

## SHORTS



## ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

## The Future Belongs to Those Who Believe in the Beauty of Their Dreams

The pages of *Shorts on Long Term Care* are normally filled with survey issues, legal news, employment law updates and other important, but sometimes “heavy” stuff that you need to know. But this month, as we approach the celebration of the holidays, I want to lift you up a bit by talking about something positive, prospective and exciting – something that is part dream in the making (hence our title, a quote by Eleanor Roosevelt) and part reality.

That something is FutureCare of NC. If you don’t know what FutureCare is, you’re about to find out. FutureCare is designed to continue the North Carolina long term care industry’s “Journey to National Best,” begun by the NC Health Care Facilities Association several years ago. FutureCare is the Association’s nonprofit educational and research foundation (which means, by the way, that all donations are tax-deductible 😊).

The Foundation Board recently asked me to serve as Board Chairman, and I was thrilled and honored to say “yes” quickly, before they could change their minds. FutureCare is not new. In fact, if you are familiar with the famous mannequin, Stan, which was featured at last year’s annual Association convention, then you know something about FutureCare. Stan was purchased by the foundation with funds from a grant provided by The Duke Endowment and has been traveling the state with professional nurse educator, Mandy Richards, RN. They have been demonstrating various clinical conditions experienced by typical nursing home patients and helping facility staff learn how to recognize clinical signs and symptoms and respond as teams to these situations. By all reports, the staff at facilities where Mandy has visited are excited by the training, learn a lot, and talk about their experience and what they’ve learned, long



by Ken Burgess

after Stan has departed for his next stop. (Note: The name “Stan” seems to reflect a simulator/mannequin of male gender, but the patient being simulated can be of either gender, male or female.)

This is only one of the exciting projects that FutureCare plans in order to help continue the Journey to National Best. Other potential projects include exploring whether and how the “Just Culture” concept might work with North Carolina’s regulatory scheme; the safety culture; looking at ways North Carolina nursing facilities can “go green” as they renovate, expand or rebuild; and leadership development programs for aspiring nursing home administrators.

FutureCare is not just another good idea. It’s a unique organization dedicated solely to improving the quality of care in North Carolina’s nursing facilities. FutureCare’s Board of Directors consists of an impressive array of industry leaders and health policy experts. Some of the names you’ll recognize are Bill Pully, president of the NC Hospital Association; Craig Souza, president and CEO, NC Health Care Facilities Association; Deborah Lekan, Duke University School of Nursing; Dr. Darlyne Menscer, former president of the N.C. Medical Society and a geriatrician at Carolinas HealthCare System; Ted Goins, Lutheran Ser-

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## Update - NC Informal Dispute Resolution and Appealing the Length of Immediate Jeopardy

by *Ken Burgess*

In last month's edition of Shorts, we ran an article on challenging the length of an immediate jeopardy citation during an informal dispute resolution (IDR). We said, consistent with federal law, that in IDR, a provider can appeal whether a deficiency citation was correct (i.e., there was actually deficient practice) and/or the scope and severity of a deficiency cited as immediate jeopardy (IJ) or substandard quality of care. We also said, again consistent with federal law, that a provider may also appeal the length of the immediate jeopardy. Since that article, the NC Department of Health and Human Services' Division of Health Service Regulation (DHSR), responsible for conducting informal dispute resolution, has taken a contrary position, stating that it will not entertain any IDR arguments about when a provider removed an IJ based on corrective action that occurred before the date DHSR says the IJ was lifted.

DHSR asserts that a provider may challenge whether IJ ever existed but cannot dispute the duration of the jeopardy. In support of its position, DHSR cites 42 CFR § 488.331 and the CMS website which set out guidelines for the IDR process for the proposition that a facility may dispute survey findings but may not appeal the length of the jeopardy except through formal appeal at the federal level. While DHSR officials point us to the federal regs and the CMS website to support their position, officials at CMS tell us that they don't get involved in state IDR procedures and that this decision belongs to DHSR.

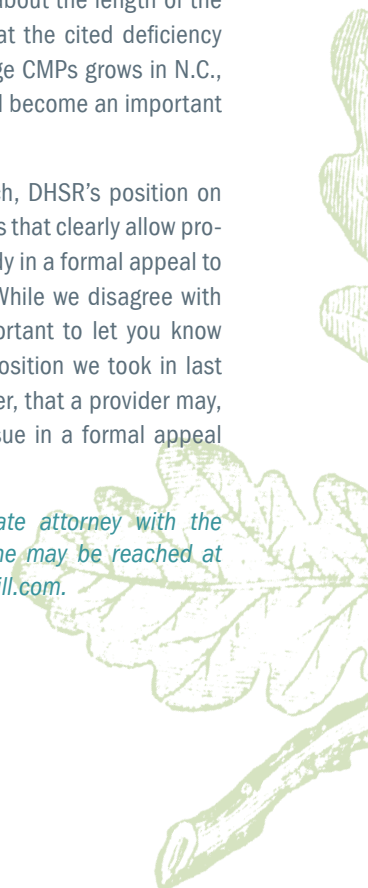
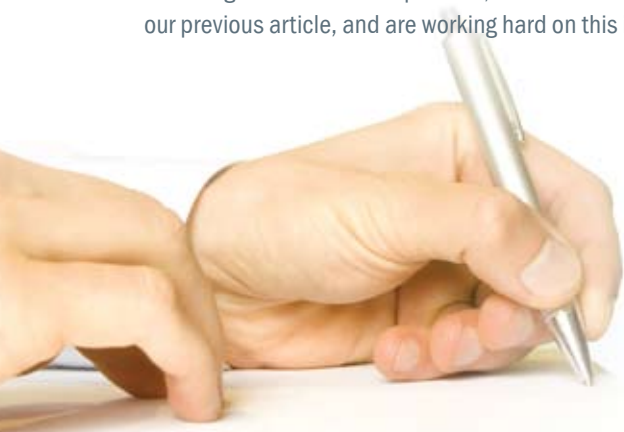
We disagree with DHSR's position, for the reasons set forth in our previous article, and are working hard on this issue. Per Sec-

tion 7212C of Chapter 7 of the State Operations Manual, CMS holds the state agency accountable for the legitimacy of the IDR process, "including the accuracy and reliability of conclusions that are drawn with respect to survey findings." DHSR's own IDR procedures (available on its website) acknowledge that a provider is entitled to present its case at IDR if it "believes that a specific deficiency or finding(s) within a deficiency cited by a survey or complaint investigation are factually inaccurate." Likewise, under federal law, a provider may challenge whether a deficiency cited as IJ was properly labeled jeopardy, since this affects the range of civil money penalties DHSR can recommend and CMS can impose. The natural corollary to this position is that a provider may dispute that the facts support the duration of the jeopardy cited.

In our view, DHSR's position is untenable because in some cases, in order to have access to its statutory right to IDR, a provider could be forced to advance an argument that it doesn't fully believe. For example, under DHSR's position, in order to be heard at IDR, even if the provider agrees that the IJ did exist but was remedied earlier than the end date cited by DHSR, rather than arguing about the length of the IJ itself, the provider must argue that the cited deficiency never existed. As the number of large CMPs grows in N.C., a trend we are clearly seeing, this will become an important issue.

In our view, based upon our research, DHSR's position on this issue conflicts with the provisions that clearly allow providers to appeal the length of jeopardy in a formal appeal to the Departmental Appeals Board. While we disagree with DHSR's position, we think it is important to let you know that DHSR doesn't agree with the position we took in last month's article. Please note, however, that a provider may, under federal law, challenge this issue in a formal appeal before an administrative law judge.

*Jessica Lewis, an RN and associate attorney with the firm, contributed to this article. She may be reached at 919.783.2941 or [jlewis@poynerspruill.com](mailto:jlewis@poynerspruill.com).*



# ASSISTED LIVING COMMUNITIES

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HAPPY HOLIDAYS FROM THE HEALTH CARE  
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## The Future Belongs to... (cont. from page 1)

vices for the Aging; Jeff Wilson, Long Term Care Management Services; Brad Wilson, incoming president of Blue Cross Blue Shield of N.C.; and Polly Johnson, former executive director of the N.C. Board of Nursing and current president and CEO of the Foundation for Nursing Excellence. FutureCare is staffed by Gordon DeFries, former President and CEO of the N.C. Institute of Medicine, Polly Welsh, Executive Vice President, and Eric Kivisto, Director of Policy Development of the N.C. Health Care Facilities Association.

During this holiday season, as we reflect on all that we have to be thankful for, we also need to think about how we'll use those blessings going forward. You'll be hearing a lot more about FutureCare, and we hope you'll embrace the foundation and its dream of making North Carolina's skilled nursing facilities the undisputed best in the nation. Please join us in this journey by offering your time, expertise and – if you can

– your financial support (did I mention that all contributions are tax deductible 😊). To learn more about FutureCare, visit the foundation's website at [www.FutureCareNC.org](http://www.FutureCareNC.org).

While it's true that the future belongs to those who believe in the beauty of their dreams, the future is shaped by those who make their dreams a reality. Happy holidays from the Poyne Spruill Health Law team. *Ken*

*Ken Burgess advises clients on a wide variety of legal planning issues arising in the SNF and assisted living settings and other aspects of long term care. He may be reached at 919.783.2917 or [kburgess@poynerspruill.com](mailto:kburgess@poynerspruill.com).*

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## HR Corner



By Danielle Barbour  
and Kevin Ceglowski



## Time for Another Policy Revision: Updates to FMLA Qualifying Exigency and Military Caregiver Leave

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (NDAA), which became effective immediately and expanded the Family and Medical Leave Act (FMLA). Specifically, the NDAA expands the coverage of the Qualifying Exigency Leave and Military Caregiver Leave provisions of the FMLA.

### Changes to Qualifying Exigency Leave

Qualifying exigency leave allows eligible employees to take up to 12 weeks of FMLA leave to address certain qualifying exigencies arising from the fact that the employee's family member has been deployed to a foreign country. Previously, only an employee with a family member serving in the National Guard or in a Reserve component of the armed forces was eligible for qualifying exigency leave. Now, employees with family members in both the regular armed forces and the National Guard or Reserve armed forces may take qualifying exigency leave.

The NDAA further modifies the Qualifying Exigency Leave provisions by eliminating the requirement that the family member's call to duty be "in support of a contingency operation." Now, an employee may be entitled to Qualifying Exigency Leave due to any qualifying exigency arising out of the fact that his or her family member is on "covered active duty" in a foreign country or has been notified of an impending call to active duty in a foreign country.

### Changes to Military Caregiver Leave

The NDAA also makes significant changes to the Military Caregiver Leave provisions of the FMLA. Previously, preexisting conditions were not covered. Now, "serious injury or illness" is defined to include illnesses and injuries that existed before the beginning of the service member's active duty that were aggravated by his or her active duty service, whether or not the illness manifested itself before the active duty service. Accordingly, an employee may take leave to care for a service member who is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was sustained during active duty and for preexisting illnesses and injuries that were aggravated by active duty service.

Additionally, employees are now entitled to take Military Caregiver Leave at any time during a period of five years after the family member is discharged from the military. Before the recent revisions to the FMLA, the regulations provided for leave only for employees caring for family members who had not yet been discharged from the armed forces.

These changes to the FMLA became effective immediately. Employers should be aware that FMLA leave rights have been expanded, and employees who did not qualify for FMLA under the old regulations may now be entitled to leave. Employers should be sure to modify their FMLA policies accordingly.

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