RIHCA - 216-RICR-40-10-1

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To:Garceau, Zachary (RIDOH) <Zachary.Garceau@health.ri.gov>
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1 attachments (186 KB)
RIHCA - 216-RICR-40-10-1.pdf;

Mr. Garceau-

The attached document contains RIHCA's public comment related to regulatory changes in Rule Identifier 216-RICR-40-10-1. Unfortunately, the Public Hearing was scheduled for the exact same date and time as the start of RIHCA's Annual Meeting; therefore, neither Katie Norman nor I will be available for public testimony.

Please let me know if you have any questions regarding this matter.

Thank you,

John

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The Department of Health Proposed Amendments to Licensing of Nursing Facilities (216-RICR-40-10-1)

Comments on Behalf of the Rhode Island Health Care Association (RIHCA)

To: RIDOH

From: John E. Gage, MBA, NHA – President & CEO

Date: December 15, 2023

These comments are submitted on behalf of the Rhode Island Health Care Association (RIHCA), a nursing facility trade association representing sixty-three (63) of the seventy-nine (79) licensed nursing facilities in the State.

While many of the proposed amendments are unobjectionable, there are several areas of concern as they relate to the requirement for RIDOH approval of a change in ownership of property, the requirement for the maintenance of the owner's equity, the timeline for approvals of Changes in Effective Control, and the definition of "significant change" as it relates to management contracts.

1.6 D. This proposed amendment attempts to broaden RIDOH's statutory authority under 23-17-4 by expanding it to include the owner of the real estate to a "person acting severally or jointly with any other person [to] establish, conduct, or maintain a healthcare facility in the state" by including the owner of the real estate because they MAY have the responsibility to "maintain" the property. In the context of the statue, "maintain" has been interpreted as "to continue to have; to keep in existence, or not allow to become less." This proposed amendment seems to be using an alternate definition of "maintain" - to keep a road, machine, building, etc. in good condition."

If real estate in which a facility operates is sold to a Real Estate Investment Trust (REIT), for instance, that REIT is not operating the nursing facility. They basically become the landlord. Obviously, there needs to be a clear delineation of who is responsible for ongoing and preventative maintenance of the real estate; however, to implicate that the REIT is "maintaining" an established healthcare facility is a stretch beyond what is reasonable.

1.6 F. This section outlines the procedures followed by RIDOH in conducting reviews of applications for changes in ownership through the Change in Effective Control (CEC) process. It indicates a 100-day timeline for approval of a CEC. In actuality, this process routinely takes much longer. In fact, some CECs have taken almost a full year to be approved. During these extended delays in the CEC process, there is great uncertainty amongst the staff and management of the

facility/facilities. This often results in an accelerated rate of turnover amongst the staff. Key employees are lost because of the uncertainty. This lengthy process is often highly disruptive and can have a negative impact on quality of care and services at a facility as key leadership and staff members leave, and systems of care fall apart.

The process of "deeming an application complete" itself often takes more than 100-days. Again, this delays transitions of licensees and can actually cause the failure of those transitions because of changes in the economic environment such as interest rate changes over the extended review period.

Requiring changes in ownership of real estate to go through the full CEC process will further burden RIDOH, will put undue hardship on licensees of nursing facilities, and have a further negative impact on the environment for operating nursing facilities in the State of Rhode Island.

It is worth noting that the recent CEC for Violet SNF Holdco LLC/Pawtucket Falls occurred in a record thirty-five (35) days. This proves that the system can work efficiently when necessary. At the very least, RIDOH should be held to the timeframe outlined in this section.

1.7 1.c. and 1.7 2.1.(1) These proposed provisions would require that maintain the minimum equity position approved by RIDOH at the time of initial licensure or change in effective control in perpetuity. From an accounting perspective, the initial equity is recorded as "Owner's Equity" on the Balance Sheet. This never changes on the books. The actual intent and purpose of this provision is unclear.

Current Health Care Services Council policy and practice is to require a minimum of 20% equity for any CEC of a nursing facility. It is worth noting that the 20% threshold is not in statute but is a Council policy. Basically, an applicant must demonstrate that they are investing cash of 20% of the proposed CEC. If the intent of the proposed regulations is that the 20% cash must be maintained, it makes no sense. This investment has already been made. The cash has been spent, if you will.

If the intent is that the new licensee will not take on any additional debt, such as lines of credit, this too is unrealistic. It is a demonstrated fact that RI Medicaid has chronically underfunded nursing facilities. LTC Medicaid applications are routinely delayed in the review and approval process because of a shortage of state workers and the ongoing redetermination process as Medicaid "unwinds" from the Covid-19 pandemic expanded coverage. Operating loans such as lines of credit are necessary to ensure the ongoing operation of the facility – making sure that residents continue to receive quality care and staff are paid on time despite reimbursement delays. Hindering such flexibility would have a devastating impact on licensees in the operation of their facility.

1.7.2 A. This provision adds both the possible suspension or revocation and the imposition of civil penalties if a new management contract or "significant changes" in management agreements are not submitted to RIDOH within thirty (30) days of the implementation of a new contract or the effective date of the new contract provisions. Since there are now significant potential penalties to this regulation, it seems that a further clarification or definition of a "significant change" should be proposed.

1.16.6 C.4. This provision increases the number of individuals that are required to be on duty who are certified in Basic Life Support (BLS) from one (1) to two (2) and requires that these individuals be employees of the facility. This provision is problematic since most facilities require all nurses to

be certified in BLS. This is how they comply with the current requirement for one (1) individual twenty-four (24) hours per day. There are occasions when this individual is not a staff member, but a nurse from a Temporary Nurse Staffing Agency. Given the dire nursing home workforce staffing crisis, it would be impossible for facilities to comply with this proposed regulation if it were not to include agency staff. Besides this concern, it is worth pointing out that there is no statutory authority for this regulatory change. It seems to be merely a regulatory change on a Department whim.

Please take RIHCA's comments into consideration when formulating final regulations. As proposed, these regulatory changes will have the unintended consequence of further destabilizing the already fragile nursing facility profession. Denying facilities access to operating capital by requiring "the maintenance of unencumbered equity" and denying licensees the opportunity to recapitalize their operations through a sale of the real property will do just that. In addition, layering additional non-statutory regulatory requirements on any staffing provisions in the midst of a nationwide and statewide nursing facility workforce crisis is wrong.

Thank you for your review and consideration of these comments.

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December 28, 2023

VIA EMAIL

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Re: Public Comment on Proposed Amendments to Licensing of Nursing Facilities, 216-RICR-40-10-1

Dear Mr. Garceau,

We are writing on behalf of Elmhurst Rehabilitation and Healthcare Center, Lincolnwood Rehabilitation and Healthcare Center, Bayview Rehabilitation and Healthcare Center at Scalabrini, Heritage Hills Nursing & Rehabilitation Healthcare Center, Morgan Rehabilitation Healthcare Center, Riverview Healthcare Community & Rehabilitation Center, Westerly Healthcare Center, West View Nursing & Rehabilitation Center, Stillwater Skilled Nursing Community, Overlook Nursing and Rehabilitation, Sunny View Home, Brentwood Health Center, Lakeside Nursing & Rehabilitation Center, Berkshire Place Nursing & Rehabilitation Center, Dawn Hill Home for Rehab and Healthcare, AdviniaCare Pawtucket Pleasant Rehab Center LLC, AdviniaCare Kingston Rehab Center LLC, AdviniaCare Providence Dodge Rehab[1] and Health Concepts, Ltd. nursing facilities (collectively, the "Facilities") to provide public comment on the proposed amendments to the Licensing of Nursing Facilities (the "Amendment"). The Amendment will have devastating consequences for Rhode Island nursing facilities and their residents, including, but not limited to, restricting access to needed capital to provide quality care and discouraging quality operators from investing in Rhode Island. We have addressed the provisions regarding equity interests and requirement for a change in effective control ("CEC") application for a change in the property owner below. Notably, we are not aware of any other state that has similar restrictions on nursing facility owners and operators.

[1] The AdviniaCare entities have filed three Change in Effective Control Applications for the acquisition of Bannister Center for Rehabilitation & Health Care, Kingston Center for Rehabilitation & Health Care and Oak Hill Rehabilitation & Health Care.

Equity Interest Provision

The amendments requiring maintenance of a certain equity interest is not within the Rhode Island Department of Health's ("RIDOH") statutory authority and are also not sustainable operationally. The Amendment provides:

> The initial contribution of equity, of non-debt funds contributed towards capital costs, defined as that initial specific amount, must remain free and clear of any repayment or liens against the assets of the licensee throughout the period of licensure, including all subsequent renewals unless granted a variance by the department.

See Proposed Amendment at 216-RICR-40-10-1.5(F); *see also* Section 1.7(C)(discussing that maintenance of the equity position will be considered during the CEC process). Equity is defined as "non-debt funds contributed towards the capital costs related to the initial establishment and licensure of a nursing facility or a change in owner or change in operator of a nursing facility which funds are free and clear of any repayment or liens against the assets of the proposed owner and/or licensee and that result in a like reduction in the portion of the capital cost that is required to be financed or mortgaged." *Id.* at Section 1.3(A)(18).

As an initial matter, requiring an initial contribution of equity to remain "free and clear" throughout the period of licensure exceeds RIDOH's statutory authority. Currently, the CEC application form itself describes a *policy* requiring a 20% equity investment in CEC projects, applied as part of the CEC process, not on an ongoing basis. As set forth therein, the equity amount is only a *policy*. There is no statutory authority for the equity policy. Requiring maintenance of such equity in a facility also lacks statutory authority. There is neither a statutory provision requiring maintenance of such an equity position nor any provision requiring a facility to seek a variance from RIDOH to obtain such funding.

Further, the Amendment is operationally unworkable. First, when receiving an initial mortgage or other financing to consummate a transaction, while a facility may only finance 80% of the value of the transaction, the financing collateral will cover 100% of the real or personal property of the operator (or owner). Financial institutions do not offer financing that will only be secured by a percentage of a property. By way of example, when a homeowner purchases a house, while they may only have a mortgage on 80% of the value of the home, the mortgage is secured by the entire property. Likewise, a security interest in the personal property of the licensed operator, including accounts receivable, would not be reduced by the 20% initial equity commitment. Accordingly, even from the outset, there will be no assets of the owner or operator that will be "free and clear."

Second, all nursing facilities, in order to ensure financial resources for quality care to their residents, engage in subsequent financing including, for example, refinancing, working capital lines of credit, and other sources of funding. These financings are essential to ensure that the facilities are able to have necessary funds to provide quality care. By requiring that the "initial contribution of equity . . . remain free and clear" throughout the licensure period, RIDOH is depriving these facilities from important sources of funds to continue operations for their residents.

Third, to the extent that this equity provision is requiring an operator to maintain the initial equity contribution in a reserve account, i.e., an escrow or other account, nursing facility owners and operators would not be able to comply. The initial equity contribution is paid to the seller as part of the transaction and, therefore, is no longer in the possession of the owner or operator after closing. Requiring that amount to sit in a reserve account would require the owner or operator to pay double the equity amount to facilitate a transaction. Similarly, nursing facilities cannot afford to have 20% of the value of their facility sit idle. In addition, the value of the facilities change over time. Rhode Island nursing facilities need to be able to put their funds to use to ensure quality care.

Finally, the reference to a possible variance does not provide a solution. First, there are no defined criteria for such a request. In addition, as RIDOH knows, the timeframe to receive approval for CEC approval regularly takes nine months or more. Adding a variance requirement for financing would restrict access of the facilities to needed funding due to the prolonged time frame for such a review.

While we recognize that RIDOH seeks to have owners and operators continue to maintain an investment in the facilities, requiring this equity position would cripple nursing facilities throughout the state and discourage the entry of new quality operators. As RIDOH currently has the statutory authority to receive information regarding financing annually under R.I. Gen. Laws § 23-17-4 (and has recently surveyed licensed facilities for such information), the proposed limitations on such financing are unnecessary. We respectfully request that RIDOH remove such language from the Amendment.

Change of Property Ownership

The Amendment also provides that the CEC process applies to a change in real property owner. This requirement is also in excess of RIDOH's statutory authority and will have serious consequences for nursing facilities in Rhode Island, including cutting off access to capital and stifling the acquisitions of facilities resulting in their closure and displacement for their residents.

The applicable statutory provisions do not require a license or CEC review for a real property owner. RIDOH relies on the following section in requiring CEC review for a change in real

property owners: "No person acting severally or jointly with any other person shall establish, conduct, or maintain a health-care facility in this state without a license under this chapter." R.I. Gen. Laws § 23-17-4; *see also* Proposed Amendment at 216-RICR-40-10-1.6(D) (stating that "a person that owns real property that is being operated by another person as a nursing facility is acting severally or jointly with such other person to conduct or maintain such property as a nursing facility").

RIDOH's conclusion is misplaced. The mere fact that a person owns real estate that is sold or leased (or subleased) to an operator of a nursing facility, does not and cannot make that person a joint and several actor with such operator. It is simply a landlord selling/leasing property to an operator who is required to be duly licensed to provide healthcare services. Such a property owner may not have control over the use of the property and certainly does not have control over the quality of any nursing facility care provided. By way of example, if a person sells/leases property to a hospital to provide hospital services, such person does not become an operator of hospital services requiring a license. Yet, RIDOH's conclusory interpretation of "joint and several" liability in this case would extend to all types of licensed facilities. Simply put, RIDOH is without statutory authority to review the sale or lease of property used by an operator to provide healthcare services.

The requirement to have a change in real property owner reviewed through the CEC process will also restrict current owners' access to capital and discourage the sale of facilities. Current owners of nursing facilities often sell all or portions of their interests in real property in order to raise needed funds for quality care. Requiring an owner to go through the CEC process would result in nearly a year delay in receiving those funds and discourage outside investment due to the lengthy regulatory process. Moreover, given that other states do not require a review of the real property owner, this requirement will discourage possible owners from acquiring facilities thereby resulting in their closure and resident displacement rather than acquisition.

As noted above, licensed operators are currently required to provide information to RIDOH, including identification of any person who owns any interest in the land or building, as well as the identity of anyone owning any interest in any mortgage, note, deed or trust or other obligations secured in whole or in part by the building in which the facility is located. *See* R.I. Gen. Laws § 23-17-65. Accordingly, RIDOH does have statutory authority to request such information. However, a requirement for CEC approval is outside RIDOH's statutory authority, is unnecessary, and will have unintended consequences of deterring quality owners and operators from investing in Rhode Island.

Summary

We hope that these comments are helpful. If the Amendment is adopted, current operators will be unable to secure needed financing to continue quality care and quality operators with resources

will not invest in Rhode Island. Nursing facilities will be forced to close, displacing residents rather than continue care through an acquisition. As a result and most importantly, Rhode Island residents in need of quality care nursing home services will suffer.

As always, thank you for your consideration.

Sincerely,

/s/ Patricia K. Rocha

/s/ Leslie D. Parker

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