



INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
333 MARKET STREET
14TH FLOOR
HARRISBURG, PA 17101

(717) 783-5417
Fax (717) 783-2664

September 18, 1998

Honorable Eugene W. Hickok, Jr., Secretary
Department of Education
333 Market Street, 10th Floor
Harrisburg, PA 17126

Re: IRRC Regulation #6-262 (#1968)
Department of Education
Nurse Aide Applicant Criminal History Record Information

Dear Secretary Hickok:

Enclosed are our comments on your proposed regulation #6-262. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact John Jewett at 783-5475. He has been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:kcg
Enclosure
cc: Jane Acri
Lyn Forlizzi
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF EDUCATION REGULATION NO. 6-262

NURSE AIDE APPLICANT CRIMINAL HISTORY RECORD INFORMATION

SEPTEMBER 18, 1998

We have reviewed this proposed regulation from the Department of Education (Education) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to legislative intent, statutory authority, need for certain provisions, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 701.1. Definitions. - Clarity

This section contains a definition of "CHRI - Criminal History Record Information" which begins with the phrase: "A report of criminal history from the State Police, or a statement that their central repository contains no information...." Within the text of the regulation, the abbreviation "CHRI" is sometimes used with the word "report" as in the titles of Sections 701.11 and 70.12. However, in other places, such as Subsection 701.12(3)(i) and in the first sentence of Section 701.13 of the proposed regulation, CHRI appears by itself without the word "report." Since each use of the term "CHRI" refers to a report which contains criminal information or a statement that no information is available, the regulation should use the term consistently. We suggest that the definition of the term be changed to "CHRI report" and that this term be used consistently throughout the regulation.

In addition, the Pennsylvania Association for Non-Profit Homes for the Aging (PANPHA) suggests that this definition should include a criminal history report from the Federal Bureau of Investigation (FBI) whenever the applicant is not a Pennsylvania resident. We agree.

2. Section 701.2. Compliance. – Need for Rule and Clarity

Section 701.2 contains this single sentence: "It is the policy of the Department to ensure compliance with the act (Nurse Aide Resident Abuse Prevention Training Act, Act 14 of 1997 (Act 14))." This should be understood since Education would not promulgate this regulation unless it intended to enforce Act 14. This section serves no purpose and should be deleted.

3. Section 701.11. Submission of CHRI report. – Legislative Intent

The Pennsylvania Association of Vocational Administrators (PAVA) and Pennsylvania School Boards Association (PSBA) submitted comments suggesting that secondary school

students not be required to submit CHRI reports before enrolling in nurse aide training courses in vocational-technical schools or comprehensive high schools. The CHRI repository at the Pennsylvania State Police (State Police) contains information about adult crimes and offenses. A juvenile's record is not maintained unless he has been convicted as an adult. Hence, PAVA and PSBA contend that the CHRI report requirement is unnecessary for high school students because the chances that they will have a record of convictions as an adult are slim to nonexistent.

In response to PAVA's and PSBA's concerns, Education staff indicate that they are examining the "safe schools" provisions of the School Code (24 P.S. §§ 13-1301-A – 1309-A) to see if this reporting requirement could serve as a substitute for a CHRI report. However, there is at least one problem with this approach. The description of offenses in Section 1304-A(a) does not match the detailed and lengthy list of offenses in Act 14. Hence, it cannot be a substitute for a CHRI report as required by Act 14.

Another flaw in PAVA's and PSBA's comments is the suggestion that high school students are unlikely to have records that include convictions as an adult. Even though the likelihood may be slim, there is the distinct possibility that high school students may have adult criminal records. The minimum age at which an individual may be prosecuted as an adult is 14 years at 18 Pa.C.S.A. § 6355(a)(1). In addition, Section 1301 of the Public School Code (24 P.S. § 13-1301) states that individuals "between the ages of six (6) and twenty-one (21) years, may attend the public schools" in their districts. Hence, individuals who are considered adults under the Crimes Code can attend public schools and may have records of convictions as adults.

Representative Jess Stairs and Senator James J. Rhodes, the Chairmen of the House and Senate Education Committees respectively, and Representative Patricia H. Vance, the prime sponsor of House Bill 133, which became Act 14, submitted comments expressing opposition to PAVA's and PSBA's suggested exemption. They believe that it was the intent of Act 14 that all applicants for nurse aide training programs be required to submit CHRI reports. They note that the act lists only two exemptions from this requirement: licensed health care professionals and volunteers.

The positions of these legislators on this issue are consistent with Act 14, reasonable and clear. There are only two exceptions in Act 14 to the CHRI report requirement for applicants seeking enrollment in nurse aide training programs. Therefore, the proposed regulation should not be amended to create a new exception for secondary school students.

4. Section 701.11. Submission of CHRI report. – Consistency with Statute and Clarity

The Pennsylvania Association of County Affiliated Homes (PACAH) contends that the proposed regulation will unduly lengthen the time required for a facility to schedule and begin a training program because it requires all applicants to submit a CHRI report before enrollment. PACAH suggests the use of a "30-day grace period" similar to what is allowed for CHRI reports for employees at facilities serving and caring for older adults. While flexibility should be encouraged, a grace period should not be added to this proposal.

Section 503(a) of the Older Adults Protective Services Act states that a facility may not hire or retain an employee if the employee's CHRI reports indicates that he or she has been convicted of certain offenses. Hence, it provides some flexibility as to when a facility must have the CRHI report for employees. On the other hand, Section 5(a) of Act 14 simply states that an applicant cannot be approved for admission into a nurse aide training program if the applicant's

CHRI report indicates conviction of any of the offenses specified in Act 14. There is no language providing for removal from enrollment. Therefore, Act 14 requires review of the CHRI report before admission can occur and does not allow a “grace period” during which applicants could enroll in a training program while waiting for the State Police or FBI to issue their CHRI reports.

However, even though there is no “grace period” during which one could enroll without a CHRI report, Section 4(a) of Act 14 allows an applicant to submit a CHRI report with their application that was obtained anytime within a year preceding the submittal. This aspect of Act 14 is not clearly stated in the proposed regulation. We recommend that Education add language indicating that an applicant may use a CHRI report that is less than one year old in their application.

5. Section 701.11. Submission of CHRI report. – Consistency, Reasonableness and Clarity

Subsections 701.11(1) and (2) contains a one-year residency requirement. Applicants who have resided in Pennsylvania for a minimum of one year must obtain a CHRI report from the State Police. Those applicants who have lived in the state for less than a year must obtain a CHRI report from the FBI. Several commentators questioned the “one-year residency rule.”

Act 14 is silent on this issue. It simply states that when the applicant is not a resident of the Commonwealth, he or she must obtain a CHRI report from the FBI. Section 502(a) of the Older Adults Protective Services Act contains a “two-year residency” standard. It requires an applicant to obtain a CHRI report from the FBI when the applicant is not, and for the two years immediately preceding application for employment has not been, a resident of the state. This requirement covers applicants for employment at nursing homes, related facilities and senior centers. Commentators suggest that Education use the two-year rule to maintain consistency. Uniformity or consistency in procedures reduces confusion and misunderstanding and promotes compliance. Unless Education can explain the need for or merits of its “one-year” rule, we recommend that it adopt the two-year standard as established in the Older Adults Protective Services Act.

6. Section 701.11(2). Submission of CHRI report. – Need for Rule and Reasonableness

Subsection 701.11(2) requires applicants who have resided in Pennsylvania for less than one year to obtain a CHRI report from the FBI and to contact Education for the required form. In the preamble and Regulatory Analysis Form (RAF) accompanying this proposed regulation, Education claims that the cost of processing FBI CHRI reports may be over \$14,000 annually. Page 4 of the RAF for this regulation includes the following statement:

The Pennsylvania Department of Education (PDE) is the designated agency to receive the Federal Bureau of Investigation’s (FBI) criminal history record information (CHRI) reports. Presently PDE handles the FBI reports for school employees. However, completing the procedures to obtain FBI reports for student nurse applicants may require additional clerical support....

The regulation and its RAF create two concerns. First, there is no authority in Act 14 for the Department to apply for or receive FBI CHRI reports. Section 4(a)(2) requires applicants to

submit FBI CHRI reports with their applications for enrollment if they are not Pennsylvania residents. Act 14 does not place this responsibility on Education.

Second, authority for Education to request and receive FBI CHRI reports has been denied under federal law and regulations. This was confirmed in the letter from Bennie F. Brewer, Programs Support Section Chief in the FBI's Criminal Justice Information Services Division, Education, dated May 27, 1998, in response to Education's request for authorization to process FBI CHRI reports for applicants under Act 14. The FBI's authority to conduct a criminal history record check for a state or local agency for a noncriminal justice purpose is imparted under Public Law 92-544. The FBI legal staff has concluded that Act 14 does not meet the standards prescribed by this federal law, because it "neither requires fingerprinting of the applicants nor does it authorize the exchange of fingerprint data with the FBI." The FBI also notes that Act 14 mandates that it is the responsibility of applicants to obtain their FBI CHRI reports rather than a governmental agency.

We see two possible resolutions of this situation. Since individuals can apply directly to the FBI for their own CHRI reports, we question the need for Education to process these requests. Individuals can apply directly to the FBI for their CHRI reports just as Pennsylvania residents must apply to the State Police. Education would not be involved in the request. This approach is consistent with Act 14 which identifies the applicant rather than any Commonwealth agency as being responsible for FBI CHRI report requests.

On the other hand, if Education opts to continue its efforts towards processing FBI CHRI report requests, then it needs to explain both the need and reason for this approach and explain how it will resolve the issues presented by the FBI. These questions need to be resolved expeditiously because training programs can not enroll nonresident applicants if they cannot obtain FBI CHRI reports. This will further reduce the number of qualified aides available for employment.

7. Subsection 701.12(1). Receipt of CHRI report by facility. – Need for Rule and Clarity

The single sentence in this subsection includes the phrase "and at the administrator's discretion." The phrase serves no purpose and should be deleted.

In addition, this subsection requires a facility administrator to designate "personnel" to review applicants' CHRI reports. Commentators suggest that the term "personnel" be changed to "designated facility representative." We agree. We also suggest that Education clarify whether a facility can designate two or more individuals as the facility representatives.

8. Subsection 701.12(3)(i). Receipt of CHRI report by facility. – Consistency with Statute and Clarity

There is no provision in the regulation requiring an applicant to submit an original of their CHRI report to the facility. Yet, Subsection 701.12(3)(i) requires the facility's personnel to make a copy of the original CHRI report. Hence, Subsection 701.12(3)(i) seems to assume that applicants will submit the originals of their CHRI reports. In contrast, Section 4 of Act 14 contains both the statutory requirement that applicants submit CHRI reports and the following provision:

(b) Original document. — For the purposes of this section, an applicant may submit a copy of the required information with the application for enrollment in the program. The applicant may, however, be required to produce the original document by the individual responsible for reviewing and approving applications for enrollment in the program.

The proposed regulation does not directly address this procedure. The Lancaster Institute for Health Education expressed concern with the use of original documents and said the regulation, as written, would create additional and needless costs for employers sponsoring applicants for training. The Pennsylvania Health Care Association also noted a related concern in Subsection 701.12(3)(v) regarding the return of "originals" to employers when they are sponsoring employees as applicants. The regulation needs to clarify the ability of applicants or their employers to submit copies of their CHRI reports and the procedures that facilities may use in requesting originals. We suggest that the regulation be amended to be consistent with the flexibility provided by Act 14.

9. Section 701.15. Confidentiality of information – Reasonableness and Clarity

Senator Rhoades and PANPHA question the "two policies" requirement in this section. The section lists two tasks or goals for protection of confidentiality. PANPHA suggests that a facility should create one policy that fully addresses both goals. Education's concern is that Subsections 701.15(a)(1) and 701.15(a)(2) should remain separate and distinct.

Since these subsections represent two important policy ingredients, we agree that they do not need to be combined into one paragraph. However, there is no need to require facilities to develop two separate policies. The two subsections could readily be implemented as the two main objectives of one policy. We recommend that the regulation be amended accordingly.