursing home residents, not just those who lived in Medicare/Medicaid certified homes. Even where those certified homes are exempted from compliance with the licensure rule, it assures that residents who live in noncertified homes are entitled to the same level of quality care. Currently, the only nursing home that is not certified is the Veteran's Nursing Home. The federal regulation governing veteran's nursing home care, 38 CFR 51, was not revised when the federal Medicare/Medicaid conditions of participation were updated in 2016. Consequently, it is essential that our state rule provide these veterans with the same protections as those enjoyed by residents living in certified facilities. The LTCOP's suggestions were made with goal of empowering and protecting all of West Virginia's nursing home residents and creating a culture of care that allows for maximum accommodation of each individual resident's needs and preferences and facilitates the creation of a homelike environment.

Please feel free to contact me directly if you require any clarification or additional information.

Respectfully submitted,



Suzanne E. Messenger, Esq.
State Long-term Care Ombudsman

WEST VIRGINIA
Health Care
ASSOCIATION

July 31, 2020

Ms. April Robertson
General Counsel, WV Department of Health & Human Resources
One Davis Square
Suite 100, East
Charleston, West Virginia 25301

SENT VIA U.S. MAIL AND ELECTRONIC MAIL TO APRIL.L.ROBERTSON@WV.GOV

**RE: WVHCA Comments to Proposed Changes to 64CSR13 (Nursing Home Licensure Rule)**

Dear Ms. Robertson:

On behalf of the West Virginia Health Care Association (WVHCA), which represents nearly all of the nursing homes in our state, I am writing to offer comments to the proposed revisions to the Nursing Home Licensure Rule (64CSR13) that have been published for public comment.

Overall, the members of the WVHCA are in general agreement with many of the proposed rule changes, and believe they comport with the legislative intent contained in HB 2607 that passed during the 2019 Regular Session of the Legislature.

However, we do have suggested changes to add clarity and avoid unintended consequences created by several of the proposed changes. For ease of reference and explanation, we have categorized the comments by general topic and included specific reference to the relevant section number used in the proposed rule.

I. **Staffing Ratio** (§8.14)

The WVHCA supports the decision to not amend or change the existing staffing ratio contained in the rule. With the current uncertainty that the healthcare community faces regarding workforce availability, we don't believe now is the time to place additional staffing requirements on our facilities.

Like other businesses and industries in our state, our members struggle with workforce availability and retention issues on a regional and statewide basis. The current staffing ratio accounts for these regional disparities, while maintaining and appropriate and safe minimum standard. An arbitrary increase in the current rate, as has been proposed

in prior years, will disrupt the current balance, and likely lead to fewer available beds for seniors in need of care.

However, as an association, we share a desire to expand and grow the workforce availability and increase retention across the entirety of the health care continuum

To assist in this desire, the West Virginia Health Care Association, along with other healthcare providers, successfully advocated during the 2020 legislative session for passage of a statewide study of healthcare workforce issues. The bill (HB 4434) directs the State Department of Commerce to analyze the workforce challenges, and report back to the legislature with its findings. It is hoped this study will provide important data and insight to guide plans and strategies to increase workforce in health care industries statewide.

## II. Proposed recommended changes/edits

A. Documentation (§4.13.3.a)(Pg. 24):

We propose restoring the original language relating to documentation in §4.13.3.a, and removing the proposed changes. The proposed changes place a potential impossibility upon a facility to know the availability of appropriate resources at a subsequent facility. These are determinations unique and known to a receiving facility and sometimes not readily known to the discharging facility.

The original language already imposes a requirement upon the discharging facility to document the reason for the transfer or discharge, and maintains the overall intent in the rule to expressly state the reason in writing.

B. Electronic Communication & Privacy (§5.3.7)(Pg. 32)

We propose making several changes (mostly stylistic) to address potential confusion.

- Move the entire new proposed paragraph from 5.3.7 to before 5.3.6 and renumbering.
- Insert the words "Electronic Communications" at the beginning of the proposed new language to be consistent with the headings used in the other sub-paragraphs.
- Strike the word "privacy" from the proposed language as duplicative with the overall section heading.

By moving the proposed language up one level, it allows the final conclusory paragraph (5.3.6) to cover all the foregoing sections, including the new proposed language. This will allow for greater clarity to facilities

to determine the accommodations and access consistent with other privacy issues.

C. Physician-Related issues (§10.10.6; §11.1.5.b; and §11.2.4.b)

There were multiple new physician-related changes made in the proposed rule. We address each below:

1. Imputing Care upon Medical Director (§10.10.6)(Pg. 69)

   For multiple reasons, we propose striking the new language in its entirety. First, the proposed language may improperly establish/interfere with doctor-patient relationship. It imposes a duty upon a facility medical director to personally care for a patient, even though it may be out of the doctor's specialty. The existing language in the rule contemplates a "coordination" and oversight, but this proposed language significantly changes the relationship to require personal care of a resident when a patient's doctor is "unavailable".

   The absence of a definition of "unavailable" also presents difficulty and potentially interferes in the doctor-patient relationship. For instance, is unavailable a temporal question (i.e. doctor not answering the phone for 15 minutes)?

2. Notification of Labs (11.1.5.b and 11.2.4.b) (Pg. 69 & 70)

   Since the proposed language is identical in both sections, we have combined our comments as to both.

   We propose restoring the original language in both sections to reflect prompt notification. The inclusion of "upon receipt" for all labs may impose an unintended consequence of contacting the physician at all hours of the night for routine/normal lab work.

   However, we recognize the need to expeditiously notify a physician of abnormal or critical testing. Hence, we would propose the following rewrite:

   <u>11.1.5.b.</u> Promptly notify the physician of the findings, <u>unless such test was expressly ordered expedited/critical by the physician in which case the physician shall be notified upon receipt of the findings;</u>

## III. Other general comments

It is our understanding that proposed changes to the following items will not apply to federally-licensed nursing homes, and only intended to mirror federal regulations for non-federally licensed facilities.

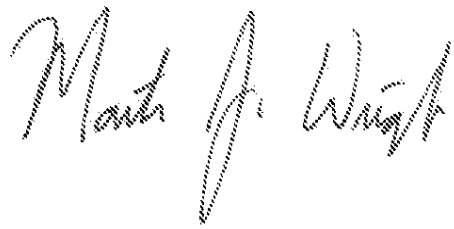
- Antipsychotic drugs (§8.13.2)(Pg. 45)
- Trauma-informed care (§8.21)(Pg. 54)
- Pain management (§8.22)(Pg. 54)

In light of such, the Association will withhold comment. However, to the extent this is intended to apply to all nursing homes and/or contradict existing federal requirements, then the Association would request an opportunity to submit comments.

This concludes our comments at this time. We again thank you for allowing us the opportunity submit feedback on the rule and appreciate your consideration of our suggestions.

We are available any time to answer questions or provide clarification.

Respectfully Submitted



Martin J. Wright, Jr.
CEO