

## CONCISE EXPLANATORY STATEMENT

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In accordance with the Administrative Procedures Act, R.I. Gen. Laws § 42-35-2.6, the following is a concise explanatory statement:

**AGENCY:** Rhode Island Department of Health

**DIVISION:** N/A

**RULE IDENTIFIER:** 216-RICR-40-10-1

**RULE TITLE:** Licensure of Nursing Facilities

**REASON FOR RULEMAKING:** The Rhode Island Department of Health is proposing amendments to the regulation, Licensing of Nursing Homes, in order to incorporate new references, add definitions for declaration of disaster emergency, direct care nursing staff, direct caregiver, essential caregiver, hours of direct nursing care, occupational therapist, physical therapist, physical therapist assistant, speech language pathologist, and vaccinated. The regulation also provides procedures for COVID-19 testing for residents and personnel; provides procedures for essential caregivers during a declared emergency; creates minimum staffing levels in accordance with statute; and requires implementation of an Alzheimer's disease plan.

**ANY FINDINGS REQUIRED BY LAW AS A PREEQUISITE TO THE EFFECTIVENESS OF THE RULE:** N/A

### TESTIMONY AND COMMENTS:

Several comments were received regarding opposition § 1.15.6(D)(1) that requires nursing facilities to develop and implement safety protocols within the first 15 days of a lockdown. The comments further request that these safety measure should be ready to be implemented. R.I. Gen. Laws § 23-17.5-37(e) states that the essential caregiver law will begin 15 days after a declared emergency. While the Department agrees that nursing facilities should be ready in the event of an emergency, there are a number of situations in which an emergency may be declared that a nursing facility may not have anticipated. These fifteen days will ensure that the nursing facility is tailoring its safety measures to the specific declared emergency. *This comment will not be accepted at this time.*

A comment was received noting that § 1.15.6(B) and § 1.15.6(C)(2) seem to conflict and should be reconciled. The Department agrees that the language conflicts and has removed § 1.15.6(C)(2). *The Department thanks you for this comment.*

Several comments were received regarding opposition to § 1.15.6(D)(5) that permits a lockdown of a nursing facility in which no outside persons can enter for a period not to exceed 30 days. This language is taken directly from R.I. Gen. Laws § 23-17.5-37(b)(4) and cannot be amended or stricken as a result. *This comment will not be accepted at this time.*

A comment was received requesting essential caregivers access to the resident when lockdowns are relaxed but visitation is not back to normal. The 30-day lockdown language appears in R.I. Gen. Laws § 23-17.5-37(b)(4). This suggestion would most likely be issued as apart of Department visitation guidance during the declared disaster emergency. *This comment will not be accepted at this time.*

A comment was received regarding opposition to § 1.15.6(D)(3) that an essential caregiver does not have to be vaccinated. The Department has removed this language as it conflicts with Long Term Care Facility COVID-19 Procedures (216-RICR-40-10-27). *The Department thanks you for this comment.*

A comment was received regarding § 1.15.6(E)(6) about an essential caregiver being replaced due to necessary circumstance but that they are not listed. Examples of necessary circumstances are provided in R.I. Gen. Laws § 23-17.5-37(b)(3). *This comment will not be accepted at this time.*

A comment was received regarding concern with § 1.15.6(D)(2)(c)(2); the comment noted that the requirement is discriminatory against lower income families who may not be able to afford personal protective equipment (PPE) and testing. This requirement is in R.I. Gen. Laws § 23-17.5-37(d). The nursing facility may supply the PPE or it may be a requirement of the nursing facility. *This comment will not be accepted at this time.*

A comment was received suggesting that § 1.15.6(E)(3) makes an essential caregiver an ad-hoc employee and that they can be removed for failure to report for duty. The comment continues to say that this provision is against the Nursing Home Reform Act which allows visitation without restriction. The language in § 1.15.6(E)(3) is permissive and does not require the essential caregiver to sign an agreement with the nursing facility. Furthermore, the Department is permitted to put restrictions on visitation as it is permitted by 42 U.S.C.A. § 1395i-3 (Nursing Home Reform Act) which states “[p]ermit immediate access to a resident, subject to reasonable restrictions and the resident’s right to deny or withdraw consent at any time, by others who are visiting with the consent of the resident.” *This comment will not be accepted at this time.*

A comment was received stating that there is no appeals process for recourse for a suspended essential caregiver. The enabling statute does not provide an appeals process for essential caregiver. However, an essential caregiver is able to contact the State’s nursing home ombudsman who may be able to assist an essential caregiver who is suspended. *This comment will not be accepted at this time.*

A comment was received noting strong objections regarding the penalties for minimum staffing in § 1.16.6. The commenter went on to say that Rhode Island is in a staffing crisis and there are not enough people in the labor market to fill positions. The minimum staffing requirements are taken from R.I. Gen. Laws § 23-17.5-32. The Department had very little discretion in implementing the compliance and penalty provisions. *This comment will not be accepted at this time.*

A comment was received that the regulation does not account for residents with cognitive issues that are not capable of independently designating an essential caregiver. Section 1.15.6(B) of the regulation and R.I. Gen. Laws § 23-17.5-37(b) both state permit “an individual with decision making authority for the resident” can designate an essential caregiver for a resident with cognitive issues. *This comment will not be accepted at this time.*

A comment was received asking that the title of the section be revised to “Essential Caregivers During a Declared Emergency or other Similar Executive Order.” The definition of “declaration of disaster emergency” in R.I. Gen. Laws § 23-17.5-37(a)(1) includes references to R.I. Gen. Laws § 30-15-9 which enables the Governor to issue Executive Orders. Inclusion of such language would be redundant. *This comment will not be accepted at this time.*

Testimony was provided recognizing that the Department has little discretion over the implementation of the nursing home staffing bill but wanted to reiterate that the industry is facing severe worker shortage and the penalties will be too extreme. *As mentioned, the Department has little discretion in the implementation and penalty amounts.*

Testimony was provided stating that medication aides are not counted within the staffing ratio and that they should be included. The nursing home staffing bill specifically includes medication aides in the calculation of the “all staff” ratio and the Department does not have the authority to include this position in the calculation of the nursing assistant ratio. *This comment will not be accepted at this time.*

Testimony was provided stating that dissemination of inappropriate photos should be included in the definition of abuse. The definition of abuse comes from statute, and to ensure consistency with statute, *the Department declines to accept this suggested amendment at this time.*

Testimony was received stating that the forms for transferring a resident (on page 43) should be available online and not have to be mailed. Many long-term care facilities do not have electronic medical records as well as the ability to transfer residents’ records electronically. *This comment will not be accepted at this time.*

Testimony was received stating that § 1.15.4(J) should include the long-term care Ombudsmen. The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received stating that § 1.15.4(N)(1) should include a report to the long-term care Ombudsmen. The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received stating that § 1.15.4(N)(2)(a) should include the phrase “or legal representative including a healthcare power of attorney.” The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received stating that § 1.15.4(W)(3) should include a requirement that there are regular and consistent attempts to contract with a medical interpreter who is class appropriate and not be limited to facilities that accept Medicaid and Medicare. The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received stating that residents’ rights should include information on how to contact the long-term care ombudsmen; and that this information be provided upon admission and annually to all residents. See section 1.15.4(X) of these regulations that contains a substantially similar requirement. *Thank you for your comment.*

Testimony was received regarding § 1.15.6(B) stating that the Department does not have the authority to determine what a family council can and cannot address. The comment further states that federal regulations require the facility to listen and act upon grievances. See [42 CFR 483.10\(j\)](#) and [483.10\(f\)\(5\)-\(7\)](#) that states, in part: that family councils may address residents’ grievances. As the Department did not make any suggested changes to this section, and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *The Department thanks the reader for this comment.*

Testimony was received stating that in §1.15.8(A) the funds collected should be put into an interest-bearing account. The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received regarding § 1.17.6 stating that dental care should be offered to residents on an annual basis. The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received stating that § 1.17.8 does not require that psychological or mental health services be provided to residents and would like such language included. The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes

your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received requesting a deadline of 30 to 90 days for reporting a change of email address to the Department (see § 1.18.3(I)). The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

Testimony was received stating that § 1.19.6 should include internet access. The Department did not make any suggested changes to this area and such changes would be in violation of R.I. Gen. Laws § 42-35-6.1; However, the Department takes your input under advisement and will consider it as part of future amendments. *This comment will not be accepted at this time.*

#### **CHANGES TO THE TEXT OF THE RULE:**

§ 1.3(A)(63) removes the definition of “vaccinated” as the term no longer appears in the regulation.

§ 1.13.7(A)(1) removes requirement of routine testing of residents.

§ 1.13.7(B)(2) removes requirement for non-vaccinated personnel to be tested in accordance with 216-RICR-20-15-8.

§ 1.13.7(B)(3) removes requirement for vaccinated personnel to be routinely tested.

§ 1.13.7(B)(4)(a) removes requirement for the nursing facility to document testing results of personnel who are tested outside of the nursing facility.

§ 1.13.7(B)(6) removes requirement for nursing facilities to collect and transmit health insurance information.

§ 1.15.6(C)(2) removed as it conflicts with § 1.15.6(B).

§ 1.15.6(D)(3) removed the phrase “but shall not be required to be vaccinated as a condition of being an essential caregiver.”

#### **REGULATORY ANALYSIS:**

In development of this rule, consideration was given to:

- 1) Alternative approaches;
- 2) Overlap or duplication with other statutory and regulatory provisions; and
- 3) Significant economic impact on small business.

No alternative approach, duplication or overlap was identified based on available information. RIDOH has determined that the benefits of the rule justify its costs.