



November 12, 2020

Commissioner Monica Bharel, MD, MPH  
Massachusetts Department of Public Health  
250 Washington Street  
Boston, MA 02108

Dear Commissioner Bharel:

On behalf of the Massachusetts Senior Care Association (MSCA), which represents approximately 400 long term care facilities, we thank the Department of Public Health (Department) for the opportunity to present testimony and comments in response to the Department's proposed amendments to *105 CMR 150.000: Standards for Long Term Care Facilities*. The proposed regulations would (1) establish a minimum hour per patient day (HPPD) of 3.58, with a sub-minimum of .508 for RN hours, (2) prohibit bedrooms with 3 and 4 beds, and (3) revise square footage and spacing requirements in nursing facility bedrooms. This regulatory proposal is part of the Executive Office of Health and Human Services' (EOHHS) nursing facility accountability and support program announced in September in a continuing response to the COVID-19 pandemic.

As in the nation, COVID-19 has devastated our communities. This highly contagious and deadly virus has led to a staggering loss of life and illness in the Commonwealth's nursing facilities. We are deeply saddened by these deaths and extend our heartfelt condolences to the families and friends of those who have died. These deaths, together with the inspiration that we draw from our brave, tireless, frontline heroes who have helped nearly 20,000 infected residents recover, strengthen our resolve to do all we can to prevent and contain a resurgence of the virus in nursing facilities. Given the inherent vulnerability of seniors to COVID-19, from the start of this pandemic and consistent with Mass Senior Care's mission, our efforts and advocacy have centered on the safety, wellbeing and care of our residents and their caregivers. Our dedicated facility staff continue to work around the clock to protect our frail elderly residents, who remain at risk of contracting this virus, particularly as the state's infection rates continue to climb. And, as a result of the dedication and commitment of our facility staff and government partners, nursing homes have made steady progress on key COVID-19 quality and process metrics.



We offer the following comments on the Department's proposed regulatory amendments.

Based on extensive discussions with Mass Senior Care members, and builders and architects who specialize in the design and construction of nursing facilities, we believe that the Department's proposed square footage requirements (105 CMR 150.017 and 150.320) to increase bedroom square footage from 90 to 108 square feet of floor area per bed for double occupancy rooms and new minimum clearance and bed spacing requirements would be massively disruptive, exorbitantly expensive and could potentially displace thousands of individuals currently living in the Commonwealth's nursing facilities.

The Department is proposing to apply new square footage and spacing requirements that were adopted three months ago in the August 2020 Interim Amendment to the Facility Guidelines Institute's (FGI) 2018 Edition of the *Guidelines for Design and Construction*. FGI standards have never been applied to Massachusetts nursing facilities and there has been no prior meaningful stakeholder engagement nor discussion about the merits of the Department's apparent shift to the FGI standards for the construction of nursing facilities. Every facility currently operating in the Commonwealth was built prior to this August 2020 amendment, in accordance with the Department's construction square footage, bed clearance and spacing rules in effect at the time. Therefore, nearly all facilities will not meet the FGI standard, including those facilities approved by the Department and constructed within the past few years. In addition, it is highly unusual, and inconsistent with CMS policy, for a state government agency to retroactively apply new construction standards to existing nursing facilities or other buildings within the Commonwealth.

A Mass Senior Care survey of nursing facilities, architects and building professionals specializing in nursing facility design and construction, has confirmed that virtually every facility in the Commonwealth will be unable to meet the Department's proposed new square footage and spacing requirements and would be forced to add 36 square feet to most resident bedrooms. This is because since 1993 virtually all facilities were built under the Department's guidelines authorizing capital funding for a maximum of 420 gross square feet per bed. It is our understanding that the state's longstanding policy on nursing facility construction standards effectively incentivized facilities to build bedrooms with square footage smaller than the requirements contained in this new proposal. It will be extremely difficult and likely impossible to easily retrofit existing buildings to meet the Department's proposed rules, due to zoning laws, space restrictions, costs and the disruption to resident care. Most facilities would be required to tear down exterior walls, expand rooflines and foundations in order to build-out existing exterior walls by at least 3 feet. The interior would also need extensive renovations including floor and ceiling expansions, new side walls of the rooms in order to meet the new exterior wall, all of which will have a cascading effect on plumbing, sewage, electrical, cable, and other infrastructure components within the facility. Based on discussions with long term care



facility design architects, we conservatively project a minimum construction cost of \$3 million per facility to come into compliance with the proposed requirements. With close to 360 nursing homes in the state needing to retrofit their physical plants solely to comply with this requirement, the minimum cumulative construction cost alone would be over \$1 billion, the majority of which would need to be funded by the state's MassHealth program. Therefore, even in the unlikely event that facilities had the space to build out their facility, this is not a realistic option for most facilities as it would be incredibly disruptive to current residents, costly and impossible to complete the reconstruction of 360 nursing facilities by January 31, 2022.

To meet the Department's proposed square footage and bed spacing requirements, the other untenable option for nursing facility residents, their families, hospital systems and operators would be to make the vast majority of existing double occupancy rooms into a single occupancy rooms by January 31, 2022. This would threaten access to care, as well as potentially place numerous facilities in breach of previously established financing arrangements with lenders. In short, this option, too, would be extremely disruptive and would result in the immediate discharge and displacement of thousands of residents, while severely limiting consumer access to necessary short term rehabilitation and long term nursing facility care. Today, during the COVID period, a point of atypically low census, the total number of residents is 31,000. Massachusetts currently has about 44,000 licensed nursing home beds. To come into compliance with the proposed new square footage and spacing requirements, facilities would have to convert the vast majority of their bedrooms from doubles to singles, drastically reducing overall bed capacity. We conservatively estimate that bed capacity would be reduced from 44,000 to 27,000. This means that at current depressed census levels due to COVID, at least 4,000 residents would be displaced upon implementation of this regulation as the state's nursing facilities will have reached maximum capacity. And, as nursing facility census continues to increase over the next year, this potential access issue would only be exacerbated. In short, consumers seeking either long term or short term care would have limited options for accessing nursing facility care. This, alone, would be incredibly disruptive for the entire health care system, including hospitals not being able to easily discharge patients to skilled nursing facilities due to a lack of available beds. In addition, we need to acknowledge and recognize that there would be an astronomical annual recurring cost to the state in reducing about half of the Commonwealth's nursing home beds and thereby the revenues necessary to operate a nursing facility. This is because the vast majority of a nursing facility's operating budget is fixed in nature and these costs would now need to be allocated over significantly fewer residents, resulting in a major increase in cost per day for operation of a facility. We conservatively estimate a 25% increase in the operating cost per day with a cumulative annual recurring operating cost of over \$700 million, for the conversion of double rooms to single rooms for compliance purposes. This cost would need to be recognized by the state's MassHealth



program. This is the simple and factual reality of the Department's proposal if applied retroactively to existing facilities. Our comments should not be viewed as opposition to single rooms, but rather the utter necessity that to achieve private rooms for all current nursing facility residents, the Commonwealth must significantly increase current funding levels on an ongoing basis.

Given the inherent inequity, disruption and cost of applying new construction standards retroactively to existing buildings, we urge the Department to amend the proposed regulation to only apply the proposed square footage and spacing requirements prospectively, that is, to new DoN projects and/or major additions subsequent to adoption of new regulations. We also urge the Department to convene a stakeholder working group of design experts and clinicians to review and report back to the Public Health Council on the merits and consequences of shifting the state's longstanding construction standards to the FGI's recommendations. Finally and importantly, Massachusetts nursing facilities remain committed to examining all practical and evidenced based strategies that can improve the design of existing facilities to prevent the spread of communicable diseases and keep our most vulnerable citizens safe. We therefore urge the Department to immediately convene a working group of infection preventionists, nursing facility providers, epidemiologists, architects, builders and other stakeholders to make high-value, evidenced-based recommendations on infection prevention within all congregate settings. These recommendations may include guidelines on isolation rooms, UV lights in HVAC systems, non-permeable partitions, hand-free sinks and other innovations designed to mitigate the spread of infection in congregate living settings.

In addition to the Department's proposed changes in square footage and spacing requirements, the Department is proposing in 105 CMR 150.017 and 150.320 to prohibit facilities from operating with more than 2 beds per room thereby eliminating the 3<sup>rd</sup> and 4<sup>th</sup> bed in existing nursing facilities. While the regulation would not take effect until January 2022, MassHealth is linking vital COVID-19 funding to an immediate so-called dedensification program, which requires nursing facilities to more quickly transfer residents out of 3<sup>rd</sup> and 4<sup>th</sup> beds unless MassHealth determines "exceptional circumstances" exist.

Based on a recent Mass Senior Care member survey, more than 130 nursing facilities have bedrooms with more than 2 beds per room, and a total of over 2,000 beds would be eliminated. Based on current census, close to 1,000 residents would need to be transferred out of these rooms to other single or double rooms within the facility or to another facility if there are no beds available within the resident's existing facility. This proposal may also result in potential violations of loan covenants as facilities secured capital funding from lenders, including HUD, under existing rules that would now be terminated. We urge the Department to implement this regulation in a careful and calibrated manner, one which protects resident-



centered care and is in compliance with federal and state nursing facility transfer rules, as well as address the following critical policy areas.

Specifically, given the significant impact of the Department's proposal on nursing facilities and their residents, we urge the Department to implement a sufficient glide path to enable facilities to plan for this change, including: (1) fast tracking Determination of Need (DoN) applications for renovation, replacement and expansion projects necessary to comply with this requirement, (2) adjusting the MassHealth capital payment standard to fund new building costs associated with meeting this regulatory requirement, and (3) approving waivers to this requirement if compliance would cause undue hardship to the facility and/or residents. This waiver provision is particularly critical for facilities that are serving special care populations and for facilities that do not have lender approval to eliminate beds, or viable alternatives to reducing capacity because they cannot build out their existing facility due to zoning or land availability restrictions.

For the over 130 facilities which have bedrooms with more than 2 beds, we also note that the Department's proposed regulation to eliminate the 3<sup>rd</sup> and 4<sup>th</sup> bed will also have a significant impact on their revenue and operating cost structure that would need to be recognized by Medicaid.

The Department is also proposing to amend to 105 CMR 150.007 Nursing Services (B) Minimal Nursing Requirements to establish specific minimum hour per patient per day (HPPD) requirements of 3.58 hours of total nursing care per patient per day, with a sub-minimum of .508 of care for a registered nurse of 3.58, which align with CMS' for 3-star staffing methodology. Our understanding is that the state will also align with CMS' HPPD definitions, inclusive of Resident Care Assistants (RCAs) and aides in training. We strongly support the inclusion of RCAs in the staffing definition as there is currently a severe shortage of certified nursing assistants (CNAs). There is also a shortage of licensed nurses including RNs and LPNs. As highlighted below, Mass Senior Care is committed to continuing to partner with government agencies and other stakeholders to address this shortage. In the immediate term, given well-documented long term care workforce shortages, we ask that this section of the proposed regulation be amended to allow a facility to petition the Department for a temporary waiver to the HPPD requirements and related penalties if a facility can demonstrate good faith efforts to fill vacant positions.

The nursing facility workforce continues to provide compassionate care to their beloved residents. These dedicated individuals - 90% of whom are women, over half of whom are people of color with most not yet earning a living wage - are the backbone of our facilities as they provide the majority of hands on care by assisting residents with all aspects of daily living, as well as providing vital companionship. They do this with great skill, empathy and compassion and they deserve our support, respect and gratitude for their bravery and sacrifice.



Mass Senior Care has long advocated for the need to work together to ensure that we have a strong, stable workforce and that our nursing facilities are well staffed. However, even with the Commonwealth's 9% unemployment rate, significant vacancies persist. In a recent Mass Senior Care survey, 91% of nursing facilities are actively hiring for CNAs and 85% are hiring for RNs. Facilities are also reporting that temporary nursing agencies are unable to reliably assist in filling vacant positions. Longstanding workforce shortages are exacerbated by difficulty in securing childcare services for working families and must be addressed jointly by both government and providers without further delay by approving and funding living wage legislation and expansion of child care vouchers. We must also expand opportunities to provide career growth for our staff by establishing and incentivizing career ladders through partnerships with local training centers, community colleges and universities so that all of our staff have the opportunity to grow within their professions. As employers, nursing facilities must continue to develop supportive workplace cultures of respect, tolerance and inclusion that offer ongoing leadership training, promote flexible scheduling, and other necessary programs that increase job satisfaction and worker retention.

We appreciate the Department's efforts during the pandemic to help support workforce recruitment including the recent announcement to resume CNA testing and certification through the Red Cross beginning on December 1st. We estimate that there are approximately 300 individuals awaiting CNA testing and certification. We also appreciate the Department's recent approval of asynchronous on-line CNA training programs that will further help to address CNA vacancies. Mass Senior Care continues to work with members on the establishment of in-facility CNA training programs and/or partnerships with CNA training providers in order to better create strong pipelines from the RCA position to CNA.

Despite enormous challenges and stressors, the vast majority of our mission-driven direct care workers have dedicated their professional lives to providing for and fiercely protecting their residents. We all must dedicate ourselves to do more to support this workforce and thereby our residents who depend on this care.

MSCA remains strongly committed to continuing to work with the Department, EOHHS, the Executive Office of Labor and Workforce Development (EOLWD) and other stakeholders to address workforce shortages and again appreciate the commitment of many in state government who are working diligently to increase the supply of staff available to work in nursing homes, and to create career ladder pathways for long term workers including working to address RN shortages in long term care. In short, we need to collectively work to execute an overall solution to address the workforce challenges facing nursing facilities.

Thank you for the opportunity to provide comments on the proposed regulations. As always, Mass Senior Care welcomes the opportunity to work with the Department to ensure that the



proposed regulations are implemented in a thoughtful, careful manner which protects residents and does not unnecessarily disrupt the provision of care.

Sincerely,

A handwritten signature in blue ink that reads "Tara Gregorio". The signature is fluid and cursive, written in a professional style.

Tara Gregorio  
President