**FINAL AND PROPOSAL**

**Issue Date: June 4, 2021**

**Volume 48 • Issue 12 • Page 472**

 **Title 10
MARYLAND DEPARTMENT OF HEALTH**

**Subtitle 09 MEDICAL CARE PROGRAMS**

**10.09.10 Nursing Facility Services**

Authority: Health-General Article, §§2-104(b), 15-103, 15-105, 19-14B-01, and 19-310.1, Annotated Code of Maryland

**Notice of Final Action**

[21-027-F]

On May 12, 2021, the Secretary of Health adopted amendments to Regulations **.01**, **.08**, **.15**, and **.19** under **COMAR 10.09.10 Nursing Facility Services**.

At this time, the Secretary of Health is also withdrawing the proposed amendments to Regulation **.07** under **COMAR 10.09.10 Nursing Facility Services**, which were printed in the same Notice of Proposed Action.

This action, which was proposed for adoption in 48:3 Md. R. 101—103 (January 29, 2021), has otherwise been adopted with the nonsubstantive changes shown below.

**Effective Date: June 14, 2021.**

**Attorney General’s Certification**

In accordance with State Government Article, §10-113, Annotated Code of Maryland, the Attorney General certifies that the following changes do not differ substantively from the proposed text. The nature of the changes and the basis for this conclusion are as follows:

Regulation .19D—F: The Department is correcting language referencing prior sections.

**.19 Pay-for-Performance — Payment Distribution.**

*A.—B.*(proposed text unchanged)

*C.* Funds shall be distributed among the facilities identified in **[[**C**]]** *§B* of this regulation, based on the facility’s relative score, such that the highest-scoring facility shall receive twice the amount per day as the lowest-scoring facility receiving payment.

*D.* Fifteen percent of the amount identified in §A **[[**or B**]]** of this regulation shall be distributed to the facilities that qualify for payment for improvement in accordance with Regulation .17 of this chapter.

*E*. Funds shall be distributed among the facilities included in**[[**§E**]]** *§D* of this regulation, based on a facility’s relative point increase from the prior fiscal year, such that the facility with the greatest point increase shall receive twice the amount per day as the facility with the smallest point increase.

*F.* A facility shall receive a lump-sum payment based on the per diem amount determined in accordance with **[[**§D or F**]]** *§C or E*of this regulation, multiplied by the facility’s Medicaid days of care in the facility’s most recent cost report, not to exceed 1 year.

DENNIS R. SCHRADER
Secretary of Health

**PROPOSAL**

**Maryland Register**

**Issue Date: January 29, 2021**

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**Title 10
MARYLAND DEPARTMENT OF HEALTH**

**Subtitle 09 MEDICAL CARE PROGRAMS**

**10.09.10 Nursing Facility Services**

Authority: Health-General Article, §§2-104(b), 15-103, 15-105, 19-14B-01, and 19-310.1, Annotated Code of Maryland

**Notice of Proposed Action**

[21-027-P]

     The Secretary of Health proposes to amend Regulations **.01**, **.07**, **.08**, **.15**, and **.19** under **COMAR 10.09.10 Nursing Facility Services**.

**Statement of Purpose**

The purpose of this action is to implement recommendations in the 2019 Joint Chairmen’s Report regarding the Maryland Medicaid nursing facility pay-for-performance program. Specifically, this action increases the size of the program, refocuses the program on reportable patient outcomes, and includes incentives and disincentives. Additionally, it updates effective dates for nursing facility rates to reflect FY 2021 and grants a 1-year extension to the Interim Working Capital Fund.

**Comparison to Federal Standards**

There is no corresponding federal standard to this proposed action.

**Estimate of Economic Impact**

**I. Summary of Economic Impact.**The proposed action implements a 4 percent rate increase for Fiscal Year 2021. Additionally, working capital advances will result in loss of potential interest income to the State.

|  |  |  |
| --- | --- | --- |
|   | Revenue (R+/R-) |   |
| **II. Types of Economic Impact.** | Expenditure(E+/E-) | Magnitude |
|   |  |
|  |  |  |
| A. On issuing agency: |   |   |
| (1) | (E-) | $5,755,632 |
| (2) | (R-) | $160,151 |
| B. On other State agencies: | NONE |  |
| C. On local governments: | NONE |  |
|   |
|   | Benefit (+)Cost (-) | Magnitude |
|   |  |
|  |  |  |
| D. On regulated industries or trade groups: |   |   |
| (1) | (-) | $5,755,632 |
| (2) | (-) | $160,151 |
| E. On other industries or trade groups: | NONE |  |
| F. Direct and indirect effects on public: | NONE |  |
| **III. Assumptions.**(Identified by Impact Letter and Number from Section II.) |
| A(1). The average reimbursement for nursing facility services will increase by 4 percent in Fiscal Year 2021. Under the provisions of this amendment, the rate represents a reduction of $1.07 per day compared with the rate that providers would otherwise receive. Based on a projected 5,399,652 days of care in Fiscal Year 2021, this reduction represents a savings to the State of $5,755,632. This amount is 50 percent federal funds and 50 percent General Funds. |
| A(2). The interim working capital fund will provide a projected $11,538,270 to providers during Fiscal Year 2021, resulting in loss of potential interest income of $160,151 based on a rate of return of 1.388 percent. This amount is 100 percent General Funds. |
| D(1). Reimbursement for nursing facilities will be reduced by $5,755,632 based on the net impact of the reimbursement adjustments in this proposal, although the average per diem rate will increase by 4 percent as described in Section IIIA(1). |
| D(2). Providers will benefit from the State’s loss of potential interest income in the amount of $160,151 due to providing working capital advances. |

**Economic Impact on Small Businesses**

The proposed action has minimal or no economic impact on small businesses.

**Impact on Individuals with Disabilities**

The proposed action has an impact on individuals with disabilities as follows:

By increasing the total amount payable through the pay for performance process, modifying criteria to become more outcome-oriented, and extending the Interim Working Capital fund, the proposed action incentivizes higher quality of care for the many individuals with disabilities who are served in nursing facilities.

**Opportunity for Public Comment**

Comments may be sent to Annie Olle, Acting Director, Office of Regulation and Policy Coordination, Maryland Department of Health, 201 West Preston Street, Room 512, Baltimore, MD 21201, or call 410-767-6499 (TTY 800-735-2258), or email to mdh.regs@maryland.gov, or fax to 410-767-6483. Comments will be accepted through March 1, 2020. A public hearing has not been scheduled.

**.01 Definitions.**

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1)—(30) (text unchanged)

*(31) “Payroll-Based Journal” means a system for facilities to submit staffing information to meet the requirements of §6106 of the Affordable Care Act (ACA) that requires facilities to electronically submit direct care staffing information (including agency and contract staff) based on payroll and other auditable data.*

**[**(31)**]***(32)—***[**(53)**]***(54)*(text unchanged)

**[**(54)**]** *(55)* “Substandard quality of care” means **[**that one or more requirements under 42 CFR §483.13, 42 CFR §483.15, or 42 CFR 483.25 were not met, to a degree constituting immediate jeopardy to resident health or safety, and a pattern of actual harm, widespread actual harm, or a widespread potential for more than minimal harm**]** *a finding of substandard care in accordance with 42 CFR §488.301*.

**[**(55)**]***(56)—***[**(58)**]***(59)*(text unchanged)

**.07 Prospective Rates.**

A.—F. (text unchanged)

G. Final facility rates for the period July 1, **[**2019**]** *2020* through June 30, **[**2020**]** *2021* shall be each nursing facility’s quarterly rate, exclusive of the amount identified in Regulation .13A(2) of this chapter, reduced by the budget adjustment factor of **[**3.4**]** *0.405* percent, plus the Nursing Facility Quality Assessment add-on identified in Regulation .11E of this chapter and the ventilator care add-on amount identified in Regulation .13A(2) of this chapter when applicable.

**.08 Interim Working Capital Fund.**

A.—G. (text unchanged)

H. The Interim Working Capital Fund expires on May 1, **[**2020**]***2021*. Providers shall repay all outstanding funds to the Department by May 1, **[**2020**]***2021*. The Department may grant repayment extensions, not longer than 60 days, under extraordinary circumstances.

**.15 Pay-for-Performance — Quality Measures.**

A. Providers shall receive a composite score based on the following:

(1) Staffing levels **[**and staff stability**]**, as described in **[**§B and C**]***§B*of this regulation, shall comprise **[**40**]***20* percent of each facility’s score;

*(2) Staffing stability, as described in §C of this regulation, shall comprise 15 percent of each facility’s score;*

**[**(2)**]***(3)* Maryland Health Care Commission Nursing Facility Family Survey, as described in §D of this regulation, shall comprise **[**40**]** *30* percent of each facility’s score;

**[**(3)**]***(4)* Minimum Data Set Clinical Quality Indicators, as described in §E of this regulation, shall comprise **[**16**]** *30* percent of each facility’s score;

**[**(4) Employment of an infection control coordinator, as described in §F of this regulation, shall comprise 2 percent of each facility’s score;**]** and

(5) Staff immunization survey, as described in **[**§G**]***§F* of this regulation, shall comprise **[**2**]***5* percent of each facility’s score.

B. Staffing Levels.

**[**(1) Maryland nursing facilities serving Medicaid patients shall provide salary data and hours of work data at least 3 months before the start of the new rate year. These data shall be for selected personnel types for a 2-week period to be specified by the Department.

(2) Each Maryland facility covered by these regulations which fails to comply with §B(1) of this regulation shall incur a 1 percentage point reduction in its applicable rental rate presented in Regulation .11B(1)(i) or (j) of this chapter.**]**

*(1) Staffing and hours of work shall be determined using the Payroll-Based Journal data for the 9-month period ending March 31 of each fiscal year.*

**[**(3)**]***(2)* A facility’s average staffing level shall be determined from its most recent data reported in accordance with §B(1) of this regulation. Total staff hours shall be divided by average daily census during the **[**survey**]** period *specified in §B(1) of this regulation* **[**in order**]** to establish the facility’s average daily staffing.

**[**(4)**]***(3)* (text unchanged)

**[**(5)**]***(4)* The result from **[**§B(4)**]** *§B(3)* of this regulation shall be multiplied by 1.26555 **[**in order**]** to establish the facility’s staffing goal.

**[**(6)**]***(5)* The facility’s staffing level from **[**§B(3)**]** *§B(2)* of this regulation shall be divided by the facility’s staffing goal from **[**§B(5)**]** *§B(4)* of this regulation **[**in order**]** to determine a score based on its percentage of the goal. A facility staffing exceeding its goal shall be scored at 100 percent.

**[**(7)**]***(6)*(text unchanged)

C. Staff Stability.

*(1) On or before May 31 of the fiscal year, nursing facilities, excluding continuing care retirement communities and facilities with fewer than 45 beds, shall report data on individual nursing staff members’ length of employment using a format and procedures designated by the Department. This data shall include all nursing staff employed by the facility during the pay period that includes March 31 of the fiscal year.*

*(2) Providers that fail to comply with §C(1) of this regulation shall receive 0 points.*

**[**(1)**]***(3)* Staff stability is based upon dates of employment for nursing staff reported **[**on the facility’s most recent salary and hours survey**]**in accordance with **[**§B(1)**]** *§C(1)* of this regulation.

**[**(2)**]***(4)* Staff stability shall be determined by the percentage of **[**hours provided by**]**staff employed by the facility for 2 years or longer at the time of the **[**survey**]***report*.

**[**(3)**]***(5)* Providers shall receive **[**0—20**]***0—15* points based upon the scoring methodology described under Regulation .16 of this chapter*.*

D. Family Satisfaction.

(1) (text unchanged)

(2) Providers shall receive **[**0—40**]***0—30*points based upon the scoring methodology described under Regulation .16 of this chapter, as follows:

(a) **[**0—20**]***0—6* points shall be based upon questions regarding general satisfaction; and

(b) **[**0—20**]***0—24* points shall be based on several categories of questions regarding specific aspects of care and environment in the nursing facility.

E. Minimum Data Set Clinical Quality Indicators.

(1) Providers shall receive scores for the 3-month period ending December 31 of the most recent prior State fiscal year based on the following quality indicators for long-stay residents from the Minimum Data Set published by the federal Centers for Medicare and Medicaid Services:

(a) (text unchanged)

(b) Percent of Residents **[**Who Were Physically Restrained**]** *with a Fall Resulting in Major Injury*;

(c)—(f) (text unchanged)

(2) Providers shall receive **[**0—2.67**]***0—5* points for each quality indicator based on the scoring methodology described under Regulation .16 of this chapter.

**[**F. Employment of Infection Control Coordinator.

(1) In accordance with State licensing regulations under COMAR 10.07.02.21, all Maryland nursing facilities are required to employ an infection control coordinator who has attended training as required in COMAR 10.07.02.21C. Scoring, based on compliance with COMAR 10.07.02.21, shall be as follows:

(a) A facility not in compliance with COMAR 10.07.02.21 shall receive no points;

(b) A facility meeting the minimum requirement of COMAR 10.07.02.21 shall receive 1 point; or

(c) A facility shall receive 2 points if:

(i) In a facility with 200 or more beds, an infection control coordinator is dedicated 35 hours or more per week to infection control responsibilities; or

(ii) In a facility with fewer than 200 beds, an infection control coordinator is dedicated to infection control responsibilities 15 hours or more per week.

(2) Providers shall receive 0—2 points for this quality measure. Data will be collected by the Department in April of each year.**]**

**[**G.**]***F.* Staff Immunizations.

(1) (text unchanged)

(2) Providers shall receive **[**0 or 2**]***0, 2, or 5* points for this quality measure. Facilities shall submit data to the Department regarding all individuals employed or contracted by the facility during the period September through April 15.

(3) Benchmark.

(a) The benchmark for staff vaccinations is **[**80**]***90* percent.

(b) Nursing facilities that **[**meet or exceed the benchmark of 80 percent**]***achieve the benchmark for at least 90 percent but less than 95 percent* for seasonal flu shall receive 2 points.

*(c) Nursing facilities that meet or exceed the benchmark of 95 percent for seasonal flu shall receive 5 points.*

**[**(c)**]***(d)* Facilities with less than **[**80**]***90* percent may not receive points for this quality measure.

**.19 Pay-for-Performance — Payment Distribution.**

**[**A. During State fiscal year 2011, 0.2445 percent of the budget allocation for nursing facility services shall be distributed based on pay-for-performance scores.**]**

**[**B.**]***A.* Beginning State fiscal year **[**2012**]***2021*, and each year thereafter, **[**0.5**]***10* percent of the budget allocation for nursing facility services shall be distributed based on pay-for-performance scores.

**[**C.**]***B.* Eighty-five percent of the amount identified in §A **[**or B**]** of this regulation shall be distributed to the highest scoring facilities, representing **[**35**]***40* percent of the eligible days of care, in accordance with the methodology described in Regulation .16 of this chapter.

**[**D.**]***C.—***[***G.***]***F.*(text unchanged)

ROBERT R. NEALL
Secretary of Health