CAHCF/CCAL
Connecticut Association of Health Care Facilities
Connecticut Center for Assisted Living

August 1, 2023

eRegulations Tracking No. PR2022-32 – Public Hearing Comments on Department of Public Health Proposed Regulations Concerning Minimum Staffing Level Requirements for Nursing Homes

Thank you for this opportunity to verbally present the views of the Connecticut Association of Health Care Facilities and the Connecticut Center for Assisted Living (CAHCF/CCAL) at this August 1, 2021 agency public hearing on the proposed regulations concerning minimum staffing level requirements for nursing homes. My name is Matthew V. Barrett. I am president and CEO of CAHCF/CCAL, a Connecticut trade association that includes one hundred and sixty-four (164) skilled nursing facility members. CAHCFCCAL is located on 213 Court Street, Middletown, CT 06457.

Introduction --- Support for 3.0 Minimum Staffing Standard but Substantial Revisions Recommended to the DPH Implementing Policies, Procedures and Proposed Regulations

The skilled nursing facility members of CAHCF/CCAL recommend substantial revisions to the proposed regulations.

At the outset of this agency public hearing, It is important to state that CAHCF/CCAL agrees with the policy goal of increasing staffing levels to 3.0 hours per resident per day as directed by the General Assembly consistent with the state appropriations adopted for this purpose – as informed by the estimated fiscal impact as to the overall statutory increase of minimum staffing levels from a total of 1.9 hours to 3.0 hours of direct care per resident per day – an increase of 1.1 hours or nearly 60%. The reason that the association is recommending significant revisions to the proposed regulations is explained in the specific method the agency has chosen to implement the substantial increase from 1.9 to 3.0 hours. The association asserts that the agency has violated the clear meaning intent of the Section 19a-563h of the general statutes, first in agency policies and procedures issued and effective March 1, 2023 and in these proposed regulations, which mirror the agency policies and procedures.

That the agency proposed regulations and issued policies and procedures violate the clear meaning and intent of the 19a-563h has already been expressed formally by the association in its Petition for Declaratory Rulings Regarding the Applicability of the CGS Section 19a-536h submitted to the Department of Public Health on February 28, 2023. The full petition is attached and we ask that it be included in today's public hearing record. Because the proposed agency

regulations are the same as the issued policies and procedures, CAHCF/CCAL asserts that proposed regulations violate 19a-563h for the same reasons expressed in the petition.

Proposed Regulations Should be Substantially Revised to Align with the Available Appropriations and Clear Meaning and Intent of the Enabling State Statute / CAHCF/CCAL Petition for a DPH Declaratory Rulings

As presented in the declaratory ruling petition, and for today's agency public hearing record, CAHCF/CCAL asserts: (1) Under The Plain Meaning Of Section 19a-563h(a), Nursing Homes Satisfy The Minimum Staffing Level Requirement Of 3.0 Hours Of Direct Care Per Resident Per Day With 3.0 Hours Of Total Nursing And Nurse's Aide Personnel Time; (2) The Legislative History And Fiscal Impact Analysis Supports The Plain Meaning Interpretation; (3) The General Assembly Specifically Rejected Minimum Staffing Levels By Licensure Status, Opting Instead To Preserve Staffing Flexibility Based On Resident Needs; (4) The DPH Policies and Procedures Violate the Statute, Do Not Comport With The Fiscal Impact Analysis and Available Appropriations, And Are Inconsistent With DSS' Interpretation And The Medicaid Increased Rate Application Process.

Once more, the main issues of concern is not in opposition to the 3.0 standard. The concern is in the harmful and costly implications of removing the longstanding flexibility of directing staff to meet the specific care needs of residents by inflexibly mandating the RN, LPN and CNA hours. This can be summarized in an excerpt from the Petition for Declaratory Rulings submitted to DPH:

> Despite the plain language of Section 19a-563h and the opposition during the legislative process for mandatory staffing ratios – including by DPH's Acting Commissioner – DPH nevertheless has mandated in the Policies and Procedures not just an increase in the minimum staffing to 3.0 hours of direct care per resident per day, but also a specific minimum for nurse aide staffing of 2.16 hours per resident per day, requiring: (i) for licensed nursing personnel (RNs and LPNs), 0.57 hours per patient during day shifts (7 a.m. to 9 p.m.) and 0.27 hours per patient during night shifts (9 p.m. to 7 a.m.); and (ii) for CNAs, 1.6 hours per patient during day shifts (7 a.m. to 9 p.m.) and 0.56 hours per patient during night shifts (9 p.m. to 7 a.m.). In addition, the Policies and Procedures add an ambiguous definition of direct care. These interpretations are clearly contrary to the legislative intent evidenced in the final fiscal analysis dated May 27, 2021, which is uses 2019 cost report data to conclude a nominal fiscal impact resulting from the passage of Section 19a-563h.[1]
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> Given that the General Assembly rejected any allocation of minimum hours among different nursing staff categories, it is clear that the state legislature intended to leave specific staffing choices to the individual nursing homes, which are in the best positions to

[1] Notably, in filing the Notice of Intent to Adopt Regulations concerning these minimum staffing requirements, DPH failed to include the Fiscal Note, including estimated costs or revenue impact on the State required under the regulation-making process in Connecticut. *See* Conn. Gen. Stat. § 4-168(a).

assess the specific needs of individual patients and determine specific staffing to meet those patients' needs.

The General Assembly's decision to leave specific staffing choices to individual nursing homes is evident given the significant fiscal impact that mandatory staffing ratios would pose for nursing homes and the State. As discussed *supra*, the initial Fiscal Note on the original draft of S.B. 1030 made clear that imposing the minimum of 4.1 hours of direct care per resident per day, plus imposing mandated staffing ratios, would cost DSS as much as an additional $200 million per year. The second Fiscal Note, addressing the amended version of S.B. 1030 that both reduced the minimum hours from 4.1 to 3.0 of direct care per resident per day and eliminated all mandatory staffing ratios, anticipated increased costs of between $300,000 and $500,000 per year. DSS then had an additional $500,000 allocated for Medicaid costs for subsequent fiscal years, reflecting the clear intent to allocate to DSS additional funding to cover only the increase in minimum staffing levels to 3.0 hours *without* accounting for additional costs of mandatory staffing ratios. The DPH Policies and Procedures do not take these financial impacts into account, and would impose an unfunded mandate that the legislature expressly chose not to impose, thus violating the statute.

Not only do the Policies and Procedures violate the plain language and legislative intent of Section 19a-563h, they represent a significant, overreaching departure from DPH's *existing* regulations regarding staffing ratios for nursing homes. *See* Conn. Agencies Regs. § 19-13-D8t(m). These regulations – which were the sole source of minimum staffing levels for nursing homes before the enactment of Section 19a-563h – permitted nursing homes to staff 1.5 hours of the total minimum 1.9 hours of direct care with any combination of "total nursing and nurse's aide personnel" based on patient needs; only 0.4 hours of the minimum time was expressly allocated for licensed nursing professionals. DPH cannot regulate beyond this without specific legislative authority, approval, and funding.

Yet, the Policies and Procedures as written have significant fiscal impact, in stark contrast with the nominal impact included in the fiscal analysis. The legislature clearly intended for the minimum staffing ratio to be established as a combined total of licensed nursing staff and nurse's aide personnel, consistent with the existing Public Health Code methods. Instead, DPH has created two separate minimum staffing levels, one for licensed nursing staff and one for nurse's aide personnel, which is a major change that will significantly increase the fiscal impact and require staffing modifications for over 100 nursing homes. In addition, in at least two presentations on the new Policies and Procedures, DPH has incorrectly claimed that the new Policies and Procedures only increase the total minimum staffing levels by 0.46 hours per day. This is clearly incorrect, as the minimum staffing levels are increased by 1.1 hours per day overall (from 1.9 to 3.0) and the Policies and Procedures establish for the first time minimum staffing levels for nurse's aide personnel, at a level of 2.16 hours per patient per day.

The Policies and Procedures undermine and contradict the plain language of Section 19a-563h and its clear legislative intent, and implement mandates that the legislature specifically sought to avoid when it modified the proposed legislation to delete staffing ratios. In addition, substantively the Policies and Procedures are not supported by proper

procedure and/or substantial evidence. While the General Assembly authorized DPH to implement interim policies and procedures, DPH was not given authority to ignore the plain language of the statute or its legislative history. Accordingly, the Policies and Procedures that mandate particular minimum staffing ratios to meet the minimum staffing levels for nursing homes violate Section 19a-563h, and its purpose and intent. In addition, to the extent that DPH intends to craft regulations that incorporate any staffing ratios, for the same reasons set forth above, those regulations also would violate Section 19a-563h.

The General Assembly intended to preserve flexibility for nursing homes to determine how best to meet the new minimum staffing level requirements based on individual patient needs, not arbitrary, fixed staffing ratios. Section 19a-563h must be read to allow nursing homes to make those staffing decisions, so long as the minimum mandate of 3.0 hours of direct patient care is achieved and staffing is sufficient to meet patient needs (pages 13-15).

Additional Recommendations:

CAHCF/CCAL also recommends that the agency consider the following additional views as it formulates a final regulation:

1. Staff are simply not available to fill open positions given the severe staffing shortages now being experienced;

2. Sufficient state funding has not been made available for compliance, and therefore the proposed regulations are a clear unfunded state mandate;

3. The DPH proposed rule reverses a several decades long policy of appropriately allowing providers the appropriate flexibility to combine direct care licensed nursing hours with nurse aide hours to comply with the new 3.0 minimum direct care staffing requirement---this DPH policy reversal has effectively and significantly increased the CNA minimum from 1.26 hours to 2.16 hours per resident per day. This is especially costly and harmful to patient care noting that almost all Connecticut skilled nursing facilities are providing direct care staffing well above the 3.0 proposed state minimum, and would be in compliance, were it not for DPH removing this essential direct care staffing flexibility;

4. In addition to how patient care may be undermined when unfunded state mandates are imposed as here, many providers assert that considerable harm is caused by the DPH proposed regulations as compliance may only be achieved with greater use of inconsistent agency staff and less resources available for licensed direct care staff, or that operators are forced to turn away patients who no longer need hospital care and who would benefit from the valuable services of Connecticut's skilled nursing facilities.

5. CAHCF/CCAL skilled nursing facility providers are very discouraged e proposed regulation reverses the ability to meet the minimum staffing requirement in a way that best meets the specific needs of their facility residents, and instead requires specific minimums for CNAs vs. licensed direct care staff.

6. Many skilled nursing home providers have expressed how the inflexible proposed staffing minimums increases the on contracted nursing staffing agencies given the severe shortages of workers, and how this is not the approach the providers believe is best, and note how increasing minimums carelessly, like raising the CNA to 2.16 will further increase agency staff usage, which in not the optimal consistent assignment approach to care;

7. The definition of direct care staff should be inclusive of all licensed and non-licensed staff who provide care to residents beyond the RN, LPN, and CNA staff in a comprehensive approach needed to provide holistic care.

8. Implementation should be phased-in over a period of three years and include an initial pilot or demonstration component. Regulatory enforcement should never be solely based on isolated incidences when a facility may fall below any minimum staffing mandate on a single shift when the facility can demonstrate they meeting the care needs of their residents with sufficient overall staff as how been a state and federal requirement for decades;

9. The proposed regulations should include waiver provisions during periods of documented staffing shortages.

10. To demonstrate that the state has insufficiently provided the promised resources needed to comply with the staffing mandate, please note that the Department of Social Services has reported that 72 skilled nursing facilities applied for $21.4 million in increased Medicaid funding to comply with the new mandate, but that because there was only $500,000 appropriated for this purpose, the agency was forced to prorate the requested amounts downward to only a fraction of the requested amount---well below 10% of the requested amount. This means that some 90% of the true costs of implementing the new requirements are an unfunded state mandate. On this point, the DPH fiscal impact associated with the proposed regulation misstates the real fiscal impact on both DSS and the skilled nursing facilities. Note CAHCF/CCAL has estimated the overall cost of compliance to be approximately $77 million;

For the reasons expressed above, CAHCF/CCAL requests substantial revisions to the proposed regulations.

Respectfully submitted,

Matthew V. Barrett
President/CEO
CAHCF/CCAL