Department of Health and Human Services
Maine People Living Safe, Healthy and Productive Lives
Paul R. LePage, Governor
Mary C. Mayhew, Commissioner

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January 7, 2013

Senator Margaret M. Craven, Chair
Representative Richard R. Farnsworth, Chair
and Members of the Joint Standing Committee on Health and Human Services
#100 State House Station
Augusta, ME 04333-0100

RE: DHHS "Progress Report" to Committee regarding LD 1700, *An Act to Provide an Alternative Method of Calculating Minimum Staffing Levels in Nursing Homes*

Dear Senator Craven, Representative Farnsworth, and Members of the Joint Standing Committee on Health and Human Services:

Please accept the attached "progress report" regarding an alternative method of calculating minimum staffing levels in nursing homes. This progress report is sent in response to your letter dated April 11, 2012 (attached). The Department was asked to convene and facilitate a workgroup to continue the discussion begun before your committee during the public hearing and work sessions on LD 1700 regarding more flexible staffing standards that preserve quality of care, do not lower current staffing levels and improve efficiency.

The workgroup held six meetings and reached immediate and ongoing consensus that flexible staffing is a desired goal, and that it is appropriate for the Department to re-examine current, minimum, shift-based staffing ratios for nursing facilities. However, due to the complexity of the impact of staffing standards on reimbursement, it is recommended that your committee during the 126th Legislature consider submitting a resolve establishing a Legislative Commission to study issues related to nursing facility staffing standards including rate-setting, resident acuity, and quality patient care. The use of legislative resources is needed to address this complex topic that impacts the delivery of quality care in Maine nursing facilities.

If you have any questions, please contact Ken Albert, Director of the Division of Licensing and Regulatory Services, at 207-287-9257.

Sincerely,

Mary Mayhew
Commissioner

MCM/klv

Enclosure

cc: Kenneth Albert, RN, Esquire, Director, Division of Licensing and Regulatory Services
Ricker Hamilton, Director, Office of Aging and Disability Services
Stephanie Nadeau, Director, Office of MaineCare Services

An Alternative Method of Calculating Minimum Staffing Levels in Nursing Facilities

"We are impressed by the strong interest in more flexible staffing standards that preserve quality of care, do not lower current staffing levels and improve efficiency." Letter (excerpt) from Senator McCormick and Representative Strang Burgess, Chairs, Joint Standing Committee on Health and Human Services, to Mary Mayhew, Commissioner, Department of Health and Human Services.

Progress Report
December 2012

Progress Report to the Joint Standing Committee on Health and Human Services, 125th Maine State Legislature

Submitted by the Department of Health and Human Services,
Division of Licensing and Regulatory Services

This report was prepared by:
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I. LD 1700 WORK GROUP: STAFFING LEVELS IN NURSING FACILITIES

1) **Background:** LD1700, *An Act to Provide an Alternative Method of Calculating Minimum Staffing Levels in Nursing Homes,* directed the Department of Health and Human Services (DHHS) to amend its minimum staffing rules to provide flexibility in staffing by setting standards based upon the 24-hour day. The Joint Standing Committee on Health and Human Services (HHS), 125th Legislature, voted against LD1700, but stated the following in a letter to the Commissioner of DHHS: "We were impressed by the strong interest in more flexible staffing standards that preserve quality of care, do not lower current staffing levels and improve efficiency." Additionally, the Committee wrote that it "is interested in encouraging the continuation of the productive discussions that began during consideration of this bill."

   The Committee's letter to the Commissioner of DHHS requested that DHHS convene a workgroup stating, "the working group should consider survey and certification data and information, connecting resident acuity and staffing standards, and the impact of staffing standards on reimbursement." The Committee requested that DHHS report to the HHS Committee by December 1, 2012, on the progress made by the workgroup, including any recommendations and proposed changes to law and rule.[1]

2) **Participants.** Joining the workgroup from the legislature were Representatives Peter C. Stuckey and Meredith N. Strang Burgess. Phyllis Powell, Assistant Director DLRS Medical Facilities Unit, facilitated the work of the group. Other members included representatives of the Long-term Care Ombudsman Program, the Maine Health Care Association, LeadingAge of Maine and New Hampshire, the Alzheimer's Association/Maine Chapter, the Maine Hospital Association, the Office of Aging and Disability Services, and Division of Licensing and Regulatory Services. A number of interested parties attended to share their views relative to minimum staffing ratios and quality of care.[2]

3) **Charge.** The workgroup was established to provide a forum to continue the discussion begun before the HHS committee that generated strong interest regarding more flexible staffing standards that preserve quality of care, do not lower current staffing levels and improve efficiency.

4) **Process.** The workgroup was convened and a series of meetings held on a two-week rotating schedule. Additionally, work group members benefited from the presence of subject matter experts at certain meetings as identified in the minutes. Examples of participating subject matter experts include: Colin Lindley, Director of Rate Setting for DHHS; Richard Lawrence, Healthcare Financial Analyst (former rate setting analyst); Catherine McGuire, Muskie School of Public Service (MDS); Kathleen Tappan, DLRS (MDS); Tammy Steuber, DLRS,

[1] Attachment 1: Communication from the Legislature to the Commissioner of DHHS dated April 11, 2012.
[2] Attachment 2: Work group members and subject matter experts who participated in the meetings.

Paralegal. Additional written material was submitted by several members of the workgroup.[3]

This "progress report," prepared by DHHS, represents the workgroup's recommendations. The draft progress report was distributed to workgroup participants and their comments reviewed for inclusion in this report.

II. RECOMMENDATIONS

1) ***Flexible Staffing Levels in Nursing Facilities:*** The workgroup reached immediate and ongoing consensus that flexible staffing is a desired goal, and that it is appropriate for the Department to re-examine current, minimum, shift-based staffing ratios for nursing facilities. "Traditional shift-based staffing patterns of 7:00-3:00, 3:00-11:00 and 11:00-7:00 are outdated and do not consider individual patient needs. Several facilities have adopted 12 hour shifts." (Maine Healthcare Association). The workgroup also agreed that any adjustment to the present minimum staffing requirements should assure that minimum staffing requirements do not fall below the existing staffing ratio.

   Action: The department will examine nursing facility staffing ratios as a part of revisions to the nursing facility rules presently in the amendment process.

2) ***Connecting resident acuity and staffing standards:*** Federal and state certification standards require that facilities staff to meet patients' needs.

   Action: This requirement will be articulated in the revised nursing facility rules (in process).

3) ***Impact of staffing standards on reimbursement: A discussion with DHHS rate*** setting staff and other subject matter experts indicated that there is not a direct correlation between staffing standards (ratios) and reimbursement. Further, there does not exist a uniform methodology for evaluating patient acuity as it relates to staffing levels. As such, there is no consistent and direct correlation between acuity and staffing standards in Maine. Due to the complexities involved (rate setting process, patient acuity measures, state and federal regulations, reimbursement methodologies, etc.) the work group recommends the formation of a Commission or other legislatively authorized group to study and propose recommendations, including legislation to address the interrelationship between staffing, reimbursement, and the delivery of safe and quality care.

   According to LeadingAge representatives, "reimbursement is a common concern among providers since the last rebasing of providers occurred in 2005, and the

[3] Attachment 3: Minutes of the workgroup meetings.

acuity of Maine patients has increased since then." According to figures provided by the Maine Healthcare Association "MaineCare underpays nursing homes for their direct care costs by $14 million."

Action: The work group recommends that a legislatively authorized Commission or work group be established to work with the MaineCare Program, the Division of Audit and the Rate Setting Unit to further clarify the relationship between the provider network, patient acuity, provider reimbursement and rebasing. Further, it is recommended that this work group should be formally established by the Legislature with specific staffing and designated participants who are appointed based on clearly defined criteria.

III. DRAFT RESOLVE

Resolve, To Establish a Commission To Study An Alternative Method of Calculating Minimum Staffing Levels in Nursing Facilities

Sec. 1. Study Commission established. Resolved: That the Commission to Study An Alternative Method of Calculating Minimum Staffing Levels in Nursing Facilities, referred to in this resolve as "the commission," is established, and be it further

Sec. 2. Commission membership. Resolved: That the commission consist of the following members:

1. Five members appointed by the President of the Senate as follows:

   A. Two members of the Senate, including one member of the party holding the highest number of seats and one member of the party holding the 2nd highest number of seats; and

   B. Three members who are experts in the field of nursing facility services; and

2. Five members appointed by the Speaker of the House as follows:

   A. Two members of the House of Representatives, including one member of the party holding the highest number of seats and one member of the party holding the 2nd highest number of seats: and

   B. Three members who are consumer advocates for, or family members of, consumers of nursing facility services;

3. One member of the Governor's office designated by the Governor at the Speaker's request;

4. An appropriate number of persons within the Department of Health and Human Services; and

5. Other persons, as appropriate; and be it further

Sec. 3. Chairs. Resolved: that the first-named Senate member is the Senate chair and the first-named House of Representatives member is the House chair of the commission; and be it further

Sec. 4. Appointments; convening of commission. Resolved: That all appointments must be made no later than 30 days following the effective date of this resolve. The appointing authorities shall notify the Executive Director of the Legislative council once all appointments have been completed. Within 15 days after appointment of all members, the chairs shall call and convene the first meeting of the commission,

which must be no later than 30 days following the appointment of all members; and be it further

Sec. 5. Duties. Resolved: That the commission shall examine and make recommendations on the development of an alternative method of calculating minimum staffing levels in nursing facilities that addresses more flexible staffing standards that preserve quality of care, do not lower current staffing levels and improve efficiency. The study commission shall also examine and make recommendations on issues related to nursing facility staffing standards including rate-setting, provider reimbursement, resident acuity, and quality patient care; and be it further

Sec. 6. Staff assistance. Resolved: That the Legislative Council shall provide necessary staffing services to the commission; and be it further

Sec. 7. Report. Resolved: That, no later than December 1, 2013, the commission shall submit a written report that includes its findings and recommendations, including suggested legislation, for presentation to the Second Regular Session of the 126th Legislature.

SUMMARY

This resolve establishes a legislative study commission to continue the work begun by the 125th Legislature (LD 1700) and the subsequent workgroup convened by the Department of Health and Human Services pursuant to a letter from the Chairs of the Joint Standing Committee on Health and Human Services to further study and make recommendations on the multifaceted issues involved in the development of an alternative method of calculating minimum staffing levels in nursing facilities.

IV. ATTACHMENTS

Attachment 1: Communication from the Legislature to the Commissioner of DHHS dated April 11, 2012.

Attachment 2: List of workgroup members and subject matter experts who participated in the meetings.

Attachment 3: Minutes of the workgroup meetings.

Attachment 4: 10-144 Code of Maine Rules Chapter 110: Regulations Governing the Licensing and Functioning of Skilled Nursing Facilities and Nursing Facilities (Chapter 9).

Attachment 5: Legislative History of LD 1700: 125th Maine Legislature, Second Regular Session, Legislative Document No. 1700, H.P. 1252, House of Representatives, December 23, 2011, "Ought Not To Pass" and related testimony (Provided by the Maine State Law and Legislative Reference Library, an Office of the Maine Legislature).

Attachment 6: Documents submitted by the Maine Healthcare Association (Rick Erb): Letter to Kenneth Albert dated November 21, 2012; Undated submission *"Flexibility was the entire purpose of LD 1700;"* Undated submission *"Nursing Facility with 60 Residents, Nursing Facility with 100 Residents."*

Attachment 7: Documents submitted by LeadingAge-Maine New Hampshire (An association of not-for-profit senior living and care communities): "Considerations and Recommendations re: LD 1700 *An Act to Provide an Alternative Method of Calculating Minimum Staffing Levels in Nursing Homes*, dated November 29, 2012;" a one-page chart that includes "state funding of actual allowable direct care costs;" and a one-page chart that includes "acuity rank" for 49 facilities. (Source: Filed cost reports for 2009 for PEER GROUP 2). Submitted by J. Watson.

Attachment 8: Documents submitted by the Maine Long-Term Care Ombudsman Program (Brenda Gallant): "Complaints Received by the Maine Long-Term Care Ombudsman Program, October 1, 2010 – September 30, 2011;" and an 11/21/12 email with suggested language changes for the progress report.

Attachment 9: Documents submitted by BerryDunn: "NF Direct Care MaineCare Underfunding – 5 Years Trend;" "Schedule of Hours Per Patient Day (PPD) By Nursing Category;"

"Schedule of NF Nursing Hours Per Patient Day (PPD) and Direct Care Underfunding For 2010."

Attachment 10: National Study: "*Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2005 Through 2010,"* (October 2011) by Charlene Harrington, Ph.D., R.N., Professor Emeritus University of California, San Francisco, CA 94118, Charlene.Harrington@ucsf.edu

Attachment 11: National Study: "*Nursing Home Staffing Standards In State Statutes And Regulations,"* (December 2010), by Charlene Harrington, Ph.D., R.N., Professor Emeritus University of California, San Francisco, CA 94118, Charlene.Harrington@ucsf.edu

Attachment 12: **Nursing Home Compare** - Medicare.gov www.medicare.gov/nhcompare/

Attachment 13: CHARTBOOK, Older Adults and Adults with Disabilities: Population and Service Use Trends in Maine, (Excerpts from DRAFT 2012 Edition), Muskie School of Public Service, University of Southern Maine.